



BRIEFING

A Government Farm Debt Mediation Bill – draft Cabinet paper

Date:	22 November 2018	Priority:	High
Security classification:	In Confidence	Tracking number:	1544 18-19 (MBIE) Sub 18-0151 (MPI)

	Action sought	Deadline
Hon Damien O'Connor Minister of Agriculture	Make decisions about the key design features of the proposed farm debt mediation regime.	26 November 2018
Hon Kris Faafoi Minister of Commerce and Consumer Affairs		

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Emma Taylor	Director, Agriculture, Marine, and Plant Policy, MPI	s 9(2)(a)	s 9(2)(a)	
s 9(2)(a)	Manager, DIRA Review Team, MPI	s 9(2)(a)	s 9(2)(a)	✓
Susan Hall	Manager, Business Law, MBIE	s 9(2)(a)	s 9(2)(a)	
s 9(2)(a)	Principal Policy Advisor, Business Law, MBIE	s 9(2)(a)	s 9(2)(a)	✓

The following departments/agencies have been consulted (if required)
Treasury, Reserve Bank, Ministry of Justice, Te Puni Kokiri, Inland Revenue Department, Parliamentary Counsel Office

Minister's office to complete:

Approved

Declined

Noted

Needs change

Seen

Overtaken by Events

See Minister's Notes

Withdrawn

Comments:

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Purpose

The purpose of this briefing is to obtain your feedback on the attached draft Cabinet paper.

Executive summary

1. You have asked officials to produce a Cabinet paper seeking approval for a Government Farm Debt Mediation Bill (**FDM Bill**) which would be considered by the Cabinet Economic Development Committee (**DEV**) on 5 December 2018. Based on discussions with a range of New Zealand stakeholders and two days of meetings in New South Wales, we would make the following key points:
 - a. In New Zealand, stakeholders were supportive of an FDM regime, ranging from lukewarm to strong.
 - b. There is widespread support for FDM among stakeholders in New South Wales. It is acknowledged as being beneficial:
 - i. to farmers for business and personal reasons
 - ii. to banks, because they can be more confident that their actions will be perceived as reasonable and they can sometimes obtain better outcomes.
 - c. The average cost of mediations in New South Wales is about A\$6,000 (i.e. \$3,000 per party).
 - d. It is important for farmers to be able to obtain financial counselling before mediations commence. It provides farmers with the support to explore options and develop a negotiating strategy in advance of the mediation.
 - e. Many farmers whose businesses are financially distressed need broader counselling support.
 - f. We consider that the following modifications to scope of the New South Wales regime should be made to fit with New Zealand's circumstances:
 - i. exclude forestry (but, as in New South Wales, include agriculture, horticulture and aquaculture)
 - ii. include security interests over livestock, wool and crops (not just land and farm machinery).

2. The recommendations in the draft Cabinet paper provide the basis for Parliamentary Counsel Office to draft a largely complete Bill. However, further work will be required, mainly around systems design. This work will include:
 - a. exploring options for farmers to obtain access to financial counselling or advice before mediations commence
 - b. designing a simple scheme for regulating mediators. A voluntary, industry-based National Mediator Accreditation Standards scheme underpins the Australian state FDM regimes. New Zealand does not have an equivalent scheme.
 - c. determining which entity will be responsible for administering the mediation regime taking such matters as expertise and cost effectiveness into consideration.
3. We are recommending that you seek Cabinet approvals in relation to these and other outstanding policy issues in 2019. We are also recommending that an exposure draft of the Bill be released in April 2019. s 9(2)(g)(i)

Recommended action

The Ministry of Business, Innovation and Employment and Ministry for Primary Industries recommend that you:

- a **Provide** any feedback on this briefing and the attached draft Cabinet paper (see **Annex 1**).

See comments as annotated / no feedback

- b **Note**, in particular, that recommendation 18 in the draft Cabinet paper proposes that an exposure draft of the Bill be released before it is finalised and introduced into the House.

Noted

- c **Note** we have concluded, based mainly on Australian experience that the FDM regime will almost certainly be considerably more successful if farmers are able to obtain financial counselling or advice before the mediation process is commenced.

Noted

- d **Note** the timeline after paragraph 41 of this briefing.

Noted

- e **Note** the Regulatory Impact Statement (see **Annex 3** to the draft Cabinet paper), which is expected to be finalised by 28 November.

