



Australian Banking Association

25 March 2022

Mr Jim Groves
Principal Policy Officer
Department of Agriculture and Fisheries
Via email: info@daf.qld.gov.au

Dear Mr Groves

Review of the Farm Business Debt Mediation Act 2017 (Qld)

The Australian Banking Association (**ABA**) welcomes the opportunity to contribute to the review of the *Farm Business Debt Mediation Act 2017 (the Act)*.

Our position

Farm Debt Mediation (**FDM**) is widely acknowledged as a successful way for the farmer and the financier to resolve matters relating to farm business debts and, in many cases, is a preferred alternative to court. Most importantly, the FDM process provides an additional avenue for farmers in financial difficulty to either re-establish and maintain their viability or exit the industry with dignity.

The ABA welcomes the review's consideration of opportunities to enhance the Act and align with legislation in other states where possible.

While we are encouraged by the progress that has occurred to date to harmonise the state schemes, the ABA continues to advocate for the implementation of uniform FDM legislation in each state via a national agreement. The ABA position is that farmers across Australia should have access to the same safeguards and support regardless of their postcode.

In response to this review, the ABA has highlighted areas for improvement in the Act in Appendix 1.

If any additional information is required, please contact me

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 1

1. Exchange of documents (Section 21)

Key Points:

- Section 21 of the Act outlines that a “farmer may give a notice to the mortgagee asking the mortgagee for copies of documents related to the farm business debt and the farm mortgage”. The use of “related to” has been interpreted to mean a broad range of documentation that is often not relevant to the mediation. The ABA recommends the Act be amended to provide greater clarity on the scope of documents and exclude those which are commercially sensitive.
- Further, 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.
- The Documents Request option in the form, *Notice S15 – Request for Mediation Incorporating Nomination for Mediators and Request for Documents*, is inconsistent with other states. If the option is selected, a 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.
- In practice, the bank may take a conservative approach to mitigate against the risk of breaching the Act by sending all documents that could be caught up in the request even if deemed excessive.
- As the farmer should already have most of the documents in their possession, it would be more efficient if the customer and/or their advisors requested specific documents either in the lead up to the mediation or at the pre-mediation teleconference, as happens in other jurisdictions.
- In practice, mediations rarely involve reviewing or discussing key documents' issues as the financial difficulty is often caused by other factors including adverse seasonal conditions, industry issues, such as low commodity prices or family and partnership disputes.
- This approach may result in a cost-saving benefit for the farmer regarding legal fees and/or advisor costs as the specific documents they consider are critical are reviewed rather than the full range of documents.

Recommendation: The Act be amended to remove the exchange of documents section entirely or, in the alternative, provide greater clarity on the scope of documents required and clearly indicate commercially sensitive documents (including all internal bank documents) are excluded.

2. Guarantors (Section 25A)

Key Points:

- It is important for Guarantors or Property Owners to be included in the mediation process to ensure they are involved in any decisions binding these parties or their assets.
- Jurisdictions such as NSW¹ include the Guarantors on the FDM forms; however, the Queensland Rural and Industry Development Authority (**QRIDA**) considers a farmer to be the only party with the farm business debt (i.e. the borrowing entity).

¹ Farm Debt Mediation Act 1994 No 91, current version for 3 September 2018, <https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-1994-091>



- As some owners are not always part of the borrowing entity (and instead provide a guarantee for the loan), key people may be excluded from FDM as it is at the mediator's discretion to include additional parties.

Recommendation: Guarantors or Property Owners to be included in the mediation process.

3. Encourage use of technology (Section 25(3))

Key Points:

- The banking sector remains supportive of the Act allowing the use of virtual technology where both parties agree. The sector also 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 in certain circumstances, there has been a reluctance by the farmer's advisors to embrace this approach in favour of face-to-face meetings. This can result in significant delays to the process due to travel restrictions and/or availability of stakeholders.
- Given the success in hosting mediations using technology and the cost/time savings for the farmer (or their advisors) in not having to attend in person, the Act should retain the use of virtual technology as an option.

Recommendation: Act to retain the use of virtual technology as an option for mediation.

4. Notices and process improvements

4.1 Notices and 'enforcement action'

Key Points:

- The ABA considers that the use of 'enforcement' in the Act and associated notices complicates the FDM process, in which enforcement is not the intent, and contributes to a negative perception of FDM amongst farmers.
- *Notice S14 – Enforcement Action* is an Approved Form, under Section 90 of the Act, and is required to be used by mortgagees when initiating mediation. However, rather than being an invitation to mediation, the form states that the notice is to inform the farmer that “the mortgagee intends to take enforcement action”, which is contrary to the purpose of FDM.
- In comparison, the equivalent notice used in NSW, *Part 1 From Creditor to Farmer – Invitation to Mediate in Respect of Farm Mortgage*², clearly states it is an invitation to mediate pursuant to the NSW Act, and that “the object of the Act is to provide for the efficient & equitable resolution of matters involving farm debts”.

