SUPREME COURT OF QUEENSLAND

CITATION:	*Parkinson & Anor v Holden* [2010] QSC 90
PARTIES:	**BRYAN PARKINSON and BARBARA PARKINSON (applicants)** **v** **COLIN HOLDEN (respondent)**
FILE NO:	BS4944 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application for statutory order of review
DELIVERED ON:	31 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	2 December 2009
JUDGE:	Mullins J
ORDER:	**Application dismissed**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS - GENERALLY – where the respondent made a decision under the *Rural and Regional Adjustment Act* 1994 (Qld) to decline the applicants' application for exit assistance under an approved assistance scheme – where applicants claim they were denied the opportunity by the respondent to comment on new material that was considered by the respondent – whether the applicants were denied natural justice – whether new material was information that was adverse to the applicants that was credible, relevant and significant ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – BIAS – APPREHENSION OF BIAS – where respondent exercised a statutory decision-making power – whether conduct of the respondent caused reasonable apprehension of bias to a reasonable observer – whether respondent should have disqualified himself from making a decision – whether it was necessary for the respondent to make the decision *Rural and Regional Adjustment Act* 1994, s 8, s 13A, s 32, s 35, s 54 *Vegetation Management Act* 1999, s 3 *Ambrey v Oswin* [2005] QCA 112, considered *Cooney v Holden* [2007] QSC 53, considered

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337, considered
Kioa v West (1985) 159 CLR 550, considered
Laws v Australian Broadcasting Tribunal (1990) 170 CLR 71,
McDonald v Holden [2007] QSC 54, considered
Minister for Immigration and Multicultural Affairs v Jia Legeng (2001) 205 CLR 507, considered
Re Refugee Review Tribunal; ex parte H (2001) 75 ALJR 982, considered

COUNSEL: J Fenton for the applicants
PG Bickford for the respondent

SOLICITORS: Crowley Greenhalgh for the applicants
McCullough Robertson for the respondent

[1] The respondent who is a public servant is the chief executive officer of the Queensland Rural Adjustment Authority (QRAA). In a decision communicated to the applicants in his letter dated 14 April 2009, the respondent affirmed a decision made by the QRAA on 27 January 2009 to decline exit assistance under the Queensland Vegetation Management Framework for Financial Assistance for Farm Businesses Exit Assistance Scheme dated 1 July 2004 (the scheme) in respect of the property known as the Humeburn aggregation (the property) comprising 99,350 hectares which is owned by the applicants. The applicants filed an application for statutory order of review of the decision on 12 May 2009. The grounds of review that are pursued by the applicants are denial of natural justice, error of law and apprehended bias.

Background

[2] The applicants, by their agent Devine Agribusiness (Devine), made an application on 22 December 2005 for exit assistance under the scheme. Although the applicants own the property, it is operated with other properties in partnership under the name of Parkinson Bros. The property is not an asset of the partnership. The property was traditionally operated as a mixed cattle, sheep and wool growing enterprise, but declining wool prices resulted in the sheep part of the enterprise being discontinued and the property was leased out to another cattle grazing business in June 2002. At that time the applicants' proposal was to develop the property for cattle grazing, but that was initially postponed because of drought and then inhibited from 2003 with legislative regulation of land clearing.

[3] The applicants were then successful in ballots for land clearing permits and obtained permits to clear 9,900 hectares of the property before 31 December 2006. Some clearing was undertaken pursuant to those permits and the applicant sold the benefit of the balance of the permits to Carbon Pool Pty Ltd receiving a sum of $495,000 (inclusive of GST).

[4] The application for exit assistance was refused by the QRAA in February 2006. A request for internal review was made by Devine and the respondent affirmed the original decision. An application was made to the court for statutory order of review. The respondent then rescinded the decision under review and conducted a

second review in August 2006. The first application for statutory order of review was discontinued in August 2006.

[5] The respondent made a new decision on 4 October 2006 to affirm the original decision. A second application for a statutory order of review was filed by the applicants in November 2006. On 30 March 2007 a consent order was made setting aside the decision under review and remitting the matter to the respondent for further consideration according to law.

