# Coversheet: Farm Debt Mediation

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|---|---|
| Advising agencies | MPI and MBIE |
| Decision sought | Approval to introduce a Government Bill to establish a statutory scheme for the mediation of farm debt |
| Proposing Minister | Minister of Agriculture |

## Summary: Problem and Proposed Approach

**Problem Definition**

**What problem or opportunity does this proposal seek to address? Why is Government intervention required?**

The farm debt mediation scheme is one of a suite of initiatives being implemented by the coalition Government to support the primary sector in a just transition to an environmentally, socially and financially sustainable future.

Key to supporting this transition is an increasing recognition that farmers need to be supported through a significant behaviour change to ensure long term viability and resilience of individual farms and the sector as a whole. The farm debt mediation scheme will form an important component of supporting farmers through a period of significant change and challenge in terms of:

- complementing work by MPI, industry organisations and regional councils to improve financial and farm planning;
- encouraging early discussions about finances and business practice between farmers and creditors; and
- facilitating farmers to exit from the industry, on advantageous terms, where this is appropriate.

**Farm debt is often complex, and resolving the debt problems of financially struggling farms can be a challenging and drawn-out process**

Levels of farm debt have been rising over recent years and farming is vulnerable to factors outside the control of farmers such as climate fluctuations, market volatility, and disease or pest incursions.

Many farms operate as family businesses, failure of which can result in the farmer and their family losing both their business and their home, and can also affect the wider community. Often farms have passed down through generations of the same family and farmers can have a strong emotional attachment to their land. Making decisions about the future of a financially struggling farm business can be highly complex and emotionally charged for farmers and their families.[1]

[1] Turner, K.J. (1990). Coping with a disaster: NZ Rural Trust in South Canterbury November 1988-June 1990. South Canterbury Rural Support Trust

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The small-scale nature of many farms means that there can be a power imbalance between farms and lenders. Farmers may lack financial expertise, and may not have adequate financial advice. In a situation of financial stress, farmers may lack the capacity to objectively enter into significant business negotiations. Lenders are usually well-resourced and have a clear understanding of the most optimal outcomes for their interests. This power imbalance may be a barrier to fully exploring options for resolving debt problems.

**There is cross sector support (including from most creditors) for a mandatory farm debt mediation scheme**

**Proposed Approach**

**How will Government intervention work to bring about the desired change? How is this the best option?**

A statutory farm debt mediation regime will provide a structured and consistent process for resolving debt problems of farms struggling financially that all parties can have confidence in. A statutory regime would apply across all secured lenders, including non-bank lenders, and could help to address the power imbalance between farmers and lenders.

It is important to note there is no obligation on either party to participate in mediation. If the farmer declines to mediate, the creditor will be able to proceed with enforcement action in line with the terms and conditions of the loan agreement. If the creditor declines to mediate, the creditor will not be able to take any enforcement action related to that debt for six months.

The scheme is considered a low cost solution (<$300,000 per annum) to a material rural problem that will deliver significant tangible and intangible benefits – financial (e.g. earlier intervention delivering better financial outcomes for approximately 100 farmers/year) and social (e.g. farmer physical and mental health, family cohesion).

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## Section B: Summary Impacts: Benefits and costs

**Who are the main expected beneficiaries and what is the nature of the expected benefit?**

The main expected beneficiaries are:

- **Farmers** who are experiencing or likely to experience financial difficulties, who will have the right to engage in mediation with lenders who have security over farm assets. Mediation, if initiated early enough, could help to turn around a failing farm business, while in other cases mediation can provide the means for a 'dignified exit'.
- **Secured lenders** will benefit from a structured and timely process for resolving debt issues. They can be more confident that their actions (including any enforcement action arising from a binding mediated agreement) will be perceived as reasonable if they have followed a mandated process in good faith, thus avoiding reputational damage.

Earlier engagement by farmers may also mean that wider options for protecting the value of the secured asset are available to both the farmers and secured lenders.

**Where do the costs fall?**

It is currently proposed that the direct costs of mediation are split equally between parties, with the ability for both parties to agree alternative cost sharing arrangements early in the mediation process. Based on data provided by the New South Wales Farm Debt Mediation scheme, we estimate the average cost of mediation to be around $6,000 ($3,000 per party) based on 20 hours of mediation at $300 per hour. It is estimated that the largest individual lenders would be engaged in a maximum of 20 mediations per annum with a total cost of $60,000 to that lender.

We expect banks and other sophisticated lenders will factor in the potential delay caused by mediation into their decision-making process. Creditors have also advised that these will largely be a substitute cost, not an additional cost, because they already invest significant resources in resolving debt issues, including some lenders already providing mediation on a voluntary basis.

The costs of mediation may also be a substitute cost for farmers, as a prolonged debt resolution process could lead to increased losses, while earlier engagement in resolving debt issues is expected to lead to broader range of options with potentially better financial outcomes.

Lenders will be required to delay enforcement action until mediation has taken place. This may also be a substitute cost in some cases, as mediation could enable a more timely resolution for debt problems.

The Government will bear the cost of administering, monitoring and enforcing the regime. The estimated costs are around $250,000 - $300,000 per annum. Establishing the scheme

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is estimated to cost $350,000 including IT, establishing a Farm Debt Mediation Office in the Ministry for Primary Industries and communications. These costs will be met out of MPI's existing baseline.

**What are the likely risks and unintended impacts, how significant are they and how will they be minimised or mitigated?**

Experiences from compulsory farm debt mediation schemes overseas suggests that there are not likely to be any major risks. Less significant risks include:

- lenders not mediating in good faith;
- farmers not mediating in good faith;
- unintended consequences for parties – particularly secondary lenders where information is very limited;
- the shift in power imbalance intended between farmers and lenders may not be fully realised; and
- unrealistic farmer expectations.

We would seek to mitigate these risks through the design and implementation of the scheme – for example through ensuring the appropriate incentives are in place for lenders and farmers to mediate in good faith, putting support in place to address the power imbalance, and working with industry bodies and support networks to raise awareness of the scheme, supporting farmers throughout the mediation process, and encouraging farmers to take action early to resolve debt issues.

Risks would be monitored once the scheme was implemented.

**Identify any significant incompatibility with the Government's 'Expectations for the design of regulatory systems'**

No significant incompatibility with the Government's 'Expectations for the design of regulatory systems' has been identified.

## Section C: Evidence certainty and quality assurance

**Agency rating of evidence certainty?**

There is limited quantitative evidence on the nature and scale of the problem. We were able to obtain qualitative anecdotal evidence from a range of stakeholders about their perceptions of the problem and how it might be addressed. Conversations with stakeholders in New South Wales and Queensland provided useful insights on farm debt mediation schemes in place there.

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*To be completed by quality assurers:*

| Quality Assurance Reviewing Agency: |
| --- |
| A Quality Assurance Panel with representatives from the Ministry of Primary Industries, Ministry for Business, Innovation and Employment, and the Treasury has reviewed the Regulatory Impact Assessment (RIA) "Farm Debt Mediation" produced by the Ministry for Primary Industries. |
| **Quality Assurance Assessment:** |
| The Quality Assurance panel considers that the RIA partially meets the quality assurance criteria. |
| **Reviewer Comments and Recommendations:** |
| The Panel considers that on its own, the evidence presented in the RIA on the nature and magnitude of the problem is insufficient to make the case for intervention in relation to the farming sector over other sectors that may face similar challenges. The analysis also has other limitations. The impact analysis, for example, largely relies on the Australian experience of farm debt mediation schemes, and the impact on smaller non-bank lenders has not been fully explored (the cost of mediation could have a greater effect on business decisions for this group).<br><br>These limitations, however, are clearly articulated in the RIA and the panel considers they are mitigated by apparent wide stakeholder support for the proposal in the context of social licence for initiatives to support farming communities. If there was more dispute about the proposal, the Panel would consider that more analysis should be provided to inform the debate.<br><br>The panel also notes the stated intention to mitigate the risk of any unintended impacts for non-bank lenders though monitoring and evaluation. We recommend that the Ministry for Primary Industries also consider specific monitoring and reporting on the availability of credit to farming businesses in general. |

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# Impact Statement: Farm Debt Mediation

## Section 1: General information

| Purpose |
| --- |
| The Ministry for Primary Industries is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated.<br><br>Cabinet agreed on 5 December 2018 to establish a farm debt mediation scheme to establish a statutory Farm Debt Mediation scheme in New Zealand[2]. The scheme will require secured creditors to farm businesses to offer statutory mediation before taking any enforcement action in relation to debt held over a farm business. It will also allow for farmers to initiate statutory mediation with a secured creditor. There is no obligation on either party to participate in mediation.[3]<br><br>The Ministers of Agriculture and of Commerce and Consumer Affairs obtained Cabinet approval for officials to work with the Parliamentary Counsel Office to draft a Farm Debt Mediation Bill and undertake a targeted consultation on an exposure draft of the Bill with key stakeholders.<br><br>Key stakeholders include the Restructuring, Insolvency and Turnaround Association of New Zealand (RITANZ), Federated Farmers, New Zealand Banker's Association (NZBA), Banking Ombudsman Scheme, The Arbitrators' and Mediators' Institute of New Zealand (AMINZ), Financial Services Federation, Federation of Maori Authorities (FOMA).<br><br>This analysis and advice has been produced for the purpose of informing Cabinet decisions on the final design and implementation of a farm debt mediation scheme and obtaining approval to introduce the Farm Debt Mediation Bill to Parliament. |

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[2] Cabinet Economic Development Committee Minute DEV-18-MIN-0290

[3] Cabinet Economic Development Committee Minute DEV-18-MIN-0290



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## Key Limitations or Constraints on Analysis

**There is limited evidence to support the analysis**

There is limited quantitative evidence on the scale of the problem. There is no data on enforced sales of assets in the farming sector, although we were able to gain anecdotal evidence from bank lenders on the scale of the problem. There is a lack of evidence about the non-bank sector, but non-bank lending is a less significant element of lending to the farming sector.

There is some evidence about the behaviour of banks and on relationships between farmers and banks. We were able to supplement this with views from a wide range of stakeholders.

There is some anecdotal evidence on financial stress and mental health issues faced by farmers whose farm businesses are financially distressed. This was supported by the views of stakeholders and in a published report on the impact the drought had on farmers, families and rural communities in South Canterbury[4] and in submissions to the Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry[5].

**A full consultation exercise was not carried out due to time constraints**

Time constraints have meant that a formal consultation exercise could not be carried out.

However, the initial Member's Farm Debt Mediation Bill was subject to a limited Primary Production Select Committee process between May and November 2018. This included inviting and hearing public submissions before the Bill was withdrawn, prior to Select Committee report back, on the understanding that a government Bill would be introduced in its place.

Subsequently we have engaged with a wide number of stakeholders including farming representative groups and lenders, followed by a more targeted engagement on the draft Bill.

## Responsible Manager (signature and date):

Emma Taylor
Director
Agriculture, Marine & Plant Policy
Ministry for Primary Industries
05 June 2019

[4] Turner, K.J. (1990). Coping with a disaster: NZ Rural Trust in South Canterbury November 1988-June 1990. South Canterbury Rural Support Trust

[5] See Volume 3 Appendices https://financialservices.royalcommission.gov.au/Pages/reports.aspx

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# Section 2: Problem definition and objectives

## 2.1 What is the context within which action is proposed?

**Policy decisions made to date**

The Coalition Agreement between the New Zealand Labour Party and New Zealand First included a commitment to an "Examination of agricultural debt mediation as well as receivership fees and charges".[6]

A Member's Farm Debt Mediation Bill was considered by Primary Production Select Committee between May and November 2018. This included inviting and hearing public submissions before the Bill was withdrawn, prior to Select Committee report back, on the understanding that a government Bill would be introduced in its place.[7]

Cabinet subsequently agreed on 5 December 2018 to establish a statutory Farm Debt Mediation scheme in New Zealand. The scheme will require secured creditors to farm businesses to offer statutory mediation before taking any enforcement action in relation to debt held over a farm business. It will also allow for farmers to initiate statutory mediation with a secured creditor. There is no obligation on either party to participate in mediation.[8]

Cabinet also agreed that an exposure draft of the Farm Debt Mediation Bill be released prior to finalisation of the Bill for introduction to test whether the Bill was fit for purpose, i.e. delivered on the decisions made by Cabinet and addressed the concerns stakeholders had with the earlier Members Bill.

Although the evidence base is thin, it is noteworthy that there is strong cross sector (including from banks) support for a mandatory farm debt mediation scheme.

**Why the farming sector?**

The farming sector is New Zealand's largest export producer and is an essential part of New Zealand's economy, society, culture and environment.

The farming sector contributed 65% of New Zealand's export earnings in 2018 (this rises to 80% when fishing and forestry are added). There are over 350,000 people employed directly in the primary sector[9], including over 25,000 staff in the red meat sector (New Zealand's largest manufacturing industry) and 30,000 staff employed on more than 12,000 dairy farm businesses. Farmers are the economic infrastructure that supports and keeps alive many

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[6] Labour and New Zealand First Coalition Agreement 2017

[7] Farm Debt Mediation Bill Select Committee Report October 2018

[8] Cabinet Economic Development Committee Minute DEV-18-MIN-0290

[9] https://www.mpi.govt.nz/dmsdocument/17638-human-capability-in-the-primary-industries-part-1-2002-to-2016-an-overview



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rural communities across New Zealand. The failure of a farm therefore can have a significant ripple effect within those communities[10].

Farming is particularly vulnerable to events outside the control of individual farmers such as pest and diseases (for example the recent kiwifruit Psa virus, *Mycoplasma bovis* incursions), climate fluctuations and global trading conditions that affect market prices.

In addition to these, because of the close relationship farmers have to the land, business decisions are often informed by a wider set of parameters which do not necessarily apply to other business sectors (e.g. to deliver on resource stewardship responsibilities) but are important for the wider New Zealand society. Many of these decisions – whether resource management or climate change related – are required to address the impacts of historical actions by previous generations with sanction of (and benefit to) society at the time.

For example, a significant proportion of the costs of mitigation actions needed to deliver on New Zealand's international climate change commitments will be borne by the farming sector. Only a small part of these costs will be able to be offset by changes in practises or gaining/maintaining premiums in a very competitive market.

It is noteworthy that the final report of the Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (February 2019) included recommendation that a national scheme of farm debt mediation be enacted (recommendation 1.11). There were no similar recommendations made for other business sectors.[11]

**Farm debt is increasing**

Farm debt has increased steadily in recent decades. As at March 2019, $62.8 billion dollars of farm debt was owed to New Zealand banks – up from $49 billion (inflation adjusted) in March 2009, and $17 billion (inflation adjusted) in March 1999[12] (i.e. a 28% increase in the level of farm debt over the past 10 years and of 270% over 20 years).

The dairy farming sector in particular is highly indebted and the Reserve Bank notes in its November 2018 Financial Stability Report that this sector remains "vulnerable to a future downturn in dairy prices"[13]. Farm debt can involve multiple lenders with security over different assets.

The Reserve Bank also note in the November 2018 Financial Stability Report that banks have expanded their lending outside the dairy sector over the last two years. Lending growth to the horticulture sector has been particularly high at around 15% in the year to September 2018, while lending to the dairy sector has only grown slightly. They further note that most

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[10] Turner, K.J. (1990). Coping with a disaster: NZ Rural Trust in South Canterbury November 1988-June 1990. South Canterbury Rural Support Trust

[11] https://financialservices.royalcommission.gov.au/Pages/reports.aspx

[12] Reserve Bank of New Zealand, C5 sector lending statistics, accessed at: https://www.rbnz.govt.nz/statistics

[13] Reserve Bank of New Zealand, Financial Stability Report for November 2018, accessed at: https://www.rbnz.govt.nz/financial-stability/financial-stability-report



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agriculture sectors are at risk of swings in commodity prices, and prices for agriculture commodities often move together which lessens the benefits to the banks from diversification. Rapid growth of lending into smaller sectors also carries risks.

