SUPREME COURT OF QUEENSLAND

CITATION:	*Scriven v Queensland Rural and Industry Development Authority* [2019] QSC 176
PARTIES:	**SAM CHESTER SCRIVEN** (applicant) **v** **QUEENSLAND RURAL AND INDUSTRY DEVELOPMENT AUTHORITY** (respondent)
FILE NO:	SC No 11058 of 2018
DIVISION:	Trial Division
PROCEEDING:	Originating Application
DELIVERED ON:	24 July 2019
DELIVERED AT:	Brisbane
HEARING DATE:	6 February 2019; supplementary submissions from the applicant received 26 March 2019 and 10 June 2019; supplementary submissions from the respondent received 3 June 2019
JUDGE:	Wilson J
ORDERS:	**The orders of the Court are:** **1. The application for judicial review is dismissed.** **2. By 7 August 2019, the respondent is to file and exchange short written submissions on the question of costs.** **3. By 21 August 2019, the applicant is to file and exchange short written submissions on the question of costs.** **4. The question of costs is adjourned to a date to be fixed.**
CATCHWORDS:	PRIMARY INDUSTRY – GENERALLY – FARM DEBT MEDIATION – where mediation occurred and no agreement was reached – where the respondent approved an exemption certificate pursuant to section 52 of the *Farm Debt Mediation Act* 2017 (Qld) – where the applicant sought a review of the respondent's decision pursuant to section 81 of the *Farm Debt Mediation Act* 2017 (Qld) – where the respondent confirmed the decision to approve an exemption certificate in a review decision – where the applicant seeks judicial review of the respondent's decision – whether certain material is inadmissible in a judicial review proceeding pursuant to

section 38 of the *Farm Debt Mediation Act* 2017 (Qld) – whether the proper construction of section 21 of the *Farm Debt Mediation Act* 2017 (Qld) requires a mortgagee to provide a farmer the liability account

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – DELEGATION OF POWER – whether the respondent's decision makers were required to be accredited mediators under the *Farm Debt Mediation Act* 2017 (Qld) – whether the *Farm Debt Mediation Act* 2017 (Qld) allowed for the chief executive officer to delegate the reviewing of an original determination

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – FAILURE TO OBSERVE STATUTORY PROCEDURE – where section 48 of the *Farm Debt Mediation Act* 2017 (Qld) required the Rural Bank Ltd to apply for an exemption certificate in the approved form – where the approved form required a statutory declaration – where the Rural Bank Ltd did not attach a statutory declaration – where the respondent accepted the application for an exemption certificate – whether the Rural Bank Ltd complied with section 48 of the *Farm Debt Mediation Act* 2017 (Qld) – whether the respondent had the express authority to determine what accounting records were "relating to a farm business debt" – whether the respondent was required to determine if the mediation was satisfactory prior to and intermediate of issuing an exemption certificate

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – IMPROPER PURPOSES – where the respondent must, under section 52 of the *Farm Debt Mediation Act* 2017 (Qld), decide, *inter alia*, to approve or refuse an application for an exemption certificate – whether the respondent's reference to the liability account as "anomalous accounting records" in the decision/s constituted an exercise by the respondent of its section 52 power for a purpose other than for which conferred

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – IRRELEVANT CONSIDERATIONS – whether the respondent took into account an irrelevant consideration by construing the Rural Bank Ltd's disclosure by reference to the definition of "farm business debt" in section 5 of the *Farm Debt Mediation Act* 2017 (Qld)

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – JURISDICTIONAL MATTERS – where the applicant requested financial records and documents from the Rural Bank Ltd, namely the liability account – whether the respondent erred in its determination

that the Rural Bank Ltd complied with section 21 of the *Farm Debt Mediation Act* 2017 (Qld) despite the non-provision of the liability account – whether the respondent erred in its determination that the Rural Bank Ltd acted in good faith

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – BIAS – GENERALLY – where the applicant contends that the respondent placed considerable weight on the Rural Bank Ltd's contentions that the liability account either does not or may not exist and contends that any such statements were fraudulent and infected the respondent's decision – whether fraud infected the respondent's decision/s – whether the respondent was biased towards the applicant on different grounds

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – GENERALLY – where the Rural Bank Ltd applied for an exemption certificate pursuant to section 48 of the *Farm Debt Mediation Act* 2017 (Qld) – where section 48(2)(b) required the Rural Bank Ltd to state the facts and circumstances forming the basis of the ground on which it is claimed an exemption certificate should be issued – where the grounds for issuing an exemption certificate were set out in section 49 of the *Farm Debt Mediation Act* 2017 (Qld) – where the Rural Bank Ltd ticked the box that relied on the grounds of section 49(1)(c) of the *Farm Debt Mediation Act* 2017 (Qld) – where the respondent determined that a ground to issue an exemption certificate existed under section 49(1)(a) of the *Farm Debt Mediation Act* 2017 (Qld) –whether the respondent, as a matter of natural justice, was obliged to notify the applicant that it proposed to issue an exemption certificate under a different ground than that ticked on the approved form, and provide him with an opportunity to respond if he so desired

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – RELEVANT CONSIDERATIONS – FAILURE TO CONSIDER – where the respondent approved an exemption certificate under section 52 of the *Farm Debt Mediation Act* 2017 (Qld) – whether the respondent failed to take into account the applicant's arguments as to the existence of a liability account

ADMINISTRATIVE LAW – PROCEDURE AND PRACTICE – EVIDENCE – where the applicant seeks to adduce material not provided to the original decision maker – where the applicant objects to the respondent's submissions which provide preliminary background of the matter

Acts Interpretation Act 1954 (Qld) s 27A
Farm Business Debt Mediation Act 2017 (Qld) s 3, s 5, s 7, s 14A, s 20, s 21, s 22, s 32, s 33, s 38, s 48, s 49, s 50, s 51, s 52, s 81, s 83
Judicial Review Act 1991 (Qld) s 4, s 20(2), s 23
Rural and Regional Adjustment Act 1994 (Qld) s 35B

Australian Pesticides and Veterinary Medicines Authority v Administrative Appeals Tribunal (2008) 216 FCR 405; [2008] FCA 1393, cited
Carroll v Sydney City Council (1989) 67 LGRA 413, cited
Chandra v Webber (2010) 187 FCR 31; [2010] FCA 705, applied
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63, cited
Hytch v O'Connell [2018] QSC 75, cited
Industrial Equity Ltd v Deputy Commissioner of Taxation (1990) 170 CLR 649; [1990] HCA 46, cited
Isbester v Knox City Council (2015) 255 CLR 135; [2015] HCA 20, cited
Johns v Australian Securities Commission (1993) 178 CLR 408; [1993] HCA 56, cited
Johnson v Johnson (2000) 201 CLR 488; [2000] HCA 48, cited
Lacey v Attorney-General of Queensland (2011) 242 CLR 573; [2011] HCA 10, cited
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24; [1986] HCA 40, cited
Minister for Immigration and Citizenship v SZLIX (2008) 245 ALR 501; [2008] FCAFC 17, cited
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259; [1996] HCA 6, cited
Minister for Immigration and Multicultural Affairs v Jia Legeng (2001) 205 CLR 507; [2001] HCA 17, cited
Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation (1963) 113 CLR 475; [1963] HCA 41, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
Re Minister for Immigration and Multicultural Affairs; ex parte Lam (2003) 214 CLR 1; [2003] HCA 6, cited
Reid v Commercial Club (Albury) Ltd [2014] NSWCA 98, cited
Rose v Boxing NSW Inc [2007] NSWSC 20, cited
SZFDE v Minister for Immigration and Citizenship (2007) 232 CLR 189; [2007] HCA 35, cited
SZOMF v Minister for Immigration and Citizenship [2011] FCA 57, cited
TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (2014) 232 FCR 361; [2014] FCAFC 83, cited

VAAD v Minister for Migration & Multicultural & Indigenous Affairs [2005] FCAFC 117, cited
Zappala Family Co Pty Ltd v Brisbane City Council & Ors; Brisbane City Council v Zappala Family Co Pty Ltd & Ors [2014] QCA 147, cited
Zin Mon Aye v Minister for Immigration and Citizenship (2010) 187 FCR 449; [2010] FCAFC 69, cited

COUNSEL: Sam Chester Scriven (self-represented) for the applicant
M A Eade for the respondent

SOLICITORS: Sam Chester Scriven (self-represented) for the applicant
Crown Law for the respondent

[1] The applicant is a farmer who had a loan default and outstanding debt with Rural Bank Ltd (“the Bank”). This is an application for a statutory order of review of a decision made by the Queensland Rural and Industry Development Authority (“the respondent”) under section 52 of the *Farm Debt Mediation Act* 2017 (Qld) (“the Act”).

[2] This application concerns the respondent’s decision exempting the Bank from the statutory obligation to offer mediation under the Act before taking enforcement action in relation the applicant’s default under the farm mortgage.[1] The respondent confirmed the decision in a later review decision.[2]

[3] The applicant seeks an order setting aside the decision and consequential orders requiring a further mediation on specific terms.[3]

[4] The applicant applies for judicial review under sections 20(2)(a), (b), (c), (d), (e), (g) and (h) of the *Judicial Review Act* 1991 (Qld) (“the *JRA*”).[4]

What is the decision being reviewed?

[5] The application raises issues with the whole process undertaken pursuant to the Act, i.e. the mediation, the decision to issue the exemption certificate and the review decision.[5] Many issues raised by the applicant are beyond the scope of this application.

[6] The respondent issued an exemption certificate with a statement of reasons on 7 June 2018 (“the original decision”).[6]

[7] On 2 July 2018, the applicant lodged a review of this decision pursuant to section 81 of the Act[7] and on 11 September 2018 the respondent confirmed the original decision (“the review decision”).[8]

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1 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-1, p 1-6.
2 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-2, p 7-11; Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-O, p 40-44.
3 Application for a Statutory Order of Review filed 10 October 2018, p 3.
4 Application for a Statutory Order of Review filed 10 October 2018, p 1.
5 Application for a Statutory Order of Review filed 10 October 2018.
6 Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-N, p 25-29; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-1, p 1-6.
7 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-25, p 285-286; Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-O, p 30-39.

[8] Pursuant to section 81(4) of the Act, if the review decision confirms the original decision, the original decision is taken to be the review decision.[9] As such, the decision that is being reviewed is the review decision, i.e. the second decision made by the respondent.

[9] However, it is noted that what occurred between the original decision and the internal review decision is relevant to address some of the issues raised by the applicant.

[10] The respondent does not dispute that:[10]

a. the review decision is a decision to which the *JRA*, applies within the meaning of section 4 of the *JRA*; and

b. the applicant is a person aggrieved within the meaning of section 20(1) of the *JRA*.

[11] Applegarth J recently set out the nature of judicial review in *Hytch v O'Connell* [2018] QSC 75:

> "[61] Judicial review does not review the merits of a decision. It is not a proceeding in the nature of an appeal, such as an appeal by way of rehearing from one court to an appellate court. In essence, it concerns the legality of a decision which is amenable to judicial review. The scope for judicial review of a finding of fact is "very narrow".[11] Judicial review of findings of fact is subject to demanding requirements if a challenge is to succeed. It is not sufficient that the decision is unreasonable in the sense of being against the overwhelming weight of the evidence. It must be perverse or capricious, for instance, because there was no probative evidence to support it.[12]
>
> [62] A decision or the process of reasoning by which it is reached is sometimes described as "illogical" or "unreasonable" or even "so unreasonable that no reasonable person could adopt it". However, these descriptions are sometimes merely emphatic ways of saying that the wrong decision was reached.[13] A decision which no rational or logical decision-maker could arrive at on the available evidence may be properly described as "illogical" or "irrational". The starting point remains, however, that there is "no error of law simply in making a wrong finding of fact".[14] Instead, a finding or inference of fact will be amenable to judicial review if there is no probative evidence to support it.[15]"

The issues to be determined

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8 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-2, p 7-11; Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-O, p 40-44.

9 *Farm Business Debt Mediation Act* 2017 (Qld) s 81(4).

10 Respondent's outline of submissions filed 4 February 2019, p 7, [33(a)].

11 *Thomas v Attorney-General, Minister for Justice and Minister for Training and Skills* [2017] QSC 308, [51].

12 *Crime and Misconduct Commission v Swindells* [2009] QSC 409, [12].

13 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, [40].

14 *Waterford v The Commonwealth* (1987) 163 CLR 54, 77.

15 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 359-360.

[12] The applicant bears the onus of establishing each of his grounds of review, and that any ground so established justifies the intervention of the Court.[16]

[13] The applicant, not only through his application but through his affidavit and submissions, makes a number of complaints and relies upon an extensive number of grounds for judicial review under section 20 of the *JRA*.

[14] The issues raised in the Application are relatively focussed:

> "3. Rural Bank "failed to take part in the mediation in good faith" as they failed to comply or make reasonable efforts to supply the documents requested by the Applicant, as required by S21(7) of the Act.
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> 4. In both the original decision and the subsequent internal review decision, QRIDA found that, in their opinion under s33(1)(c), Rural Bank had acted in good faith, such decisions constituting separate breaches of the rules of natural justice – (JRA 220(2)(a)) and not in accordance with procedures required within the Act – (JRA s20(2)(b)).
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> 5. In the 'Notice S52 Decision …' QRIDA admitted at paragraph [64] that Rural Bank had engaged in 'non-provision of anomalous accounting records" but considered the records were not required to establish the farm business debt as define under s5 of the Act …
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> 11. QRIDA places considerable weight on the word of Rural Bank, whose representatives repeatedly stated that the liability account either does not, or may not, exist or would not answer direct questions as to its existence and denied its relevance. As RBA and AASB evidence show, the liability account does exist. This means the decision by QRIDA was induced or affected by fraud – a breach of JRA s20(2)(g).
>
> 12. Rural Bank requested the exemption certificate from QRIDA under s49(1)(c), stating that there has been no satisfactory mediation between them. QRIDA granted the exemption certificate under s49(1)(a), stating the mediation was satisfactory. By granting the exemption certificate under a different section to which it was requested, RIDA has not made the decision in accordance with s48(2)(b), s52(1)(a)(b), and s52(2) of the Act and the decision is not authorised under the enactment breaching JRA s20(2)(d) and was a breach of procedural fairness towards the Applicant under JRA s20(2)(a).
>
> 13. Mediation is satisfactory per s7 of the Act if both the mortgage and the farmer have participated in mediation in good faith. The mortgagee in their application for an exemption certificate maintains the mediation was not satisfactory. QRIDA has not made the decision in accordance with s49(1)(a) and s52(2)(c) of the Act and the decision is not authorised under the enactment breaching JRS s20(2)(d) and was a breach of procedural fairness towards the Applicant under JRA s20(2)(a).