[6] Devine provided further material to the respondent by letter dated 1 June 2007 in support of the applicants' application for exit assistance, including a supplementary report prepared by Devine, reports of Dr Beale and Dr Slaughter and comments of veterinarian Mr Michael Flynn on weaning percentages. A further decision by the respondent declining to grant the application for exit assistance was advised to the applicants in September 2007. A third application for statutory order for review was filed in the court in November 2007. A consent order was made in August 2008 setting aside that decision and remitting the matter for further consideration in accordance with the terms of an agreement dated 8 August 2008 between the parties. Under this agreement the applicants and the respondent agreed to the appointment of an independent and experienced expert to undertake a full property inspection, evaluation and review of the viability of the property and provide a written report. The parties also agreed to each pay one-half of the expert's fees and charges related to the provision of the report. The parties also agreed that if the fresh decision to be made by the QRAA was unfavourable, the applicants were entitled to seek internal review pursuant to ss 13A and 13B of the Act and that the respondent would make a decision in accordance with the requirements of s 13C of the Act within the time limit prescribed in that provision.

[7] Mr Drysdale was the appointed expert who provided a report dated 31 October 2008 and a supplementary report dated 18 December 2008. The instructions that were given to Mr Drysdale with the concurrence of the applicants and the QRAA were to assess the viability of the property on the basis that the property was a "stand-alone farm business" and operating "in its current state of development and under existing vegetation management legislation." Mr Drysdale was instructed to assume that the long-term sustainable carrying capacity of the holding in its current state of development was approximately 20,000 DSE, the affected area of the property that could not be cleared because of the vegetation management legislation was 27,896 hectares and, if the affected area were able to be developed, the property would be viable as a stand-alone farm business.

[8] Apart from these assumptions, Mr Drysdale assumed a business model for the purpose of calculating the viability of the property for cattle grazing and calculated the cash flow of such a business based at the property. That resulted in a negative EBIT (earnings before interest and tax) of $17,935. Mr Drysdale allowed for interest charges of $70,000 for the funds to purchase 1,200 cows and 24 bulls. Mr Drysdale noted that an estimated negative EBIT of $17,935 with an interest charge of $70,000 meant that the property would operate at a loss, even before allowance for depreciation and capital improvements. Mr Drysdale concluded that the property as a stand-alone business, in its present state of development and under current market conditions and industry cost structures, was not a viable property. Mr Drysdale in his supplementary report used different cow numbers and higher weaning percentages which resulted in an EBIT that became positive, but concluded

that the property was unviable, as that positive EBIT would not cover depreciation ($20,000), capital expenditure ($20,000) and interest ($70,000).

[9] A new primary decision was made by the delegate of the QRAA on 27 January 2009 that declined the application for exit assistance. A request for internal review of that decision was made by the applicants. The respondent's decision on internal review dated 14 April 2009 is the decision which is the subject of this application for statutory order of review.

The scheme

[10] The *Vegetation Management Act* 1999 (*VMA*) was substantially amended by the *Vegetation Management and Other Legislation Amendment Act* 2004 (the Amendment Act) of which the operative provisions commenced on 21 May 2004. The purpose of the Amendment Act was to phase out broadscale clearing of remnant vegetation in Queensland by 31 December 2006. That was specifically incorporated in s 3(2)(e) of the *VMA* as a means of achieving the purposes of the *VMA*. The scheme was a measure that was introduced as a consequence of the Amendment Act.

[11] The QRAA is established under the *Rural and Regional Adjustment Act* 1994 (the Act) as a body corporate that represents the State. The QRAA's primary function specified in s 8(1) of the Act is to put approved assistance schemes into effect by ensuring the schemes are properly and fairly administered and directly giving the assistance the schemes provide for. The scheme falls into the category of a transitional scheme that is defined in s 54 of the Act as an approved assistance scheme in existence under the Act immediately before the commencement of s 54 on 12 October 2004. A transitional scheme is, for the transitional period for the scheme, taken to be an approved assistance scheme under the Act, by virtue of s 54(1) of the Act.

[12] The scheme was approved by the Executive Council on 1 July 2004 under s 11(1) of the Act in the terms that it then was (reprint 3A). Its purpose is set out in section 1 of the scheme:

> "To assist primary producers who are:
> - without prospects of sustainable long-term viability as a direct consequence of the implementation of the new vegetation management arrangements enacted through the *Vegetation Management and Other Legislation Amendment Act 2004* and
> - have taken the decision to adjust out of primary production or relocate their enterprise
>
> The assistance will be through the purchase of their land in the Farm Business, and the facilitation of the disposal of the Farm Business consistent with the objectives of the Scheme."