## 2.2 What regulatory system, or systems, are already in place?

Lenders that will be regulated under this Act are subject to other broader regulatory systems. The regulatory systems that are relevant for the purposes of this RIA are:

- the prudential regulation of banks and non-bank deposit-takers under the Reserve Bank Act 1989 and the Non-bank Deposit Takers Act 2013 respectively. The purpose of prudential regulation is to promote the maintenance of a sound and efficient financial system.
- market conduct regulation under the Financial Markets Conduct Act 2013 and other financial sector legislation. The purpose of market conduct regulation is to promote and facilitate the development of fair, efficient and transparent financial markets.
- the Credit Contracts and Consumer Finance Act 2003 (CCCFA Act) and other consumer protection legislation. Of the various purposes of the CCCFA Act, the one that is most relevant to this RIA is to promote and facilitate fair, efficient, and transparent markets for credit.

These do not require mediation between debtor and creditor. However the dispute resolution regime under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSP Act) requires all financial service providers (including banks and other lenders) to be registered and, if they provide services to retail clients, to belong to an approved dispute resolution scheme. There are currently four approved schemes, including the Banking Ombudsman Scheme.

Our view is that the FSP Act does not amount to being a regulatory system that is analogous to farm debt mediation. The FSP Act is designed to deal with disputes between financial service providers and consumers. It is not designed for negotiating solutions in relation to insolvent businesses, particularly where there is no dispute about the fact that a business is in default. This is why the Banking Ombudsman Scheme excludes, among other things, complaints that relate to a bank's commercial judgment about lending or security decisions.

Financial advice in the sector is generally provided by the farmer's accountant. Local bank account managers can also be trusted financial advisors. Larger and/or more complex farming operations may directly employ financial managers. Industry good organisations provide a range of farm planning advice and tools, including some financial planning tools, but these are generally based around stock management, environmental performance, cash flow management etc., rather than supporting strategic financial planning.

There are no mediation services that specifically target the primary sector, although local rural support organisations, citizen advice organisations etc. are often able to direct farmers to information and resources on financial, mediation and dispute resolution services.

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## 2.3 What is the policy problem or opportunity?

**An opportunity to be an integral part of a comprehensive package of initiatives that aim to ensure the long term sustainability and resilience of New Zealand's primary sector**

The farm debt mediation scheme is one of a suite of initiatives being implemented by the coalition Government to support the primary sector in a just transition to an environmentally, socially and financially sustainable future. Other initiatives within the suite include the integrated farm planning programme, development of farmer centred agricultural support services, improved environmental and climate change regulatory frameworks, and the establishment of the Primary Sector Council. It also complements recent changes within MPI to establish a Rural Communities and Farming Support Directorate, purpose built to support farmers through changes that will impact their farm practice and financial viability.

Key in this is an increasing recognition that farmers need to be supported through a significant behaviour change to ensure long term viability and resilience of individual farms and the sector as a whole. The farm debt mediation scheme will form an important component of supporting farmers through a period of significant change and challenge in terms of:

- complementing work by MPI, industry organisations and regional councils to improve financial and farm planning;
- encouraging early discussions about finances and business practice between farmers and creditors; and
- facilitating farmers to exit from the industry, on advantageous terms, where this is appropriate.

The scheme is considered a low cost solution (<$300,000 per annum) to a material rural problem that will deliver significant tangible and intangible benefits – financial (e.g. earlier intervention delivering better financial outcomes) and social outcomes (e.g. physical and mental health and family cohesion) for approximately 50-100 farmers/year.

**Farm debt is often complex, and resolving the debt problems of financially struggling farms can be a challenging and drawn-out process**

High levels of farm debt and challenges facing the farming sector could result in increasing pressure on farming businesses and their lenders.

Many farms operate as family businesses, failure of which can result in the farmer and their family losing both their business and their home and can also affect the wider community. Often farms have passed down through generations of the same family and farmers can have an emotional attachment to their land. Making decisions about the future of a financially struggling farm business can be highly complex and emotionally charged for farmers and their families.

Where there are multiple lenders with security over different assets, one lender taking

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enforcement action over an asset can affect the viability of the farm business as a whole.

The small-scale nature of many farms means that there can be a power imbalance between farms and lenders. Farmers may lack financial expertise, and may have limited access to financial advice. In a situation of financial stress, farmers may lack the capacity to objectively enter into significant business negotiations. Lenders are usually well-resourced and have a clear understanding of the most optimal outcomes for their interests. This power imbalance may be a barrier to fully exploring options for resolving debt problems[14].

Secured lenders, particularly banks, generally view repossession of farms and farming assets as a last resort. Lenders are often reluctant to sell assets, particularly during a downturn when prices are low. Lenders can sometimes find it difficult to engage with financially stressed farmers. Banks in particular, are concerned about the effect on their reputations of repossessing farms.

As a result, the process of resolving the debts of financially struggling farm businesses can become drawn-out, creating additional stress for farmers, while debt continues to accrue and equity is eroded. There are often other problems associated with financial difficulties such as animal welfare and poor environmental outcomes which need to be addressed promptly.

There is some evidence from Rural Support Trusts that independent mediation has been beneficial to farmers in coping with significant changes in circumstance, for example the work of the Restructuring Manager of the South Canterbury Rural Support Trust during the 1988 – June 1990 South Canterbury drought to support farmers to restructure businesses or exit industry (see case studies in Appendix 2 of South Canterbury Rural Support Trust report).[15]

**Policy objectives**

Policy objectives would be to provide a consistent, structured, equitable, cost effective, and timely process that all parties can have confidence in, that will:

- support farmers in financial distress in their dealings with lenders;
- enable the identification and exploration of options for turning around a failing farm business; and
  enable a farmer with an unviable business to ‘exit with dignity’.

**There is limited evidence on the scale of the problem in New Zealand**

There is no readily available data on enforced sales of assets in the farming sector. Stakeholders with insights into the banking sector have told us that numbers of farm receiverships have fallen recently. One major bank has told us that they had only had one farm receivership in the last three years and another that they had had no farm receiverships in the past two years.

[14] Turner, K.J. (1990). Coping with a disaster: NZ Rural Trust in South Canterbury November 1988-June 1990. South Canterbury Rural Support Trust

[15] Turner, K.J. (1990). Coping with a disaster: NZ Rural Trust in South Canterbury November 1988-June 1990. South Canterbury Rural Support Trust



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It is more common for farmers themselves to sell land or other assets, or the farm business as a going concern when the lender has concluded that the farm business is not viable. Again, there is no available data on the scale of this. Anecdotal evidence from lenders would suggest that the numbers of sales of financially stressed farm businesses are relatively low.

This could change in the event of a future downturn. In 2016, the Reserve Bank carried out stress testing on lending to the dairy sector which suggested that a severe downturn could result in between 4 and 25% of dairy farmers having non-performing loans[16].

There is limited evidence on the non-bank lending sector. Reserve bank data suggests this is a relatively small proportion of lending to the agricultural sector – around $328 million as at 30 September 2018 compared with $62 billion lent by banks[17] and that most of this appears to be lending for equipment finance. There is no data on enforcement actions by the non-bank lending sector.

***Banks***

Banks view receivership as a last resort. Banks are very concerned about the reputational impacts of being seen to repossess farms, and are also reluctant to sell assets during a downturn when prices are low.

The number of farm receiverships have fallen recently. [redacted] have advised that there are 10-12 farms/year that are identified as being under sufficient stress to warrant elevated engagement, but of those they would only expect one or two would get to point of triggering enforcement action. Another bank advised that they had only had one receivership in the past three years and a third that they had had no receiverships in the past two years.

***Non-bank lenders***

Non-bank lenders that hold security interests over farm assets other than farmland (e.g. a tractor, or milking or irrigation equipment) add complexities around farm debt securities.

Banking sector representatives, mediator representatives, and farming industry bodies consider that non-bank lenders tended to take enforcement action more quickly, with harsher actions (e.g. foreclosing unexpectedly, acting insensitively, and charging high penalty interest rates) and are less likely to offer mediation voluntarily. This can set off an unintended, and potentially unnecessary, chain reaction of events which results in a worse outcome than the initial situation warranted. Where they know of these situations, banks will often pick up debts owed to non-bank lenders in the interest of keeping the farm running.

There is likely a lot of enforcement action associated with non-bank secured credit which banks and industry organisations are not aware of – for example repossession of equipment, vehicles and smaller machinery/plant, which is unlikely to be recorded within financial

[16] Reserve Bank of New Zealand, An updated assessment of dairy sector vulnerabilities, Bulletin Vol 78, no 8, December 2015, accessed at: https://www.rbnz.govt.nz/research-and-publications/reserve-bank-bulletin/2015/rbb2015-78-08

[17] Reserve Bank of New Zealand, statistics on non banks: funding and claims by sector – T4, accessed at: https://www.rbnz.govt.nz/statistics/t4



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reporting systems, statistical information gathering, or reported to the banks by the farmers themselves.

Statutory mediation could provide increased protection for farmers in relation to non-bank lenders/asset financiers.

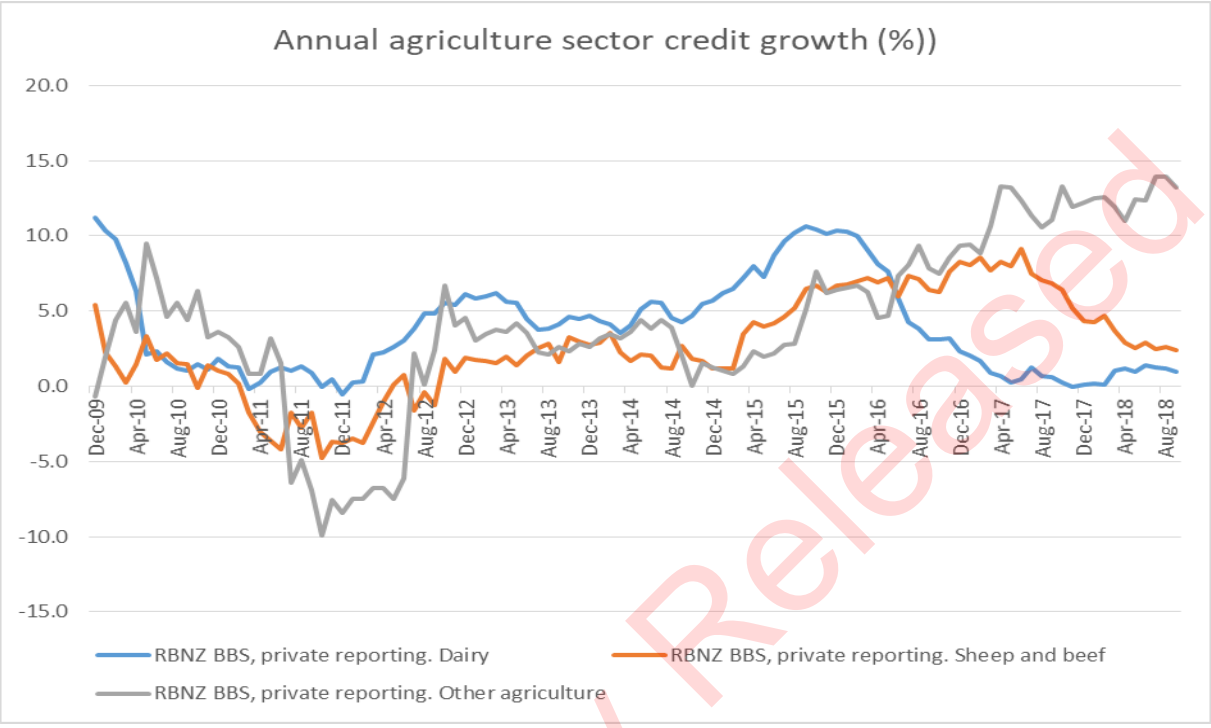



**Figure 1 Annual agriculture sector credit growth**

***Farmers***

Farmers, particularly dairy farmers, have a lot of debt. The nature of the business also means that farmers often lack the corporate structure that is normally associated with such debt levels.

It is more common for farmers themselves to sell some land or other assets, or sell their farm businesses as a going concern when the lender has concluded the business is not viable. Stakeholders from the banking sector told us that the numbers of financially stressed farmers selling their businesses is relatively low.

Farmers' satisfaction with their banks remains fairly high but there is a noticeable trend downwards in satisfaction levels which is considered to be expected after the recent dairy downturn. There have not been a lot of foreclosures, but there is banking pressure in less obvious ways, for example selling off land blocks. There was also a slight increase in non-performing loans and more farmers were feeling dissatisfied, beleaguered and embattled[18]. Although it used a limited sample size (n=36), a recent survey of farmers by Rural Women

[18] Federated Farmers, November 2018 Banking survey

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New Zealand found that over 80% of respondents considered that mandatory farm debt mediation would be helpful[19].

Recent RBNZ information indicates that banks have begun to expand their lending outside the dairy sector over the last two years (see Figure 1).[20]

*Dairy*

The dairy sector in particular is highly indebted and the Reserve Bank notes in its November 2018 Financial Stability Report that this sector is "vulnerable to a future downturn in dairy prices"[21]. Levels of unserviceable debt are still an issue but not as significant as previously[22]. RITANZ have advised that this is particularly the case for dairying, which in NZ is much more capital intensive than Australia and can put farmers in precarious financial positions.

*Sheep and beef farming*

Exposure to high levels of unserviceable debt is considered to be less significant in the sheep and beef sector than it is in the dairy sector.

However, the relatively low debt to equity ratio across the sector (equity as a percentage of total assets per sheep and beef farm in 2016/17 was 74%) masks a number of farms with very high levels of debt – 5% (1250 farms) have less than 20% equity[23].

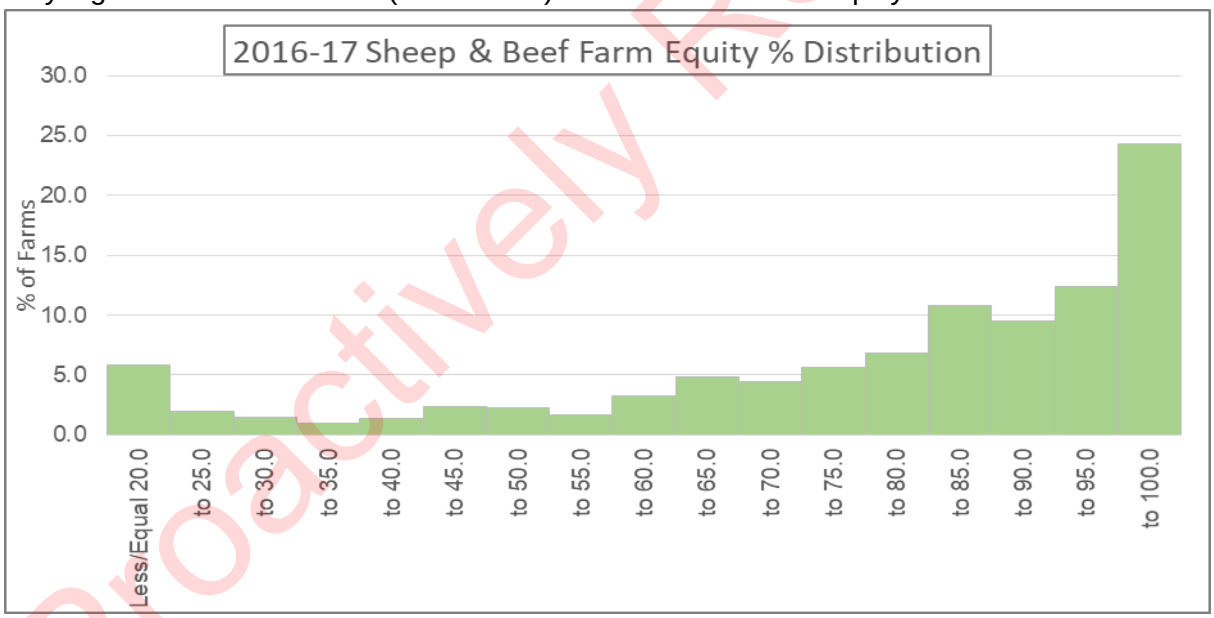



**Figure 2 Distribution of sheep and beef farm equity in 2016/17**

[19] Rural Women New Zealand: Farm Debt Mediation Survey.

