25 February 2022

David Evans
Director, Financial Policy
Department of Agriculture, Water and the Environment
Via email

Dear David,

Development of a better practice guide for Farm Debt Mediation

The Australian Banking Association (**ABA**) welcomes the opportunity to provide feedback on the proposed better practice guide for Farm Debt Mediation (**FDM**).

Banks are always looking for ways to better support customers during times of financial difficulty, particularly agribusiness customers, and have adopted policies, programs, practices, and support services to do this.

Banks also understand that agriculture is both cyclical and impacted by climatic conditions and therefore the income pressures faced by their agribusiness customers are different from other customers. Various arrangements are made available to support farmers through tough times and to help make their payments more manageable.

The ABA continues to advocate for the implementation of uniform FDM legislation in each state via a national agreement. Farmers across Australia should have access to the same services regardless of their postcode. The ABA encourages the Federal Government to continue to drive cooperation with the states and territories to achieve this.

Multiple government reports and inquiries have outlined, and some formally recommended, the need for a national FDM approach. This uniformity would deliver positive outcomes for all parties as inefficiency, inequity, and costs are reduced.

FDM is widely acknowledged as a successful way for the farmer and the financier to agree on the strategy to resolve financial difficulty. Most importantly, this provides an additional avenue for farmers in financial difficulty to either re-establish and maintain their viability or exit the industry with dignity.

The Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, outlined the need for a national FDM scheme to be enacted as soon as practical and this recommendation was accepted by the Government.

This is one of the few recommendations that is not yet finalised.

While the ABA is encouraged by the progress that has occurred to date, including support for harmonisation of the various state and territory schemes, currently, the process varies across Australia, and where a scheme does exist, there is inconsistency in operation.

The ABA is supportive of a better practice guide with the following principles:

- Aligns and shares best practices across states and territories to improve outcomes of FDM
- Provides consistent information about the respective FDM processes (including timelines and requirements)
- Highlights the key considerations when engaging with FDM compared to other processes
- Reflects progress made to date and;
- Works towards further state harmonisation.

While banks agree this is an important step with respect to the issues we have detailed further below, it does not meet the underlying need that Australian farmers should receive legislated, equitable outcomes regardless of their location.

The ABA provides its response to each of the consultation questions in the Appendix A and looks forward to continuing to work closely with the Government through this important consultation process. Please contact me if you require further information.

Yours sincerely

Lauren Worldon
Director Business Engagement and Policy

About the ABA

The Australian Banking Association advocates for a strong, competitive and innovative banking industry that delivers excellent and equitable outcomes for customers. We promote and encourage policies that improve banking services for all Australians, through advocacy, research, policy expertise and thought leadership.

Appendix – Responses to consultation questions

Experience of current FDM arrangements

What is your experience of current FDM arrangements?

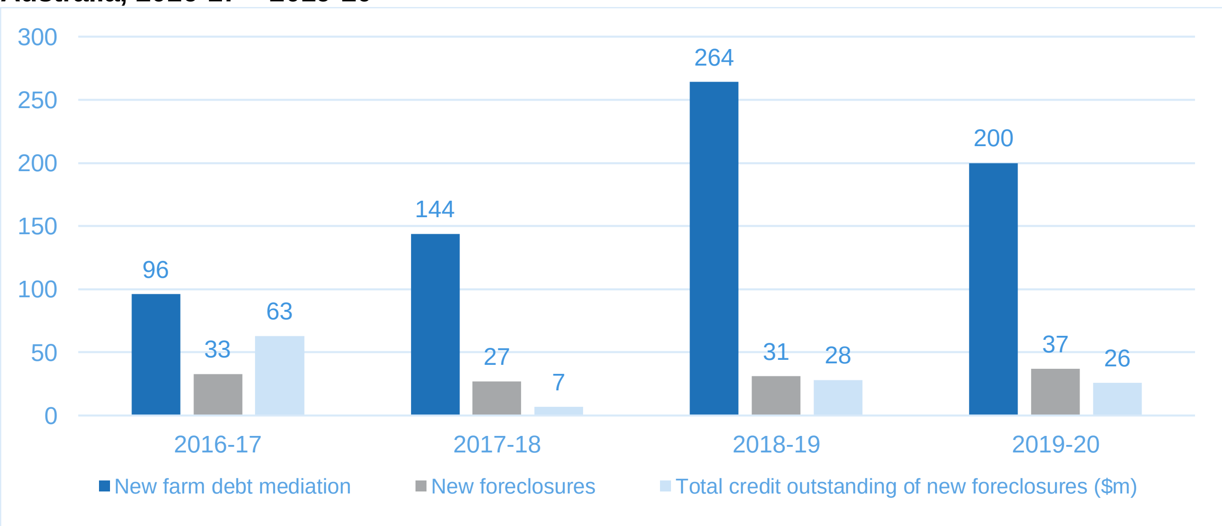
What is working well with FDM arrangements, what could be improved, and are there any gaps that could be addressed through a better practice guide?