[13] Relevant definitions for the scheme are set out in section 4 of the scheme and include:

> "*Area of land affected* – means the area covered with vegetation that cannot be cleared under the legislation, regulations and assessment codes proclaimed on 21 May 2004 but which could have been

cleared under the legislation, regulations and state assessment codes in place prior to that date.

Farm Business – is a business that involves primary production, which shall include, but not limited to the agricultural, aquacultural, horticultural, pastoral or apicultural industries, and is operated as either an owner operator, or as part of a family company or partnership."

[14] Section 5 of the scheme provides:

"5 Assessment Criteria

5.1 QRAA must be satisfied that:

- the Farm Business has a property which includes an area or areas of land affected;
- the Farm Business acquired the property or a contract for acquisition or usage of the particular land(s) was entered into prior to the 22/05/2003, being the date of the announced changes;

5.2 the applicant has demonstrated that clearing of the area of land affected was necessary to attain or maintain sustainable long term viability for:

5.2.1 past viability, the previous capacity of the Farm Business to meet the following factors:

- the operating costs of the Farm Business
- the living costs of the farm family
- servicing of the Farm Business debts
- future capital requirements for plant and Improvements
- investment in sustainable farming systems

5.2.2 potential viability, in addition to the above, the following factors:

- the scale and nature of the operations of the Farm Business
- development plans having regard to the productive capacity of the land holding(s) and capacity to finance the implementation of the plan
- the capital contribution of the applicant to acquire and develop the Farm Business;
- the long term economic trends which impact on the Farm Business;
- the provision of financial support for the Farm Business by lenders;
- the demonstrated technical, financial and business management performance of the producer

5.3 the applicant has demonstrated that, as a direct consequence of the introduction of the new vegetation management arrangements, the Farm Business is not, or does not have the potential to be, a viable commercial operation taking into account the criteria listed above;

5.4 the applicant has demonstrated that all secured creditors agree to allow the applicant to exit the Farm Business, and both the applicant and secured creditors are prepared to enter into an agreement approved by QRAA to transfer the title of the land holding(s) to NRM&E. The applicant must be able to transfer title to NRM&E and be prepared to agree to take no further equity interest in the land holding(s) thereafter; and

5.5 the applicant has lodged an application with QRAA prior to any of the following having occurred:
- the settlement of sale of the Farm Business, or
- a mortgagee taking possession of the Farm Business; or
- the Farm Business being declared by a court to be bankrupt; or
- a served eviction notice, allowing where relevant, for due legal process to occur, unless failure to lodge was due to extenuating circumstances (excluding due legal and commercial practice) applying in relation to the applicant.

5.6 under normal circumstances the primary producer is responsible for the contribution of the majority of his/her labour to the Farm Business enterprise and generates the majority or has the potential to generate the majority of income from that enterprise.

5.7 the Farm Business will not receive (through the ballot process) a permit to clear vegetation in an area or areas of land affected, for which they are seeking financial assistance."

The decision

[15] Mr Coe who was a loans officer at the QRAA attended as an observer for the QRAA when Mr Drysdale inspected the property on 16 October 2008. Mr Parkinson and his manager were also present. Mr Drysdale, Mr Parkinson and Mr Coe travelled in the one vehicle to traverse the property and the manager was in another vehicle. Mr Coe prepared a memorandum dated 20 October 2008 that recorded the comments made by Mr Parkinson during the inspection and his own observations.

[16] Mr Coe prepared an assessment dated 19 January 2009 of the applicants' application for exit assistance for the purpose of the committee of the QRAA that was to make the decision on the application. In this report, Mr Coe dealt with the

history of the application, details of the use of the property, information obtained by the QRAA from Mr Parkinson, an overview of the assets and liabilities and operating profit of Parkinson Bros at the time of the application and since the application, a summary of the expert opinions provided by Devine and an analysis of Mr Drysdale's evaluation of the viability of the property. Mr Coe recorded in his report that Mr Parkinson advised him that he estimated that the applicants had paid about $130,000 in capital gains tax on the net profit a prendre funds of $420,000 and therefore actually received about $290,000. Devine had earlier advised that the net proceeds of about $250,000 were invested in superannuation. Mr Parkinson had also advised that the applicants were trying to recover some of the capital gains tax that had been paid.