[20] Reserve Bank of New Zealand, Financial Stability Report for November 2018, accessed at: https://www.rbnz.govt.nz/financial-stability/financial-stability-report

[21] Reserve Bank of New Zealand, Financial Stability Report for May 2018, accessed at: https://www.rbnz.govt.nz/financial-stability/financial-stability-report

[22] Rural Support Trust (2019), pers. comm.

[23] Beef+Lamb NZ, data from annual Sheep and Beef Farm Survey

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Although it is unclear where the debt is owed – with 93% of the 25,000 sheep and beef farms being owner-operated[24] it is likely that a significant proportion will be intergenerational borrowing within families – there remains a number of beef and sheep farms that are significantly exposed to even minor changes in market conditions or to adverse events which may trigger default.

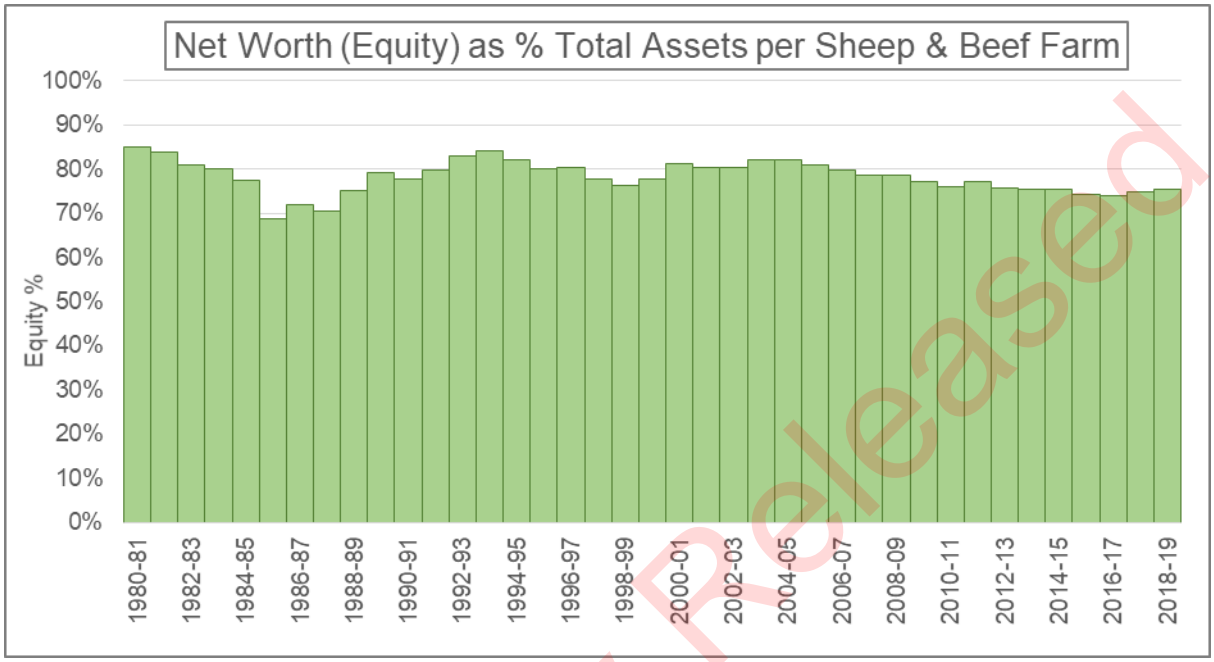



**Figure 3 Equity held as percentage of as percentage of asset value for sheep and beef farms**

*Horticulture*

It has not been possible to get any definitive information on the debt situation in the horticulture sector, although Provided under Confidence both support the introduction of a compulsory farm debt mediation scheme.

Provided under Confidence both note that few foreclosures actually occurred on the back of the Psa virus incursion as the banks were quite supportive while orchards transitioned from the old Hort 16A gold (that was very susceptible to Psa) to the new Sungold variety. This meant that many orchards were able to survive, albeit with difficulty for quite a few years.

*Aquaculture*

Little is known about the financial arrangements in the aquaculture sector. A significant proportion are owned and/or managed by one of the large fishing companies (e.g. Sandford, Talley's) or large corporates (New Zealand King Salmon). However there remain a number of smaller companies and family owned enterprises. There was a high profile foreclosure of a family business (Greenshell NZ Ltd) approximately five years ago which the receivers have

[24] Beef+Lamb NZ, 2018 Farm Facts

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only recently concluded winding up proceedings.

It is understood that the 2017/18 response to the *Bonamia* incursion had a significant financial impact on a number of oyster farms. Oyster farmers received compensation under the Biosecurity Act 1993 to cover the impact of the response (e.g. destruction of stock). However it is understood that the underlying financial situation of some oyster farms at the time of the incursion resulted in additional financial difficulties for some farmers. These are likely to continue for some time.

A looming issue for many aquaculture farmers is the costs and uncertainty of current resource consents that need to be renewed. This process typically costs tens of thousands of dollars and can easily amplify if there are public objections. These costs are borne by the applicant and inevitably put a great deal of financial pressure on the industry. The recent regulatory history in aquaculture sector, where the previous regime was grandfathered into the current system, means that approximately 75% of resource consents to occupy and use water space fall into a common expiry in 2024-25.

Climate change is also likely to have an increasing effect on aquaculture operations, for example New Zealand King Salmon are already having to move sites, at considerable expense, to cope with changing water temperatures.

***Based on this anecdotal evidence, we estimate that the numbers of compulsory farm debt mediations in New Zealand are likely to be low even in the event of a downturn, with around 50-100 mediations per annum.***

**Evidence on lender behaviour and lender-farmer relationships is mixed**

The Federated Farmers biannual banking surveys show consistently high rates of satisfaction from farmers with their banks, although the most recent survey (November 2018) showed a further drop in satisfaction – 73.7% of farmers said they were satisfied with their banks, the lowest level since surveys began in 2015. The proportion of farmers reporting feeling 'undue pressure' from banks has increased in the past six months, most noticeably in the dairy industry (including sharemilkers) over the past six months with a rise from 4 to 18%[25].

Some mediation already takes place between lenders and financially stressed farmers, however it has not been possible to quantify this as mediation is a confidential process. Such mediation is generally creditor initiated and as such likely to still have the balance of power issues that the scheme is intending to address.

**There is evidence that financial difficulties cause stress and farmers are unlikely to seek help**

International and national evidence shows that occupational stress is pervasive in the agricultural sector and that key stressors are uncontrollable events such as the weather and

[25] Financial Markets Authority and Reserve Bank of New Zealand (2018) Bank Conduct and culture: findings from an FMA and RBNZ review of conduct and culture in New Zealand retail banks, accessed at: https://fma.govt.nz/news-and-resources/reports-and-papers/bank-conduct-and-culture-review/

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global economic conditions, along with isolation, bureaucracy and financial pressures.

Research indicates that farmers are unlikely to seek help for stress and mental health problems – for example, the Walker/Massey University survey found that 79% of respondents had not accessed support services for assistance despite high levels of reported stress.

Anecdotal evidence from rural support organisations and other stakeholders have also indicated that financial issues are frequently a contributing factor in farmer mental health issues and suicides.[26]

## 2.4 Are there any constraints on the scope for decision making?

Cabinet has already agreed to establish a statutory Farm Debt Mediation scheme in New Zealand Parliament (see Cabinet Minute DEV-18-MIN-0290).[27]

This analysis and advice has therefore been produced for the purpose of informing Cabinet decisions on options for the final design and implementation of a farm debt mediation scheme and obtain approval to introduce the Farm Debt Mediation Bill to Parliament (see Recommendation 20 of Cabinet Minute DEV-18-MIN-0290).[28]

## 2.5 What do stakeholders think?

**We engaged with a number of stakeholders**

The main stakeholder groups with an interest in farm debt are farmers and secured lenders. Rural support organisations and networks, financial advisors and accountants, and insolvency practitioners also have an interest in the problem. Mediators also have an interest as they are sometimes called on to help with debt resolution.

We engaged with a wide range of stakeholders comprising:

- Federated Farmers
- Horticulture New Zealand (HortNZ)
- DairyNZ
- Beef + Lamb New Zealand
- Aquaculture New Zealand
- New Zealand Winegrowers Association
- Kiwifruit Vine Health Authority

[26] Turner, K.J. (1990). Coping with a disaster: NZ Rural Trust in South Canterbury November 1988-June 1990. South Canterbury Rural Support Trust

[27] Cabinet Economic Development Committee Minute DEV-18-MIN-0290

[28] Cabinet Economic Development Committee Minute DEV-18-MIN-0290

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- Deer Industry New Zealand
- Dairy Women's Network
- Rural Women New Zealand
- Rural Support Trusts
- Farmers' advocates
- Te Tumu Paeroa
- The Reserve Bank of New Zealand
- New Zealand Banker's Association (NZBA)
- ANZ and Westpac banks
- Banking Ombudsman Scheme
- The Arbitrators' and Mediators' Institute of New Zealand (AMINZ)
- The Resolution Institute
- Financial Services Federation
- John Deere
- The Restructuring, Insolvency and Turnaround Association of New Zealand (RITANZ) Financial advisors and chartered accountants serving the rural sector

Stakeholders have expressed a range of opinions on whether there is a problem and what the nature of the problem is, but are broadly supportive of a mandatory farm debt mediation scheme.

**Lenders**

There were mixed views from stakeholders about banks and other lenders:

- Some farmer support groups and farming industry bodies told us banks and other lenders can behave badly when dealing with farmers in financial difficulty, for example putting undue pressure on farmers, taking action without reasonable notice and being reluctant to explore all options for turning around the business. The Banking Ombudsman Scheme told us that common complaints about bank behaviour included banks not acting fairly or respectfully and acting too quickly with no opportunity to explore other options.
- Some rural accountants, financial advisors, farmer support groups and the Reserve Bank commented on the power imbalance between farmers and banks. We were told that farmers can feel intimidated and stressed by the power imbalance. In particular farmers dislike their accounts being transferred away from the local bank representative (with whom they have an established relationship) to 'faceless' centralised banking teams that specialise in debt.
- Some stakeholders, including financial advisors, accountants, and farmer support groups considered that banks sometimes lent irresponsibly and did not take due account of risk. We were told that the cyclical nature of farming means that banks tend to over-lend when commodity prices are high. Accountants and financial advisors commented that some banks will provide budgets for farmers to justify lending to them.

***Banks***

- On the other hand, some stakeholders were of the view that that banks usually

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behave reasonably. A farmer support group commented that banks have recently improved their practices, and Provided under Confid told us that banks had acted reasonably during the kiwifruit Psa crisis. The banks we spoke to told us they often went 'above and beyond' what they considered to be reasonable for farmers facing financial difficulty.

- We were told by the banking sector that banks routinely offer mediation and other assistance (such as independent legal and financial advisors) to farmers in financial difficulty and will explore all options before taking enforcement action. Mediator representatives and accountants questioned whether mediation offered by banks was independent and suggested that banks varied in their practice, and that there may be inconsistency even within banks.

- Banking sector representatives, mediator representatives, and farming industry bodies considered that non-bank lenders tended to take enforcement action more quickly, and sometimes acted less fairly than banks. A financial advisor told us that banks will often pick up debts owed to non-bank lenders in the interest of keeping the farm running.

**Secondary lenders**

- The Financial Services Federation and Financial Services Complaints Limited are the oversight bodies for secondary lenders. The organisations noted that farm debt mediation would only impact a small number of their members, those that focused on farm supplies and vehicle finance in particular.

- They considered that farm debt mediation would have some cost implications for the sector, particularly to smaller lenders that have less flexibility and lower margins to accommodate the costs in time and from deferred payments. This could have a flow on effect on costs and availability of secondary credit to farmers as well as the businesses of the smaller lenders. They did note, however, that the impact of the scheme may be offset by farmers declining to use the mediation for smaller debt amounts given the requirement to meet 50% of the costs mediation.

- Finance companies are already subject to mediation costs for any general complaints against them, which are currently funded through their levies. There is a risk therefore that there will be a duplication of costs for lenders, given the broad application and use of the complaints regime by debtors for non-dispute negotiations.

- They noted that certainty about what property falls under the scheme will be critical to supporting secondary lenders to comply, particularly in the case of smaller lenders. Provided under Confidence noted that their Australian component was already subject to farm debt requirements in New South Wales and Queensland. They highlighted that as farmers were their sole market, they already worked hard to identify mutually beneficial arrangements with farmers who were not meeting their repayments.

- Provided under Confidence did not think mediation would be useful because at the point of enforcement action they generally had already engaged in numerous discussions with farmers. However, they considered the cost of meeting farm debt mediation requirements in New Zealand would be minimal as it constituted around one sixth of their business (about 3,000 – 4,000 contracts). Provided under Confidence noted that costs of mediation generally also included their travel and accommodation costs as farmers generally requested mediation locally. They estimated overall costs ranged between

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$5,000 and $10,000. They considered farm debt mediation in New Zealand would have no impact on their business.

**Timeliness**

- We were told by accountants, Provided under Confiden and financial advisors that sometimes neither banks nor farmers act promptly when financial difficulties first start to arise, meaning that opportunities might be lost to save a business.
- Financial advisors, banks, mediator representatives and farmer support groups told us that some farmers can 'bury their heads in the sand' and can be reluctant to engage constructively with banks to find solutions.
- Accountants, financial advisors, farming industry bodies and banks also commented that banks often work with financially struggling farmers for a long period of time (sometimes for years) to resolve debt issues.

**Farmers face unique challenges**

Stakeholders were asked whether they thought farmers faced unique challenges in relation to financial problems and debt that meant that farming should be treated differently from other businesses.

Most stakeholders argued that they did, although some banking and insolvency sector representatives considered that the issues farmers face are not significantly different from other small businesses.

Stakeholders came up with a number of issues that they considered were specific to farmers with debt problems, including:

- Nearly all stakeholders felt that farmers had an emotional attachment to their land, particularly if the farm had been in the same family for several decades and this made farming a 'special' type of business.
- A number of stakeholders, particularly farmer support groups and farming industry bodies told us that that farming foreclosures affect whole families and wider communities.
- Farming industry bodies and farmer support groups were concerned about the vulnerability of the sector to high levels of debt.
- Some stakeholders mentioned that farming is a significant part of the economy.
- A wide range of stakeholders commented that farming is subject to uncontrollable forces such as pests and diseases, natural hazards, adverse weather events, and global market conditions.
- Farming industry bodies, farmer support groups and banks mentioned an increasing number of future challenges for farming such as environmental regulations, effects of climate change, and uncertainty in global markets, which could create financial difficulties in the near future.
- Accountants, farmer support groups and farming industry bodies considered that farmers are subject to unique stressors such as isolation and the fact that farming is a

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'24/7' business.

Further engagement with appropriate stakeholder groups is planned to inform the detailed design and implementation of the proposal.

**Engagement with Māori**

We have engaged with Te Tumu Paeroa, the Māori Crown Relations Unit within the Ministry of Justice, Te Puni Kokiri (TPK) and the Federation of Māori Authorities (FOMA),as well as a number of Māori farmers and rural professionals.

*Māori use of farm debt mediation*

Up to now, collectively-owned iwi, hapū and whānau farmland has tended not to be mortgaged, but this is changing as Māori farming businesses expand their operations and land holdings. However, stakeholders identified access to capital as a major issue to their business success, and in part due to this, debt-related issues were highly uncommon. A Māori farmer with over 40 years' experience could only recall one situation where a Māori farmer was involved in a serious debt proceedings, in this case resale.

Engagement highlighted that collectively owned Māori farms tend to have sophisticated governance structures and utilise professional financial advice more regularly. A number of stakeholders also raised that the view, and value of land, in te ao Māori was not focused on financial value. The intergenerational importance of land, role of kaitiakitanga and the intrinsic value of land meant that Māori were less likely to farm for capital gains. As a result, there the risk of debt-related issues were less likely.

The current approach to farming and difficulties accessing capital mean that Māori are less likely to utilise farm debt mediation for land-related debt. Stakeholders identified an opportunity for Māori to utilise farm debt mediation for financial arrangements with non-land property (e.g. farm machinery, stock). In particular, rural professionals and Māori farmers identified an opportunity for iwi lending or capability building for Māori farmers to support better business and farming practice. Officials will continue to work with Māori agricultural professionals, iwi and hapū as part of the implementation of the Bill to ensure that this opportunity is maximised.