Noted

Emma Taylor
**Director, Agriculture, Marine, and Plant
Policy, MPI**
22 November 2018

Susan Hall
**Manager,
Business Law, MBIE**
22 November 2018

Hon Damien O'Connor
Minister of Agriculture

Hon Kris Faafoi
**Minister of Commerce and Consumer
Affairs**

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Proactive Release

Background

1. You asked officials to prepare a Cabinet paper recommending the introduction of a statutory Farm Debt Mediation (**FDM**) regime modelled on the New South Wales Act. A draft paper is attached (see **Annex 1**).
2. A Regulatory Impact Statement is also attached (see Annex 3 to the Cabinet paper). It has not yet been assessed, so there may be some changes. We are anticipating that it will be assessed by 28 November.
3. The rest of this briefing:
 - a. discusses the issues identified in the executive summary;
 - b. provides information about who we have consulted;
 - c. includes a timeline through to consideration of the introduction of the Bill by DEV on 1 May 2019.

Discussion of key issues

The case for FDM legislation

4. The main arguments for introducing FDM legislation in New Zealand are that some types of farming businesses face risks that either do not exist in other sectors or, if they do exist, tend to be more pronounced in farming. These risks include:
 - a. increasing levels of farm debt in recent years
 - b. vulnerability to business downturns as a result of susceptibility to conditions outside of the farmer's control (for example climate fluctuations, weather events, market volatility and disease or pest incursions)
 - c. farm business failure also commonly leads to the loss of the family home
 - d. vulnerability to mental stress for farmers and their families when financial problems occur
 - e. an imbalance in negotiating power between banks and farmers
 - f. animal welfare issues and environmental risks when farm businesses have cash flow problems.

Support for introducing a statutory FDM regime in New Zealand

5. We have held 18 meetings to date with non-government New Zealand stakeholders about the possible introduction of a statutory FDM regime. A complete list of these stakeholders can be found in paragraph 39.
6. Everyone we consulted with supports the introduction of a statutory FDM scheme:
 - a. The strongest support mainly came from stakeholders who have first-hand dealings with farmers and their families (Rural Women New Zealand, s 9(2)(a) and a trustee of the Hawkes Bay Rural Support Trust).
 - b. The two major stakeholders (Federated Farmers and the New Zealand Bankers Association) were more moderate in their support.
 - c. The Recovery Insolvency and Turnaround Association of New Zealand (**RITANZ**) considers that a statutory mediation scheme should be implemented across the

economy, not just for farming.

What we learnt about the New South Wales FDM scheme

7. We met with officials from the New South Wales Rural Assistance Authority (RAA) (which is part of the Department of Primary Industries), two experienced farm debt mediators, the Resolution Institute, the New South Wales Farmers' Association and the Australian Banking Association. We also held a teleconference with Brisbane-based representatives of the ANZ Bank.
8. The New South Wales FDM Bill was introduced into Parliament in 1994 after two or three years of high interest rates (up to 23 percent per annum), low wool prices, a severe drought, and an escalation in the rate of farmer suicide. There was some scepticism about whether the FDM regime was needed when it was introduced. However, support for FDM developed.
9. We were also consistently told that the New South Wales regime represents best practice in Australia. It is simple and provides the flexibility mediators need to facilitate satisfactory outcomes.
10. Overall, FDM is generally accepted as providing for efficient and equitable resolution of farm debt issues. Although it is targeted as a farmer support measure, the Australian banking sector acknowledges that FDM also has benefits for lenders.

Benefits for farmers

11. The benefits to farmers arise for both personal and business reasons:
 - a. A structured process is less stressful for farmers. A theme in the Australian meetings (and several New Zealand meetings) was around the high level of mental stress that can arise for farmers and their families when they have negative equity and/or serious cash flow problems. However, some stakeholders questioned whether there was a causal link.
 - b. Although there is an inherent power imbalance between banks and farmers, FDM provides farmers with a degree of bargaining power.
 - c. Most mediation processes in overseas jurisdictions conclude with an agreed solution that provides for the farmer to continue in business or to exit with dignity.
12. A review of the New South Wales 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. The consultation document issued by the RAA in connection with the review stated that of the processes commenced under the New South Wales Act from 1995 to 2016:
 - a. Satisfactory mediations took place 65 percent of the time (i.e. 1,659 satisfactory mediations out of 2,522 processes commenced)
 - b. The parties reached agreement in 90 percent of the cases where satisfactory mediations had taken place (i.e. 1,487 out of 1,659 satisfactory mediations)
 - c. Of the remaining 35 percent where satisfactory mediations did not take place, farmers notified the RAA or the creditor that they did not wish to enter into or proceed with mediation just over half of the time (i.e. 458 out of 863 processes that did not lead to satisfactory outcomes).

13. Canada's experience also gives an indication of what might be expected in New Zealand. Of 1,666 agreements reached in Canada from 2008 to 2014 the three most common outcomes were:
- 46 percent – debt restructuring
 - 21 percent – satisfactory exit arrangement
 - 15 percent – disposal of some assets.