[17] Mr Coe's report noted that on 14 January 2009 the QRAA contacted Mr Drysdale regarding his supplementary report and set out notes from that conversation:

> "Mr Drysdale advised that he had not worked the revised figures all the way to the EBIT but expected 'it would be close to positive'.
>
> When asked why the 1,111 cows had been used at 60% instead of 1372 [1400-2% losses], Mr Drysdale advised that 'the 233 by 8 year old cows [1400/6] would not be joined as they are going to be sold'.
>
> This means that these 233 cows will be running on the property from January to July for no return.
>
> Mr Drysdale agreed that pregnancy testing could be carried out and would result in 'more calves and assume a more profitable enterprise'. He did not wish to go into details of this as he was not sure about what percentage of accuracy can be achieved with preg testing, pointing out that he has heard a lot of horror stories ie 30% actually in calf.
>
> Mr Drysdale was asked if he would be happy with reporting we had discussed the issue of preg testing and that he acknowledged there would be more calves and he assumes more profitability if it was used. He agreed to that.
>
> The scenario of culling cows that are not in calf rather than selling for age was touched on but Mr Drysdale gave the impression that his job was done and not interested in doing any more."

[18] The minutes dated 23 January 2009 of the relevant QRAA committee that dealt with the applicants' application record the committee's decision to decline the application on the basis that viability was not affected by the vegetation management legislation and the applicants do not meet the eligibility criteria 5.2, 5.3 and 5.6. This resulted in the letter dated 27 January 2009 that was sent by Mr Cosgrove (who was the acting general manager of the Program Delivery section of the QRAA) to the applicants. That was a detailed letter that set out the reasons of the committee in concluding that the property had shown evidence of viability in the past and had the potential to remain viable in the long term. Specific reference was made of accumulated trading profits that had not been returned to the business and that 1,167 head of cattle transferred out of the property in the 2002 year (prior to the leasing of the property), but only 576 head were transferred back in the 2006/2007

year at the conclusion of the lease, and that the profit a prendre funds of $450,000 had not been utilised within the property. Reference was also made to the committee's opinion that, looking at the property as a stand alone farm business, the applicants do not meet eligibility criterion 5.6. This letter explained why the committee did not accept Mr Drysdale's reports:

> "The report of Mr K M Drysdale has assumed a debt load of $810,000 currently exists on "Humeburn" for the purchase of 1,200 cows and 24 bulls. Mr Drysdale's initial report and his "Revisited" report are both clearly influenced by this assumed debt load and the associated interest expense of $70,000 pa.
>
> With regard to Mr Drysdale's reports, the Committee has been unable to fully accept the model he has used as the basis for his assessment of non-viability. If this model was fully accepted and applied to the "After Proposed Development – Fully Stocked" scenario contained in the Devine Agribusiness report of December 2005, it would bring into question whether even a fully developed "Humeburn" would have been viable.
>
> It is considered that Mr Drysdale's adopted weaning percentage of only 60% is too conservative, given all the opinions put forward during the application process. It is also considered that it would be illogical to carry 444 cows (40% of 1,111) each year that will not be producing a calf. Pregnancy tested in calf cows purchased as replacements for the non-producing cows would increase the number of weaners available for sale each year and therefore improve profitability."

[19] The applicants' request for an internal review was made on their behalf in their solicitors' letter dated 27 February 2009. That letter set out each of the grounds on which it was claimed the decision should be set aside and provided details of the reasons that the applicants considered errors were made in the decision-making process by the QRAA.

[20] The applicants' solicitors' letter addressed why the committee's decision in relation to eligibility criterion 5.6 involved an error of law. The applicants' solicitors asserted that the QRAA failed to have regard to the factual material in the initial application report by Devine, report by Dr Slaughter and Mr Drysdale's report which confirmed the non-viability of the property. The applicants' solicitors also dealt at length with the claim they made that the decision of the QRAA was based on an erroneous factor which was the assumption of a 1,400 breeder herd. They referred to the fact that the application and supporting report by Devine adopted a 1,200 breeder herd for the purposes of the assessment and stated at paragraph 3.1(d) of their letter:

> "Identifying the non-pregnant cows and replacing them with pregnancy tested in-calf breeders so as to increase overall breeder numbers, rather than carrying replacement stock, is not a feasible management option for the reasons set out in paragraph 3.5 below."