Positive experiences to date

Since the NSW Government introduced the *Farm Debt Mediation Act 1994* (NSW), banks have found FDM an effective and valuable mechanism that facilitates negotiation between a farmer and their bank to find an equitable resolution of farm business debts, in an efficient way.

Members consider that FDM is a constructive process where the bank and farmer consider the options for resolving their financial difficultly and, is generally, a bank's preferred platform when dealing with farmers as it allows them to meet and better understand their options. On many occasions, this has helped to avoid recovery action or formal processes, as highlighted in the graph below.

Figure 1: New instances of loans and leases under mediation and new farm foreclosures, Australia, 2016-17 – 2019-20



Source: APRA; Department of Agriculture, Water and the Environment; Agricultural Lending Data report 2019-20.

Additionally, members have found FDM helps address the potential imbalance that may exist between farm businesses and their bank and, importantly, allows for an agreement to be reached. Members also encourage their customers to meet with a rural financial counsellor or other qualified advisers as part of this process for additional support.

Notably, having a knowledgeable mediator with experience in agribusiness impacts the outcome as they understand the unique and complex circumstances affecting farming operations and agribusiness lending.

Areas for improvement

Members wish to highlight three key areas for improvement for FDM**:**

1. Inconsistencies and differences across state regimes. Specifically, this relates to terminology, procedural requirements, document requests and timeframes.

   For example,

- Document Requests: The QLD document request option in the notice is inconsistent with other states (*section 15*). If this option is selected, the bank is obliged to reproduce a broad range of documents the farmer may already have in their possession and may not necessarily need for the FDM process. The document request process seems more closely aligned to legal discovery in litigation rather than good faith negotiations which is the central premise of mediation.

2. The language used in the prescribed forms in some states focuses on enforcement rather than resolution and can result in resistance from farmers willing to engage. Furthermore, this can detract from the notion of FDM being a positive process with the key driver to seek a resolution as opposed to being the last step before enforcement.
3. Currently, where there is a voluntary surrender, in all states lenders are still obliged to offer FDM. Members have reported the additional stress and administrative burden this can pose on the farmer and suggest the legislation should, with appropriate safeguards for farmers, allow lenders to be exempt from having to offer FDM in these situations.

While a better practice guide will be unable to rectify the inconsistencies in state schemes, it could avail benefits, especially if targeted at a wider audience than farmers and banks. These benefits could include:

- Improving the perception of FDM by highlighting its positive role in the resolution process, showcasing case studies of how mediation has assisted farmers and how early engagement can allow for all options to be explored in the best possible way.
- Summarising and simplifying state-based schemes and highlighting key differences where applicable so this is easy for farmers and their advisers to understand.
- Showcase the principles member banks have adopted to ensure farmers are fully aware of the support their bank will provide.
- Promotion of the better practice guide to trusted advisers and a wider range of financers, including non-bank lenders and asset finance providers, to share best practices and improve the experience when a farmer is experiencing hardship.

Early engagement

How is early engagement in FDM being currently achieved?

Are there any barriers that you are aware of preventing early engagement in practice?