Stakeholders noted that there were a small number of iwi lenders who could now fall under the farm debt mediation requirements. Effective engagement during the implementation period was identified as being key to ensuring Māori lenders were aware of new obligations.

*Ensuring farm debt mediation is fit for purpose for tangata whenua*

Māori are significant contributors to New Zealand's farming industries and ensuring the mediation system provides for tikanga Māori principles will be important for the success of the regime. Feedback officials have had on ensuring the mediation process is fit for purpose for Māori businesses includes:

- flexibility of timeframes, to allow for engagement and discussion with wider hapū and iwi stakeholders, and to determine mandate for participating in mediation and making decisions, or establishing processes for making these decisions.

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- flexibility of mediation process and involving parties in agreeing to this process, for example location, how mediation will take place (language and speaking rights).

TPK and stakeholders highlighted the importance of parties having the ability to select when tikanga is appropriate to the matter being mediated. This is important because not every dispute about Māori land lends itself to being resolved in accordance with tikanga. Stakeholders also expressed concerns that a limited or generalised view of tikanga should not be imposed through farm debt mediation. Tikanga differs from region to region, so parties should have the ability to determine when and how to implement it through mediation.

Stakeholders considered that the role of mediators was critical to achieving fit for purpose mediation for Māori. Mediator bodies consider that they currently have mediators appropriately skilled in tikanga. However, many stakeholders are not convinced these mediators have a sophisticated understanding of tikanga. TPK's recent work on proposals to introduce dispute resolution into the Māori Land Court has found a lack of individuals with expert skills in both tikanga and mediation.

Due to the low numbers of Māori accessing the regime, this is not considered to be an urgent issue. However, Officials will continue to work with TPK and the Ministry of Justice as they progress work on this as part of proposed changes to the Te Ture Whenua Māori Act 1993.

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# Section 3: Options identification

## 3.1 What options are available to address the problem?

**Four options**

Four options have been considered to address the timely and equitable resolution of farm debt issues. These include the status quo, as there are already informal processes offered by banks, as well as a non-regulatory option (a formalised voluntary mediation scheme). The four options are:

- status quo;
- a formalised voluntary farm debt mediation scheme;
- compulsory farm debt mediation applying to all lenders (preferred option); and
- compulsory farm debt mediation applying only to banks.

The criteria for analysing the options were:

- cost effectiveness;
- whether it would provide a consistent and equitable process that would address the power imbalance between lenders and farmers;
- whether it would provide a timely means of resolving debt issues that allows options to be fully explored; and
- whether it would provide certainty for all parties.

Stakeholders were asked for their views on different options. Consideration of options was also informed by evidence from farm debt mediation schemes in Australia, Canada and the US, and by conversations with stakeholders in New South Wales (NSW) and Queensland.

**The power of mediation**

All options, except the status quo, involve increased use of mediation as a mechanism for enabling the timely and equitable resolution of farm debt. The benefits of mediation are generally recognised and it is widely-used as an inexpensive and confidential mechanism for resolving disputes. Mediation can:

- bring all parties together for a frank exchange of views and information in a non-threatening atmosphere;
- enable the weaker party to gain some control over the process;
- provide a structured and consistent framework that all parties can have confidence in; and
- enable the exploration of a wide range of issues and options and the constructive negotiation of solutions.

If entered into early enough, farm debt mediation could help farmers to turn around a failing farm business, while at the worst, it could allow a timely and 'dignified exit' for a farmer with an unviable farm business.

*Insights from on the ground in Australia*

Officials visited NSW and talked to a number of stakeholders there about how the NSW scheme operates and its effectiveness. We also talked to a bank which had involvement with

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schemes in NSW and Queensland. This provided valuable insights that could help inform the design and implementation phase of the proposed scheme.

Stakeholders were positive about the benefits of the scheme. An important component of the NSW system that supports the farm debt mediation scheme is a financial counselling service. All relevant stakeholders considered this to be critical to ensure farmers are adequately prepared for mediation, and to address the power imbalance.

A number of stakeholders in NSW commented that the farm debt mediation scheme had resulted in lenders changing their culture, and being prepared to enter discussions earlier. In fact, the number of mediations carried out under the NSW scheme has fallen in recent years. It appears that banks are now more proactive in working with farmers at an earlier stage, including conducting mediations on a voluntary basis, rather than using the compulsory farm debt mediation scheme. An Australian bank commented that while mediation involves upfront costs, it mitigates their losses.

See Appendix One for a case study of farm debt mediation in Victoria. The Victorian Small Business Commission (VSBC) website also includes a number of short testimonials of the impact of farm debt mediation in Victoria[29])

*Capacity to deliver*

Both AMINZ and the Resolution Institute were confident that an increased demand for mediation could be met from the available supply of mediators. There is already a pool of qualified and accredited mediators in New Zealand, many of whom have experience in rural issues. There would also be the potential to use Australian mediators if there was a shortage in New Zealand.

**Status quo**

***Key features***

Under the current arrangements, some lenders would continue to offer mediation to farmers in financial distress on a voluntary basis. This may not involve independent or trained and experienced mediators. Not all lenders would offer mediation. Where there are multiple lenders, the actions of one lender could continue to create problems for other lenders, and could undermine the viability of the farm business.

Lenders, particularly banks, are likely to continue to be reluctant to take enforcement action for two reasons:

- Concerns about harm to their reputation particularly where a receiver is appointed.
- It can reduce the value of farm assets over which they hold security interests - this risk would be greater if large-scale enforcement action was taken.

[29] https://www.vsbc.vic.gov.au/case-study/mediating-a-farm-debt/



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***Analysis***

The scale of the problem is currently small – it appears that very few farm repossessions take place currently, and relatively small numbers of farms face significant debt problems. However the indebtedness of the farming sector and its vulnerability to future shocks means that the number of farmers facing financial difficulties could increase. While banks are unlikely to take large-scale enforcement action for the reasons noted above, this would mean a large increase in the number of farms that have debt issues that need to be resolved with banks.

While the status quo would not involve any direct additional cost to government, it does not meet the criteria for addressing the problem:

- Lenders have different approaches to resolving debt issues which means there is not a consistent and equitable process. Farmers are disadvantaged by a power imbalance when dealing with lenders, particularly large banks.
- While some lenders may use mediation to try to resolve debt issues in a timely manner, there is no incentive for farmers to participate in this. Some lenders use informal approaches such as mediation and financial advice to resolve debt issues, but this may not change public perceptions that they are acting unfairly. Some lenders may be reluctant to fully explore all options. There is no incentive to instigate action at an early stage when financial issues first arise.
- There is a lack of a structured framework for resolving debt, meaning that all parties face uncertainties over the process. This can be stressful for farmers as the less powerful party.

***Stakeholder views***

Engagement with stakeholders has helped to identify the problems inherent in the status quo.

Not all stakeholders considered that these problems needed to be urgently addressed, but most stakeholders from across the range of sectors that we engaged with considered that there would be benefits in addressing them. On the whole, farming industry bodies and farmer support felt most strongly that problems with the status quo needed to be addressed, while banking sector representatives felt least strongly that there was a need for change. One bank considered that their current approach was adequate, while another felt it would be useful to have more certainty in resolving debt issues.

**A formalised voluntary mediation scheme**

***Key features***

A formalised voluntary mediation scheme would involve lenders signing up to an agreement that they would offer mediation as part of a debt resolution process, and before entering into any enforcement action. The NZBA started to develop a code of conduct for its members, which involved them agreeing to enter into mediation. However, the NZBA decided not to proceed with this when the now withdrawn Member's Farm Debt Mediation Bill was introduced in May 2018.

To have credibility with farmers, a voluntary mediation scheme would need to be developed

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and agreed jointly between lenders and farmers – for example by the NZBA and Federated Farmers. However, NZBA membership is restricted to banks.

***Analysis***

A formalised voluntary mediation scheme would be developed and administered by industry bodies. There would be no cost to government.

This option could encourage more widespread use of mediation by lenders and would be a better option than the status quo. A voluntary scheme partly meets the criteria as more use of mediation could increase consistency, lead to more timely debt resolution and increase certainty for parties involved.

However, there would be no requirement for banks to sign up to a voluntary scheme even if they were members of the NZBA, and there would be no requirement for other lenders to join the scheme. Furthermore, there would be no consequences for lenders signed up to the scheme should they fail to comply.

A voluntary scheme would have limitations in addressing power imbalances, because lenders would still be able to conduct mediation according to their own terms. For example, it would not be possible to require parties to the mediation to provide relevant documentation and this could hinder the transparency and fairness of the process, and lenders could charge the costs of mediation to farmers.

***Stakeholder views***

Most stakeholders were of the view that a voluntary scheme would not work because lenders would be able to opt out of it. Farmers were less likely to be aware of a voluntary scheme, and lenders may not offer mediation as an option. [redacted] advised very strongly that a voluntary scheme would not work and that mediation would not be offered unless it was compulsory. Farming industry bodies, farmer support groups and financial advisors also felt that a voluntary scheme would not be effective.

***Overseas evidence***

Queensland introduced a voluntary farm debt mediation scheme – the Queensland Farm Finance Strategy. The voluntary agreement was developed by the Queensland Farmers Federation and the Australian Banking Association, with input from stakeholders. This has since been replaced by a statutory scheme. A Queensland Parliamentary report on the Farm Business Debt Mediation Bill 2016 noted that many witnesses and submitters supported the introduction of a mandatory scheme to replace the voluntary scheme[30]. Explanatory notes for

[30] Queensland Parliament, Finance and Administration Committee, Report No. 34, 55th Parliament – Farm Business Debt Mediation Bill 2016 and Rural and Regional Adjustment (Development Assistance) Amendment Bill 2016, pp 25-27, accessed at: https://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2016/5516T2083.pdf



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the Bill state that many large lenders 'readily participated in mediation' under the voluntary approach, but not all lenders did so[31]. The voluntary agreement lacked independence as there was no separation between ownership of the agreement and its operation.

An evaluation of the NSW Farm Debt Mediation scheme carried out in 2000 considered whether the scheme should become voluntary. Although settlement rates for voluntary mediation schemes were found to be comparable with compulsory schemes, the report concluded that there was not a strong justification for changing the regime to a voluntary one on the grounds that take-up would be lower and there was not strong support among users of the scheme to warrant making the change to a voluntary scheme[32].

**Compulsory Farm Debt Mediation applying to all secured lenders (preferred option)**

***Key features***

This option would require all secured lenders to offer mediation before they could take enforcement action to repossess assets. Lenders would also be able to offer mediation when a farming business was in default. Farmers would have the ability to initiate mediation, which, combined with industry bodies raising awareness of the scheme, would encourage them to seek mediation early in the process. The regime would be largely based on the NSW Farm Debt Mediation scheme which is regarded as best practice in Australia.

Key aspects of the scheme would be:

- It would cover all farming activities including sharemilking, horticulture and aquaculture, but would exclude forestry[33], lifestyle farms and wild harvest fishing and hunting.[34]
- It would only apply in relation to loans secured by assets that are an integral part of the farming operation.
- Lenders would be required to offer mediation when a farmer was in default and the lender intended to take any form of enforcement action; farmers would be able to initiate mediation with secured lenders at any time.
- Mediation would be provided by independent mediators.
- Mediation would take place within specified time limits with a moratorium on the lender enforcing their security interest.
- There would be measures in place to avoid participants acting in bad faith and gaming the system:

[31] Farm Business Debt Mediation Bill 2016 Explanatory Notes, accessed at: https://cabinet.qld.gov.au/documents/2016/Aug/FarmDBill/Attachments/ExNotes.PDF

[32] Altobelli T (2000) Research into Farm Debt Mediation Act 1994, University of Western Sydney Macarthur report, accessed at: https://www.raa.nsw.gov.au/__data/assets/pdf_file/0004/275953/uws-macarthur-report-research-farm-debt-mediation-act.pdf

[33] Forestry is a long term investment and is less vulnerable to business downturns. For example, forestry business operators have choices about when to harvest trees. Agricultural, horticultural and aquaculture businesses do not have those same options in relation to their primary production activities.

[34] The Bill provides an ability to add business activity (e.g. forestry) by regulation if policy positions change in the future, for example if the Government's pro-afforestation policies led to increasing number of family-owned farms became more involved in forestry in the future.



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- where lenders fail to comply with a request for mediation or to offer mediation, any enforcement action taken in breach of it would be rendered void;
- where farmers have acted in bad faith, lenders would be able to take enforcement action; and
- there would be restrictions on how frequently farmers would be able to require lenders to mediate.

***Analysis***

This option would meet the criteria:

- It would provide a consistent and equitable process that applied to all secured lenders, including non-bank lenders. Mediation can help address the power imbalance between lenders and farmers, but evidence from overseas suggests that this needs to be carefully considered in the design of the scheme.Compulsory mediation would provide a timely means of resolving debt issues that allows options to be explored, as well as allowing a farmer to 'exit with dignity' from an unviable business.It would provide certainty for lenders and farmers by introducing a structured and time-bound process.

This option would need to be implemented and administered directly by government, or contracted by government to another body. It is estimated that costs of administering a scheme would be $250,000-$300,000 per annum.

***Stakeholder views***

Nearly all the stakeholders we spoke to support a compulsory farm debt mediation scheme, although stakeholders varied in the strength of their support for a scheme. The Dairy Women's Network did not support the scheme as they felt that it would not help address the power imbalance between farmers and lenders. RITANZ felt a compulsory scheme would be beneficial but should be offered to any failing business. Provided under Confid noted that other businesses can be affected by farmers spending less money during a downturn and suggested that a scheme should not be limited to farming.

- Stakeholders from the banking sector stated that a compulsory scheme would not make a significant difference to their practice as banks already offer mediation. However, a formalised scheme would help 'level the playing field' when non-bank lenders were involved, and would also help with public perceptions that there was a structured process to be followed. They also commented that it could 'smooth the down' for farmers with unviable businesses.
- Farming industry bodies, farmer support groups and mediators were the strongest supporters of a compulsory scheme. Provided under Confidence – previously they did not support a compulsory farm debt mediation scheme, but now believe this is needed in view of upcoming challenges facing the sector (increase in environmental regulation, climate change mitigation obligations, increased costs of lending as a result of RBNZ's proposed changes to the level of capital reserves banks must hold).
- Financial advisors and accountants were also strongly supportive of a scheme because they believed it would provide a consistent approach, could provide a

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'backstop' where bank processes had failed, and could help farmers face the reality of their situation and work through available options before it was too late.

Other benefits identified by stakeholders included:

- an independent mediator would help address the power imbalance between lenders and farmers;
- where there were a number of lenders it would be helpful to get everyone around the table;
- everyone with an interest in a farm business could be involved, including family members;
- it would encourage earlier conversations about financial problems and help farmers to think strategically;
- even if the mediation resulted in farm foreclosure, it would help farmers to come to terms with this because it would give them an opportunity to be heard and to obtain 'closure';
- mediation would stop banks 'rushing things' before all options had been explored;
- it would prevent farmers drawing out the process, often to their own detriment, and would mean that if there were animal welfare and environmental issues, these could be addressed in a timely way; and
- some stakeholders pointed to the success of compulsory farm debt mediation schemes in Australia and felt this could work well in New Zealand.

On the whole, stakeholders did not think there were significant risks of unintended consequences if a compulsory farm debt mediation scheme was to be established. Banks were of the view that there were no risks as they already offer mediation.

- Several stakeholders stressed the importance of having qualified and capable mediators. Some thought that mediators should have knowledge of farming while others thought it didn't matter as long as all parties agreed on the choice of mediator.
- Banks and financial advisors thought the scheme needed to be able to address situations where parties were not acting in good faith.

A number of stakeholders, particularly financial advisors, farming industry bodies and farmer support groups considered that other support needed to be offered alongside mediation. A financial advisor told us that financial problems are often the 'tip of the iceberg' and there are usually a host of other issues relating to how the farm is being run. Some stakeholders told us that that a significant proportion of farmers with financial difficulties also had mental health issues.

These stakeholders considered that mediation should also include independent financial advice and expert help with farm plans, as well as support for emotional and mental health issues. HortNZ referred us to their industry-led Psa response which included independent financial advice – they considered this scheme had been a very effective way of working with lenders to explore options for keeping businesses viable.