[21] The applicants' solicitors also referred to Mr Drysdale's opinion that 1,200 cattle could not be sustained on the property in the long term, and were not sustained in the past, due to drought conditions. The letter challenged the committee's analysis

of the accumulated trading profits from the property, the significance of the fact that 1,167 head of cattle were transferred out of the property in 2001/2002 (when the property was leased to others in June 2002) and only 576 head of cattle were transferred back in 2006/2007 (when the lease to others ended in November 2006), how the profit a prendre funds of $450,000 (exclusive of GST) should be dealt with and why the QRAA should adopt Mr Drysdale's adopted weaning percentage of 60%. The applicants' solicitors did not address the relevance identified by the QRAA of the transfer out of stock from the property in June 2002 and the transfer back of about one-half the number of cattle in 2006 which was that the value of the cattle transferred out had not been used within the business conducted from the property. The applicants' solicitors asserted that the amount of cattle transferred out and subsequently transferred back in after the lease had ended was irrelevant to the assessment of long term viability.

[22] The respondent wrote to the applicants' solicitors on 23 March 2009 requesting the cooperation of the applicants to an inspection of the property by one of the three independent experts nominated by QRAA. The applicants' solicitors' letter in response dated 7 April 2009 adopted the position that Mr Drysdale had been appointed under the agreement that had been reached between the parties on 8 August 2008 and that it was not appropriate for the QRAA to seek to appoint some other expert to justify the refusal of the applicants' application for exit assistance. The proposal for obtaining another independent expert's report was not pursued by the respondent.

[23] The respondent made a note to file on 8 April 2009 that shows he considered the extensive issues raised in the applicants' solicitors' letter seeking the review. The respondent noted:

> "QRAA has received advice from experienced DPIF staff in the region that pregnancy diagnosis can be practically employed without representing an exorbitant cost. DPIF staff also advised that the Drysdale model suggesting that 40% of all breeders (444 cows), not producing a calf, would continue to be pastured on the property each year, was an indication of poor management ability. They believed that culling not in calf cows would be a good management strategy. It is apparent that Mr Parkinson is a particularly good manager and is highly unlikely to operate under the Drysdale model."

[24] The respondent's letter dated 14 April 2009 communicating his decision on the internal review to the applicants' solicitors identified the evidence and material that was relied upon in making the decision that was described as in accordance with the assessment criteria set out in section 5 of the scheme and made the following findings of fact:

> "(a) The application has been considered under the Queensland Vegetation Management Framework Financial Assistance for Farm Businesses Exit Assistance Guidelines dated 1 July 2004;
>
> (b) 1,167 head of cattle were transferred out of "Humeburn" in 2001/02 prior to the leasing of the property with 576 head being transferred back in at the conclusion of the lease in 2006/07;

(c) Accumulated trading profits of $316,000 were achieved for the ten year period to 2007;

(d) Profit a prendre funds of $450,000 were received under an agreement regarding land that was approved in the ballot for land clearing;

(e) The Profit a Prendre funds were placed in superannuation rather than the business;

(f) Mr Drysdale's initial and subsequent report indicate that "Humeburn" is not viable and that this assumes a debt of $810,000 for the purchase of stock;

(g) Borrowings from commercial lender Rabobank are for the "Parkinson Bros" entity, not "Humeburn" solely;

(h) Had cattle and funds referred to in (b), (c) and (d) above been reinvested into the business little to no debt would be required for stock purchase;

(i) Based on the above findings, it is QRAA's opinion that viability or potential viability is not evident as a direct consequence of the introduction of the new vegetation management arrangements."

[25] On the basis of the evidence and materials identified by the respondent and those findings, the respondent considered the applicants were unable to satisfy eligibility criterion 5.3, because there were other circumstances impacting on the viability of the property, other than the introduction of the vegetation management arrangements. Those circumstances that were identified in the reasons focussed on the availability to the applicants' business of funds or assets generated from the property that were not utilised in the business conducted on the property. Although the respondent had referred in his file note of 8 April 2009 to information obtained from DPIF (Department of Primary Industries and Fisheries) staff on the feasibility of pregnancy testing and the poor management involved in continuing to pasture cows that were not producing calves, that information was not part of the reasoning that the respondent used to reach his conclusion.

Nature of the review decision

[26] Part 3A of the Act deals with the process of internal review of a decision by the QRAA. The nature of the decision-making undertaken on internal review was described in *Cooney v Holden* [2007] QSC 53 (*Cooney*) at [26]-[28] and *McDonald v Holden* [2007] QSC 54 (*McDonald*) at [15]-[16]. It is an independent decision-making process on the basis of all the material that is before the respondent in order to decide the outcome of the application for exit assistance.