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[16] *Industrial Equity Ltd v Deputy Commissioner of Taxation* (NSW) (1990) 170 CLR 649, 671. See also *VAAD v Minister for Migration & Multicultural & Indigenous Affairs* [2005] FCAFC 117, [45].

> 14. The name of the QRIDA reviewer, John Simpson, does not appear on the Register of Mediators, Mediators are required to be accredited in accordance with Part 5 of the Act and, under s76, to be listed in the Register of mediators. If Mr Simpson is not accredited, and his name is not listed on the register then he is not qualified to make any alteration to the decision under s81 of the Act and any decision he makes should be considered outside his jurisdiction to make – a breach of JRA s20(2)(c)".[17]

[15] However, the applicant's grievances expand within his affidavit and submissions.[18] The applicant's application, affidavit and submissions forms a patchwork of mounting complaints. Correlating, and making sense of, the applicant's complaints has been akin to piecing together a scrambled jigsaw. Many of the applicant's complaints are repetitive; sometimes phrased with a new twist.

[16] The cornerstone of the applicant's submissions is that the Bank failed to comply with a request by the applicant for documents "related to" the "farm business debt" under section 21 of the Act, namely the statements of a "liability account". Such a failure, the applicant submits, meant that the Bank did not act in "good faith".

[17] The applicant ultimately summarised the principal questions requiring resolution:[19]

a. what is the proper construction of sections 5, 21 and 22 of the Act ("the statutory construction issue");

b. whether the respondent made any intermediate determination through the use of the phrase "the non-provision of anomalous accounting records" ("the intermediate determination issue");

c. whether the respondent has the proper authority under the Act to determine the documents requested under sections 21 and 22 were anomalous and that their non-provision did not amount to the Bank failing to take part in mediation in good faith (this is part of the intermediate determination issue);

d. whether the respondent was permitted to issue an exemption certificate to the mortgagee, the Bank, on a ground different from that relied upon by the Bank either at all, or without providing notice of the applicant and permitting the applicant to have an opportunity to respond ("the procedural fairness issue");[20]

e. whether the exhibits containing material from mediation between the parties are admissible in this proceeding.

[18] The applicant raises other issues which fall away upon the resolution of these principal questions. However, I also deal with a number of other discrete issues that the applicant has raised in submissions.

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17 Application for a Statutory Order of Review filed 10 October 2018, p 1-3.

18 Affidavit of Sam Chester Scriven sworn on 9 November 2018; Applicant's outline of submissions filed 1 February 2019; Applicant's written submissions dated 4 February 2019; Applicant's further written submission dated 26 March 2019; Applicant's oral submissions summary received 26 March 2019.

19 Applicant's oral submissions summary received 26 March 2019, p 1.

20 Applicant's written submissions dated 4 February 2019; Applicant's further written submission dated 26 March 2019; Applicant's oral submissions summary received 26 March 2019; Respondent's outline of submissions filed 4 February 2019.

McKenzie friend

[19] The applicant is self-represented and made an application for two McKenzie friends to assist him at the hearing.[21] This issue did not need to be ultimately determined as a process was agreed between the parties[22] whereby the respondent would make oral submissions and the applicant would review the transcript and then make further written submissions.[23]

Admissibility of material annexed to the applicant's affidavit sworn 7 December 2018

[20] The applicant's affidavit sworn 7 December 2018 annexes material that was not before the decision maker, listed as follows:[24]

a. a copy of the peer-reviewed paper entitled, *Can banks individually create money out of nothing? – The theories and the empirical evidence,* published by Richard A. Werner in the International Review of Financial Analysis, volume 36, 2014;

b. a copy of the peer-reviewed paper entitled, *How do banks create money, and why can other firms not do the same? – An explanation for the coexistence of lending and deposit-taking,* published by Richard A. Werner in the International Review of Financial Analysis, volume 36, 2014;

c. a copy of the peer-reviewed paper entitled, *A lost century in economics: Three theories of banking and the conclusive evidence,* published by Richard A. Werner in the International Review of Financial Analysis, volume 46, 2016;

d. copies of two articles published in the Bank of England Quarterly Bulletin, 2014 Q1, volume 54, number 1 by Michael McLeay, Amar Radia and Ryland Thomas of the Bank's Monetary Analysis Directorate and entitled, respectively, *Money in the modern economic: an introduction* and *Money creation in the modern economy*;

e. a copy of the Deutsche Bundesbank Monthly Report, dated April 2017, and entitled, *The role of banks, non-banks and the central bank in the money creation process*;

f. the published text of a speech delivered by the Deputy Governor of Norges Bank, Jon Nicolaisen, at the Norwegian Academy of Science and Letters, dated 25 April 2017, and entitled, *What should the future form of our money be?*;

g. the published text of a speech delivered by the Chairman of the Governing Board of Swiss National Bank, Thomas J. Jordan, at Zurich, 16 January 2018, and entitled, *How money is created by the central bank and the banking system*;

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21 Exhibit 1.

22 Transcript of the hearing on 6 February 2019, p 16.

23 Applicant's further written submissions dated 26 March 2019; Applicant's oral submissions summary received 26 March 2019

24 Affidavit of Sam Chester Scriven sworn on 7 December 2018, p 1-2.

h. the published text of a speech delivered by the Assistant Governor (Financial Markets) of the Reserve Bank of Australia, Christopher Kent, at Sydney, 19 September 2018, and entitled, *Money – Born of Credit?*;

i. a copy of AASB130 *Disclosures in Financial Statements of Banks and Similar Financial Institutions;* published by the Australian Accounting Standards Board, dated July 2004; and

j. a copy of the CPA report by Vernon Sydney Pike entitled *The Bank Loan according to Central Banks* and dated December 2018.

[21] The applicant does not dispute that the material in question was not provided to the original decision maker, however, submits that the material is relevant for the following reasons:[25]

a. The documents are relevant to show the fraud alleged pursuant to section 20(2)(g) of the *JRA*. The applicant submits that the documents prove as an established fact, the existence of both the bank liability and bank asset accounts in relation to the record keeping of bank loans in Australia.

b. These documents confirm that the "fundamental bank accounting facts" contained in the applicant's submissions have now been established beyond a reasonable doubt.

c. The documents are relevant to show the alleged bias claimed by the applicant, which denied him procedural fairness. The documents are evidence that a certified forensic accountant, an academic and high level employees of the Bank quoted, know and admit to the existence of the bank liability account by whatever name it may be called. To prove that bias may have occurred in the decision, the applicant is required to show that the respondent may have had prior knowledge of the liability account's existence, but chose instead to side with the Bank based on one written representation that the accounts did not exist.

[22] The applicant submits further that "given the relevance of bank loan accounting concepts to understanding the legal issues raised by my application … the court may benefit from having access to the factual evidence concerning bank loan accounting contained in the documents provided".[26]

[23] The respondent objects to the admissibility of this material.[27]

[24] The principles relevant to the admissibility of material not before the original decision maker on an application for judicial review are set out by Bromberg J in *Chandra v Webber*[28] and can be summarised as:

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25 Applicant's written submissions dated 4 February 2019, p 2-3, [5].

26 Applicant's further written submission dated 26 March 2019, p 2.

27 Respondent's outline of submissions filed 4 February 2019, p 7-8, [38]-[41].

28 *Chandra v Webber* [2010] FCA 705, [40]-[45]

a. the admissibility of evidence on an application for judicial review of an administrative decision will depend on the ground of review and the circumstances of the case;[29]

b. evidence beyond that which was before the decision maker may be relevant where the following grounds of review are raised:

  (a) the unreasonable exercise of the power given to the decision maker;[30]

  (b) excess of jurisdiction because of the absence of a jurisdictional fact;[31]

  (c) a breach of the rules of procedural fairness;[32]

  (d) actual or apprehended bias and fraud.[33]

c. the "touchstone" for admissibility is usually relevance, i.e., that the evidence sought to be adduced must be relevant to the grounds relied upon by the applicant;[34]

d. ordinarily there is "no reason" for any material other than what was before the decision maker to be placed before the court;[35]

e. evidence beyond that which was before the decision maker may be relevant where grounds of review allege a breach of procedural fairness, want of jurisdiction, actual or apprehended bias and fraud;[36]

f. it will often be the case that evidence supporting an allegation of bias will not have been adduced before the decision maker;[37]

g. evidence may also be admissible to prove the meaning of technical terms contained in material utilised by the decision maker;[38] and

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[29] *Chandra v Webber* [2010] FCA 705, [40] citing *McCormack v The Commissioner of Taxation* (2001) 114 FCR 574, [38]-[40].

[30] *Chandra v Webber* [2010] FCA 705, [41] citing *Attorney-General for the Northern Territory v Minister for Aboriginal Affairs* (1989) 23 FCR 536 at 539-40; *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446, [458]; *Attorney-General (NT) v Hand* (1988) 16 ALD 318 at 320*; Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155, 169.

[31] *Chandra v Webber* [2010] FCA 705, [41] citing *McCormack v The Commissioner of Taxation* (2001) 114 FCR 574, [38]-[40]; *Attorney General for the Northern Territory v Minister for Aboriginal Affairs* (1989) 23 FCR 536, 539-540.

[32] *Chandra v Webber* [2010] FCA 705, [41] citing *Percerep v Minister for Immigration* (1998) 86 FCR 483 at 495; *McCormack v The Commissioner of Taxation* (2001) 114 FCR 574, [38]; *Attorney-General (NT) v Hand* (1988) 16 ALD 318, 320.

[33] *Chandra v Webber* [2010] FCA 705, [44]. See also [54].

[34] *Chandra v Webber* [2010] FCA 705, [40].

[35] *Chandra v Webber* [2010] FCA 705, [40] citing *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446, [442].

[36] *Chandra v Webber* [2010] FCA 705, [41]-[44].

[37] *Chandra v Webber* [2010] FCA 705, [44].

[38] *Chandra v Webber* [2010] FCA 705, [45] citing *Telstra Corporation Ltd v ACCC* (2008) 176 FCR 153 at [48].

h. the applicant bears the onus of demonstrating how the evidence is relevant to a ground or grounds of review.[39]

[25] I give leave to file this fresh evidence so to consider the allegation of fraud raised by the applicant. However, upon consideration of the evidence, this evidence in no way substantiates the allegation of fraud. Further, I found this evidence of no assistance and of no relevance in relation to any of the issues raised in this application.

[26] I accept the respondent's submission that none of the documents establish or support the applicant's contentions that:[40]

a. there existed, as a question of fact, a "liability account" in the name of the applicant held by the Bank;

b. the Bank held or holds assets on behalf of the applicant;

c. the Bank's records are misleading and fraudulent;

d. the Bank failed to comply with its obligations in section 21(4) of the Act (a question of law);

e. the applicant is not contractually indebted by way of a loan to the Bank; and

f. that the applicant was not afforded procedural fairness by the respondent.

[27] The documents are not relevant to prove the meanings of technical accountancy terms used in bank loan accounting and that those terms were misinterpreted and/or misconstrued by the decision maker when it was decided that document to which the terms relate were "anomalous" to the loan accounts.

[28] The documents do not substantiate the "the fraud" alleged, or any apprehended or actual bias of the Bank or the decision makers.

Admissibility of mediation documents

[29] Pursuant to section 38 of the Act, confidentiality provisions dictate the non-admissibility of certain documents in any civil, criminal or administrative proceeding.

[30] Section 38 provides:

> "**38 Confidentiality**
>
> (1) The following matters are not admissible in any civil, criminal or administrative proceeding—
>
> (a) anything said or done during a mediation meeting;
>
> (b) a document prepared for the purposes of a mediation meeting;

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39 *Chandra v Webber* [2010] FCA 705, [46].

40 Respondent's outline of submissions filed 4 February 2019, p 8, [41].

(c) a document prepared for the purpose of being given to a party to a mediation as required under section 21 or 22.

(2) This section does not apply to—

(a) a heads of agreement; or

(b) a contract, mortgage or other document prepared to give effect to a heads of agreement; or

(c) a summary of a mediation prepared under section 33; or

(d) a proceeding or a part of a proceeding before QCAT that is not open to the public, including, for example, a proceeding started under section 82; or

(e) a proceeding or a part of a proceeding that relates to—

(i) violence or a threat of violence; or

(ii) ongoing activity of a criminal nature being concealed; or

(iii) the abuse of a child or another person.

(3) In this section—

mediation meeting includes anything done for the purpose of arranging for, or following up matters discussed or agreed at a mediation meeting."

[31] The importance on the confidentiality of such documents is enforced by section 83 of the Act, which makes it an offence to disclose such information:

"**83 Disclosing information**

A person must not disclose any information obtained in a mediation meeting or in connection with the administration of this Act unless the disclosure is made—

(a) if the information is about a person—by, or with the consent, of the person; or

(b) with the consent of the person from whom the information was obtained; or

(c) to the extent necessary to perform the person's functions under or in relation to this Act; or

(d) as reasonably required for the purpose of referring a party or parties to mediation to a person, agency, organisation or other body and, with the consent of the parties to the mediation, for the

purpose of aiding in the resolution of an issue between the parties; or

(e) as otherwise required or allowed by law; or

(f) with another lawful excuse.

Maximum penalty—20 penalty units or 6 months imprisonment."

[32] The respondent, as a preliminary matter at the hearing, referred to section 38 of the Act and also drew the Court's attention to section 83 of the Act.

[33] The respondent provided to the Court every single document upon which it relied and was entitled to rely when it made its decisions. It is noted that this is customary in judicial review proceedings.[41] However, at the beginning of the hearing counsel for the respondent identified a number of documents that had been included in breach of section 38 of the Act.[42] The respondent's position is that these documents are inadmissible.[43]

[34] The applicant submits that the documents are admissible. The applicant submits that it would be a denial of procedural fairness for the applicant to have this Court be prevented from accessing information for the purpose of reviewing a decision which the decision makers (and counsel) had admitted to relying upon when making their determination.[44] Further, in relation to the offence provision of section 83 of the Act, the applicant waives his right to confidentiality, to admit all such mediation documents into this Court.[45]

[35] Section 38 of the Act mandates that these documents are inadmissible in these proceedings. The applicant, by waiving any right to confidentiality, cannot override section 38 of the Act.

Material prepared by the Bank for the purposes of a mediation meeting

[36] Exhibit SJC-18 to Stacey Carvolth's affidavit affirmed 20 November 2018[46] relates to material prepared by the Bank for the purposes of a mediation meeting,[47] and includes a position paper. This material was attached to an affidavit filed on behalf of the respondent.