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**Evidence from overseas**

A number of overseas jurisdictions have compulsory farm debt mediation schemes, where secured lenders are required to offer mediation to farmers before they can take enforcement action. These are generally regarded as being successful and evaluations have shown that they have benefits for farmers as well as for lenders.

There are a number of independent evaluations of farm debt mediation schemes in the US, Canada and Australia, although most of these were carried out some time ago.

*United States – mediation works, but better outcomes come with wider support*

Evaluations of farm debt mediation schemes in the US carried out in the 1990s found that:

- the vast majority of parties reached mutual agreements;
- most parties were satisfied with the mediation process; and
- mediation was faster, cheaper and more private than Court proceedings, and parties were usually more receptive to a final agreement[35].

In Minnesota, a compulsory farm debt mediation scheme was found to have 'reduced tension, improved communications, promoted settlements and helped farmers make decisions about their future'[36].

However, some US evaluations commented that mediation did not protect the weaker party and that farmers were often inadequately prepared for mediation. Schemes that helped the farmer develop financial plans and proposals helped mitigate the power imbalance. In fact, evaluations stressed the need for farmers to be provided with emotional, financial and legal assistance alongside the mediation process to ensure the effectiveness of the programmes[37].

*Canada – neutrality and financial planning support are important*

An evaluation of the Canadian farm debt mediation scheme was carried out in 2016 by the Office of Audit and Evaluation. This found that the scheme was 'largely achieving its intended outputs and outcomes' and 'there continues to be a need for a neutral service that offers financial mediation' for farmers in financial difficulty[38]. The mediation process in Canada includes a detailed review of the farmer's finances, and the preparation of a 'recovery plan' drawn up with the help of a financial professional was seen as 'a crucial step' in the process. Lenders were less satisfied with the scheme than farmers and mediators and felt it had resulted in less favourable outcomes for themselves (this was also the case in some of the

[35] Bailey C A (1994) The role of Mediation in the USDA, Nebraska Law Review, Vol 73, Issue 1, pp 142-153

[36] Willardson N D (1987) Alternative Dispute Resolution in Farmer-Lender Disputes: Mandatory Mediation in Minnesota, Law & Inequality: A Journal of Theory and Practice, Vol 5, Issue 3 pp 487-511

[37] Bailey, ibid., Willardson ibid., Cooper C L (1993) The Role of Mediation in Farm Credit Disputes, Tulsa Law Review, vol 29, Issue 1, pp 159-182

[38] Office of Audit and Evaluation (2016) Evaluation of the Farm Debt Mediation Service, accessed at: http://www.agr.gc.ca/eng/about-us/offices-and-locations/office-of-audit-and-evaluation/evaluation-reports/evaluation-of-the-farm-debt-mediation-service/?id=1464291484565



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evaluations of US schemes).

The evaluation also found that there was limited awareness of the programme which meant that farmers were not applying early enough to explore all the options for business turnaround.

Data from Canada on the outcomes of mediation showed that from 2008 – 2014:

- 46 percent of cases involved debt restructuring;
- 21 percent of cases involved a satisfactory exit arrangement; and
- 15 percent involved the disposal of some assets.

*New South Wales – a model of success with support of both framers and creditors*

A detailed evaluation of the NSW farm debt mediation scheme was carried out in around 2000, concluding that farm debt mediation was 'working quite satisfactorily in NSW'[39]. Mediation was perceived as a better alternative than going to court by all parties – with benefits including convenience, cost-effectiveness, speed, allowing parties to create tailor made settlements and engage meaningfully, encouraging communication and information sharing.

Benefits for farmers were that farm debt mediation often resulted in lenders writing off part of the debt, that it helped address emotional issues for farmers, and that it helped farmers understand the realities of their situation and the options open to them.

In contrast with the US and Canada, lenders were very positive about the NSW farm debt mediation scheme and there was no evidence suggesting that rural lending had been affected in any way as a result of farm debt mediation.

However the evaluation also found that farmers had a high level of dissatisfaction regarding the outcomes of farm debt mediation, which may have been due to unrealistic expectations about lenders writing off part of the debt. Farmers also felt there was a power imbalance in favour of the lender as lenders were more experienced in mediation – the Act has since been amended to address this, including providing for farmers to initiate mediation. Other mechanisms have also been introduced to address this, including more education about the process.

A review of the NSW Act conducted in 2017 found broad stakeholder support for the key features of the Act including its simplicity, flexibility and structured approach to informal dispute resolution and its procedural fairness and equitable cost sharing.

Of the 1659 'satisfactory mediations' that have taken place under the NSW scheme between 1995 and 2016, parties reached agreement in 90% of cases[40].

[39] Altobelli T (2000) Research into Farm Debt Mediation Act 1994, University of Western Sydney Macarthur report, accessed at: https://www.raa.nsw.gov.au/__data/assets/pdf_file/0004/275953/uws-macarthur-report-research-farm-debt-mediation-act.pdf

[40] Rural Assistance Authority, *Farm Debt Mediation Act 1994 (NSW) Revies: Consultation Paper*, 23 March 2017, accessed at: https://www.raa.nsw.gov.au/fdm/2018-amendments



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There have also been good success rates for other Australian state-run compulsory farm debt mediation schemes:

- In Victoria, 96.4% of farm debt mediations reached settlement in the 2015-16 financial year[41]; and
- In Queensland, where the scheme has only been running since 1 July 2017, 85 percent of mediation cases have reached agreement[42].

*Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*

The Final Report from the Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, published in February 2019, was supportive of compulsory farm debt mediation and recommended introducing legislation for a consistent national approach[43].

**Compulsory farm debt mediation applying to banks only**

***Key features***

This option is similar to the option described above, but would apply only to banks and not to non-bank lenders.

***Analysis***

This scheme would also need to be implemented and administered directly by government, or contracted by government to another body. Costs of administering the scheme are estimated to be similar to a scheme that encompasses all lenders.

This scheme would partly meet the criteria in that it would provide a consistent, timely and structured approach, but only in relation to banks. Although non-bank lending is a small proportion of overall farm sector lending, we were told that non-bank lenders often act more quickly to enforce, and that their actions can affect the viability of farm businesses. A bank-only scheme would not therefore provide a consistent approach across the lending sector.

***Stakeholder views***

A Farm Debt Mediation Bill was introduced as a Member's Bill on 15 May 2018. The Member's Bill proposed a compulsory scheme that would apply to banks only, and only when the bank intended to appoint a receiver. A number of regulatory and legislative quality issues were identified with the Member's Bill and it has since been withdrawn. Several submitters to the Member's Bill were of the view that a farm debt mediation scheme would also need to apply to non-bank lenders.

[41] Victoria Small Business Commissioner, Annual Report 2015-16, accessed at https://www.vsbc.vic.gov.au/wp-content/uploads/2016/10/vsbc-Annual-Report-2015-16.pdf

[42] Queensland Rural and Industry Development Authority, Annual Report 2017-18, accessed at: http://www.qrida.qld.gov.au/annual-report

[43] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report, accessed at: https://financialservices.royalcommission.gov.au/Pages/reports.aspx

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Our conversations with stakeholders supported this view, with a number commenting on the value of getting all lenders and farming interests 'around the table', while others including accountants and Provided under Confid felt that non-bank lenders took enforcement action more quickly than bank lenders. A farmer support group commented that as farmers get desperate, they borrow from more and more lenders. Banks were of the view that non-bank lenders should be included to 'level the playing field'.

**3.2 What criteria, in addition to monetary costs and benefits, have been used to assess the likely impacts of the options under consideration?**

The criteria for analysing the options were:

- cost effectiveness;
- whether it would provide a consistent and equitable process that addresses the power imbalance between lenders and farmers;
- whether it would provide a timely means of resolving debt issues that allows options to be explored; and
- whether it would provide certainty for all parties.

**3.3 What other options have been ruled out of scope, or not considered, and why?**

Other options identified but not pursued in depth were:

- Providing financial support to farmers – it is not government policy, and would be inconsistent with international obligations, for government to financially support individual farmers.
- Establishment of dedicated financial advice services capability –
    - Would not address the underlying power imbalance between creditors and farmers, nor timely means of a timely means of resolving debt issues, nor provide certainty for all parties.
    - The absence of knowing affected farmers means that the service would not be able to target support and advice to those that need support.
    - The costs of establishing and ongoing provision of an advisory service to 50,000 plus farmers would be high while its potential to reach affected farmers dispersed.
- Industry body delivery of mediation. Industry bodies already provide financial planning and business advice (paid for by farmers through levy), however –
    - They would face the same issues identified for a dedicated financial advice services capability.
    - There would be significant inefficiencies and overlaps arising from multiple bodies providing similar services.
    - Costs fall only on farmers.
    - Providing mediation services would be a significant variation from industry

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organisations activities and would require changes to organisations mandate, and consequential changes to sect commodity levy orders (including consultation).

- Tightening regulation of banks – the regulatory framework for oversight of creditors and lending arrangements is considered fit for purpose. The framework for managing disputes between creditors and borrowers, including farmers, (e.g. Banking Ombudsman, dispute resolution schemes for secondary lenders registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008) are considered to be working well. Farm debt mediation is not a dispute resolution service, in that neither party has necessarily done anything wrong- it is instead a facilitated discussion about mutually agreed (fair and legal) contractual terms.

We also have not considered the introduction of compulsory mediation before lenders can take enforcement action on any business for the reasons set out in Section 2.1.

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## Section 4: Impact Analysis

**4.1 Marginal impact: How does each of the options identified at section 3.1 compare with the counterfactual, under each of the criteria set out in section 3.2?**

| | Status Quo | Formalised voluntary mediation | Compulsory mediation applying to all lenders | Compulsory mediation applying only to banks |
|---|---|---|---|---|
| **Costs** | If mediation occurs the costs fall to both parties unless terms of loan agreement:<br>a. specifically provide for mediation; or<br>b. include provisions for allocating costs of mediation. | -<br>This would be developed and administered by industry bodies and therefore would be a low cost option compared with the status quo.<br>**Lenders who sign up to scheme:** costs of their share of mediation (estimated at $3000 on average) and of delaying enforcement. For some lenders this may be a substitute cost as they already invest significant time and effort in debt resolution. Costs to industry bodies of developing and administering the scheme would depend on the detail of the scheme but would likely be less than a compulsory scheme.<br>**Farmers**: costs of their share of mediation (estimated at $3000 on average). Costs to industry bodies of developing and administering the scheme would depend on the detail of the scheme but would likely be less than a compulsory scheme.<br>**Government**: minimal cost | -<br>This option will need to be implemented and administered by government.<br>**Lenders**: costs of their share of mediation (estimated at $3000 on average) and of delaying enforcement. For some lenders this may be a substitute cost as they already invest significant time and effort in debt resolution.<br>**Farmers**: costs of their share of mediation (estimated at $3000 on average).<br>**Government**: implementation costs are estimated to be $350,000 and administration costs are estimated to be around $250,000-$300,000 per annum.<br>It is envisaged that there would be an adequate supply of qualified mediators. | -<br>This option will need to be implemented and administered by government.<br>**Banks**: costs of their share of mediation (estimated at $3000 on average) and of delaying enforcement. For some lenders this may be a substitute cost as they already invest significant time and effort in debt resolution.<br>**Farmers**: costs of their share of mediation (estimated at $3000 on average).<br>**Government**: Implementation costs are estimated to be $350,000 and administration costs are estimated to be around $250,000-$300,000 per annum.<br>It is envisaged that there would be an adequate supply of qualified mediators. |

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| | | | | |
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| Consistent and equitable process | O<br>If mediation offered will be on basis of creditor terms – either informal or on basis of the terms and conditions of the creditor's loan agreement, the power imbalance maintained. | +<br>Could encourage more use of mediation but would not be consistent across all lenders. Would have limitations in addressing power imbalance. | ++<br>Would provide consistent and equitable process for all secured lenders. Can help address power imbalance if scheme is carefully designed. | ++<br>Would improve consistency in relation to banks but would not be consistent or equitable across all lenders. |
| Timely means of resolving debt issues | O<br>Unknown, likely determined by creditor. | +<br>Where mediation is used this could improve timeliness, but would not be consistent across all lenders. | ++<br>Would meet this criterion as mediation would be time-bound, but would also allow for fully exploring options. | +<br>Would meet this criterion, but only for banks. Non-bank lenders could disrupt the debt resolution process by taking enforcement action. |
| Provides certainty for all parties | O<br>Unlikely unless both parties commit to process and implement outcomes agreed at start of process. | +<br>Could provide improved certainty where mediation used but process would not be consistent across all lenders. | ++<br>Would provide certainty through a consistent structured process. | +<br>Would meet this criterion, but only for bank lending. Non-bank lenders could disrupt the debt resolution process by taking enforcement action. |
| **Overall assessment** | O | +<br>Would be an improvement on status quo but would have fewest benefits of all options. Most stakeholders did not support this option. | ++<br>Meets all of the criteria. | +<br>Would be an improvement on the status quo, and meets the criteria in relation to banks. If non-bank lenders are not involved, there is potential for them to disrupt the debt resolution process. Most stakeholders did not support this option. |

**Key:**

| | | | | | |
|---|---|---|---|---|---|
| ++ | much better than the status quo | + | better than the status quo | O | about the same as the status quo |
| - | worse than the status quo | - - | much worse than the status quo | | |

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## 4.2 Design options for a statutory Farm Debt Mediation Scheme

The design of the statutory Farm Debt Mediation Scheme needs to reflect the New Zealand farming environment and regulatory context, in particular needs include the key features:

- The farming activities that should be covered Bill;
- The type of assets that should be covered;
- The criteria for triggering mediation; and
- The rules for the conduct of mediation.

**The farming activities that should be covered by the Farm Debt Mediation Scheme**

The following criteria have been identified for determining what kinds of farm or farmer the scheme should apply to:

- Criterion 1: The level of vulnerability to business down-turns as a result of susceptibility to conditions outside the farmer's control (e.g. adverse weather and climate fluctuations, biosecurity incursions or volatile global market conditions);
- Criterion 2: The extent to which the form of farming means that the farmer lives on the farm or the location of the home is integral to the business;
- Criterion 3: The potential for mental wellbeing, animal welfare or environmental issues as a result of financial stress; and
- Criterion 4: A significant imbalance in negotiating power between the borrower and lender.

| Farming Activity | Criteria | | | |
|---|---|---|---|---|
| | Vulnerability to down turns | Home is integral | Animal and human wellbeing | Significant imbalance in power |
| Agriculture (including sharemilking) | + | + | + | + for businesses that are family-owned and operated |
| Horticulture | + | + | + | + for businesses that are family-owned and operated |
| Aquaculture | + | + for owner-operated businesses, the family home is often located in remote locations that are close to | + | + for businesses that are family-owned and operated |

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| | | | | |
|---|---|---|---|---|
| | | boat access to designated aquaculture areas | | |
| Forestry | - | - | - | - |
| Wild harvest fishing | -<br><br>less susceptible to the risks associated with criterion 1 | - | - | +<br><br>for businesses that are family-owned and operated |

+ meets criteria - does not met criteria

In addition, we recommend:

- including any activity involving primary production carried out in connection with any of the included activities. This will avoid the risk that a farming business is excluded because it also undertakes secondary activities, such as having a plant nursery as part of an orchard;
- including a business where two or more of the included farming activities will, taken together, meet a "primarily involved" test; for example, a farm that is 40 percent dairy, 40 percent horticulture, and 20 percent plant nursery; and
- excluding lifestyle farms because they are not intended to be operated as true commercial businesses that provide a primary household income.

In future it might be appropriate to include forestry within the FDM scheme if increasing numbers of family-owned farms become more heavily engaged in forestry over coming decades, as the government introduces pro-afforestation policies to contribute to meeting New Zealand's obligations under the Paris Agreement on Climate Change and the Climate Change Bill.