Denial of natural justice

[27] The applicants' points of claim were framed in broad terms that the applicants were never given an opportunity to comment on Mr Coe's report, but consistent with the

approach that was taken in *Cooney* and *McDonald*, the applicants endeavoured to show that new information emerged in Mr Coe's report that was then before the respondent, when undertaking the internal review of the decision to decline the applicants' application, and that was the reason the applicants should have been given an opportunity to comment on Mr Coe's report. Mr Fenton of counsel on behalf of the applicants pointed, in particular, to the following aspects of Mr Coe's report:

(a) information obtained by Mr Coe from the Department of Natural Resources regarding fodder harvesting on the property;

(b) the reworking by Mr Coe of Mr Drysdale's figures to get a positive EBIT of $15,000;

(c) the allowance by Mr Coe in his reworked figures for PTIC (pregnancy tested in calf) cows after Mr Coe's discussion with Mr Drysdale about the use of PTIC cows to which the applicants were not privy.

In addition, the applicants pointed to the respondent's reliance on information from DPIF staff on the feasibility of pregnancy testing which was contrary to the information provided in the applicants' solicitors' letter of 27 February 2009.

[28] To the extent that there was new material in Mr Coe's report, the respondent relies generally on the approach that a person likely to be affected by an administrative decision does not have to be given an opportunity to comment upon every adverse piece of information irrespective of its "credibility, relevance or significance": *Kioa v West* (1985) 159 CLR 550, 628-629 (*Kioa*).

[29] The content and scope of the doctrine of natural justice in relation to a particular statutory decision must be evaluated by reference to the legislative context and the nature of the decision-making process required to be undertaken by the decision-maker: *Kioa* at 584-585. It is relevant that the respondent is a public servant who was required to make an administrative decision under the Act on the application for internal review and was not undertaking an adjudicative role: *Cooney* at [30].

[30] In relation to the fodder harvesting permit, the additional information obtained by Mr Coe from the Department of Natural Resources did not appear to have had any effect on either the QRAA decision of 27 January 2009 or the respondent's decision. It clearly does not fall within the category of information that is adverse to the applicants which is credible, relevant or significant, because it was not of any significance or relevance in the respondent's decision- making.

[31] In relation to the reworking of the figures by Mr Coe, to the extent that they are based on the use of PTIC cows and the utilization of pregnancy testing to maximise weaning percentages, that was not the reason that the respondent refused the application. One of the significant differences in Mr Coe's reworking of the figures that was expressly relied on by the respondent in the reasons for his decision was to reject the applicants' borrowing of the sum of $810,000 to restock the property in 2006 (which resulted in an expense of annual interest in the applicants' calculations and in Mr Drysdale's figures of $70,000) on the basis that no allowance was made for the value of the 1,167 transferred cattle, their progeny or the proceeds from their sale, use of past surpluses of $316,000 and funds available from the sale of the carbon credits. The information obtained by the respondent from DPIF staff on the feasibility of pregnancy testing and the reference in the material before the respondent to the results of Mr Coe's discussion with Mr Drysdale in January 2009

about the use of PTIC cows was adverse information from the applicants' perspective, but was not of any significance or relevance in the reasons given by the respondent for his ultimate decision.

[32] The respondent correctly identified the question that had to be answered by him in deciding the application made by the applicants for exit assistance. Although the applicants can point to a couple of pieces of new information in the material before the respondent, it did not play any role in the decision-making of the respondent that enables the applicants to rely successfully on the ground of denial of natural justice.

Error of law

[33] The applicants allege that the respondent made an error of law in the interpretation of "viable commercial operation". In connection with this ground, the applicants alleged that the respondent had not taken into account the living costs of the farm family, as required under eligibility criterion 5.2.1 when assessing past viability of the farm business. The respondent relied on the fact that his letter dated 14 April 2009 advising the applicants of his decision expressly referred to the fact that the decision was determined in accordance with the assessment criteria set out in section 5 of the scheme (which included the factors in section 5.2.1). The respondent gave evidence at the hearing that confirmed that was his approach. The applicants submitted that little weight should be given to the late justification given by the respondent in his affidavit filed on 21 August 2009 and his oral evidence at the hearing.

[34] The applicants expressed their contention about the respondent's error in disregarding the living costs of the farm family in a number of ways. They argued that living costs were overlooked by the respondent in reasoning that the accumulated trading profits could have been reinvested in the business, but that, in any case, the investment of the net profit a prendre funds in superannuation was spending those funds of living costs.