[37] This material is inadmissible in this application, pursuant to section 38 of the Act. In any event, none of this material was relevant in the determination of this matter.

An email from the mediator to all of the parties

[38] Exhibit SCS-I to the applicant's affidavit sworn 7 December 2018[48] is an email from the mediator to all of the parties. The applicant states that this email is relevant for the following reasons:[49]

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41 Transcript of the hearing on 6 February 2019, p 21, line 16-18.
42 Transcript of the hearing on 6 February 2019, p 18-26.
43 Transcript of the hearing on 6 February 2019, p 24, line 36-36, p 25, line 1-4.
44 Applicant's further written submission dated 26 March 2019, p 1, [IV].
45 Applicant's further written submission dated 26 March 2019, p 1, [V].
46 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-1, p 226-240.
47 *Farm Debt Mediation Act* 2017 (Qld) s 38(1)(b).
48 Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-I, p 11-12.

"(a) The exhibit is evidence of incorrect reasoning in the mediator's interpretation of ss 21 and 22 to mean that of s5. This error led to the mediator giving a crucial summary to the decision-maker that both parties had acted in good faith, despite the written objection by Applicant;

(b) The exhibit shows the mediator and the decision-maker both incorrectly interpreted and applied s5 of the FBDMA as fulfillment criteria to determine if the parties had met their obligations in ss21 and 22;

(c) The exhibit is also evidence that the mediator contravened s20(3)(c) of the FBDMA, when he sided with one party over the other, based on his own interpretation of the FBDMA. The objection attached to the summary should have alerted the decision-makers that the mediator may have adjudicated over the issue of fulfillment of ss21 and 22 and to investigate the matter, to ensure all parties and the mediator had complied with their obligations. The decision-makers did not.

(d) The exhibit shows that, in the opinion of the mediator, the Applicant no longer queried the existence of the debt, but still had reservations of the quantum of the debt, which required production of the requested account documents. He also noted that the bank had not responded to the Applicant's request for those account documents despite claims the Bank has denied their existence."

[39] This email was not before the decision maker and I requested further submissions from the parties addressing this issue.

[40] The applicant submits that the email should be admissible on the following bases:[50]

a. judicial review cannot be limited in its supervisory jurisdiction;

b. section 83 of the Act allows for the disclosing of the email where the information was about the applicant, sent to and in his possession and where consent was implied and given;

c. section 83 of the Act allows for the disclosing of the email where the Court is being asked to determine if a breach of the Act occurred;

d. section 30(1)(d) of the *JRA* grants the Court the power to make "an order directing any of the parties to do, or refrain from doing, anything that the Court considers necessary to do justice between the parties"; and

e. section 18 of the *JRA* does not list the Act as being exempt from its operation.

[41] The respondent submits that this email is inadmissible on three bases:[51]

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49 Applicant's written submissions as to the admissibility of exhibit SCS-I of the applicant's affidavit filed 12 November 2018 received 10 June 2019, p 1, [1].

50 Applicant's written submissions as to the admissibility of exhibit SCS-I of the applicant's affidavit filed 12 November 2018 received 10 June 2019, p 1, [4].

51 Respondent's written submissions as to the admissibility of exhibit SCS-I of the applicant's affidavit filed 12 November 2018 received 3 June 2019, p 1, [3]-[4].

a. the mediator is (properly) not a party to these proceedings. Serious untested allegations have been made against him by the applicant in his written submissions. The mediator's conduct is not in question in this application. The exhibit is neither relevant nor admissible to the extent the applicant seeks to call that conduct into question.

b. the exhibit was not before the respondent for either of its decisions (all material before the respondent is contained in the affidavit of Stacey Joy Carvolth affirmed 20 November 2018 (CD6)). It was not considered by the respondent and thus had no bearing on the respondent's decision-making process; and

c. the email is a document that falls within section 38 of the Act.

[42] This material is inadmissible in this application, pursuant to section 38 of the Act. The fact that an exception may apply pursuant to section 83(e) and (f) of the Act does not make the documents admissible pursuant to section 38 of the Act.

[43] Further, this email was even not before the respondent. The respondent did not consider this email as part of the reasons in either the original decision,[52] or the review decision.[53]

[44] I accept the respondent's submission that the applicant has failed to discharge his onus as to how the email is relevant to a ground or grounds of review:[54]

a. given the email was not before the respondent, it cannot in anyway support or reject the applicant's allegation that there is a perception of bias on the part of the respondent, nor can it logically touch upon the question as to whether any intermediate decision was made by the respondent;

b. the email does not support any contravention of the rules of procedural fairness as argued by the applicant and, in any event, the applicant had every opportunity to put the email before the respondent but did not do so;

c. the email does not support the proper construction of sections 5, 21 and 22 of the Act; that is a question of law for this Court; and

d. as to the applicant's allegation that the respondent failed to oversee the procedures of the Act by not inquiring and determining whether the Mediator had abided by the Act, that is a new allegation that does not go to one of the grounds previously relied upon by the applicant. In any event, the Act did not require the respondent assess the mediator's conduct. All essential procedural requirements were complied with by the respondent as outlined in the respondent's submissions filed 4 February 2019 at [47]-[52].

[45] Even if the email was not inadmissible pursuant to section 38 of the Act, leave would not be granted for the applicant to adduce this fresh evidence.

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52 Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-N, p 25-29; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-1, p 1-6.

53 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-2, p 7-11; Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-O, p 40-44.

54 Respondent's written submissions as to the admissibility of exhibit SCS-I of the applicant's affidavit filed 12 November 2018 received 3 June 2019, p 1, [5].

[46] Exhibit SCS-I to the applicant's affidavit sworn 7 December 2018 is inadmissible.

Admissibility of paragraphs 7 to 13 of the respondent's submissions

[47] The applicant objects to paragraphs 7 to 13 of the respondent's submissions which set out some preliminary background information in chronological order about:

a. the term facility opened by the Bank and subsequent renewal by the applicant;

b. the mortgage over the applicant's livestock and farming equipment to secure his current and future indebtedness to the Bank, the "Heads of Agreement";

c. the date the Bank instituted proceedings in the Supreme Court;

d. the date the Bank prepared and served on the applicant an "Enforcement Action Notice" in accordance with section 14 of the Act; and

e. correspondence from the applicant to the Bank setting out his then position and requesting copies of statements of a liability account.

[48] The applicant objects to these background paragraphs of the respondent's submissions on the grounds that they may be prejudicial and are of no value to the Court for the following reasons:[55]

a. the selected information does not include the full bank asset and bank liability account information;

b. despite any previous correspondence between the applicant and the Bank, it is not and was not in mediation disputed that the applicant has loan default and outstanding debt with Rural Bank;

c. conversations and information discussed in mediation is in confidence and may render the pre-mediation correspondence obsolete and inconsequential;

d. the questions before the Court do not involve the ascertaining of amounts owed or borrowed. It is sufficient within section 5 of the Act for documents to be produced to ascertain whether the debt exists and is determined to be a "Farm Business Debt" and therefore subject to the requirements of the Act; and

e. without a certified Accountant or Forensic Accountant such as Mr Vernon Pike available to interpret and comment on the selected information presented by the applicant, it may be misconstrued. It is reasonable to presume that the respondent as an independent and impartial party to the mediation should have access to such experts to deal with certain matters in dispute to which qualified and expert opinion needs to be sought.

[49] The objections raised by the applicant reflect his global complaints about the Bank and the respondent's conduct, and to some extent, re-iterate his views in the form of an objection.

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[55] Applicant's written submission dated 4 February 2019, p 2-3, [3].

[50] Paragraphs 7 to 13 of the respondents' submissions set out a number of matters in chronological order, they do not misrepresent the underlying evidence and they do provide some preliminary background information to this application.

[51] Paragraphs 7 to 13 does not include the full bank asset and bank liability account ("the liability account") information, however, paragraph 13 does include a reference to a request by the applicant to the Bank for this information. The Bank's position was that the liability account does not exist.[56]

[52] The applicant objects to some of this material on the basis that they are conversations and information that was discussed in mediation and is in confidence and, therefore, if admitted may render the pre-mediation correspondence obsolete and inconsequential.[57] None of the content of paragraphs 7 to 13 of the respondent's submissions falls within the meaning of section 38(1) of the Act. Rather the background information referred to in paragraphs 7 to 13 of the respondent's submissions occurred prior to the mediation meeting as defined in section 38(1) of the Act.

[53] The evidence underlying these submissions is admissible, and the submissions are not objectionable.

Background

[54] The respondent's submissions set out in detail a chronology of events and factual findings in the original decision and the review decision.[58]

[55] The applicant had a loan agreement and mortgage with the Bank whereby he received funds pursuant to the loan agreement at his direction or request. The applicant does not challenge having entered into any loan agreement, receiving funds pursuant to the loan agreement at his direction or request and otherwise being in default.[59]

[56] On or about the 3 December 2015, the Bank instituted proceedings against the applicant in the Supreme Court of Queensland in relation to this loan and debt owed.[60]

[57] On 1 July 2017, the Act came into force regulating the taking of any enforcement by the Bank against the applicant.[61]

[58] On 12 October 2017 the Bank served an Enforcement Action Notice and Mediation Information Package on the applicant.[62] The applicant responded by requesting financial

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56 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-15, p 208; Respondent's outline of submissions filed 4 February 2019, p 4, [19(c)].

57 Applicant's written submission dated 4 February 2019, p 2-3, [3].

58 Respondent's outline of submissions filed 4 February 2019, p 2-6, [6]-[31].

59 Applicant's oral submissions summary received 26 March 2019, p 2, [11].

60 Proceeding number BS12280/15.

61 Respondent's outline of submissions filed 4 February 2019, p 2, [12].

62 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-3, p 12-14. Referred to by the decision maker in the original and review decisions – see Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-1, p 2, [1]; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-2, p 7, [1]; Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-O, p 40, [1].

records and documents and challenged the existence of the loans arguing that the original agreement was merely an exchange of assets.[63]

[59] On 8 November 2017 the applicant responded to the Enforcement Action Notice with a Notice S15 Request for Mediation Incorporating Nomination of Mediators and Request for Documents ("the Notice S15").[64]

[60] The Notice S15 is the approved form for farmers to request documents from the mortgagee and the applicant ticked the box requesting documents. The Notice S15 contains the following information:

> "Is the mortgagee requested to provide copies of documentation related to the farm business debt and farm mortgage under section 21 of the Act? If requested, documents provided by the mortgagee may include, but are not limited to:
>
> - the farmer's application for the farm business debt and farm mortgage, and any variation of the debt or mortgage
> - the contractual relationship between the farmer and the mortgagee, including any loan or mortgage documents
> - correspondence between the farmer and the mortgagee about changes to the farm business debt or the farm mortgage
> - the farmer's default under the farm mortgage and any action taken by the mortgagee in relation to the default and any other matter prescribed by regulation
>
> The mortgagee must comply with this notice, at the mortgagee's cost, within thirty (30) business days after receiving the notice and provide as an electronic document or a written version.
>
> If the mortgagee has given the relevant documents to the farmer within the three months before receiving the notice, the mortgagee is taken to have complied with the notice to the extent the notice relates to the document".[65]

[61] The applicant continually requested the liability account from the Bank.[66] His correspondence to the Bank explains the nature of this liability account:

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63 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-4, p 15-16. Referred to by the decision maker in the original and review decisions – see Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-1, p 2, [2]; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-2, p 7, [2]; Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-O, p 40, [2].

64 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-1, p 2, [2]; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-2, p 7, [2]; Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-O, p 40, [2].

65 Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-A, p 1-2; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-5, p 17-18.

66 See, e.g., Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-H, p 10; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-4, p 15-16, exhibit SJC-10, p 175-184, exhibit SJC-12, p 195, exhibit SJC-14, p 206-207.

"I have reason to believe that you, the Lender, may not have loaned any money to me,[67] the Borrower, and that you may have breached the original agreement concerning the above-referenced account related to the alleged 'loan' or 'loan of credit'.

Publicly available banking and finance publications indicate that, instead of the Lender lending the Borrower 'cash or money's worth' according to relevant acts and statutes; there was merely an exchange of assets between the parties and not a loan of money from the Lender to the Borrower.

The Borrower acknowledge receipt of numerous statements of a 'loan account' provided by the Lender, however the Borrower has learned that the 'loan account', according to Generally Accepted Accounting Practices (GAAP), is only one part of the accounting record and that it is an asset account. That asset account records the Lender's acceptance and deposit of the Borrower's 'loan agreement' as a debit item, but does not show the loan of money or provision of credit, as outlined in the loan contract, mortgage provisions, terms and conditions and other accompanying documents.

The asset account does not show any withdrawal from the assets of the Lender, as one would see should they make a loan of 'cash or money's worth' which they own.

Further, it appears that the Borrower's contract, debt receivable and associated mortgage have been negotiated and securitised without our consent, for which a substantial financial benefit was received by the Lender.

Such conduct by the Lender is considered misleading and deceptive and may be a breach of the Code of Banking Practice.

The Borrower hereby requests the following financial records and documents as similarly set out in those required under the National Consumer Credit Protection Act 2009 (the Act) Division 2, Sections 88 thru 96, and Schedule 1 to the Act, the National Credit Code (the Code) Division 5:

1. A separate Listing Document for each account maintained under or for the purposes of the Borrower's credit contract sequentially recording all transactions made on every such account, including asset accounts and liability accounts; and

2. A statement of the liability account related to the loan account for the Borrower; and

3. The document of prime entry authorising the withdrawal of the amount of the alleged loan from the Lender's assets; and

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67 This allegation was not maintained by the applicant in this proceeding.

4. All financial records that evidence the withdrawal of the amount of the alleged loan from the Lender's assets; and

5. Full details of all assignments, conveyances, securitisations and/or sales associated with the Borrower's account, receivables and/or mortgage".[68]

"My request for documents is based on very simple accounting principles.

The account statements you have provided show that the bank made debit and credit entries in two asset accounts only.

Your accounting department will agree that, under accounting rules using the double-entry method, three must be both an asset and a liability account to record correctly all credits and debits for every transaction associated with any loan facility.

I have seen no statements of the bank's liability accounts and hence no record showing discharge of the bank's original liabilities. I would expect the required matching credit items to be recorded in a bank asset account, but the account statements you have provided do not record the withdrawal of any bank assets sufficient to discharge the bank's original liabilities on either facility.

In order to ascertain whether Rural Bank has generated my loans and calculated the balances owing on each of my accounts accurately, all the credits and all the debits entered in both the asset and liability accounts need to be reconciled for each facility.