Benefits for lenders

14. Banks obtain three main benefits:
- a. Having a structured statutory process facilitates dialogue, particularly in relation to farmers who are reluctant to discuss their financial problems.
 - b. s 9(2)(ba)(i)
 - c. Better outcomes can sometimes be achieved because mediation provides farmers with the opportunity to present a viable business plan that the bank might not otherwise have considered.

Costs

15. The default position under the New South Wales Act is that the parties pay an equal share of the mediator's fee, and pay their own costs associated with attendance at the mediation.
16. We were told that the average cost of mediations is about A\$6,000 (20 hours at \$300 an hour). The commitment for mediators includes:
- a. preparation time, including reading and analysing documents supplied by the parties
 - b. separate pre-mediation meetings with each party (usually about two hours for each meeting)
 - c. the mediation, which can usually be completed in one day, but can take longer.

There is more to Australian FDM systems than the legislation

17. A clear and consistent message from our meetings in New South Wales is that there is more to the FDM systems in all three Australian states than just the legislation that regulates FDM. Those Acts fit within a broader range of institutions and programmes, most importantly:
- a. access for farmers to free-of-charge pre-mediation financial counselling
 - b. a voluntary, industry-based scheme for regulating mediators called National Mediator Accreditation Standards.

Pre-mediation financial counselling and advice

18. Australian farmers can obtain free and confidential financial counselling from the Rural Financial Counselling Service. This service includes the provision of support and assistance that helps the farmer to prepare for mediation and reduce the power imbalance between banks and farmers. Under this programme counsellors can work with farmers to understand their financial position and assist with the preparation of budgets. There are rural financial counsellors in 34 towns throughout New South Wales.
19. A report prepared by the Canadian Office of Audit and Evaluation in 2016 indicates that their free-of-charge pre-mediation financial support programme goes further than the New South Wales financial counselling scheme. The Agriculture and Agri-Food Canada service also includes provision for the "financial reviewer" to provide the farmer with assistance to develop a recovery plan.

National Mediator Accreditation Standards

20. The New South Wales Act says very little about who is permitted to carry out farm debt mediations. It merely states that:
 - a. the Rural Assistance Authority may accredit persons as mediators
 - b. regulations may make provision for or with respect to the accreditation of mediators.
21. National Mediation Accreditation Standards are a voluntary, industry-based scheme that was introduced in Australia in 2008. The Resolution Institute states that the standards have been widely adopted across a range of regulatory regimes, not just FDM. The goal is to improve the quality of mediation services and assure consumers that practitioners are trained, assessed and qualified.

The implications for New Zealand

Financial counselling or advice

22. Overseas experience indicates that it is important for farmers to have access to pre-mediation financial counselling or advice. Farmers need to go into mediations with, at minimum, an inventory of all their farm assets and reliable cash flow projections. Farmers will have little if any negotiating power in the mediation without this information.
23. The Australian Banking Association agrees that farmer access to financial counselling is essential. Banks do not want to have to negotiate with farmers who are not adequately prepared.
24. There is no formal farmer financial counselling or advice support system in New Zealand at present. The Rural Support Trust is available to hold confidential discussions with individuals living and working rurally. However, it is not set up to provide the professional financial counselling or advice that is needed to support farm debt mediations. The Rural Support Trust website notes that:

“If more than a cup of tea and a yarn is needed, we can connect with the professionals who can provide further support, including farming or business advice, financial information, health, mental health and counselling services.”
25. The draft Cabinet paper notes that consideration will be given on how to ensure that farmers can access support of this nature as part of the implementation for the scheme (see paragraphs 71-73). Our intention is that recommendations will be made on this issue in a subsequent Cabinet paper planned for May 2019 (see recommendation 20). This is one of a number of systems design issues we intend to address in that Cabinet paper. None of this work will delay drafting the FDM Bill.

The regulation of mediators

26. In contrast with Australia, there is no mediator-specific regime in New Zealand to ‘hook into’ for the purposes of the FDM Bill. Our view is that the potential benefits of the FDM regime will not be fully achieved if some mediators do not have appropriate personal qualities and experience to conduct a mediation process independently, competently and professionally.
27. This issue is discussed in paragraphs 66-68 of the draft Cabinet paper. This is another of the systems design issues that will be reported on in the April 2019 Cabinet paper.

