Australian Banking Association

02 September 2022

The Hon Mark Furner MP
Minister for Agricultural Industry Development
Minister for Rural Communities
Queensland Government
GPO Box 46
BRISBANE QLD 4001
Via email: agriculture@ministerial.qld.gov.au

Dear Minister,

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

The Australian Banking Association (**ABA**) welcomed the opportunity to contribute to the review of the Farm Business Debt Mediation Act 2017 **(the Act**) and we wish to provide further feedback for consideration following the release of the final report[1].

The ABA continues to advocate for the implementation of uniform farm debt mediation (**FDM**) legislation in each state via a national agreement and acknowledges the challenges experienced to date in achieving this.

The review of the Act presents a great opportunity to encourage further harmonisation across state schemes. The ABA welcomes the consideration noted in the final report to amend Section 14 of the Act to ensure QRIDA has the flexibility to amend the wording of enforcement action notices. During the consultation, the banking industry called for changes to some notices to remove the references to enforcement action, as it is contrary to the purpose of FDM, and the ABA recommends this is enacted.

One important area the banking sector raised during the consultation, but which the final report does not address, was the vast scope regarding provision of documents. 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.

As it stands, these document provisions can:

1. Distract from the purpose of the mediation; and
2. Result in additional complexity/duplication of documents, creates uncertainty as to the scope of documents and adds costs to the farmer.

The ABA proposes the Act is 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 (all internal bank documents including but not limited to credit assessments) are excluded.

Key Points

Distraction from the purpose of meditation:

The current sections of the Act regarding the provision of documents are more closely aligned to the legal discovery process in legal proceedings rather than mediation and acting in good faith.

ABA member banks have shared examples where the request for documents has been used to delay the mediation or seek commercially sensitive documents for the purposes of litigation rather than focus on an agreement, which is the principal aim of mediation. In extreme cases, where the farmer is seeking

[1] Review of farm business debt mediation act 2017 report, https://documents.parliament.qld.gov.au/tp/2022/5722T962-D642.pdf

documents and, the bank has decided should not be provided, court proceedings such as *Scriven v Queensland Rural and Industry Development Authority*[2] have followed.

Complex legal arguments are unlikely to be resolved in a farm debt mediation which is not the appropriate framework for those types of matters.

Results in additional complexity/duplication of documents, creates uncertainty as to the scope of documents, and adds costs for the farmer:

Duplication/complexity

In notice Section 15, when the documents request 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.

Most of the documentation lenders produce has already been provided to the farmer previously or, indeed, originated from the customers themselves. Examples may include the loan application form completed by the farmer that was sent to the bank, the Letter of Offer/Loan Contract, or the mortgage, which are all provided to the customer by the bank at origination.

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.

Arguments have been raised that the production of documents is a reciprocal obligation to ensure each party to the mediation is treated equally.

Our members' experience with the operation of the Act is a bank only requires loan servicing information and valuations for the purposes of a credit assessment (if the farmer is seeking additional credit at the mediation) rather than seeking documents in the customer's possession that could be used to strengthen the bank's position at the mediation. The credit assessment documents are necessary to ensure a responsible and prudent credit risk assessment is completed. In this way the reciprocal obligation argument is fundamentally flawed as the principal motivation can vary between the farmer and the banks.

For example, our members have observed multiple occasions where a significant volume of documents have been sent to the customer, pursuant to the Act, via online file sharing platforms and the files appear to have never been opened or accessed by the farmer. This provides anecdotal evidence that customers, possibly at the request of their advisors, may "opt in" to receive the documents out of an abundance of caution or a lack of understanding of mediation when there may be no intention to review them.

Uncertainty

The review's final report noted that the legislation is clear enough as it stands in that it only applies to documents relating to the debt, not all documents pertaining to the farmer or other documents. However, the ABA disagrees:

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" may be interpreted to mean a broad range of documentation that is often not relevant to the mediation. In practice, a 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 completely irrelevant to the mediation. Therefore, the ABA recommends the Act be amended to provide greater clarity on the scope of documents and exclude those which are commercially sensitive or internal.

The review's final report did note that consideration could be given to explicitly excluding commercially sensitive documents, though was ultimately not included as a formal consideration on the grounds of potential unintended consequences – the ABA suggests this is worth consideration.

[2] Scriven v Queensland Rural and Industry Development Authority, Supreme Court of Queensland, https://www.queenslandjudgments.com.au/caselaw/qsc/2019/176

In practice, mediations rarely involve reviewing or discussing key document 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. Therefore, providing a broad range of documents to a farmer is of little utility to a farmer in the vast majority of cases.

Costs for the farmer

The current requirement under the Act to provide a wide range of documents may add additional costs for a farmer who may need to incur legal fees and/or advisor costs to review the broad range of documents provided by the bank. If the scope of documents was more precise, the cost for legal review could be reduced.

Given the reasons above, the ABA would appreciate your consideration to review the current document request provisions in the Act and would welcome the opportunity to discuss this matter further. Please do not hesitate to contact me.

Yours sincerely

Director, Business Engagement and Policy