My counsel agrees that we must be able to calculate an accurate balance owing on each facility, and that requires full and correct accounting records for each facility.

You will agree that, without accurate accounting records that show evidence of adequate consideration by the bank, for example, even the validity of the contracts themselves cannot be assumed or presumed, as you appear to be doing at present. If Rural Bank does have such evidence, now would be the time to provide it to me in good faith.

I am sure it is a requirement under the relevant banking and finance statues, codes and regulations which bind Rural Bank that accurate financial records must be kept and produced at the request of the customer.

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[68] Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-4, p 15-16. Referred to by the decision maker in the original decision at Affidavit of Sam Chester Scriven sworn on 9 November 2018, SCS-N, p 26, [2] and p 28, [36]; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-1, p 2, [2]; p 4, [36]. Also referred to by the decision maker in the review decision at Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-2, p 7, [2] and p 9, [36]; Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-P p 40, [2] and p 42, [46].

> So that I can be full informed prior to mediation, the bank's liability accounts must be produced and provided to me. I hope this makes my position clear".[69]

[62] The applicant did not receive any document, referred to by him as the liability account, from the Bank.

[63] The primary complaint by the applicant is that he requested the liability account from the Bank pursuant to section 21 of the Act and the Bank should have complied with such a request.[70]

[64] The respondent submits that section 21 of the Act does not require the Bank to provide such a document[71] and in any event there is evidence that the Bank was not in possession of this document.[72]

[65] The Bank wrote to the applicant on 23 November 2017 and stated:

> "You have been advised that what you seek in regards to the 'other statements' simply does not exist".[73]

[66] The reference to "other statements", on a sensible reading of the previous correspondence between the applicant and the Bank, includes the applicant's request for the liability account.

[67] The applicant and the Bank attended mediation on 24 January 2018.

[68] The Form 2 – Summary of Mediation states that "the Mortgagee [the Bank] advised that it did not intend to continue with mediation and no further communication was received by the Farmer [the applicant]".[74]

[69] The mediator agreed that, to his knowledge, a document/information exchange occurred sufficiently.[75] In the mediator's opinion the parties participated in mediation in good faith.[76] No agreement was reached,[77] and the mediator commented:

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69 Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-H, p 10. Referred to by the decision maker in the original decision at Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-N, p 26, [11]-[12]; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-1, p 2, [11]-[12]. Also referred to by the decision maker in the review decision at Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-P, p 41, [11]-[12]; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-2, p 8, [11]-[12].

70 Applicant's outline of argument filed 1 February 2019; Applicant's written submission dated 4 February 2019; Applicant's oral submissions summary received 26 March 2019; Applicant's further written submission dated 26 March 2019.

71 Respondent's outline of submissions filed 4 February 2019, p 11-14.

72 Transcript of the hearing, p 43, line 43-45.

73 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-15, p 208.

74 Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-J, p 13-14; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-19, p 241-242.

75 Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-J, p 13; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-19, p 241.

76 Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-J, p 14; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-19, p 244.

77 Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-J, p 13; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-19, p 241.

> "The mediation was adjourned to allow the Farmer to consider an offer by the Mortgagee. The Farmer put a counter offer which was not accepted by the mortgagee. The Mortgagee then indicated that it did not intend to continue with the mediation.
>
> The Farmer does not agree with my Summary of Mediation and contends that the Mortgagee has not made full disclosure, and has not acted in good faith. In accordance with s 33(4) Farm Business Debt Mediation Act 2017 I note the disagreement by the Farmer accordingly. The nature of the Farmer's disagreement is set out in the attached email dated 6 April 2018."[78]

[70] The attached email referred to by the mediator[79] raises the applicant's persistent view of the concealment by the Bank of the liability account, deceptive and misleading conduct by the Bank and that full disclosure did not occur.

[71] On 1 May 2018, the Bank made an application for an exemption certificate,[80] and the respondent issued a show cause notice pursuant to section 50 of the Act.[81] In response, the applicant provided submissions as to why an exemption certificate should not be issued.[82]

[72] On 7 June 2018, the respondent granted the exemption certificate with reasons.[83] The applicant requested an internal review with supporting submissions.[84]

[73] On 11 September 2018, the review decision upheld the original decision and provided reasons.[85]

The powers and duties of the respondent when issuing an exemption certificate

[74] It must be appreciated from the outset that the respondent had no power or duty to:

a. rule on the amount of the farm business debt said to be owed, other to be satisfied than that an amount has been borrowed by a farmer within the meaning of "farm business debt", and that the farmer is in default in accordance with its terms;[86]

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78 Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-J, p 14; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-19, p 242.

79 Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-J, p 15; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-19, p 243.

80 Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-K, p 16; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-20, p 244.

81 Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-L, p 19-20; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-20, p 244.

82 Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-M, p 21-24; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-23, p 278-281.

83 Affidavit of Sam Chester Scriven sworn on 9 November 2018, SCS-N, p 25-29; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-1, p 1-6.

84 Affidavit of Sam Chester Scriven sworn on 9 November 2018, SCS-O, p 30-31; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-25, p 285-286.

85 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-2, p 7-11; Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-P p 40-44.

86 *Farm Business Debt Mediation Act* 2017 (Qld) s 52(2).

b. consider and rule upon whether or not a mortgagee has complied with its record-keeping or accounting requirements established under any other law, regulation, policy or procedure; and

c. consider and rule upon questions of law pertaining to contractual disputes between the parties, or the lawfulness of a farmer or mortgagee's conduct.

[75] The applicant concedes that the applicant has loan default and outstanding debt with the Bank.[87]

[76] The respondent has no power or duty to determine the amount owed, to resolve contractual disputes between the parties, or consider the source of funds provided by a mortgagee, nor any accounting requirements under any law, regulation, policy or procedure.

The relevant statutory provisions of the Act

[77] The respondent's powers and obligations in relation to issuing an exemption certificate are set out in Part 4, Division 2 of the Act.

[78] Section 48 states that a mortgagee may apply to the respondent for a certificate exempting the mortgagee from the obligation to offer mediation under the Act before taking enforcement action in relation to the farmer's default under the farm mortgage. Section 48(2) states that the application must:

> "(a) be in the approved form; and
>
> (b) state the facts and circumstances forming the basis of the ground on which the mortgagee claims an exemption certificate should be issued; and
>
> (c) be accompanied by the fee prescribed by regulation."

[79] Section 49 sets out the grounds for issuing an exemption certificate:

> "**49 Grounds**
>
> (1) Each of the following is a ground for issuing an exemption certificate in relation to a farmer's default under a farm mortgage—
>
> (a) the farmer and the mortgagee took part in mediation for the farm business debt and the mediation—
>
> (i) considered matters relating to the farmer's default; and
>
> (ii) was satisfactory;
>
> (b) the farmer has failed to, and does not intend to, mediate for the farm business debt about matters relating to the farmer's default;
>
> *Note—*

[87] Applicant's written submissions dated 4 February 2019 p 1, [3(b)]; p 11, [41].

See section 53 for when a farmer has failed to mediate.

(c) all of the following apply—

(i) the farmer and the mortgagee agreed to mediate for the farm business debt about matters relating to the farmer's default;

(ii) 3 months, or a longer period agreed in writing by the mortgagee, has elapsed since the mortgagee gave an enforcement action notice to the farmer;

(iii) during that period, the mortgagee has attempted to mediate in good faith;

(iv) there has been no satisfactory mediation between the farmer and the mortgagee;

(d) the farm business debt is secured, in part, by a farm mortgage of farm property in another State and, under the corresponding law of that State—

(i) the mediation for the farm business debt considered matters relating to the farmer's default under the farm mortgage of farm property in Queensland and was satisfactory; or

(ii) the farmer has failed to, and does not intend to, mediate for the farm business debt about matters relating to the farmer's default.

(2) For subsection (1)(c)(iii), a mortgagee not agreeing to reduce or forgive a debt does not, of itself, mean the mortgagee has not attempted to mediate in good faith."

[80] Sections 50 and 51 concern the issuing of a show cause notice to the farmer and the farmer's response.

[81] Section 52 sets out the respondent's powers and obligation when deciding an application:

"**52 Deciding application**

(1) The authority must—

(a) consider the mortgagee's application for an exemption certificate; and

(b) consider all representations made in accordance with the show cause notice; and

(c) decide to approve or refuse the application; and

(d) as soon as practicable after making the decision, give the farmer and the mortgagee a notice that states the decision.

(2) The authority must decide to approve the application if the authority is satisfied—

(a) the farmer is in default under the farm mortgage; and

(b) an enforcement action suspension certificate is not in force for the farm mortgage; and

(c) there is a ground, relating to the farmer's default, to issue the exemption certificate. (3) If a ground mentioned in section 49(1)(a) or (d) exists, the authority may decide to issue an exemption certificate for the farm mortgage whether or not the mortgagee gave an enforcement action notice to the farmer.

(4) The authority must decide to refuse the application if the authority is satisfied—

(a) a heads of agreement is in force for the farm business debt; and

(b) the cooling-off period for the heads of agreement has not ended.

(5) If the authority decides to approve the application, the notice the authority gives the farmer under subsection (1)(d) must be an information notice for the decision.

(6) If the authority decides to refuse the application, the notice the authority gives the mortgagee under subsection (1)(d) must be an information notice for the decision."

[82] Accordingly, sections 50, 51 and 52 of the Act required the respondent to observe the following procedures upon an application being made under section 48 of the Act:

a. the respondent must issue a show cause notice to the applicant farmer annexing the Bank's application for an exemption certificate;[88]

b. the respondent must afford the applicant a period of at least 20 business days to make written representations as to why an exemption certificate should not be issued;[89]

c. the respondent must consider the Bank's application and the applicant's representations, determine whether to approve or refuse the application, and then provide notice to both the applicant and Bank as soon as practicable;[90]

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88 *Farm Business Debt Mediation Act* 2017 (Qld) s 50. See the show cause notice issued at Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-L, p 19-20; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-20, p 244.

89 *Farm Business Debt Mediation Act* 2017 (Qld) ss 50, 51. See the written submissions made by the applicant at Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-M, p 21-24; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-23, p 278-281.

90 *Farm Business Debt Mediation Act* 2017 (Qld) s 52(1). See Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-N, p 25-29; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-1, p 1-6.

d. the respondent must decide to approve the application if satisfied of the three matters set out in section 52(2) of the Act.[91]

[83] It is noted that there is no discretion for the respondent if the matters in section 52(2) of the Act are satisfied, but there is discretion embedded into section 52(3) of the Act.

[84] The terms of the respondent's original reasons make it clear that the respondent was satisfied of the three conditions of section 52(2) and determined this matter accordingly:[92]

> "In terms of section 52 of the Act, QRIDA is satisfied that:
>
> (a) the farmer is in default under the farm mortgage;
>
> (b) no enforcement action suspension certificate is in force; and
>
> (c) the grounds under section 49(1)(a) relating to the farmer's default are evident.
>
> Therefore, we advise that the application for an exemption certificate is approved".

[85] The respondent's reasons in the review decision are in the same terms.[93]

The decision makers were not accredited mediators

[86] The applicant complains that the respondent's decision makers were not accredited mediators for the purpose of the Act.[94]

[87] It is noted that the respondent's role is separate and distinct from that of the mediator. The mediator is required to mediate the dispute impartially with the aim of bringing about an agreement[95] and the respondent has no role to play in mediation between a farmer and mortgagee.

[88] Instead, the powers and duties of the respondent (including its delegates, the decision makers in the original and review decision) with respect to any mediation of the dispute between the applicant and the Bank are prescribed in, *inter alia*, Part 4 and Division 2 of Part 6 of the Act.

[89] None of the powers or duties contained in those Parts required the respondent's delegates to be accredited mediators.

The power to delegate

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[91] *Farm Business Debt Mediation Act* 2017 (Qld) s 52(2), those matters being (a) the farmer is in default under the farm mortgage; and (b) an enforcement action suspension certificate is not in force for the far mortgage; and (c) there is a ground, relating to the farmer's default, to issue the exemption certificate.

[92] Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-N, p 29, [68]; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-1, p 5, [68].

[93] Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-2, p 11, [72]; Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-O, p 44, [72].

[94] Affidavit of Sam Chester Scriven sworn on 9 November 2018, p 5, [49] and [56]. See also Application for a Statutory Order of Review filed 10 October 2018, p 3, [14], NB: only refers to decision maker of the original decision.

[95] *Farm Business Debt Mediation Act* 2017 (Qld) s 20.

[90] The applicant also raised the issue (not in the application but in submissions) as to whether the Act allowed for the chief executive officer to delegate the reviewing of an original determination.[96] It does.

[91] The chief executive officer has the power to delegate functions exercised under the Act by virtue of section 35B of the *Rural and Regional Adjustment Act* 1994 (Qld):

> "**35B Delegation**
>
> (1) The chief executive officer may, with the board's approval, delegate the chief executive officer's functions under this Act or another Act, including a function delegated to the chief executive officer by the authority, to an appropriately qualified employee of the authority.
>
> (2) In this section–
>
> ***function*** includes power."

[92] In relation to the internal review, sections 81(2) and (3) of the Act states:

> "(2) The application may be dealt with only by a person who—
>
> > (a) did not make the original decision; and
> >
> > (b) holds a more senior office than the person who made the original decision.
>
> (3) Subsection (2)—
>
> > (a) does not apply to an original decision made personally by the chief executive officer; and
> >
> > (b) applies despite the Acts Interpretation Act 1954, section 27A."

[93] Section 81(2) states that the review may be dealt with only by a person who did not make the decision and who is more senior than the person who made the original decision. I accept the respondent's submission that if that was intended to only be a reference to the chief executive officer, then the subsection would be superfluous and have no work to do.[97]

[94] Section 81(3) expressly refers to section 27A of the *Acts Interpretation Act* 1954 (Qld) ("*AIA*") and shows:

a. the legislature's recognition that s 27A of the *AIA* permits delegation by the chief executive officer; and

b. the legislature's intention to limit the broad and general terms s 27A of the *AIA*, such that any delegate cannot be the original decision maker and must be a more senior person.

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96 Applicant's outline of argument filed 1 February 2019, p 5, [8].
97 Respondent's outline of submissions filed 4 February 2019, p 28, [14(a)].