*Corporate farming*

During consultation the Provided under Confidence both stated that larger businesses such as corporate farms with multiple holdings should be excluded because they could be presumed to be able to engage with their lender without the support of the statutory regime. Larger agricultural businesses are also less likely to be the family home of their owner. We do not agree with this argument for the following reasons:

- while larger businesses can be expected to be able to engage with their lenders without the support of a FDM regime, officials are not aware of any significant risks in allowing them to also use the regime. Officials also note the difficulties that could arise in trying to define who would be 'in' and who would be 'out'. The NSW Act places no cap on the size of businesses which may use it and relevant parties in NSW cited no issues as a result; and
- a number of iwi and hapū operate large farm businesses. Any meaningful exclusion for larger businesses is therefore likely to inadvertently exclude some iwi-owned businesses. This could be perceived to be discriminating against those businesses on the basis that their owners hold their assets collectively rather than individually. The

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Government could also be open to criticism on the basis that the Crown, through the treaty settlement process, has been a major contributor to the collective ownership of assets by iwi and hapū.

**The type of assets that should be covered by the Bill**

We propose that this regime should only apply in relation to loans which are, in substance, secured by assets that are an integral part of the farming operation. Under this approach, the following assets will be included:

- farmland (including buildings);
- farm machinery and plant (such as, vehicles or machines commonly used for farming operation purposes, for example, tractors, milking equipment and irrigation systems);
- livestock (so that share-milking arrangements will be brought within the regime); and
- harvested crops and wool (such as, picked fruit, crops held in silos, hay and silage, and shorn wool stored on farm).

This will exclude assets that do not form part of the core farming business (such as recreational vehicles). The FDM scheme should be used in respect of ordinary consumer debt.

**The criteria for triggering mediation**

The FDM regime should, among other things, promote farm business turnaround where possible. We consider that the regime should be triggered where a farmer is in default and a lender intends to take any form of enforcement action in relation to debt secured over farmland or an asset that is an integral part of a farming operation.

We also consider that the objectives of the Bill would be better promoted if farmers are able to initiate mediation, without needing to meet any statutory criteria other than having debt secured over the farm business. It is important to encourage farmers to seek mediation early, before defaulting on a loan. The experience in NSW and elsewhere has been that when mediation occurs early, farmers are likely to be in a stronger position to mediate at a time when their emotional stress is lower, and business equity remains intact.

The final report of the Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (February 2019) recommended "*that lenders should offer farm debt mediation as soon as the loan is classified as distressed. If used in conjunction with rural financial counselling services, early farm debt mediation should allow wider and better choices for the lender and borrower about servicing, and ultimately repaying, the loan.*"[44]

**The rules for mediation**

Mediators must have the flexibility to facilitate a mutually acceptable process and agreement. The Bill does set out key procedural rules such as a method for appointing mediators, development of procedure agreement, and the time within which mediation should take

[44] https://financialservices.royalcommission.gov.au/Pages/reports.aspx#final



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place, to ensure that the FDM regime is fully effective. These rules are the same as or similar to the rules that apply under the NSW Act, adapted as appropriate.

The Administering Agency and Approved Mediation Organisations will provide further guidance on what needs to be included in procedure agreements and conduct of mediations. See section 6.1 for further information on oversight of mediators.

**Prohibition and enforcement certificates**

Prohibition and enforcement certificates are an integral part of the scheme. In the absence of a mediation agreement, parties can apply to the Administering Agency to make a determination on whether enforcement action can proceed or not.

- Farmers can apply for a **Prohibition Certificate** which, if issued, has the effect of suspending any enforcement action for that debt for six months.

  A Prohibition Certificate is issued when the creditor has declined to mediate or there is evidence the creditor **has not** acted in good faith during the mediation process.
- Creditors can apply for an **Enforcement Certificate** which allows the creditor to proceed with enforcement actions related to the debt. The certificate has a duration of three years from the date of mediation concluding. The farmer will not be able to initiate further mediation processes in relation to that debt during this period and the creditor will be able to take enforcement action in relation to farm debt, as set out in the financial agreement.

  An Enforcement Certificate is issued when the farmer has declined to mediate or there is evidence the creditor **has** acted in good faith during the mediation process.

- Either party can apply within 10 days for an administrative review of the determination by the Chief Executive of the government department responsible for administering the scheme, during which time there is a further stay on enforcement actions.

The certificate system is based on the NSW schemes, where it has been a critical factor in the success of that scheme for the following reasons:

- it preserves the independence of the mediators, as mediators have the discretion to call an end to a mediation process if they believe that one or both parties are not acting in good faith. This is not a typical function for mediators and there is a risk that it could compromise their perceived independence. To address this risk, the NSW Rural Assistance Authority determines whether mediation has been completed satisfactorily, based on a summary of mediation provided by the mediator and any further submissions made by either party; and
- it provides a clear process for situations where mediation is not completed and/or agreements are not reached. Parties can submit their views on application of either prohibition or exemption certificates prior to them being issued.

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## Section 5: Conclusions

**5.1 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?**

The preferred option is a statutory farm debt mediation scheme that applies to all lenders.

While the problem appears to be small-scale, and there is not a pressing case for taking action, a compulsory farm debt mediation scheme that applies to all lenders would provide benefits for farmers and, to a lesser extent, lenders. It would provide a consistent and structured process to enable options for farm businesses that are struggling financially to be fully explored, and would provide for a 'dignified exit' for farmers with unviable businesses. It could also help address the power imbalance between farmers and lenders. Risks are not significant and can be addressed through careful design of the scheme.

A compulsory scheme would be expected to have the greatest benefits. The preferred option meets the assessment criteria because it would be applied across all lenders and would therefore provide a consistent and equitable process and would provide certainty for both lenders and farmers. It would also provide a timely means of resolving debt issues that allows all options to be fully explored. Because the other options do not apply to all lenders, there is the potential for the process to be disrupted by a lender who was not part of the debt resolution process taking enforcement action. While it is a more expensive option than the status quo or a formalised voluntary scheme, it would still be low cost to implement and administer.

Stakeholders from the farming and lending sectors generally support a compulsory farm debt mediation scheme. Most stakeholders consider that farming businesses face some unique challenges that mean that farming should be treated differently from other businesses, such as emotional attachment to land, vulnerability to uncontrollable events and high levels of debt in the sector.

Only one stakeholder was opposed to a compulsory farm debt mediation scheme, because they felt that it would not address the power imbalance between farmers and lenders. Evidence from overseas indicates that mediation schemes can address power imbalances but need to be carefully designed to do so. Providing financial advice and support to farmers to ensure they are adequately prepared for mediation is critical to addressing power imbalances.

Two other stakeholders considered that a farm debt mediation scheme should be applied more widely – Ministers have determined that the scope of the work would be limited to the farming sector.

Evidence on the scale and nature of the problem in New Zealand is limited but this has been supplemented by anecdotal evidence from a wide range of stakeholders. There are also a number of evaluations of farm debt mediation schemes overseas which are positive about the benefits of farm debt mediation schemes. Conversations with stakeholders in NSW provided valuable insights into this.

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## 5.2 Summary table of costs and benefits of the preferred approach

| **Affected parties** *(identify)* | **Comment**: *nature of cost or benefit (eg ongoing, one-off), evidence and assumption (eg compliance rates), risks* | **Impact** *$m present value, for monetised impacts; high, medium or low for non-monetised impacts* | **Evidence certainty** *(High, medium or low)* |
|---|---|---|---|
| **Additional costs of proposed approach, compared to taking no action** | | | |
| Lenders and farmers | The costs of mediation will be shared equally between parties, unless both parties agree to alternative arrangements reached in the mediation process. Individual mediations are estimated to cost an average of $6000 ($3000 for each party) based on 20 hours at $300 per hour[45]. This will vary depending on the complexity of the case. Individual lenders are unlikely to be involved in large numbers of mediations – we estimate there would be a maximum of 20 per annum for an individual lender. For most lenders this would be significantly less. As some lenders already provide mediation on a voluntary basis, this may be a substitute cost for some lenders.<br>This may also be a substitute cost for farmers as a prolonged debt resolution process could lead to increased losses.<br>There is no data available on how many mediations currently take place so it is not possible to calculate the marginal cost. | Average $3000 per mediation per party.<br>An estimated maximum cost of $60,000 for an individual lender (20 mediations per annum).<br>For most lenders this cost would be significantly lower. | Medium |
| Lenders | Lenders will be required to delay enforcement action until mediation has taken place. Whether this creates an additional cost for lenders will vary depending on circumstances. In many cases, mediation could enable a more timely resolution to debt issues. | Low | Low |
| Farmers | Farmers will need to prepare adequately for mediation – this might involve obtaining financial advice and | Low, but is difficult to determine more specifically as will vary | Low |

[45] These costs are based on data provided by the New South Wales Farm Debt Mediation scheme

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| | drawing up farm plans. Farmers may also require wider support and counselling.<br><br>Banks may look to pass costs onto farmers. | depending on each individual farmer's situation. Feedback from farmer bodies indicate that farmers would be able to resource this.<br><br>The Bill specifically addresses this in relation to the debt subject to the mediation process, but it is possible that fees on future loans to the farmer may reflect previous costs. | <br><br>Low |
| Regulators | The government will bear the costs of administering the regime. These are estimated to be low provided the scheme is administered by an existing body – in NSW the scheme is administered by 1 FTE.<br>There will be an implementation set up cost including publicising the scheme, IT systems – again assuming the scheme is to be administered by an existing body. Costs will depend on the final design of the scheme. | $250-300,000 per annum for administering the scheme if administered by an existing body.<br>$350,000 to set up a scheme, subject to details of final design.<br>This will be absorbed in MPI's existing baseline. | Medium |
| Wider government | N/A | | |
| Other parties | N/A | | |
| **Total Monetised Cost** | Does not include costs for farmers and lenders as it is not possible to calculate the marginal costs – these will vary depending on individual circumstances. | Regulators:<br>$250-300,000 per annum<br>$350,000 for implementation | Medium |
| **Non-monetised costs** | | Low | Medium |

| **Expected benefits of proposed approach, compared to taking no action** | | | |
|---|---|---|---|
| Farmers | Farmers will be provided with a structured and timely process for exploring available options to resolve debt issues with lenders. In some cases, earlier intervention may lead to turning around a failing business, while in others it may provide a means for a 'dignified exit'. It is not possible to quantify these benefits as they will vary depending on individual circumstances. | Medium | Medium |

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|---|---|---|---|
| Lenders | Lenders would benefit from a structured and timely process for resolving debt issues. The benefits are likely to be greatest for bank lenders which already invest significant time and resources in debt resolution, and have the greatest concern for their reputations. The benefits are likely to be less for the non-bank sector. This sector represents a very small proportion of overall farm lending. It is not possible to quantify these benefits as they will vary between individual lenders and cases. | Low | Medium |
| Regulators | N/A | | |
| Wider government | N/A | | |
| **Total Monetised Benefit** | It is not possible to quantify these benefits as they will vary between individual lenders and cases. | | |
| **Non-monetised benefits** | More timely debt resolution, consistent and equitable process, certainty for all parties. | Medium | Medium |

### 5.3 What other impacts is this approach likely to have?

### 5.4 Is the preferred option compatible with the Government's 'Expectations for the design of regulatory systems'?

No significant incompatibility with the Government's 'Expectations for the design of regulatory systems' has been identified. In particular we consider the proposed Farm Debt Mediation Scheme:

- is the least cost option for obtaining the government's' objectives;
- will have minimal adverse impacts;
- has the support of the regulated parties; and
- has significant potential to deliver material benefits to the regulated parties.

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# Section 6: Implementation and operation

## 6.1 How will the new arrangements work in practice?

*Cabinet policy decisions*

Cabinet agreed on 5 December 2018 to establish a statutory Farm Debt Mediation scheme in New Zealand, based on the New South Wales Farm Debt Mediation Act 1994. The scheme will require secured creditors to farm businesses to offer statutory mediation before taking any enforcement action in relation to debt held over a farm business. It will also allow for farmers to initiate statutory mediation with a secured creditor[46]. There is no obligation on either party to participate in mediation.

The Ministers of Agriculture and of Commerce and Consumer Affairs obtained Cabinet approval for officials to work with the Parliamentary Counsel Office to draft a Farm Debt Mediation Bill and undertake a targeted consultation on an exposure draft of the Bill with key stakeholders.

*Engagement with stakeholders on the draft Farm Debt Mediation Bill*

MPI and MBIE consulted with NZBA, RITANZ, Federated Farmers, Minters and Anderson Lloyd (the last two being legal firms with extensive experience in farm debt mediation/ negotiations) on the draft Farm Debt Mediation Bill.

The purpose of the engagement was to test whether the Bill was fit for purpose, i.e. delivered on the decisions made by Cabinet and addressed the concerns stakeholders had with the earlier Members Bill.

Feedback was supportive of the Bill as drafted, in particular noting that how it largely reflected issues they had raised with the Members Bill (e.g. extending to all enforcement action, modelling the Bill on the NSW legislation, acting in good faith as central to the scheme). There were also a number of technical and lower level policy improvements identified which were incorporated as much as possible.

In addition to the engagement on the draft Bill, MPI and MBIE consulted with a wider range of stakeholders between October 2018 and April 2019 on the scheme design and options for administration of the scheme. Stakeholders included farmers, RITANZ, Federated Farmers, NZBA, Banking Ombudsman Scheme, AMINZ, Financial Services Federation, FOMA, and Rural Support Trust.
Officials also visited NSW and talked to a number of stakeholders there about how the NSW scheme operates and its effectiveness. This provided valuable insights into the design and implementation of the scheme. The NSW Rural Assistance Authority has also provided valuable advice and support throughout the period of drafting the Bill and finalising scheme design.

The consultation and engagement on the draft Bill between December 2018 and May 2019 have resulted in a number of improvements to scheme design which require Cabinet's consideration or re-consideration. The rationale for these are summarised in Appendix Two. Appendix Three sets out the secondary policy and technical decisions made by the Minister

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of Agriculture and Minister of Commerce under delegation from Cabinet.

How the key issues raised at Select Committee and subsequent feedback from stakeholder consultation, and the engagement on the draft Government Bill, have been addressed in the Farm Debt Mediation Bill are set out Appendix Three.

**Design of a statutory Farm Debt Mediation scheme**

*Regulatory framework*

Part 1 of the Bill sets out the preliminary provisions, including key definitions relating to farm property and eligible farm debt.

Part 2 relates to the operation of the farm debt mediation scheme and covers:

- the restrictions on the enforcement of farm debt;
- the mediation process;
- matters relating to the mediation agreement; and
- processes for applying and issuing enforcement and prohibition certificates, their duration, and the effect on the relevant farm debt.

Part 3 sets out general provisions relating to mediators, administrative review of decisions, the effect of the Bill on contrary provisions in a loan agreement, regulation-making power, and the issuing of notices under the Bill.

*Efficient operation of the scheme*

Prohibition and enforcement certificates are an integral part of the scheme because they preserve the independence of the mediators and provide a clear process where mediation is not completed and/or agreements are not reached. A certificate system requires an independent body to administer certificates and, at times, make judgements. See figure x below for further detail on how the scheme would operate.

**Options for the administration of the Farm Debt Mediation scheme**

It is proposed that the Ministry for Primary Industries will be responsible for administering the legislation and implementing the Farm Mediation Scheme.

The use of the FDM scheme is likely to be small scale, with low numbers of mediations carried out annually. As such, the administration of the scheme needs to be proportionate to the anticipated workload. This level of demand is not considered to be large enough to justify either a stand-alone administrative body or setting up a complex system for training and accrediting mediators.