[35] Mr Bickford of counsel argued that the applicants' emphasis on living costs of the farm family as a separate factor overlooked the reasoning process of the respondent which caught up all factors, as the respondent was able to decide the application on the basis that the applicants' high debt level which gave rise to the significant interest debt claimed by them materially affected the viability of the property, as a result of the decisions made by the applicants in the course of running the business on the property (by not reinvesting available funds from the property back into the business), rather than as a direct consequence of the implementation of the Amendment Act.

[36] What the applicants have characterised as an error of law looks very like an argument on the merits of the application. The fact that the applicants disagree with the respondent's reasoning process does not establish an error of law. This ground has not been made out by the applicants.

Apprehended bias

[37] The principle for the disqualification for apprehended bias is set out in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 (*Ebner*) at [6] in terms that, subject to qualifications relating to waiver or necessity, a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring

an impartial mind to the resolution of the question that the judge is required to decide. The principle has to be modified for an administration decision-maker who is not in an adjudicative role: *Re Refugee Review Tribunal; ex parte H* (2001) 75 ALJR 982 at [27]-[29].

[38] The applicants rely on the application of the principle to administrative decision-makers, as illustrated by *Ambrey v Oswin* [2005] QCA 112 (*Ambrey*) at [39]-[42]. The applicants submit that a reasonable observer would apprehend that the respondent had prejudged the matter because he had, in fact, judged the application on three previous occasions. The applicants rely on the deficiencies identified in the respondent's earlier decisions identified in the grounds in the earlier judicial review applications or the claims that were otherwise made that resulted in the earlier decisions of the respondent in respect of the same application for exit assistance being rescinded or set aside.

[39] The respondent relied on the fact that the parties agreed on 8 August 2008 that any subsequent decision by the QRAA on the applicants' application for exit assistance could be the subject of internal review by the respondent. The respondent submitted that it did not necessarily follow that the respondent had pre-judged the matter, because he had considered it on three prior occasions. It was also submitted on behalf of the respondent that a consideration of his notes of 8 April 2009 and his reasons of 14 April 2009 did not necessarily lead to the conclusion that he had pre-judged the matter. The respondent relied on the description of a state of mind that amounts to prejudgment by Gleeson CJ and Gummow J in *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [72]. In the alternative, the respondent argued that his role as a decision-maker attracts the rule of necessity: *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 71, 88-89.

[40] Under s 13A of the Act, the internal review of the decision of the QRAA in relation to the approved assistance scheme is made to the chief executive officer of the QRAA who is appointed to that office under s 32 of the Act by the Governor in Council for a specified term, not exceeding five years. There is provision in s 35 of the Act for the appointment by the Governor in Council of an acting chief executive officer during any vacancy in the office or any period when the chief executive officer is absent from duty or cannot perform the duties of the office.

[41] The test for the apprehension of bias on the part of the respondent has to be considered by the fair-minded lay observer in the context of the nature of the respondent's position and the framework set up for that decision-making under the Act. The policy that is reflected in the Act is that the internal reviews will be decided by the chief executive officer and the Legislature did not make provision for an alternative decision-making process for the internal reviews. The parties' understanding of that policy was reflected by the terms of the agreement that was reached on 8 August 2008. The fact that the respondent had considered the application on the prior occasions could not in these circumstances be treated by the fair-minded lay observer as a factor that might have led the respondent to decide the internal review, other than on its legal and factual merits: *Ebner* at [8]. The role of the respondent in relation to the applicants' application was very different to that of the decision-maker in *Ambrey*. The fact that the respondent explored the option of seeking another independent expert's report does not point to prejudgment.

[42] The applicants suggested that, if the respondent's decision were set aside, any further decision could be made by a person appointed to act in the respondent's position, when the respondent was next on holidays. This suggestion was also used to argue that necessity did not demand that the respondent make the decision. That argument only served to highlight the framework which applied to the decision-making of the respondent under part 3A of the Act.

[43] The first step of the test for apprehended bias set out in *Ebner* is not shown to apply in relation to the subject decision of the respondent. It is therefore unnecessary to consider the exception of necessity. The applicants have not made out this ground of review.

Orders

[44] As the applicants have been unsuccessful in establishing any of their grounds of review of the respondent's decision that were pursued at the hearing, the application must be dismissed. I invite submissions from the parties on the costs of the application.