[95] Section 27A(7) of the *AIA* deems that review decision is taken to have been performed or exercised by the chief executive officer.[98]

The statutory construction issue

The respondent's decision

[96] The respondent considered sections 5 and 21 of the Act in the original and review decisions and determined that the Act did not extend to the Bank needing to provide statements of account for the applicant's asset position with the Bank.[99]

The applicant's position

[97] The applicant submits that the Bank failed to provide documents that were requested by him and the respondent failed to record the non-compliance.[100]

[98] The applicant's essential submissions can be summarised as:

a. the respondent erred in its determination that the Bank complied with section 21 of the Act by reason of the Bank's provision of documents and failure to provide "liability accounts"; and

b. the respondent otherwise erred in its determination that the Bank acted in "good faith".

[99] The applicant submits that the respondent (and the mediator) have failed to understand the proper function of section 5 with section 21 and 22 of the Act.[101] The applicant submits:

a. that section 5 gives the legislative definition of a Farm Business Debt, so as to ascertain which debts are subject to mediation under the Act;[102]

b. once the debt is taken to have met the definition then the Farmer and the Bank are under the jurisdiction of the Act;[103]

c. the debt does not need to be re-proven via sections 21 and 22, as these provisions are for the aid of a successful mediation;[104]

d. sections 21 and 22 are about ensuring the equitable and efficient resolution through mediation, of the already defined farm business debt;[105]

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98 *Acts Interpretation Act* 1954 (Qld) s 27A(7).

99 Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-N, p 29, [63]; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-1, p 5, [63]; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-2, p 11, [67]; Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-O, p 44, [67].

100 Applicant's outline of argument filed 1 February 2019, p 2, [4].

101 Applicant's oral submissions summary received 26 March 2019, p 1, [3]-[4].

102 Applicant's oral submissions summary received 26 March 2019, p 1, [3].

103 Applicant's oral submissions summary received 26 March 2019, p 1, [3].

104 Applicant's oral submissions summary received 26 March 2019, p 1, [3].

105 Applicant's oral submissions summary received 26 March 2019, p 1, [5].

e. resolution through mediation requires each party to know the debtor's full financial position and ability to enter into heads of agreement and this cannot happen without knowing the full quantum of the debt;[106]

f. knowing only the total mortgage amount of the farmer does not fulfil the purpose of the Act, nor sections 21 and 22, which is for equitable resolution through mediation. Successful mediation in good faith does not require the parties to negotiate a heads of agreement, but does require the parties to know the full financial position of the farmer.[107]

[100] The applicant submits that section 21(4) lists (a) to (e) as a guide to types of documents. The applicant interprets the term "relating to" and "not limited to" as giving broader scope to the types of documents listed in section 21(4) of the Act.[108]

[101] The applicant submits that such an interpretation "best achieves the main purposes of the Act, being the equitable and fair resolution of a farm business debt and correcting the previous power imbalance between the lender and the farmer that existed prior to the Act".[109]

[102] The key phrase in section 21(4), the applicant submits is, "relating to", which expressly implies that the list given is not exhaustive. Therefore, the applicant submits, documents relating to section 21(4)(a) "variation of the debt", or section 21(4)(d) "the farmers default", under Australian accountancy principles, must include the total assets and liabilities of the farmer in relation to the default.[110]

The respondent's position

[103] The respondent submits that the type of documents listed in section 21(4) of the Act is not a "guide" but identifies the very documents the mortgagee is required to provide; the liability account is not one of them.[111] The Bank was not required to provide the liability account and the respondent did not err in its determination that the Bank complied with section 21 of the Act.

Section 21 of the Act

[104] A provision of an Act should be construed consistently with the language and purpose of the Act.[112] The correct approach to statutory construction must begin and end with the text itself,[113] whilst also not forgetting that the "modern approach to statutory

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106 Applicant's oral submissions summary received 26 March 2019, p 1, [5].
107 Applicant's oral submissions summary received 26 March 2019, p 1, [9].
108 Applicant's outline of argument filed 1 February 2019, p 2, [4].
109 Applicant's outline of argument filed 1 February 2019, p 2, [4].
110 Applicant's further written submission dated 26 March 2019, p 4, [17].
111 Respondent's outline of submissions filed 4 February 2019, p 11, [59].
112 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [69].
113 *Zappala Family Co Pty Ltd v Brisbane City Council & Ors; Brisbane City Council v Zappala Family Co Pty Ltd & Ors* [2014] QCA 147, [55].

construction … insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise”.[114]

[105] The interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation. The statutory purpose of a legislative provision may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials. The purpose of a statute is not something which exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction.[115]

[106] Section 3 of the Act sets out the Act's purpose:

> “**3 Purpose**
>
> (1) The purpose of this Act is to provide an efficient and equitable way for farmers and mortgagees to resolve matters relating to farm business debts.
>
> (2) The purpose is achieved mainly by—
>
> > (a) providing for mediation as a way for farmers and mortgagees, participating in good faith, to efficiently and equitably resolve matters relating to farm business debts; and
> >
> > (b) requiring a mortgagee, before taking action to enforce a mortgage securing a farm business debt—
> >
> > > (i) to offer mediation for the farm business debt to the farmer; and
> > >
> > > (ii) if the farmer asks for the mediation—to take part in the mediation in good faith; and
> >
> > (c) providing that action that is taken to enforce a mortgage securing a farm business debt in contravention of this Act has no effect”.

[107] The meaning of “farm business debt” is integral to the purpose of the Act and is defined in section 5:

> “**5 Meaning of farm business debt**
>
> A farm business debt is an amount owed by a farmer that—
>
> > (a) was borrowed for the purpose of conducting a farming business; and
> >
> > (b) is secured by a farm mortgage”.

[108] The focus of section 5 is an amount owed by the farmer to the mortgagee.

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114 *Zappala Family Co Pty Ltd v Brisbane City Council & Ors; Brisbane City Council v Zappala Family Co Pty Ltd & Ors* [2014] QCA 147, [55] citing *CIC Insurances Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408.

115 *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573, [44].

[109] Farm mortgage is defined as "a mortgage of farm property".[116]

[110] Section 21 deals with the Bank giving requested documents to a farmer. The relationship between the farmer and mortgagee is contractual.[117] The mortgagee's obligation are set out in section 21 of the Act which addresses the provision of those documents relating to that contractual relationship that are held by the mortgagee to evidence an amount owing by the farmer to the mortgagee:

> "**21 Giving requested documents to farmer**
>
> (1) The farmer may give a notice to the mortgagee asking the mortgagee for copies of documents related to the farm business debt and the farm mortgage.
>
> (2) The farmer may give the notice—
>
>> (a) when the farmer gives a request for mediation notice to the mortgagee; or
>>
>> (b) at any time after the farmer gives a request for mediation notice to the mortgagee but before the mediation ends.
>
> (3) The mortgagee must comply with the notice, at the mortgagee's cost, within—
>
>> (a) 30 business days after receiving the notice; or
>>
>> (b) a longer period agreed between the farmer and the mortgagee, in consultation with the mediator.
>
> (4) The mortgagee complies with the request by giving the farmer copies of the documents in the mortgagee's possession or control relating to—
>
>> (a) the farmer's application for the farm business debt and farm mortgage, and any variation of the debt or mortgage; and
>>
>> (b) the contractual relationship between the farmer and the mortgagee, including any loan or mortgage documents; and
>>
>> (c) correspondence between the farmer and the mortgagee about changes to the farm business debt or the farm mortgage; and
>>
>> (d) the farmer's default under the farm mortgage and any action taken by the mortgagee in relation to the default; and
>>
>> (e) any other matter prescribed by regulation.
>
> (5) The mortgagee gives a document that is an electronic document by giving a clear image or written version of the document.
>
> (6) If the mortgagee has given a document mentioned in subsection (4) to the farmer within the 3 months before receiving the notice, the mortgagee

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[116] *Farm Business Debt Mediation Act* 2017 (Qld), sch 1.

[117] This is not disputed by the applicant – see applicant's oral submissions summary received 26 March 2019, p 2, [9].

> is taken to have complied with the notice to the extent the notice relates to the document.
>
> (7) If the mortgagee fails to comply, or to make reasonable efforts to comply, with the request, the mortgagee has failed to take part in the mediation in good faith".

[111] Pursuant to section 21(1) of the Act, the farmer can only request documents related to the "farm business debt and the farm mortgage" which is defined in section 5 of the Act.

[112] A request for documents that are not related to the "farm business debt and the farm mortgage" is outside the scope of section 21 of the Act and the mortgagee does not need to comply with any such request. Of course, the mortgagee may provide documents beyond those required by section 21, but it is not required to by statute, and a failure to do so does not mean that mortgagee has failed to take part in the mediation in good faith pursuant to section 21(7) of the Act.

[113] Section 21 is directed at documents that are related to an amount owed by the farmer that was borrowed for the purpose of conducting a farming business and is secured by a farm mortgage. Documents outside that scope are irrelevant for the purposes of section 21 of the Act.

How does section 21 of the Act work?

[114] Section 21(1) of the Act states that a farmer may give a notice to the mortgagee asking for copies of documents related to the farm business debt and the farm mortgage. Section 21(4) establishes how the notice is able to be properly discharged by a mortgagee.

[115] The mortgagee is required to comply with the farmer's request pursuant to section 21(4) of the Act. Failure to comply, or to make reasonable efforts to comply, with the request means that that mortgagee has failed to take part in the mediation in good faith.[118]

[116] The use of the opening words "the mortgagee complies" in section 21(4) contemplates that the categories of documents that follow are sufficient to reach the necessary level of compliance (subject to the qualification that the mortgagee only needs to make "reasonable efforts" to comply contained in section 21(7)).

[117] Section 21(4) sets out those documents that "relate to" the "farm business debt" and the "farm mortgage" for the purpose of section 21(1), otherwise the express listing of the categories of documents in section 21(4) would have little work to do.

[118] The inclusion of section 21(4)(e), which permits other matters to be prescribed by regulation, suggests that the legislature intended the provision of specific types or categories of documents that could be expanded upon regulatory promulgation.

[119] As noted, the relationship between a farmer and a mortgagee is necessarily contractual in nature. The mediation process is facilitated, in part, by the provision of prescribed documents from a mortgagee.[119] Each type or category of documents relates to that contractual relationship.

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118 *Farm Business Debt Mediation Act* 2017 (Qld) s 21(7).

119 *Farm Business Debt Mediation Act* 2017 (Qld) s 21(4).

[120] In this case, the relationship between the Bank and applicant is evidenced by:

a. the Facility Terms and letter of offers (collectively, "the Contract");[120]

b. the first registered mortgage over the applicant's rural property "Meribah" ("the Mortgage");[121] and

c. the "Specific Security Mortgage" that complied with the *Personal Property Securities Act* 2009 (Qld) granting a mortgage over the applicant's livestock and farming equipment to secure his current and future indebtness to the Bank ("the Chattel Mortgage").[122]

[121] These documents were provided by the Bank to the applicant.[123]

[122] The Contract required the Bank to provide, at the applicant's request, credit of up to $800,000 under the term facility and $100,000 under the loan facility.[124] The applicant agreed to pay those advanced funds back according to the terms of the Contract. Where those funds were advanced from and how those transactions were accounted for by the Bank is not relevant to the contractual relationship between those parties.

[123] It is noted that the applicant does not appear to contest:

a. having actually received funds by the Bank;

b. having executed the Mortgage and Chattel Mortgage;[125]

c. having directed the Bank to advance funds to him or on his behalf pursuant to the Contract;[126]

d. his indebtedness to the Bank;[127] and

e. his being in default under the Contract.[128]

[124] The applicant executed a "Heads of Agreement", dated 3 October 2014, recording his indebtedness to the Bank and his default in repayment.[129]

[125] It is those matters above that are relevant for the purposes of the Act and it is those matters that are established by the very categories of documents required to be disclosed under section 21(4) of the Act.

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120 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-9, p 28-57 and 101-159.

121 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-9, p 58-60.

122 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-9, p 63-99.

123 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-9, p 25-174.

124 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-9, p 28-57. Note: the renewed by the applicant subject to an increase in the term facility to $900,000, see exhibit SJC-9, p 101-159.

125 Applicant's written submission dated 4 February 2019, p 3, [6]; p 11, [41]; Applicant's oral submissions summary received 26 March 2019, p 2, [11].

126 Applicant's oral submissions summary received 26 March 2019, p 2, [11].

127 Applicant's written submission dated 4 February 2019, p 1, [3(b)].

128 Applicant's written submission dated 4 February 2019, p 1, [3(b)]; p 11, [44]; Applicant's oral summary received 26 March 2019, p 2, [11].

129 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-9, p 161-165.

[126] The obligation in section 21(4) cannot extend to permitting a farmer to request any documents that he or she unilaterally contends is "related to" the farm business debt and farm mortgage. To stipulate strict compliance by the mortgagee with any request of a farmer, is contradictory to the clear and express qualification contained in section 21(7) that a mortgagee is only required to make reasonable efforts.

[127] Section 21(4) of the Act does not incorporate expansive language consistent with the subsection providing a guide for documents to be provided. Had the legislature intended the categories of documents to be wider, then it could have easily done so through substituting the phrase "including", or linking the phrase "relating to" expressly to "the farm business debt", or adding the term "but are not limited to".

[128] It is noted that the Notice S15 form imports words that are not in section 21 and states:[130]

> "documents provided by the mortgagee may include, but **are not limited to**…". [emphasis added]

[129] Section 21 does not use such expansive terms. It is noted that whilst the Notice S15 is an approved form, its words cannot supersede the statute. The legislature has not used the words "but not limited to" in section 21(4) to provide a much wider class of documents. It is the words of the statute that are paramount and stipulate the mortgagee's compliance with section 21 of the Act, not the contents of an administrative form.

[130] As stated above, the legislature has left open an opportunity for a wider category of documents by including section 21(4)(e) which states "the mortgagee complies with the request by giving the farmer copies of the documents in the mortgagee's possession or control relating to … any other matter prescribed by regulation". No regulation has been prescribed as yet to widen the category of documents.[131]

[131] The extrinsic material also does not support the applicant's contention of section 21 having a wider ambit.

[132] The remarks of the Minister during the introduction of the *Farm Business Debt Mediation Bill* in 2016 in which she referred to the provision of documents by the mortgagee as intending to be a "level of disclosure" of "certain documents" as follows:[132]

> "One variation from the approach in New South Wales and Victoria is that the bill allows a farmer to require a mortgagee to provide copies of certain documents relating to the farm debt or mortgage. Similarly, the mortgagee can request certain information about the farmer's financial position. This exchange of information is intended to ensure a level of disclosure that will build trust between the parties and ensure their negotiations are well informed".

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130 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-5, p 18; Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-A, p 2.

131 The only Regulation effective as at current date, the *Farm Business Debt Mediation Regulation* 2017 (Qld), deals with choosing a mediator.