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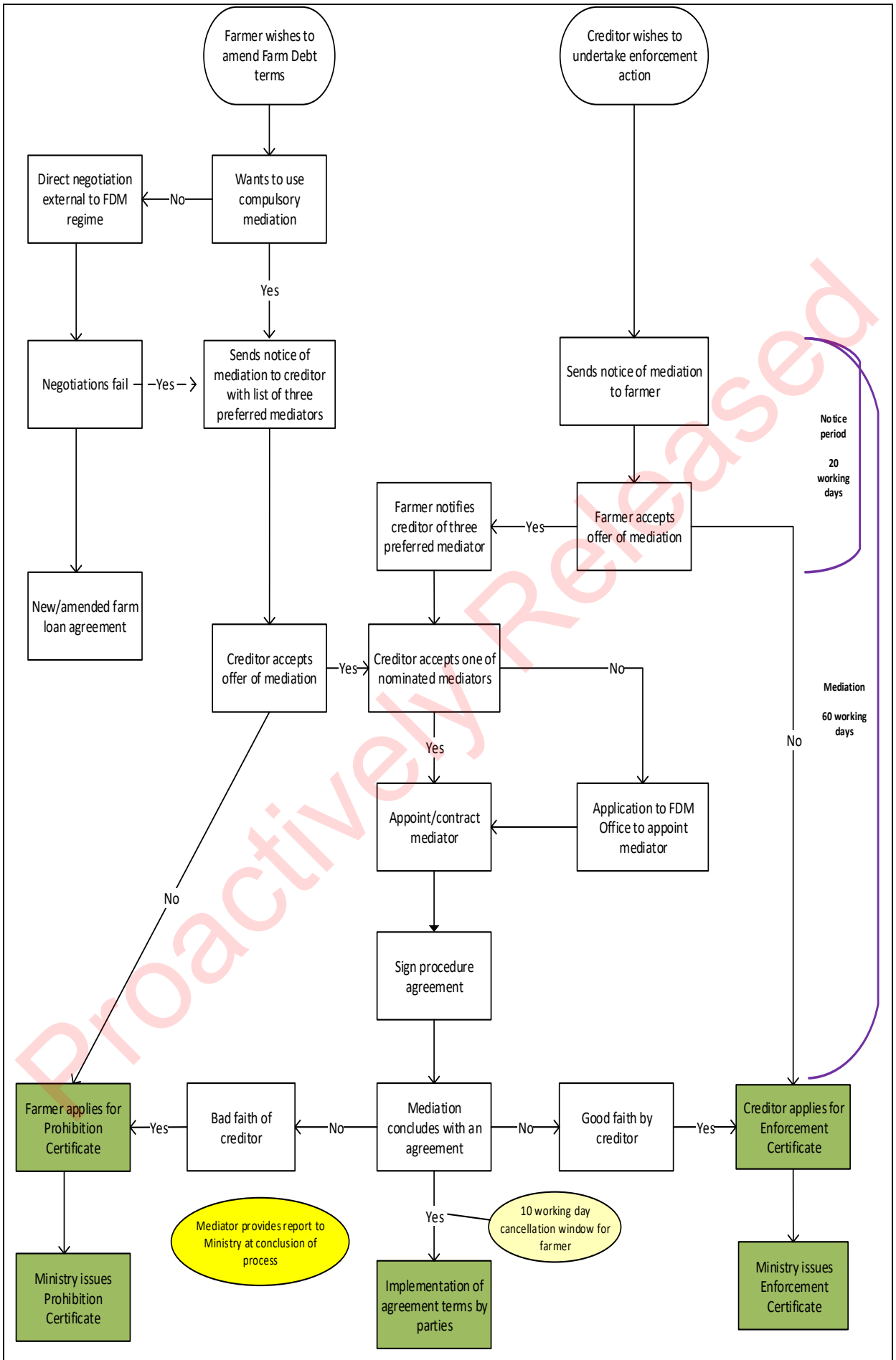



**Figure 4 Farm Debt Mediation Scheme**

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It is proposed that an Office of Farm Debt Mediation is established within MPI. MPI is considered the most appropriate agency because, on balance, the scheme fits with its primary sector and rural affairs responsibilities. Other agencies considered included MBIE, Office of the Banking Ombudsman (as proposed in the Private Member's Bill), Ministry of Justice, a new standalone agency and contracting out to an established mediation organisation.

The key criteria for assessing the options were:

- strategic fit with organisational mission and purpose;
- institutional and personnel capability to deliver;
- structural fit within organisation; and
- links to/relationships with relevant support services.

| Criteria | MPI | MBIE | Banking Ombudsman scheme (BOS) |
|---|---|---|---|
| Strategic fit | Subject matter 'fit' with farming, & expertise in farming sector<br>Rural affairs portfolio | Subject matter 'fit' with dispute resolution and also with consumer protection and financial markets | Expertise in banking sector and dealing with disputes (including in farming sector)<br>Confidentiality<br>• include claims for direct losses limited to $200k<br>Confidentiality |
| Capability | Organisational infrastructure & capability to support administration of scheme<br>No expertise in running mediation schemes<br>No expertise or networks in financial sector | Organisational infrastructure & capability to support administration of scheme<br>Expertise in dispute resolution & running mediation schemes<br>Confidentiality | Confidentiality |

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| | | | |
|---|---|---|---|
| Structural fit | Rural communities and support directorate | Confidentiality | |
| Link to other support | Existing networks and relationships with farming sector:<br>• Rural trusts<br>• Farm business planning<br>• Agricultural services<br>• Industry organisations<br>Lack of links to financial support | Confidentiality<br>Links to banking, commercial mediation and dispute resolution organisations | Confidentiality<br>Links to banking |
| Other matters | | | Confidentiality<br>Would not be able to administer legislation |

Although the Ministry of Justice was considered to have the organisational infrastructure and capability to support administration of scheme, it has no expertise in farming, no existing networks and relationships with farming sector and would not be able to administer the legislation.

The anticipated small scale of the scheme would not justify establishment of a new entity, while contracting a third party with mediation expertise (e.g. Confidentiality ) raises a number of issues which would have an impact on the effectiveness and cost of the scheme for participants (especially farmers). These include:

- Elevating the risk of market capture by one organisation over existing competitors.
- Stakeholders have raised concerns that none of the individual mediation/dispute resolution organisations on their own have enough representation in all parts of New Zealand to enable ready access to appropriately qualified and competent mediators.
- Mediators would be required to be accredited with the contracted organisation, creating additional costs for those already accredited to other organisations.
- A government agency would still need to be appointed to administer the legislation and oversee the contract (including monitoring and reporting) with additional associated costs.

**Office of Farm Debt Mediation (OFDM)**

The Office of Farm Debt Mediation will have five core functions/ responsibilities:

- efficient operation of the scheme (e.g. setting rules, issuing certificates);
- oversight of mediators;
- ensuring farmers have ready access to appropriate financial, business planning support;
- raising and maintaining awareness of the scheme; and

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- monitoring, evaluating and reporting on the effectiveness of the scheme, with a view to continuous improvement in the schemes performance.

The use of the FDM scheme is likely to be small scale with low numbers of mediations carried out annually. As such, the administration of the scheme needs to be proportionate to the anticipated workload.

It won't be large enough to justify either a stand-alone administrative body or setting up a complex system for training and accrediting mediators.

**Oversight of mediators**

There needs to be a system to ensure mediators are appropriately qualified and experienced and meet appropriate standards. In Australia, the National Mediation Accreditation Standards (NMAS) set a minimum standard for mediators to become accredited to deliver mediation services. There is no similar system in New Zealand.

It is proposed that the Ministry has the power to approve mediation organisations (AMO) who would be responsible for oversight of authorised farm debt mediators. AMOs would be required to meet certain standards and criteria, which will be set by the Chief Executive of the Ministry. These criteria are likely to include:

- a formal membership/accreditation process which ensures mediators have met minimum qualifications, training and experience in mediation;
- a public list of mediators;
- sound organisational governance arrangements;
- performance monitoring and review mechanisms;
- continuous professional development programmes for mediators; and
- other criteria as set by notice from the administering Ministry.

AMO would then authorise farm debt mediators, where they are qualified and competent to act in this area of expertise. This determination will be made on the basis of criteria set by the Ministry. AMO would be required to maintain a publically available list of authorised farm debt mediators. The Ministry will be required to maintain a publically available up to date list of all approved mediation organisations.

There are at least two professional associations (AMINZ and the Resolution Institute) and one company (Fairways) already operating in New Zealand who have the capability and capacity to become AMO. Enabling more than one organisation to become an AMO will help ensure competitive fee setting, avoid one organisation obtaining a commercial advantage in a relatively small market, and maximise availability of mediators in all areas of rural New Zealand.

**Farmer support – financial education and counselling**

It is not proposed that the Office of Farm Debt Mediation (OFDM) will provide direct financial and management advisory services to farmers in financial difficulty who are about to enter or are in mediation. There are a large number of government, non-government, and professional advisory services already available in this area.

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**Office of Farm Debt Mediation**

**Oversight of Approved Mediation Organisations (AMO)**

- Set criteria and application process for becoming an AMO
- Assess applications/approve
- Publish list of AMO
- Monitor and manage AMO performance
- Publish suspension and revocation policy and procedures
- Set competency and qualification requirements for mediators
- Establish administrative review process for approval/revocation of AMO

**Farmer support**

- Identify and publish information on organisations that provide business planning and financial support
- Raise awareness and support of industry organisations for the FDM
- Ensure financial literacy and awareness is incorporated into farm business planning initiatives (government and non-government)
- Work with industry bodies and rural support organisations

**Mediation Mechanism**

- Set notification requirements
- Publish minimum requirements and sample template for Mediator Report
- Issue Certificates
- Publish guidance on 'good faith'
- Establish (and implement) administrative review process for issue of Certificates

**Communications**

- Establish and regularly website
- Articles placed regularly in industry organisation, banking publications and email communications
- Advertising in local print media
- Engagement with stakeholder organisations
- Distribution of reports to industry organisations, financial organisations, rural support organisations, MPI, etc to inform

**Accountability**

Establish and maintain a monitoring regime

- Monitoring against objectives of farm debt mediation (likely qualitative)
- Administrative data (geography, farm type, type of debt, current economic conditions/sector etc.)
- Record outcomes of mediation (agreement, enforcement, prohibition)
- Effectiveness of mediation process/scheme (e.g. exit survey)

Evaluation and reporting

- Establish indicative baseline as much as practical using Year 0 data
- Annual reporting against baseline
- Three yearly evaluation of effectiveness of scheme
- Update information/support materials on basis of information

**Figure 5 Farm Debt Mediation Scheme**

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The OFDM will therefore focus on ensuring that information on how to access these services is readily available and up to date and, in particular:

- identifying and publishing information on organisations that provide business planning and financial support for farmers;
- raising awareness and support of industry organisations for the Farm Debt Mediation Scheme;
- promoting incorporation of financial literacy and awareness into farm business planning initiatives (government and non-government); and
- ensuring information obtained through its monitoring and evaluation programme informs the advice provided by government and non-government farm advisory services.

## 6.2 What are the implementation risks?

Based on anecdotal evidence, we estimate that the numbers of compulsory farm debt mediations in New Zealand are likely to be low even in the event of a downturn, with around 50-100 mediations per annum. Experience of compulsory farm debt mediation schemes overseas suggests that there are not likely to be any significant risks.

Implementation risks include:

- lenders may not mediate in good faith and may initiate enforcement earlier because of the requirement to mediate;
- farmers may not mediate in good faith;
- the power imbalance between farmers and lenders may not be adequately addressed;
- farmers may choose to opt out of mediation; and
- farmers may not choose to trigger mediation, thus losing the opportunity to take early action while options to save the business are still available.

We would seek to mitigate these risks through the design and implementation of the scheme – for example through ensuring the appropriate incentives are in place for lenders and farmers to mediate in good faith, putting support in place to address the power imbalance, and working with industry and support networks to raise awareness of the scheme and encourage farmers to take action early to resolve debt issues.

Risks would be monitored once the scheme was implemented.

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# Section 7: Monitoring, evaluation and review

## 7.1 How will the impact of the new arrangements be monitored?

**Monitoring against objectives of farm debt mediation**

There are two objectives for the scheme as set out in the December 2018 Cabinet paper:

- to provide the opportunity for farmers and secured creditors to meet and discuss options to turn around financially stressed farm businesses in a timely manner; and
- to provide a means for farmers to exit with dignity and options where the business is no longer viable.

It should be noted that the objectives are not to stop farms going into receivership, but to ensure that all options are explored, to enable farmers to exit with dignity where a business is no longer viable, and for debt resolution to occur in a timely way. It may be difficult to objectively measure some of these, for example, whether a farmer was able to 'exit with dignity' as this is likely to be subject to the perceptions of the farmer and others involved in the process. Different parties may have widely diverging views of the same mediation process. That said, the outcome of mediation is still important as it can provide some insight into whether objectives were being met. An increase in receiverships would be a matter for concern, for example, and could indicate that options were not being fully explored.

Analysis, however, will need to factor in that farmers may still be dissatisfied with the outcome because they entered into the mediation with unrealistic expectations (as was found to be the case in NSW).

**Monitoring effective and efficient operation of the scheme**

As well as monitoring whether objectives are being met, monitoring needs to ensure that the scheme is operating efficiently and effectively, and to identify where improvements can be made. In particular information collected will need to support evaluation of and regular reporting on whether the scheme:

- is cost effective;
- provides a consistent and equitable process that addresses the power imbalance between lenders and farmers;
- provide a timely means of resolving debt issues that allows options to be explored,; and
- provides certainty for all parties.

*Monitoring the impact on secondary lenders and availability of credit*

It is important that the impact the scheme has on secondary lending in the farming sector is monitored. At present there is a significant absence of information on the size and scale of farm debt held by secondary lenders. The Financial Services Federation and Financial Services Complaints Limited (the industry bodies for the secondary lenders) have also raised reservations that the costs of the scheme will outweigh the benefits, given the size and nature of secondary loans.

Particular attention will need to be paid to:

- developing a baseline of secondary farm debt – amounts, overall size, items;

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- the number and outcome of mediations;
- fees, interest rates, conditions and availability of secondary credit (e.g. to determine if the administrative and financial costs of servicing farm debt mediation results in increased costs of, or barriers to, secondary credit for farmers; and
- the relationship between FDM and other dispute resolution schemes.

**Data that could be collected for monitoring and evaluation**

*Administrative data that could be collected*

- Who initiated mediation – farmer or creditor?
- Type of creditor/financial arrangement (e.g. bank, secondary, hire purchase)
- Geographical location and type of farm, farmer demographics
- Timeframes for processing the various stages
- Number of exemption and prohibition certificates issued and why (i.e. refusal to mediate, because satisfactory mediation has taken place, breach of agreement, farmer has changed mind after cooling off period etc.)
- Number of mediations initiated
- Numbers of mediations judged to be satisfactory
- Numbers of mediations judged to be unsatisfactory
- Numbers of mediations where agreement reached/no agreement reached
- Number of requests for administering authority to review its decisions re certificates
- Costs of running the scheme
- Complaints

*Outcomes of mediation*

This could be provided by the mediator (the legislation should specify that confidentiality requirements do not apply to providing anonymised data for research and monitoring purposes).

Only high-level outcomes would be needed e.g. exit from business, debts restructured, debts forgiven.

*Exit surveys*

Exit surveys from participants (and possibly also their representatives) could provide an indication of satisfaction and the perceived value of the mediation process for participants. It could also provide a means of monitoring how well the scheme is running (such as administration arrangements, quality of mediators, financial literacy etc.) and what improvements could be made.

*Baseline data*

There is currently a lack of baseline data. Engagement with stakeholders has provided a qualitative sense of what the current situation is but there is no available data on, for example, how many mediations currently taking place, how many farms go into receivership, how often farmers sell assets in order to pay off debts etc.

RBNZ regularly surveys banks and it may be possible to include questions relating to farm debt. This would not encompass secondary lenders but the Financial Services Federation will be approached to survey their members. Federated Farmers will also be asked to include additional questions to support establishing baseline information in their next bi-

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annual banking survey.

Specific questions to obtain data for a baseline will be developed in consultation with these organisations but might include questions on:

- How many mediations take place currently with secured lenders – there may be definitional issues (for example was the mediator fully independent?);
- The outcomes of debt resolution – for example receiverships, debt restructuring, exits;
- Timeliness – for example the average length of time that centralised debt management teams manage debt cases; and
  Whether farmers had the time and opportunity to consider options – although this would be a subjective judgement.

There may still be some problems with obtaining some of this information, for example banks might be reluctant to provide detail, and it is also likely to be difficult to reach farmers who had been through debt resolution, particularly those who have exited from farming.

**Evaluation/review**

A more in-depth study would need to be undertaken to understand whether the scheme was meeting its objectives and is cost effective, consistent and equitable, delivering timely resolution of debt issues while exploring all options, and creating certainty for all parties.