Member banks have established processes through regular loan monitoring and review of key financial indicators to ensure banks can hold early discussions with a customer showing signs of distress and seek agreement for a future strategy.

It is important to highlight that on many occasions, informal discussions exploring options often result in a positive outcome without the requirement for FDM. Depending on the customer's preference, these initial conversations may or may not include external advisers, and members note formal FDM is commonly held once other options have been exhausted.

In addition, some customers may be experiencing times of distress due to the loss of a loved one, separation or a business dispute. While in these moments, customers may require additional support from their banks, formal farm debt mediation may not be appropriate as the customer remains financially sound and alternative solutions can be put in place e.g. loan restructuring.

On the ground, dedicated agribusiness bankers and dedicated hardship teams are trained to identify signs of distress and ensure customers are made aware of the option to engage FDM where appropriate.

The key barrier preventing early engagement in practice is found to be the wording of notices and perceived stigma attached to mediation. As highlighted above, many farmers (and their advisers) regard this process as a precursor to enforcement instead of a way towards a constructive resolution.

Additionally, given various state legislation, in which some require the loan to be in default, this can cause the banks some challenges in commencing the early engagement process. For example, if a bank undertakes mediation whilst the loan is not in default, whether informal or at the farmer's request, and the loan subsequently defaults, the bank cannot apply for an exemption certificate and must recommence mediation.

Instances of mediation

How should a better practice guide deal with who may initiate FDM, when they may/must initiate FDM, and potential instances of multiple mediation?

The banking sector remains supportive of both the customer and the financier having the ability to initiate FDM if this is required.

Member banks ensure conversations occur in the early stages of distress as this is found to provide more favourable outcomes, providing farmers and financers with a broader range of longer-term strategies to support the customer through hardship.

While occurrences are rare, multiple mediations may be required when a farming property is located in different states and is governed by different legislation or schemes. This becomes overly burdensome for farmers in distress in managing the various processes.

Timeframes

Are current legislated timeframes considered sufficient?

How can timeframes across jurisdictions be made more consistent?

When specifically considering the three-year period for an exemption certificate, experience from members highlights this is appropriate.

The ABA advocates for time frames for notices, documentation, holding of FDM and certificates to be consistent across all states. There are differences under the current schemes, and while harmonising such timeframes should be a priority, a better practice guide should include a user-friendly and quick reference comparison of timeframes.

Access to information

How effective are existing communication activities and support services to ensure farmers get the information they need?

Are there any ways communication could be improved?

Is there anything that could improve pre-mediation assistance between lenders and farmers, and what is considered best practice?

Is there anything government can do to improve access to information?

As highlighted above, the ABA believes improving the perception of FDM to be a positive step in the resolution process would be of great benefit to farmers. Additionally:

- Sharing case studies of how FDM has assisted farmers recover would reduce the stigma attached to FDM, particularly for farmers who may view the process as a precursor to enforcement.
- Prescribed forms, website content and support materials need to be less confrontational, removing language that is focused on enforcement rather than resolution.
- A simple, easy to use, summary of the state-based schemes would also be useful to ensure that farmers have a consistent reference point for information in relation to FDM.
- Reinforcing the benefit of pre-mediation teleconference for FDM to clearly articulate the process and requirements to all stakeholders and potentially give the parties prior knowledge of issue likely to be ventilated.
- Mediation packs, including fact sheets, good faith guides, details of Rural Financial Counsellors and covering letters, should be included when issuing FDM Notices.
- In Queensland, farmers have access to a Farm Business Analysis Assistance program administered by the Farm Debt Restructure Office (**FDRO**). This provides primary producers with access to a panel of independent specialists who provide an impartial report, and we advocate for a similar program to be delivered nationally.

Reviews and complaints

What is your experience with current review and complaint procedures?

Is information about review and complaint procedures readily available and promoted?

Member banks have formal processes in place where they are notified of a complaint by the Australian Financial Complaints Authority (**AFCA**) and have specific provisions in the Banking Code of Practice for how complaints will be handled, specifically relating to FDM.