132 Queensland, *Parliamentary Debates*, Legislative Assembly, 30 August 2016, 3125 (Leanne Donaldson, Minister for Agriculture and Fisheries).

[133] The remarks of the Minister during the resumption of the second reading speech in 2017 in which specific categories of documents were referred to as comprising a mortgagee's obligations under section 21 were as follows:[133]

> "The bill provides that a farmer may request copies of documents from the mortgagee relating to the farm business debt and the mortgage. Those documents relate to the farmer's application for the farm business debt, the mortgage and any variation of these, the contractual relationship between the farmer and the mortgagee, correspondence about changes to the debt or mortgage and the farmer's default. The bill also requires the farmer to provide the mortgagee with certain documents or information".

[134] At the time relevant stakeholders submitted that additional documentation should be required to be disclosed by a mortgagee or a farmer should have the right to request the provision of further documentation.[134] The Minister responded to these submissions in the following terms:[135]

> "However, I believe that the provisions of the bill concerning the extent of the documentation that can be requested of either party represent a good compromise between vastly different opinions".

[135] The applicant submits that the best possible atmosphere for mediation, is the open and transparent sharing of information either voluntarily, or forcefully, through sections 21 and 22 of the Act.[136] That is the case, however, the sharing of information is not unlimited and has to be in accordance with the terms of section 21 and 22 of the Act.

[136] If section 21(4) is only a guide, as the applicant submits, then it would be an invitation for further disputes and contrary to the purpose of the Act to provide for an efficient and equitable way for farmers and mortgagees to resolve matters relating to farm business debts.[137]

[137] If section 21 of the Act allowed the farmer to request documents wider than those set out in section 21(4), then the mediation process could be mired, from the outset, by complaints about the ambit of the request and the non-provision of documents pursuant to such a request.

[138] Section 21 of the Act avoids such a situation by stipulating in clear terms what the mortgagee must provide under request by the farmer.

[139] The liability account requested by the applicant is not related to the documents set out in section 21(4). However, section 22 of the Act specifically refers to the farmer's assets and liabilities, which would capture the liability account.

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133 Queensland, *Parliamentary Debates*, Legislative Assembly, 21 March 2017, 644 (Bill Byrne, Minister for Agriculture and Fisheries and Minister for Rural Economic Development).

134 Finance and Administration Committee, Parliament of Queensland, *Farm Business Debt Mediation Bill 2016 and Rural and Regional Adjustment (Development Assistance) Amendment Bill 2016* (Report No 34, November 2016) 45-46.

135 Queensland, *Parliamentary Debates*, Legislative Assembly, 21 March 2017, 644 (Bill Byrne, Minister for Agriculture and Fisheries and Minister for Rural Economic Development).

136 Applicant's further written submission dated 26 March 2019, p 3, [9].

137 *Farm Business Debt Mediation Act* 2017 (Qld) s 3(1).

Section 22 of the Act

[140] The applicant states that the farmer's obligation is set out in section 22 of the Act and for the farmer to fulfil his obligations in sharing his full asset and liability position, he requires information held by the mortgagee. Without this information, the applicant submits that an equitable and efficient resolution through mediation cannot take place because the farmer cannot know his overall financial position.[138]

[141] Section 22 provides:

> "**22 Giving documents to mortgagee**
>
> (1) The farmer must give the mortgagee documents or up-to-date information about—
>
> > (a) the farmer's most recent taxation return prepared for lodgement with the Australian Taxation Office; and
> >
> > (b) the farmer's assets and liabilities; and
> >
> > (c) the farmer's cash flow projections for a period of at least 1 year.
>
> (2) The farmer must comply, at the farmer's cost, with subsection (1) within—
>
> > (a) 30 business days after receiving a notice from the mortgagee under section 16(3); or
> >
> > (b) a longer period agreed between the farmer and the mortgagee, in consultation with the mediator.
>
> (3) The farmer gives a document that is an electronic document by giving a clear image or written version of the document.
>
> (4) If the farmer fails to comply, or to make reasonable efforts to comply, with this section, the farmer has failed to take part in the mediation in good faith."

[142] Section 22 does not provide any legislative obligation on a mortgagee to provide documents. There is no statutory basis upon which a farmer can request its own assets accounts from the mortgagee. There may be other avenues that a farmer can request its own liability assets accounts, but for the purposes of this Act, sections 21 and 22 doesn't transform this to be an obligation on the mortgagee to provide asset documentation.[139]

[143] If the farmer cannot, for whatever reason, comply with providing "up-to-date information about … the farmer's assets and liabilities",[140] then, if the farmer has shown reasonable efforts to comply then the farmer has not failed to take part in the mediation in good faith.[141]

The Bank was not required to provide the liability account document

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[138] Applicant's oral summary received 26 March 2019, p 2, [7].
[139] Transcript of the hearing on 6 February 2019, p 52, lines 1-8.
[140] *Farm Business Debt Mediation Act* (Qld) s 22(1)(b).
[141] *Farm Business Debt Mediation Act* (Qld) s 22(4).

[144] On the proper construction of sections 5, 21 and 22 of the Act the Bank was not required to provide the liability account as requested by the applicant.

[145] The liability account is not related to the "farm business debt" and the "farm mortgage" as defined by section 5 of the Act.

[146] The liability account document is not related to any category as set out in section 21(4) of the Act. The terms of section 21(4) are clear and do not provide the section as a "guide" but identifies the categories of documents that a mortgagee is required to provide. It is an exhaustive list and does not extend to the liability account as sought by the applicant.

[147] Accordingly, the Bank has complied with section 21 and it could not be said that the Bank has failed to take part in the mediation "in good faith" pursuant to section 21(7) of the Act.[142]

[148] In any event it is noted that the Bank has asserted that the liability account does not exist.[143] The applicant contests such an assertion.[144] However, this issue does not need to be determined on this application. It is noted that the decision maker did not make any finding as to whether the liability account existed.[145] It did not need to. Any liability account, even if it did exist, does not fall within section 21 of the Act.

[149] The applicant has continually stated that the Bank has not acted in "good faith" by not providing the liability account and the respondent erred by finding that it did so. The applicant has repeatedly alleged:

a. the Bank concealed/withheld the liability account;[146]

b. the Bank did not mediate in good faith by not providing the liability account;[147]

c. the mediator erred in his mediation functions;[148]

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142 *Farm Business Debt Mediation Act* 2017 (Qld) s 21(7).

143 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-15, p 208; Respondent's outline of submissions filed 4 February 2019, p 4, [19(c)].

144 Applicant's written submission dated 4 February 2019, p 5, [12]; Applicant's further written submission dated 26 March 2019, p 5, [34].

145 Affidavit of Sam Chester Scriven sworn on 9 November 2018, SCS-N, p 25-29; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-1, p 1-6; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-2, p 7-11; Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-P p 40-44.

146 Applicant's written submission dated 4 February 2019, p 5, [12]; p 9, [28]; Affidavit of Sam Chester Scriven sworn on 9 November 2018, p 4, [37]-[38]; exhibit SCS-J, p 14-15, exhibit SCS-M, p 32-38; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-19, p 242-243.

147 Application for a Statutory Order of Review filed 10 October 2018, p 1, [3]; Applicant's outline of argument filed 1 February 2019, p 3, [5]; Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-J, p 14-15; exhibit SCS-M, p 21; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-19, p 242-243, exhibit SJC-21, p 247.

148 Applicant's oral submissions summary received 26 March 2019, p 1, [4]; p 3, [20]; Applicant's further written submission dated 26 March 2019, p 3, [14]; Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-M, p 21. NB: it should be noted that the applicant relies on, *inter alia*, exhibit SCS-I to make this argument, which I have already determined is inadmissible in this application.

d. the respondent has erred in finding that the Bank acted in good faith;[149]

e. the respondent was biased when finding that the Bank acted in good faith.[150]

[150] Upon a proper construction of section 21 of the Act the Bank was not required to provide the liability account.

[151] Accordingly, any assertion that the Bank did not take part in the mediation in good faith pursuant to section 21(7) of the Act cannot be sustained or entertained. Any of the applicant's complaints founded in such allegations have no basis upon a proper construction of section 21 of the Act.

[152] The respondent did not err in determining that the Bank complied with section 21 of the Act.

Compliance with section 48 of the Act issue

[153] The applicant states that the Bank did not comply with section 48 of the Act:

> "**48 Applying for exemption certificate**
>
> (1) The mortgagee for a farm mortgage may apply to the authority for a certificate (an exemption certificate) exempting the mortgagee from the obligation to offer mediation under this Act before taking enforcement action in relation to the farmer's default under the farm mortgage.
>
> (2) The application must—
>
> > (a) be in the approved form; and
> >
> > (b) state the facts and circumstances forming the basis of the ground on which the mortgagee claims an exemption certificate should be issued; and
> >
> > (c) be accompanied by the fee prescribed by regulation".

[154] The applicant's arguments in relation to this issue can be summarised as:

a. it is a statutory requirement that the application for exemption be in the approved form;[151]

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[149] Application for a Statutory Order of Review filed 10 October 2018, p 1, [4]; p 2, [11]; Applicant's outline of argument filed 1 February 2019, p 4, [6]; Applicant's oral submissions summary received 26 March 2019, p 2, [10]; p 3, [19]-[20]; Applicant's further written submission dated 26 March 2019, p 4, [16]; p 6, [44]; Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-O, p 32.

[150] Applicant's written submissions dated 4 February 2019, p 9, [28]; Applicant's outline of argument filed 1 February 2019 2019, p 3, [4]; p 5, [7]; Applicant's written submission dated 4 February 2019, p 4, [8]; p 10, [32]; Applicant's further written submissions dated 26 March 2019, p 2, [4(e)]; p 4; [22]-[23]; Applicant's oral submissions summary received 26 March 2019, p 3 [32].

[151] Applicant's oral submissions summary received 26 March 2019, p 3, [29]; Applicant's outline of argument filed 1 February 2019, p 4-5, [7]; Applicant's written submissions dated 4 February 2019, p 9, [31].

b. the approved form (Form 4) explicitly requires “A statutory declaration setting out the facts which are considered to constitute grounds for an application”;[152]

c. the Bank did not attach a statutory application and the exemption certificate should not have been issued/[153] the application should have automatically been rejected;[154] and

d. that the respondent accepted the application without the statutory declaration and approved the certificate on different grounds supports the appearance of perceived bias.[155]

[155] The Bank’s application used the approved form, “Form 4”.[156]

[156] There is no statutory obligation requiring a statutory declaration setting out the facts which are considered to constitute grounds for an application. Section 48 does not necessitate a mortgagee to swear or depose to the facts and circumstances relied upon. Section 48(2)(b) requires the mortgagee to “state” the facts and circumstances upon which the mortgagee claims an exemption.

[157] However the approved form has a box which states:

> “Copies of relevant documents attached (these should include):
>
> •Enforcement Action Notice S14 sent to the farmer; and
>
> •Request for Mediation Notice S15 from the farmer; and
>
> •Summary of Mediation Form 2 from the mediator confirming “satisfactory mediation” has taken place; and
>
> •Copies of any correspondence between the parties; and
>
> •A statutory declaration setting out the facts which are considered to constitute grounds for an application”.[157]

[158] This list of documents cannot transform the provision of these documents into a legislative requirement. It is noted that the approved form is not even in mandatory language but rather use the term “should include”, not “must include”. This suggestion as contained in the approved form is not a legislative requirement.

[159] I am satisfied that the Bank satisfied the legislative requirement of section 48(2)(b) by providing:

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152 Applicant’s oral submissions summary received 26 March 2019, p 3, [30]; Applicant’s outline of argument filed 1 February 2019, p 4-5, [7].

153 Applicant’s written submissions dated 4 February 2019, p 9, [31]; Applicant’s further written submission dated 26 March 2019, p 6, [44].

154 Applicant’s oral submissions summary received 26 March 2019, p 3, [31].

155 Applicant’s oral submissions summary received 26 March 2019, p 3, [32]. See also Applicant’s outline of argument filed 1 February 2019, p 4-5, [7].

156 Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-K, p 16-18; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-20, p 244-246.

157 Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-K, p 16-18; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-20, p 244-246.

a. the details contained in the form itself; and

b. the attachment of numerous documents upon which the Bank relied which were certified to be true and correct by the Bank.

[160] I am satisfied that the Bank's application for an exemption certificate complied with section 48(2)(b) of the Act.

[161] The applicant states the deliberate disregard of a missing statutory declaration shows an actual bias by the respondent.[158] Any ground based on the applicant's complaint that section 48 was not complied with cannot be sustained.

The intermediate determination issue

[162] The applicant states that the heart of this application is that the respondent made an intermediate determination on the way to the final decision of granting an exemption certificate to the Bank.[159]

[163] The applicant submits that all subsequent arguments and points of contention stem from this intermediate determination which allowed the respondent to determine that the mediation was satisfactory.[160]

[164] The applicant cites a number of issues that arise under this category:[161]

a. whether the respondent made an intermediate determination that the accounts requested by the applicant from the Bank were anomalous?;

b. whether the respondent made an intermediate determination that the non-provision of those anomalous accounting records did not qualify the Bank as having mediated in bad faith?; and

c. whether the respondent had the proper authority under the Act to determine the documents requested under section 21 and 22 were anomalous and that their non-provision did not amount to the Bank failing to take part in the mediation in good faith?

[165] Central to all of these issues is the respondent's reference to "anomalous accounting records" in the original decision[162] and the internal review decision.[163]

[166] The applicant contends that the respondent improperly exercised its powers under the Act through a determination as to what were "correct" or "proper accounting procedures" by virtue of the respondent's reference to the "liability accounts" sought by the applicant as being "anomalous accounting records".[164]

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158 Applicant's outline of argument filed 1 February 2019, p 5, [7].
159 Applicant's written submissions dated 4 February 2019, p 10, [34].
160 Applicant's written submissions dated 4 February 2019, p 10, [34].
161 Applicant's oral submissions summary received 26 March 2019, p 1, [1].
162 Affidavit of Sam Chester Scriven sworn on 9 November 2018, SCS-N, p 29, [64]; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-1, p 5, [64].
163 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-2, p 11, [68]; Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-P p 44, [68].
164 Application for a statutory order of review filed 10 October 2018, p 2, [5].