²Farm Debt Mediation Act 1994 No 91, current version for 3 September 2018, <https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-1994-091>



- Further, Qld's *Notice S14 – Enforcement Action* states that the action is in relation to a property and farm mortgage under which the farmer is “in default”. This requires the farmer to be in default before a notice of intention to mediate can be issued and restricts a bank’s ability to engage in mediation early and at a time when the farmer may have more options available. The reference to “in default” also appears contrary to Section 6 of the Act, in which the meaning of mediation for a farm business debt contemplates a scenario “when the farmer has defaulted, or is at risk of defaulting, under the farm mortgage”.

Recommendation: *Notice S14 – Enforcement Action* to remove the reference to ‘enforcement’ and ‘in default’.

4.2 Process improvements

Key Points:

- The ABA suggests there are opportunities to streamline processes and reduce complexity within the FDM process. This includes consolidating the number of notices required when initiating mediation to the following:
 1. Invitation to mediate
 2. Acceptance/decline of mediation and nomination of mediator
 3. Acceptance/decline of mediator
- The number of notices required at this stage can lead to confusion amongst farmers as to what has already been agreed to.
- Further, to ensure all parties are prepared ahead of mediation, it is recommended that both the farmer and the mortgagee exchange position papers no less than five business days prior to mediation. This aligns with the intent of acting in good faith and would help to avoid some circumstances whereby position papers are provided within hours of mediation being held.

Recommendations:

- Consolidation of the number of notices required when initiating mediation to include; invitation to mediate, acceptance/decline of mediation and nomination of mediator and acceptance/decline of mediator.
- Position papers be exchanged no less than five business days prior to the mediation.

5. Trusted advisors

Key Points:

- To ensure complete transparency, a statement confirming the remuneration advisors will receive for their services should be disclosed to both the farmer and the mediator.
- Effective remuneration disclosure would support better decision-making by farmers and the Act should expressly prohibit the recovery by that advisor of any amount not disclosed in that statement.

Recommendations:

- Advisors should be required to give the farmer and the mediator in writing a statement of the remuneration they will receive for their services.
- The Act should expressly prohibit the recovery by that advisor of any amount not disclosed in that statement.



6. Unintended overreach of the Act

Key Points:

- In 2017, the Act was amended³ to include 'farm equipment' and not just 'farm land'. Consequently, the definition of 'farm mortgage' naturally expanded beyond land and water mortgages, and included securities granted over chattels.
- Standard forms of business securities over chattels are general security agreements that cover a wide category of business assets that are not farm property for example, crops, livestock, and equipment that may be entirely unrelated to farming.
- Section 12 of the Act currently references enforcement of a 'farm mortgage' and outlines the significant consequences for non-compliance. The Act is clearly intended to apply only to the farmer's farm business debts, however a 'farm mortgage' is not limited to securing only the farm business debts of the farmer. Modern forms of securities are consistently 'all monies' securities, i.e. the security will secure all debts owing by the mortgagor at any time.
- The current application of Section 12 to any enforcement of a farm mortgage means that if a security over farm property, intentionally or inadvertently because of all monies wording, secures any farm business debt, then it cannot be enforced at all for any other secured debt until the Act is complied with.
- Consequently, the Act may have unintentional overreach and apply to equipment unrelated to the farming operations.
- This situation can also readily arise where the farm mortgage that secures the farm business debt is given by a guarantor who has separate banking facilities and uses their property as security for both guaranteeing the farm business debt as well as their own debts. This can be very common in large corporate groups who farm under one set of companies while holding assets and conducting unrelated business in other companies.
- The wording of the Act is clear that the Act does apply where the third-party debt was borrowed for the purpose of conducting a farming business, but not otherwise. However, it does not address where the farm mortgage secures both types of debt which can result in unintended overreach of the Act.
- The above restrictions on enforcement can lead to an unfortunate consequence that steps have to be taken to comply with the Act for the farm business debt and farm property, only so that the farm mortgage can be enforced over the other assets or for the other debts. This can occur even though the farmer is only in default because of the separate financial position of a guarantor who has provided the farm mortgage.
- To address the above issues, the ABA recommends Section 12 should expressly exclude application to enforcement of a farm mortgage over property that is not farm property or in respect of debt that is not farm business debt.
- Such clarification does not reduce any rights of the farmer in relation to their farm business debt and any farm property.

Recommendation: Section 12 of the Act should expressly exclude application to enforcement of a farm mortgage over property that is not farm property or in respect of debt that is not farm business debt.

³ <https://www.legislation.qld.gov.au/view/pdf/bill.third.exp/bill-2016-092>