A number of evaluations of farm debt mediation schemes have been carried out in overseas jurisdictions. Most of these have drawn on administrative data and surveys of participants – usually farmers, creditors and mediators. Others have also used in-depth interviews with stakeholders (for example those administering the scheme, representative bodies) and others. A potential limitation of using surveys for a New Zealand scheme might be that if uptake of the scheme is relatively low (less than 50/year for example) it may be difficult to get enough survey returns for a valid result. Likewise, the number of agricultural lenders is also likely to be quite low. Alternative methods such as in-depth interviews may be more useful, but these would not provide quantitative data.

Questions that could be explored in an evaluation include:

- the perspectives of different parties on the process;
- satisfaction with the mediation process;
- what changed as a result of mediation;
- the outcome of mediation;
- unintended consequences for parties – farmer, banks, secondary lenders;
- fairness of the process, and perceptions of power imbalances (including differences between banks and secondary lenders);
- levels of awareness of farm debt mediation;
- what could be improved about the scheme; and
- trends over time.

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### 7.2 When and how will the new arrangements be reviewed?

It is proposed that the Chief Executive of the Ministry will commission an independent review of the scheme within three to five years of the scheme being established.

The review should evaluate the implementation and performance of the Farm Debt Mediation scheme against its intended objectives and identify potential improvements to ensure the intended scheme benefits can be better realised. The review should particularly consider:

- impact against overall policy objectives;
- identification and analysis of any unanticipated impacts, constraints, or emerging risks;
- the scheme's value for money – for participants and government; and
- options for improvement.

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## Appendix One Case study of farm debt mediation from Victoria

**The situation:** A family farm had got into substantial debt with their lender. Following the procedures outlined in the *Farm Debt Mediation Act 2011* the lender (creditor) wrote to the farmers requesting mediation over the farm debt. The farmers agreed.

**The process:** The matter was then referred to the VSBC by the Department of Economic Development, Jobs, Transport and Resources (this is where farm debt matters commence, and they are then referred to the VSBC once a farmer has agreed to mediate with the creditor).

The VSBC dispute resolution officer looking after the file attempted to get the parties to mediation. This proved somewhat difficult as the farmers, in addition to experiencing difficulties with the lender, were in the process of divorcing, and were waiting on a decision from the Family Court regarding division of their marital assets.

Although understanding of the farmers' predicament, the lender wanted to undergo mediation as soon as possible as the farmers' debts were significant. The VSBC dispute resolution officer managed to arrange mediation for a date after the Family Court decision was handed down, which allowed both the lender and the farmers (whose property settlement had now been determined) to have a clearer picture of how they could come to some resolution at mediation.

**The resolution:** A complicated and difficult mediation was held between the lender and the divorced couple (who were represented by different lawyers). After much discussion it was agreed that the farmers would both sell property in order to cover the outstanding debts.

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**Appendix Two** **Farm Debt Mediation – Summary of Cabinet decisions required**

| Clause | Cabinet Decision required | Rationale |
|---|---|---|
| **Matters for Cabinet re-consideration** | | |
| Clause 16<br>Mediator appointment | Removed the first step of farmer nominating one mediator (which if the creditor refuses then requires farmer to identify panel or three for creditor to select from).<br>Creditor to select one mediator from a panel of three nominated by farmer<br>Administering agency no longer to maintain register of accredited mediators (maintains list of approved mediation organisations). | • Simplified process which removes the first step that adds time and potentially angst to process. Principle of farmer nominated maintained. Stakeholder suggested/supported.<br>• Change to reflect different approach to management of mediators (see Part 3). |
| Clause 41<br>Conflicts of interest | Allowing for parties to mediation to agree to retain a mediator who has a real or perceived conflict of interest. | • Cabinet agreed that where mediator had conflict of interest, including perceived conflict of interest, they would withdraw from the mediation. However this is not in line with how conflicts of interests are managed by other mediation schemes. |
| **Further matters to progress system design** | | |
| 4 Interpretation | MPI as administering agency of Farm Debt Mediation Scheme. | |
| Part 3 - Mediators | It is proposed that the MPI has the power to approve mediation organisations (AMO) who would be responsible for oversight of authorised farm debt mediators. AMO would be required to meet certain standards and criteria, which will be set by the Chief Executive of the Ministry. These criteria are likely to include: | • The use of the FDM scheme is likely to be small scale with low numbers of mediations carried out annually. As such, the administration of the scheme needs to be proportionate to the anticipated workload. This level of demand is not considered to be large enough to justify either a stand-alone administrative body or setting up a complex system for training and accrediting mediators. |

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| Clause | Cabinet Decision required | Rationale |
|---|---|---|
| | • formal membership/accreditation process which ensures mediators have met minimum qualifications, training and experience in mediation;<br>• public list of mediators;<br>• sound organisational governance arrangements;<br>• performance monitoring and review mechanisms;<br>• continuous professional development programmes for mediators; and<br>• other criteria as set by notice by the administering Ministry.<br>AMO would then authorise farm debt mediators, where they are qualified and competent to act in this area of expertise. This determination will be made on the basis of criteria set by the Ministry. AMO would be required to maintain a publically available list of authorised farm debt mediators.<br>There are at least two professional associations (AMINZ and the Resolution Institute) and one company (Fairways) already operating in New Zealand who have the capability and capacity to become AMO.<br>The Ministry will be required to maintain an up to date list of all approved mediation organisations. | • Enabling more than one organisation to become an AMO will help ensure competitive fee setting, avoid one organisation obtaining a commercial advantage in a relatively small market, and maximise availability of mediators in all areas of rural New Zealand. |
| Clause 38 Approval of | Provides ability for the Chief Executive of MPI to | |

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| Clause | Cabinet Decision required | Rationale |
|---|---|---|
| mediation organisations | approve mediation organisations (AMO). | |
| Clause 39 Suspension or cancellation of approval | Mechanism for Chief Executive to suspend or cancel approval of an AMO. | |
| Clause 40 Authorisation of mediators | Obligations on AMO to ensure mediators have the appropriate expertise skills and qualification before authorising as Farm Debt Mediators. | |
| Clause 41 Exclusion of liability | As per Cabinet decision 5 in Appendix 2. | |
| Clause 43 Requirements for mediation organisations and mediators | Sets out process for the Chief Executive of MPI to set criteria (as per clause 43) for approving mediation organisations (AMO) and set the qualifications and competency requirements of mediators. | |

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## Appendix Three Farm Debt Mediation – Schedule of second order and technical policy decisions made by Ministers

| Clause | Second order or technical policy decision | Rationale |
|---|---|---|
| N/A | Ensure tikanga principles are provided for in mediation process | • The mechanism provided for mediation is considered to be sufficiently flexible to allow tikanga principles to be incorporated in the mediation process on an individual case by case basis (e.g. time allowed to provide and accept notice, process for developing and agreeing procedure agreements).<br>• Officials have worked with TPK to ensure that the approach for incorporating tikanga in Farm Debt Mediation is consistent with that proposed for mediation in the Māori Land Court.<br>• Guidance material on incorporation of tikanga will be developed by MPI with in collaboration with Māori and TPK. |
| Clause 4<br>Farm debt | Eligibility of farm debt is determined at the point the contract is entered into | • Mixed feedback on this during targeted engagement. However, the benefit of certainty outweighs the potential for inequity where property is either wrongfully in or out. |
| Clause 4<br>Property | Inclusion of licence, consents and permits | • Importance of these forms of property to the operation of farms, in particular aquaculture, and possible use as security for loans. |
| Clause 4<br>Enforcement action | Include notices as part of enforcement action | • Inconsistent to allow notices for enforcement action that would be considered void under the Bill.<br>• Failure to comply with notice requirements under the Property Law Act (year) does not make the enforcement action void. To avoid property being sold without compliance with farm debt need to include issuing of notices as enforcement action. |
| Clause 4<br>Primary production operation | Explicit exclusion of lifestyle blocks as per Cabinet agreement. No explicit exclusion of forestry. | • Cabinet agreed that forestry should be excluded from the farm debt mediation regime at this time, but acknowledged that it may be appropriate to include forestry in the future. Particularly if the Government's pro-afforestation policies led to increasing number of family-owned farms became more |

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| Clause | Second order or technical policy decision | Rationale |
|---|---|---|
| | Ability to add business activity (e.g. forestry) by regulation | involved in forestry in the future.<br>• To ensure the Bill is fit for purpose in a dynamic environment (i.e. to avoid unnecessary complexity and time); any changes will still be subject to Regulations Review Committee oversight. |
| Clause 14<br>Extension | Allowing for an extension of farmer response | • The ability to apply for an extension was introduced to allow for extra time to secure support for the mediation process, for example in instances where there are a number of family members involved or iwi/hāpu owned farms |
| Clause 17<br>Procedure agreement | Requirement for parties to enter into a procedure agreement before commencing mediation | • NSW Act prescribes the procedural approaches. Feedback from stakeholders, especially organisations and government agencies directly involved in mediation, that this is inconsistent with usual professional mediation practise and can limit the flexibility to mediate according to specific circumstances. The Bill provides what may be included in a procedure agreement (based on NSW Act) while administering agency and AMO are expected to provide template examples |
| Clause 18<br>Costs | Provision to allow for parties to enter into different arrangement regarding costs | • In response to significant stakeholder feedback that farmer's ability to access capital could be a major disincentive to participating in the scheme and that parties could make arrangements to share costs without the requirement for farmers to pay upfront. |
| Clause 23<br>Confidentiality | Procedure agreement prevails over confidentiality | • This recognises that both parties may agree to less stringent confidentiality if they *both* agree that this will benefit the mediation process and likelihood of good outcome. Unwillingness to waive elements of effect of Cl23 confidentiality provisions should not be considered as not acting in good faith. |
| Clause 24 | Failure to reach agreement not grounds of bad faith | • There can be a number of valid reasons why an agreement is |

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| Clause | Second order or technical policy decision | Rationale |
|---|---|---|
| Mediation agreement | | not reached even though both parties have engaged constructively in mediation process (e.g. genuine belief by one or both parties that there is valid basis to their position – agree to disagree, family/business partners not in agreement of final outcome despite farmer following best practise). |
| Clause 29<br>Enforcement certificate | Change from 'exemption' to 'enforcement' certificate | • This is to reflect what it actually allows – it lifts the prohibition created by the FDM on enforcement activities legally available to the creditor under the loan agreement. It is not exempting the creditor from anything, just a recognition that FDM process has concluded and enforcement action under the loan agreement can proceed. |
| Clause 31<br>Application | Chief Executive has the ability to request further information from the applicant | • This was based on advice from NSW where the Authority requests further information from some applicants. |
| Clause 34<br>Notice | Requirement to provide notice to the other party when an application for certificate has been made. | • This allows the other party to determine whether they want to review the decision. |
| Clause 35<br>Content | Content of certificate | • Content required for certificate to operate. |
| Clause 52<br>No Contracting out | | • Overrides any provision in a financial agreement which attempts to circumvent the Farm Debt Mediation mechanism. |
| Clause 54<br>Power to make regulations by Order in Council | Regulation making powers relating to specifying a business undertaking for the purposes of the definition of primary production operation, any fees and charges, and other matters necessary for the administration of the Act or for giving it full effect. | • Recognises that situations in which the Farm Debt Mediation regime may change in the future and additional secondary legislation may be needed to clarify or give full effect to intent of the Bill. |

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| Clause | Second order or technical policy decision | Rationale |
|---|---|---|
| **Schedule 1 Transitional, savings and related provisions** | | |
| 1<br>Application of Act | Applies to all debt, whether incurred before or after the commencement of the Act | Is rationale needed here? |
| 2<br>Enforcement actions in progress before act may continue | | • Unrealistic and impractical to suspend enforcement processes that are underway. Potentially may lead to a mini gold rush, but not considered to be major risk as the usual issues around credibility and reputation of creditors that exists now will apply. Some secondary/tertiary lenders may act early to avoid but considered low risk. |

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## Appendix Four History of Farm Debt Mediation Bill development

### *Select committee consideration of Private Member's Bill*

The Primary Production Select Committee received 17 written submissions and heard four oral submissions on the Private Member's Farm Debt Mediation Bill. These included submissions from individual farmers, banks and bank associations, receivers and insolvency practitioners, farmer welfare and farmer industry organisations, and professional mediators and mediation organisations.

All supported a mandatory farm debt mediation scheme with the exception of RITANZ and Kensington Swan (a company specialising in receiverships). Notably ANZ Bank and NZBA supported a mandatory scheme. There was a consistent call for a New Zealand scheme to replicate the Australian mandatory schemes, notably the NSW Farm Debt Mediation Act (1994), as amended.

There was also strong support for the scheme to be enacted through standalone legislation, extended to cover other types of secured farm debt, and capture secondary and tertiary lenders. Good faith was noted by many as fundamental to the operation of the scheme.

Submitters therefore largely made recommendations that focused on ensuring the Bill adequately provided for a farm debt mediation scheme that reflected the nature and specific challenges of farm debt or made recommendations on specific operational matters and procedures.

### *Government Bill*

Many of these points were reiterated/reinforced during subsequent consultation on farm debt mediation by MPI and MBIE with a wide range of interested parties between November 2018 and May 2019; with further feedback provided through targeted engagement in April 2019 on the draft Bill with NZBA, RITANZ, Federated Farmers, Minters and Anderson Lloyd (the last two being legal firms with extensive experience in farm debt mediation/ negotiations).

The table below sets out how the key issues raised at Select Committee have been addressed in the draft Farm Debt Mediation Bill.

| Issue identified with Private Members Bill | Draft Farm Debt Mediation Bill |
|---|---|
| Should be standalone legislation. | Yes. |
| All secured debt should be captured. | Yes. |
| Need for better definition of key terms, e.g. farm debt, farm, agriculture, etc. | Yes. Definitions tightened, brought into line with the NSW legislation and tested in subsequent targeted engagement. |
| Corporate farming operations of a certain size or above should be excluded as would normally have access to similar levels of professional support (accountants, lawyers, etc.) that creditors do. | No. Cabinet considered that excluding larger corporate entities would add unnecessary complexity and costs. |
| Mediation should start as early as | Yes. Draft Bill clarifies that mediation must be offered by |



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| possible in enforcement of debt recovery process, not just wait until the point a receiver is about to be appointed. | the creditor before any step is taken to recover debt after a default (e.g. s119 notices of the Property Law Act 2007 are included). |
| Independent administrator strongly supported, with some support for administration by the Office of Banking Ombudsman. | Yes. Proposed that MPI will administer the scheme. |
| Mediators need to be appropriately qualified and accredited by professional organisations. | Yes. Draft Bill explicitly requires mediators to be appropriately qualified and accredited by a professional organisations.<br><br>Mediators can only provide mediation services if they are an approved [by the Ministry] mediation organisation (AMO) or have been authorised as a farm debt mediator by an AMO. |
| Need to have exception to mandatory mediation, or ability to conclude early, where issues such as animal welfare, environmental management are a concern, degradation of asset value is occurring. | No. This has not been included as we consider there are alternative mechanisms to deal with animal welfare and environmental management issues (e.g. interventions under the Animal Welfare Act, Regional Council interventions under Resource Management Act).<br><br>Creditors are likely to move earlier to mediate if there are material concerns in regards to erosion of asset value. |
| Term of mediation needed to be specified and for a longer period than the 10 days provided (the exception to this was RITANZ); 40 - 60 working days were identified as realistic and reasonable. | Yes. 60 days maximum duration, unless participants agree otherwise. |
| Equal sharing of mediation costs, but ability to adjust through mutual agreement. | Yes. Equal sharing of mediation costs, but ability to adjust through mutual agreement (when drafting the procedure agreement). |
| Mediation must be between parties, but supporting parties should be able to participate if agreed to by both parties (preferably at the start of the process). | Yes. Development of procedure agreement provides opportunity for parties to agree who else can participate and to what extent in the mediation process. |
| Mediators are just that, they should not have any determinative responsibilities, and consequently any final report by the mediator to the administrator of the scheme must be high-level and objective. | Yes. Independence, non-determinative role of mediators is confirmed in the Bill; MPI will be responsible for making any determinations in respect to issuing a Certificate (prohibition or enforcement). |
| Need to ensure confidentiality in the process and any outputs (e.g. mediation agreement, summary of mediation) are appropriately protected. | Yes. Provisions in the Bill specifically address confidentiality issues. |

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