Bank conduct and culture

28. The Financial Markets Authority (FMA) and Reserve Bank of New Zealand issued a joint report on 5 November 2018 entitled *Bank Conduct and Culture*. It outlined their findings from a review of conduct and culture in 11 New Zealand retail banks. The report states that:

“[We] found a small number of issues related to poor conduct by bank staff. Issues related to system or process weaknesses were more commonplace. Based on these findings, conduct and culture issues do not appear to be widespread in banks in New Zealand... However, we are concerned about banks’ lack of proactivity in identifying and remediating conduct issues and risks in their business. More broadly we identified weaknesses in the governance and management of conduct risks. This is a vulnerability that, if left unchecked, has the potential to lead to widespread issues.”

29. The FMA-Reserve Bank report also notes that “the risk of poor outcomes was increased by the incentives offered to staff, which are typically highly focused on sales performance.” They elaborated on this risk in a follow-up report published on 15 November called *Bank Incentive Structures*.

Comment

30. The reports do not indicate that problems are more significant in any particular sector. The only reference to rural sector customers was an indirect one in the first report. It cites the mis-selling of interest rate swaps some years ago as an example of banks treating customers poorly.
31. Overall, we consider that the FMA-Reserve Bank report does not have any implications about whether or not there is a case for a statutory FDM system. Nor does it affect our thinking in relation to the way that the FDM system should be designed.

A second Cabinet paper

32. The attached draft Cabinet paper addresses the key issues in relation to the policy of the FDM Bill. However, a number of important system design issues still require further information. These relate to such matters as the scope of the definition of “farmers”, how to design the scheme to reflect Tikanga Māori, the impact of mediation on enforcement, and the allocation of responsibilities for administering the FDM regime. To this end, the attached draft Cabinet paper:
- a. seeks delegated authority for you to jointly make detailed policy decisions that may arise during the drafting of the legislation (recommendation 15)
 - b. notes that you will submit a further paper to Cabinet in April 2019 which will, among other things, seek decisions relating to implementation (recommendation 20).

Communications and risks

Unrealistic expectations about what FDM might achieve

33. The bulk of stakeholders consulted to date have largely realistic expectations about what a statutory FDM regime can achieve. Nevertheless, it will be important to manage any excessive expectations that some stakeholders, particularly farmers might have.
34. We consider that the main messages should be to the following effect:
- a. The structured regime involving independent mediators will provide a supportive and dignified means for farmers to negotiate with banks and other lenders.
 - b. Mediation will provide opportunities for farmers and their lenders to explore and agree business turnaround solutions subject to certain conditions, such as restructuring debt, selling down assets or converting land to a different form of farming.

- c. The agreed outcome, in some cases, will be for the farm to be sold or the creditor to take possession of the property.
- d. The outcome is likely to be the same or similar with or without FDM if the farm business is not viable.

Organisations that may have expectations of a role under the FDM Bill

- 35. Mark Patterson's Members' Bill envisaged that Arbitrators' and Mediators' Institute of New Zealand (**AMINZ**) and the Banking Ombudsman Scheme would have statutory roles. AMINZ members would have had a monopoly on providing mediation services. Mediations would have been carried out through the Banking Ombudsman Scheme.
- 36. Both bodies have told us that they wish to be expressly referred to under the Government Bill. We do not support either approach:
 - a. AMINZ has a competitor. The Resolution Institute is an Australasian entity and one-sixth of its members are New Zealanders. Some mediators accredited under the Australian FDM Acts are members of the Resolution Institute. We consider that AMINZ members' interests will be adequately reflected under the proposed accreditation regime without any express reference to AMINZ. We instead propose
 - b. It would be complicated to link the FDM system to the Banking Ombudsman Scheme because the great majority of non-bank lenders are members of other dispute resolution schemes registered under the *Financial Service Providers (Registration and Dispute Resolution) Act 2008*.
- 37. For these reasons we consider that the Bill should not identify either organisation.

Consultation

- 38. The consultation section of the draft Cabinet paper provides information about consultation with other government agencies (see paragraphs 84-87).
- 39. We have consulted with the following New Zealand-based stakeholders:
 - a. The rural sector – Federated Farmers, Rural Women New Zealand, Canterbury Rural Support Trust, Hawkes Bay Rural Support Trust, Dairy New Zealand, Dairy Women's Network, Beef + Lamb New Zealand, Horticulture New Zealand, Te Tumu Paeroa and farmers' advocates s 9(2)(a).
 - b. The banking sector – New Zealand Bankers Association, ANZ Bank, Westpac Bank, the Banking Ombudsman Scheme and a former agri-business banking representative s 9(2)(a).
 - c. Arbitrators' and Mediators' Institute of New Zealand.
 - d. Restructuring, Insolvency and Turnaround Association of New Zealand
 - e. Primary Sector Chartered Accountants.

Annex 1: Draft Cabinet Paper 'A Government Farm Debt Mediation Bill'

Final Version Proactively Released

Proactive Release