[167] The applicant's submissions[165] appear to rely on the following grounds:

a. section 23(c) of the *JRA*: a determination that the documents sought by the applicant were "anomalous" which constituted an exercise by the respondent of its section 52 power for a purpose other than a purpose for which the power is conferred;[166]

b. section 23(b) of the *JRA*: a failure to take into account relevant considerations, namely the applicant's arguments as to the existence of a "liability account" in the applicant's name;[167] and

c. section 23(a) of the *JRA*: the taking into account of an irrelevant consideration by construing the Bank's disclosure by reference to the definition in section 5 of "farm business debt".[168]

[168] The applicant further submits that this is simply a question of whether the respondent had the express authority under the Act to determine what accounting records are "relating to a farm business debt".[169]

[169] It is the reference to the respondent's use of the term "anomalous accounting records" in the original and review decisions that the applicant seizes upon.

[170] The respondent's use of language in original and review decisions should be read in context and not be overly dissected. The respondent's reasons, as an administrative decision maker, are "meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed".[170]

[171] The respondent's reasons should not be "construed minutely and finely with an eye keenly attuned to the perception of errors".[171] A court should not be concerned with "looseness in the language nor with unhappy phrasing" of the administrative decision maker.[172]

[172] The matters that the decision maker is bound to take into account is determined upon construing the scope and purpose of the relevant legislation; questions of weight afforded to relevant considerations are unable to be impugned (at least in the absence of *Wednesbury*[173] unreasonableness).[174]

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165 Applicant's outline of argument filed 1 February 2019, p 3-4, [6].

166 See also applicant's oral submissions summary received 26 March 2019, p 3, [26]-[27].

167 See also applicant's written submission dated 4 February 2019, p 7, [16].

168 See also applicant's further written submission dated 26 March 2019, p 5, [29]-[30].

169 Applicant's oral submissions summary received 26 March 2019, p 3, [27]. See also applicant's written submission dated 4 February 2019, p 11, [40].

170 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 271-272, quoting *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280, 287.

171 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 271-272, quoting *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280, 287.

172 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259; [1996] HCA 6 at 271-272, quoting *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280.

173 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 K.B. 223, p 230, 233-234.

174 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39-41 per Mason J. See also *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 55 per Brennan J: "The Court has no jurisdiction to visit the exercise of a statutory power with invalidity for failure to have regard to a

[173] The use of the term "anomalous accounting records" needs to be put in context by reference to the respondent's reasons for the review decision:[175]

> "**Reasons**
>
> [64] In considering the review of original decision on whether an application for an exemption certificate is approved, QRIDA needs to be satisfied that the facts and circumstances forming the basis on which the mortgagee claims an exemption from obligation to mediate, meets the grounds as per section 49 of the Act.
>
> [65] Section 21 of the Act requires the mortgagee to comply with the request for documents from the farmer by giving copies of the documents in their possession or control relating to the farm business debt and farm mortgage. Rural Bank on request had provided copies of various documents to Mr Scriven considered by them relevant to the matter on 9 November 2017 and 14 November 2017.
>
> [66] Mr Scriven contends in his further written representations in his request for internal review of the original decision that erroneous consideration was given to the two allegations, which involve: (i) concealment of the missing bank Liability account; and (ii) making false and misleading entries in the disclosed bank Asset account.
>
> [67] Further, Mr Scriven contends that the failure of Rural Bank to provide the Bank's 'liability account statements' (described as Mr Scriven as his asset position) represents a lack of good faith, frustrating the mediation by this non-disclosure. The definition of farm business debt as per section 5 of the Act, is an amount owed by a farmer that was borrowed for the purpose of conducting a farming business. This definition does not extend to the mortgagee needing to provide statements of account for Mr Scriven's asset position with the bank. QRIDA considers Rural Bank has complied in providing documents in relation to the farm business debt and mortgage.
>
> [68] Section 21(7) of the Act outlines that a mortgagee has failed to take part in good faith, if they fail to comply, or to make reasonable efforts to comply with the request for documents. **QRIDA considers Rural Banks non-provision of anomalous accounting records as reasonable under the circumstances and does not extend to a failure to take part in the mediation in good faith**.[176]
>
> [69] The allegations raised by Mr Scriven regarding lack of disclosure by Rural Bank and alleged defective accounting practices are irrelevant in the administration of the Farm Business Debt Mediation Act 2017 (Qld). Mr Scriven does not at any time demonstrate that he did not have

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particular matter unless some statute expressly or by implication requires the repository of the power to have regard to that matter or to matters of that kind as a condition of exercising the power".

175 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-2, p 11-12, [64]-[73]; Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-P p 43-44, [64]-[73]. See also the original decision at Affidavit of Sam Chester Scriven sworn on 9 November 2018, SCS-N, p 29, [62]-[68]; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-1, p 5, [62]-[68].

176 Emphasis added.

sufficient information about the farm business debt for the purposes of the mediation.

[70] Further, section 33(1)(c) of the Act outlines the obligations of the mediator to provide their opinion as to whether the mediation was satisfactory, and the parties participated in good faith. The summary of mediation indicates that this was the case. Given the experience of the mediator involved and extensive effort on the part of the mortgagee to provide relevant documents to inform mediation, QRIDA considers that the mortgagee has made reasonable efforts to comply with section 21 of the Act.

[71] Section 7 of the Act outlines when mediation has been satisfactory. Relying on the summary of mediation and the comments of the mediator in the summary of mediation, QRIDA accepts that the mediation proceeded as far as it reasonably could with both parties participating in good faith, thereby satisfying the definition of satisfactory mediation as per the Act.

[72] QRIDA considers that Rural Bank in their application for an exemption certificate has established grounds for exemption under section 49(1)(a) by participating in mediation with the farmer that considered matters relating to the farmer's default and was satisfactory as per the reasons outlined in items and 66.

[73] In terms of section 52 of the Act, QRIDA is satisfied that:

(a) the farmer is in default under the farm mortgage;

(b) no enforcement actions suspension certificate is in force; and

(c) the grounds under section 49(1) relating to the farmer's default are evident.

The Internal Review of Original Decision can only consider the provisions of the Farm Business Debt Mediation Act 2017 (Qld). QRIDA does not have any administrative authority over any other legislation raised in the Form 7 Request for Internal Review of Original Decision and the corresponding attachment submitted by Mr Scriven, dated 2 July 2018.

In accordance with the above findings, the original decision is upheld."

[174] It is clear that the respondent made express reference and gave proper, genuine and realistic consideration to the applicant's submissions, and the arguments upon which he relied, by reference to its statutory role prescribed in section 52 of the Act.[177]

[175] The respondent's reasons appreciate and acknowledge the applicant's complaint about the Bank failing to provide the "liability account".

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177 Original decision: Affidavit of Sam Chester Scriven sworn on 9 November 2018, SCS-N, p 29, [61]-[73]; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-1, p 5, [61]-[73]. Review decision: Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-2, p 11-12, [61]-[73]; Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-P p 43-44, [61]-[73].

[176] Indeed, the review decision acknowledges that the applicant, in his request for internal review of the original decision, submitted that erroneous consideration was given to the two allegations, which involved:[178]

a. concealment of the missing bank "liability account"; and

b. making false and misleading entries in the disclosed bank asset account.

[177] Further the respondent, in both decisions, referred to the applicant's argument that the failure of the Bank to provide the "liability account" represented a lack of good faith by the Bank thus frustrating the mediation by this non-disclosure.[179]

[178] The respondent properly considered the issues raised by the applicant by construing the scope and purpose of the relevant legislation and considered sections 21 and 5 of the Act and determined that the documents sought by the applicant fell outside the scope of the Act.

[179] The review decision makes it clear that the Act did not extend to the Bank needing to provide the "liability account".[180] This is a correct interpretation of the Act.

[180] If the "liability account" existed or not was immaterial to the respondent's reasons. The respondent made no determination one way or the other as to whether the records sought by the applicant exist or existed.

[181] The applicant accepts that the respondent at no time made a finding of fact that the documents requested did not exist.[181] The respondent would not be expected to do so once it was determined that the relevant provisions of the Act did not extend to the Bank needing to provide statements of account for the respondent's asset position with the Bank.

[182] The respondent's reference to "anomalous documents" was not based on the respondent's opinion. I accept the respondent's submission that any reference by the respondent to the non-production of "anomalous" accounting records:[182]

a. is not a misconstruction of the applicant's submissions nor a determination of "accounting procedures"; but

b. is, at its highest, an observation or comment that any so-called "liability accounts" deviated from what was required to be provided by the Bank pursuant to the Act.

[183] It could be said that a request for any document outside the scope of section 21 of the Act would be a request for an anomalous document for the purposes of the section 21.

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178 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-2, p 12, [66]; Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-P p 44, [66].

179 Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-N, p 29, [63]; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-1, p 5, [63]; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-2, p 11, [67]; Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-O, p 44, [67].

180 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-2, p 12, [67]; Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-P p 44, [67].

181 Applicant's oral submissions summary received 26 March 2019, p 3, [23].

182 Respondent's outline of submissions filed 4 February 2019, p 16, [84(c)].

[184] Any alleged failure to consider the applicant's "liability account" could not have had any bearing on the outcome of the respondent's decision as such matters are not relevant to section 21 of the Act.[183]

[185] Taking the respondent's decision in its entirety, the respondent's statement that the Bank's "non-provision of anomalous accounting records as reasonable under the circumstances" is not the respondent purporting to exercise any power or determine "correct" or "proper" accounting procedures.

[186] Nor, could it be considered that the respondent is exercising its power to sanction any alleged bad faith on the part of the Bank.

The mediation

[187] The respondent determined that the mediation was satisfactory.

[188] The respondent referred to section 7 of the Act and relied on the summary of mediation and the comments of the mediator in the summary of mediation and accepted that the mediation proceeded as far as it reasonably could with both parties participating in good faith, thereby satisfying the definition of satisfactory mediation as per the Act.[184]

[189] Satisfactory mediation is defined pursuant to section 7 of the Act:

> "**7 When mediation has been satisfactory**
>
> Mediation for a farm business debt has been satisfactory if—
>
> > (a) as a result of the mediation, the farmer and the mortgagee have entered into a heads of agreement; or
> >
> > (b) the mediation has proceeded as far as it reasonably can with the farmer and the mortgagee having participated in good faith, but they have not entered into a heads of agreement; or
> >
> > (c) the mediation is of a type, or a class, or meets criteria prescribed by regulation for this paragraph."

[190] The applicant submits that the respondent was required, by virtue of the grounds in section 49 of the Act, to determine if the mediation was satisfactory prior to and intermediate of making the final determination to issue an exemption certificate.[185]

[191] The applicant submits that:

a. the mediation was not satisfactory;[186]

b. the Bank did not mediate in good faith;[187] and

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183 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40.

184 Original decision: Affidavit of Sam Chester Scriven sworn on 9 November 2018, SCS-N, p 29, [66]; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-1, p 5, [66]. Review decision: Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-2, p 12, [71]; Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-P p 44, [71].

185 Applicant's further written submission dated 26 March 2019, p 4, [23].

186 Applicant's outline of argument filed 1 February 2019, p 2, [5].

187 Applicant's outline of argument filed 1 February 2019, p 2, [5].

c. the exemption certificate should not have been issued.[188]

[192] Accordingly, the applicant submits that, in such circumstances, the respondent was required to determine whether the mediation summary was correct and in accordance with the Act before reviewing the other application criteria for the exemption certificate.[189]

[193] The applicant submits that to determine whether the mediation summary was correct, the respondent must examine the conduct of both parties and make a determination as to whether they acted in good faith.[190] Further, the applicant asserts, if the respondent was to also "oversee that the procedures of the Act have been complied with" in relation to the conduct of the parties, then they must also determine whether the mediator had abided by the Act and not simply relied upon the summary statement of the mediator.[191]

[194] The applicant refers to an email[192] that was not before the decision makers, to allege that the mediator had "violated" section 20 of the Act and if the respondent had overseen whether procedures of the Act had been complied with, this violation would have been discovered.[193]

[195] I have already determined that this email is inadmissible in these proceedings.

[196] The respondent cannot be criticised for not considering a document that was not before any of the decision makers.

[197] Pursuant to section 7(b) of the Act, satisfactory mediation comprises three elements:

a. the mediation proceeded "as far as it reasonably can";

b. the farmer and mortgagee participated in good faith; and

c. no heads of agreement was entered into.

[198] It is uncontroversial that no heads of agreement was entered into between the applicant and the Bank.

[199] The mediator was "satisfied" that the mediation had gone as far as it reasonably could, and that agreement was unlikely (within the meaning of section 32(b)(ii) of the Act), and thus determined that the mediation had ended.[194]

[200] The respondent accepted that the mediation proceeded as far as it reasonably could after a consideration of both the mediation summary and the mediator's correspondence.[195] It is noted that this was not challenged by the applicant in his internal review application.[196]

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188 Applicant's written submission dated 4 February 2019, p 9, [31].
189 Applicant's oral submission summary received 26 March 2019, p 2, [16].
190 Applicant's oral submission summary received 26 March 2019, p 2-3, [18].
191 Applicant's oral submission summary received 26 March 2019, p 3, [19].
192 Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-I, p 11-12.
193 Applicant's oral submission summary received 26 March 2019, p 3, [20].
194 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-21, p 248.
195 Affidavit of Sam Chester Scriven sworn on 9 November 2018, SCS-N, p 29, [66]; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-1, p 5, [66].
196 Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-M, p 21-24; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-23, p 278-281.

[201] In the mediator's opinion both parties participated in mediation in good faith.[197] The applicant did not agree with the summary of mediation and contended that the Bank had not made full disclosure by not disclosing the "liability account" and has not acted in good faith.[198]

[202] The respondent, while acknowledging the applicant's position, determined that the Bank was not required to provide the "liability account".[199] The respondent was correct to conclude, with reference to the Form 2 Mediation Summary, that the parties participated in the mediation in good faith.

[203] Although the Form 2 Mediation Summary contains no statement as to whether, in the mediator's opinion, the mediation was satisfactory (section 33(1)(c)), the mediator was mandated to provide reasons for any opinion he held that the mediation was not satisfactory (s 33(1)(d)). No reasons were provided.[200]

[204] Accordingly, taking into account the mediator's obligations under Act, the Form 2 Mediation Summary as a whole,[201] and the mediator's correspondence,[202] the inference that can be drawn is that the mediator was of the opinion the mediation was satisfactory.

[205] I accept the respondent's submission that the respondent was entitled to consider the Form 2 Mediation Summary and the mediator's opinion as to the parties having acted in good faith.[203]

The procedural fairness issue

[206] The respondent relied upon a ground that differed from the ground relied upon by the Bank's application for an exemption certificate.

[207] The material difference is that the Bank ticked the box in the approved form that correlated to section 49(1)(c),[204] that, *inter alia*, there had not been a satisfactory mediation, whereas the respondent granted an exemption certificate on the basis that mediation between the parties met the definition of "satisfactory mediation" within

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197 Form 2 Summary of Mediation, see Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-J, p 14; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-19, p 243.