- 198 Before we enter a farm debt mediation with you, we will inform you that you may have a right, as an alternative to farm debt mediation, to make a complaint to our external dispute resolution provider.
- 199 If we do not reach an agreement at a farm debt mediation and you then decide to make a complaint to our external dispute resolution provider, we will give our consent for the external dispute resolution provider to consider the complaint. This paragraph only applies where your complaint would have been excluded by our external dispute resolution provider because it had previously been the subject of a farm debt mediation.

It is important to highlight a complaint and FDM are two distinct processes. The complaint process seeks to address a dispute and is a precursor to determining whether the bank may have done something wrong, whereas FDM is intended to be a structured negotiation process to try resolve financial distress.

Overall, members have minimal concerns with the current review and complaints procedure, reporting only on occasion the process can be slow and may extend the period by which a resolution can be reached.

Good Faith

In your experience, has the interpretation of good faith been an issue in FDM?

To date, members have not expressed significant concerns with the current interpretation of good faith. Where customers and banks mediate in good faith, often agreements are reached more quickly and outcomes more satisfactory for all parties.

While the incidence is low, examples have been provided where advisers, without appropriate qualifications, have misused the process by raising legal arguments which cannot be dealt with at mediation as a means to stall the process. FDM is not an appropriate forum for legal disputes or discovery of documents before a court process.

Costs

Does the cost of FDM discourage participation in early FDM?

Are any improvements/changes needed to the way costs are currently shared?

Member banks have reported the costs of engaging professionals can discourage some farmers in FDM participation. In some regional and remote communities, there can be a lack of experienced professionals in FDM, which can cause additional complexities.

To ensure costs do not become a prohibitive factor for farmers to engage in FDM, member banks have shown to give favourable consideration to covering a higher percentage of the costs associated with mediation and by agreeing to reduce the farmer's travel costs by conducting the FDM in a regional centre closer to them, particularly when there is confidence this would result in a positive and equitable resolution.

In Victoria, FDM is subsidised by the relevant government department, with both the farmer and the bank paying a fixed cost of $195.00 each. Consideration should be given to this being extended in all states.

Accessible format

What are your views on allowing for FDM sessions to be held online?

What benefits or limitations do you see occurring with online mediation?

Are there any other accessibility issues impacting on FDM?

The *Queensland Act* allows for the use of virtual technology where both parties agree. The banking sector supports this provision being extended to all states to enable FDM sessions to be held online and to encourage appropriate training and support for those using this new technology.

While the banking sector considers that "in-person" mediations can be more constructive, especially in circumstances where farmers may be under significant stress, COVID-19 has accelerated the adoption of digital technology and has resulted in increasing consumer confidence via these platforms.

As the country experienced continued lockdowns and ways of working moved to digital, member banks have noted some instances where customers were reluctant to undertake FDM virtually or have reported issues with insufficient bandwidth to allow for an online meeting to occur. To assist customers facing these circumstances, member banks offered alternatives such as providing office space in the local town or, where appropriate, conducting FDM via a phone call.

Overall, members have a positive experience of online FDMs with the exception of some incidences where unqualified advisers use the optionality to frustrate the process due to customers being uncomfortable with online means.

Adoption of a better practice guide

How could the development of a better practice guide benefit you/your organisation/members?

What would be the best way to implement and measure the success of a better practice?

Please refer to previous consultation questions for examples of how a better practice guide could benefit.

Whilst a national scheme would be the ideal solution and provide consistency, the member banks support the implementation of a best practice guide.

In addition, a better practice guide may address clearer definitions for key terms/clauses such as the term "financial distress", and it could provide more robust guidance on concepts that have been left unclear or not stated, e.g. pre-mediation discussions.

Successful implementation of a better practice guide could occur through various channels, including Rural Financial Counselling Services, state farming groups and other key industry and government bodies. Additionally, banks could consider using this resource to aid mandatory training for dedicated agribusiness hardship, and banking teams and the ABA and member banks could include this guide on public websites.

Additionally, a better practice guide could be included on the relevant state government websites in relation to FDM and in correspondence forwarded to the farmer by the bank to provide an initial and common point of reference for farmers.