198 Form 2 Summary of Mediation, see Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-J, p 14; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-19, p 242. See also Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-J, p 15; exhibit SCS-M, p 21-24; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-19, p 243; exhibit SJC-23, p 278-281.

199 Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-N, p 29, [63]; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-1, p 5, [63]; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-2, p 11, [67]; Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-O, p 44, [67].

200 Form 2 Summary of Mediation, see Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-J, p 13-15; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-19, p 241-243.

201 Form 2 Summary of Mediation, see Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-J, p 13-15; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-19, p 241-243.

202 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-21, p 248.

203 Respondent's outline of submissions filed 4 February 2019, p 27, [147].

204 Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-K, p 16-18; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-20, p 244-246.

section 7 of the Act. This was the respondent's position in the both the original decision[205] and in the review decision.[206]

[208] The Bank applied for an exemption certificate pursuant to section 48 of the Act.[207] Section 48(2)(b) required the Bank to state the facts and circumstances forming the basis of the ground on which the Bank claims an exemption certificate should be issued.

[209] Section 49 of the Act sets out the grounds.

[210] The Bank ticked the box on the approved form (the Form 4 Application for Exemption Certificate) that relied on the grounds of section 49(1)(c) of the Act.[208]

[211] Section 49(1)(c) has a number of conditions where there has been no satisfactory mediation between the farmer and the mortgagee. However, the respondent didn't proceed under this section. Rather, the respondent was satisfied that the grounds under section 49(1)(a) relating to the farmer's default were evident, i.e. that there was a satisfactory mediation.[209]

[212] It is noted that the meaning of "satisfactory mediation" was not clarified in the approved form. "Satisfactory mediation" has a legal meaning, pursuant to section 7 of the Act, beyond everyday parlance.

[213] The contents of the Form 2 Mediation Summary,[210] together with correspondence from the mediator,[211] reveal that section 7(b) of the Act was satisfied, i.e. that:

a. the mediation proceeded "as far as it reasonably can";

b. the applicant and the Bank participated in good faith; and

c. no heads of agreement was entered into.

[214] It is noted that the applicant contested the mediation summary as he stated that the Bank had not made full disclosure and not acted in good faith.[212] However, as stated

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205 Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-N, p 29, [67]; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-1, p 5, [67].

206 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-2, p 11, [72]; Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-O, p 44, [72].

207 Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-K, p 16-18; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-20, p 244-246.

208 Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-K, p 17; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-20, p 245.

209 Original decision: Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-N, p 29, [67]; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-1, p 5, [67]; Review decision: Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-2, p 11, [72]; Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-O, p 44, [72].

210 Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-J, p 13-15; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-19, p 241-243.

211 Affidavit of Sam Chester Scriven sworn on 9 November 2018, SCS-N, p 29, [66]; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-1, p 5, [66].

212 Form 2 Summary of Mediation, see Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-J, p 14; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-19, p 242. See also Affidavit of Sam Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-J, p 15; exhibit SCS-M, p 21-24; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-19, p 243; exhibit SJC-23, p 278-281.

previously, the Bank has complied with section 21 of the Act; it could not be said that the Bank has failed to take part in the mediation in good faith.

[215] Section 52 sets out the respondent's duties and obligations in deciding the application for an exemption certificate. As stated previously, the original and review decisions both make it clear that the respondent was satisfied of the matters in section 52(2) when issuing the exemption certificate:[213]

a. the farmer is in default under the farm mortgage (see section 52(2)(a) of the Act and [73](a) of the review decision);

b. no enforcement action suspension certificate is in force (see section 52(2)(b) of the Act and [73](b) of the review decision); and

c. the grounds under section 49(1)(a) relating to the farmer's default are evident (see section 52(2)(c) of the Act and [73](c) of the Review Decision).

[216] The applicant states that whether or not the respondent is mandated to approve an exemption certificate on any of the grounds required does not extinguish the right for the applicant to respond to those grounds. The applicant alleges a practical injustice in not being informed of the grounds to which the applicant is asked to reply.[214]

[217] The principal question is whether the respondent, as a matter of natural justice, was obliged to notify the applicant that it proposed to issue an exemption certificate under a different ground than that ticked on the approved form, provide him with an opportunity to respond if he so desired.

[218] It is important to address what natural justice is and what it requires.

[219] As was observed by Allsop CJ, Middleton and Foster JJ, the "essence of natural justice is fairness – it is its root as a legal conception and it lies at the heart of its operation".[215] The concern of the law of natural justice is the avoidance of "practical injustice".[216]

[220] Moreover, natural justice is not fixed and rigid; it is flexible and depends upon the legislative framework and the circumstances of the case.[217]

[221] There has been no practical injustice or unfairness to the applicant in the circumstances of this matter.

[222] The applicant has not shown that he lost any opportunity to put forward any information, or argument to the respondent, or otherwise suffered any detriment, by the respondent determining the application under section 49(1)(a) of the Act.

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213 Original decision: Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-N, p 29, [68]; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-1, p 5, [68]. Review decision: Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-2, p 11, [73]; Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-O, p 44, [73].

214 Applicant's oral submission summary received 26 March 2019, p 3, [28].

215 *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, p 392-393, [108].

216 *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1, p 13-14, [37].

217 *Johns v Australian Securities Commission* (1993) 178 CLR 408, p 471; *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475; [1963] HCA 41, p 504.

[223] The applicant states that he saw "no facts or circumstances that would form the basis of the grounds upon which the exemption certificate should be issued".[218] The respondent submits that, in such circumstances, there is nothing further that the applicant could or would say in response to the fact that the grounds change from section 49(1)(c) to section 49(1)(a) of the Act.[219]

[224] The applicant was aware from the original decision that the respondent considered that the Bank, in their application for an exemption certificate, had established grounds under section 49(1)(a) by participating in mediation with the farmer that considered matters relating to the farmer's default and was satisfactory.[220]

[225] Importantly, the applicant, upon applying for an internal review, was provided with a full opportunity of putting forward further written submissions. He chose to do so but did not address this issue.[221]

[226] The whole determination was considered afresh and it was considered afresh in light of the applicant having ample opportunity to consider, review and put forth any argument he saw fit in relation to the entirety of the decision.[222]

[227] The applicant was thereby afforded a full reconsideration of the decision *de novo*. If there was any denial of natural justice, it was thereby "remedied",[223] or "cured".[224]

[228] Viewing the decision-making process in its entirety demonstrates that, in the circumstances, the applicant was afforded procedural fairness.

Fraud, actual or apprehended bias

[229] Although not ultimately a central plank of the applicant's submissions, the applicant does raise issues of fraud, bias and apprehended bias.

[230] The applicant contends that the respondent placed considerable weight on the Bank's contentions that the "liability account" either does not or may not exist and contends that any such statements were fraudulent and infected the respondent's decision,[225] enlivening section 20(2)(g) of the *JRA*.

[231] Section 20(2)(g) provides for the review of a decision where the "decision was induced or affected by fraud".

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218 Affidavit of Sam Chester Scriven sworn on 9 November 2018, p 5, [50].

219 Transcript of the hearing on 6 February 2019, p 76, line 33-35.

220 Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-N, p 29, [67]; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-1, p 5, [67].

221 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-23, p 278-280 and SJC-25, p 285-286; Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-O, p 30-39.

222 Transcript of the hearing on 6 February 2019, p 75, line 39-42.

223 *Zin Mon Aye v Minister for Immigration and Citizenship* (2010) 187 FCR 449, 473, [117]; see also *Carroll v Sydney City Council* (1989) 67 LGRA 413, 419-420.

224 *Rose v Boxing NSW Inc* [2007] NSWSC 20, [89]; see also *Carroll v Sydney City Council* (1989) 67 LGRA 413, 419-420.

225 Applicant's written submissions dated 4 February 2019, p 9, [28].

[232] The alleged fraud by the Bank must have actually induced or affected the respondent's decision/s.[226] Fraud is required to be strictly articulated and proven.[227]

[233] The existence or non-existence of any "liability account" was not relevant to the respondent's determination that the Bank had met its requirements under section 21(4). Any alleged fraud did not affect the decision making process.[228]

[234] Further, the applicant's reference to "RBA and AASB evidence", and general "accounting procedures" as purportedly requiring a "liability account" to be established and maintained the applicant's name does not establish the serious allegation that the Bank was fraudulent.

[235] Although not particularised in the applicant's application, the applicant contends in his outline of argument that the respondent was actually biased towards the applicant by reason of a deliberate disregard of a "missing statutory declaration" and the making of a determination on a ground different than that relied upon by the Bank.[229] The substance of both of these issues has already been dealt with.

[236] The applicant claims that the Bank, by providing copies of various documents "considered by them relevant to the matter", and the respondent, by "endorsing" this in the original decision[230] and the review decision,[231] is biased. This issue relates to the applicant's complaint that the Bank did not provide the "liability account" in breach of section 21 of the Act. The substance of this issue has already been dealt with.

[237] Furthermore, the applicant claims that the conduct of both decision makers in being "unable to distinguish the two distinguishable claims by the applicant" may merit the accusation of bias.[232] It is assumed that the "two distinguishable claims" referred to are the asset and liability accounts which the applicant refers to in the same submissions as "two accounts in the name of the borrower".[233] This issue relates to the failure to provide the "liability account" and the asset account by the Bank. The substance of this issue has already been dealt with.

[238] Finally, the applicant submits that if exhibit SCS-I to the applicant's affidavit sworn 7 December 2018[234] is accepted, it is possible that the decision maker was affected by correspondence from the Bank and not the applicant, suggesting a perception of bias.[235] The applicant makes this submission based on a connected submission that exhibit SCS-I shows that the mediator breached section 20(3)(c) of the Act. I have already determined

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226 *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189, [24]-[26], citing *Wati v Minister for Immigration & Ethnic Affairs* (1996) 71 FCR 103, 112.

227 *Australian Pesticides and Veterinary Medicines Authority v Administrative Appeals Tribunal* (2008) 216 FCR 405, 419-420, [69], citing *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534, 538.

228 *Minister for Immigration and Citizenship v SZLIX* (2008) 245 ALR 501, [33].

229 Applicant's outline of argument filed 1 February 2019, p 5, [7]; Applicant's written submission dated 4 February 2019, p 4, [8]; Applicant's further written submissions dated 26 March 2019, p 2, [4(e)]; Applicant's oral submissions summary received 26 March 2019, p 3 [32].

230 Affidavit of Sam Chester Scriven sworn on 9 November 2018, SCS-N, p 29, [62]; Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-1, p 5, [62].

231 Affidavit of Stacey Joy Carvolth affirmed on 20 November 2018, exhibit SJC-2, p 11, [65]; Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-O, p 44, [65].

232 Applicant's written submission dated 4 February 2019, p 10, [32].

233 Applicant's written submission dated 4 February 2019, p 9, [27].

234 Affidavit of Sam Chester Scriven sworn on 9 November 2018, exhibit SCS-I, p 11-12.

235 Applicant's further written submission dated 26 March 2019, p 4, [22]-[23].

that this exhibit is inadmissible in this proceeding. This email was not even before the decision maker of the original decision or the review decision. Therefore the decision maker could not possibly be affected by this email.

[239] Actual bias is a serious allegation which must be distinctly made[236] and strictly proved.[237]

[240] It requires that the respondent was so committed to providing an exemption certificate to the Bank that the respondent's mind was incapable of alteration whatever evidence or arguments may be presented.[238] There is no such evidence before me.

[241] Any allegation of actual bias is unfounded on the material.

[242] The applicant also raises issues of general bias against the respondent, including, that the respondent's original decision maker was employed with two financial institutions, thus giving rise to apprehended bias.[239]

[243] The principles relevant to apprehended bias are uncontroversial.

[244] The question is whether a "fair-minded lay observer might reasonably apprehend that the [decision maker] might not bring an impartial mind to the resolution of the question the [decision maker] is required to decide". It "gives effect to the requirement that justice should both be done and be seen to be done".[240]

[245] The question comprises a two-step test:

a. first, the identification of what is said might lead the decision maker to "decide a [decision] other than on its legal and factual merits"; and

b. second "articulation of the logical connection between the matter and the feared deviation from deciding the [decision] on its merits".[241]

[246] The test is objective, the fair-minded lay observer is taken to be reasonable,[242] and to be aware of the nature of the decision, the context in which it is made, and knowledge of the circumstances leading to the decision.[243]

[247] The applicant has failed to discharge his heavy onus.

[248] There is no sufficient basis to conclude that a reasonable fair-minded lay observer, aware of the context of the Act, and the role of the respondent, would have a reasonable suspicion that one of its officers who had previous employment with a financial institution (other than the Bank) would be unable to, by that fact alone, bring an impartial mind in deciding whether to issue an exemption certificate to a mortgagee.

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236 *Reid v Commercial Club (Albury) Ltd* [2014] NSWCA 98, [68].
237 *SZOMF v Minister for Immigration and Citizenship* [2011] FCA 57, [24].
238 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 531-532, [72].
239 Applicant's outline of argument filed 1 February 2019 2019, p 5, [7].
240 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63, p 344, [6].
241 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63, p 345, [8].
242 *Johnson v Johnson* (2000) 201 CLR 488, 492-493, [12].
243 *Isbester v Knox City Council* (2015) 255 CLR 135, 146, [23].

[249] In any event, the applicant was provided with a fresh decision by a different delegate and there is no allegation of actual or apprehended bias levelled by the applicant against the review decision maker.

Summary

[250] The applicant has failed to make out any grounds under the *JRA*.

[251] In particular:

a. the Bank's application complied with section 48 of the Act;

b. the respondent's reasoning discloses no error of law in its construction of section 21 of the Act and its determination that the Bank acted in good faith;

c. the respondent made no intermediate decision by the use of the words "anomalous accounting records";

d. the applicant suffered no procedural fairness by the respondent issuing an exemption certificate on a different ground from that relied on by the Bank; and

e. there is no evidence that the respondent biased, nor is there any reasonable apprehension of bias.

[252] The application for judicial review is dismissed.

[253] I will give the parties an opportunity to consider these reasons before they are required to file and exchange short written submissions on the question of costs.

[254] I will set a timetable for the exchange of written submissions and, if it is appropriate, then I will deal with the question of costs on the papers, unless either party requests a hearing. In order to facilitate that process, I will adjourn the question of costs to a date to be fixed.

Orders

[255] The application for judicial review is dismissed.

[256] By 7 August 2019, the respondent is to file and exchange short written submissions on the question of costs.

[257] By 21 August 2019, the applicant is to file and exchange short written submissions on the question of costs.

[258] The question of costs is adjourned to a date to be fixed.