



10 May 2019

Document Number: B19-0248

Farm Debt Mediation: key themes from targeted consultation and final policy approvals

Purpose:

This paper provides an overview of the key themes from targeted consultation on the draft Farm Debt Mediation Bill and seeks final policy approvals for key features of the system design and amendments to the regime.

Minister	Action Required:	Minister's Deadline
Minister of Agriculture	<p>Note the summary of themes emerging from consultation, and MPIs proposed response</p> <p>Agree in principle to key features of the scheme</p> <p>Note that the scheme will need to be administered by a Government agency, and further advice on this is to follow</p> <p>Agree to forward this paper to the Minister of Commerce and Consumer Affairs for his information</p>	15 May 2019

Contact for telephone discussion (if required)

	Name	Position	Work	Mobile
Responsible Manager	Privacy	Manager, DIRA Review	Privacy	
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Key Messages

1. Last December, Cabinet approved the drafting of a Farm Debt Mediation Bill [CAB-18-MIN-0608 refers]. Since then, officials have been simultaneously developing the accompanying system design and working with the Parliamentary Counsel Office to develop the Bill.
2. The Bill has been based on the Farm Debt Mediation Act 1994 (NSW), but has been designed to fit with New Zealand property law and legal frameworks, and allow additional flexibility in the system to provide for the incorporation of tikanga.
3. Last month, you approved targeted consultation on the draft Farm Debt Mediation Bill. Feedback was constructive and focused on the technical operation of the regime and streamlining the process for mediation. An overview of key themes of consultation and our proposed response is set out in Appendix One.
4. The overall operation of the scheme as set out in the draft Bill is consistent with the regime agreed by Cabinet. However, there have been some amendments proposed to what Cabinet agreed, in order to ensure the system is robust, and in response to stakeholder feedback and targeted engagement on the Bill. These amendments, and the rationale for the changes, are set out in this paper.
5. We are seeking your agreement to these amendments and a number of key features of the system design.

Recommendations

6. The Ministry for Primary Industries recommends that you:

- a) **Note** the summary of these emerging from consultation, and MPI's proposed response

Noted

b) **Agree:**

- That the scheme will be administered by the Ministry of Primary Industries, and funded from baselines
- Farmers to nominate three mediators, and creditors to then select from these mediators
- Parties can, if they choose, agree their own arrangements regarding costs
- Require mediators to disclose any conflicts of interest, including perceived conflicts, and to withdraw unless the parties agree to the mediator continuing
- Flexibility to allow for the inclusion of tikanga where parties wish to have this as part of the process
- Mediation bodies apply to the Government administration agency to become an approved mediation organisation
- A transitional period of 12 months before the Act is in force to ensure the system and creditors are prepared, and that farmers are aware of the system

Agreed / Not Agreed

- c) **Agree** to forward this paper to the Minister of Commerce and Consumer Affairs for his information

Agreed / Not Agreed

Emma Taylor
Director
Agriculture, Marine & Plant Policy

Hon Damien O'Connor
Minister of Agriculture

/ / 2019

Background

Development of the Bill

7. Last December, Cabinet approved the drafting of a Farm Debt Mediation Bill. Over the past few months, officials from the Ministry of Primary Industries and the Ministry of Business, Innovation and Employment have been simultaneously developing the accompanying system design for implementation of the Bill, and working with the Parliamentary Counsel Office (PCO) to draft the Bill itself.
8. The Bill has been based on the Farm Debt Mediation Act 1994 (NSW), but has been designed to fit with New Zealand property law and legal frameworks and allow additional flexibility in the system to provide for the incorporation of tikanga.
9. The overall operation of the scheme as set out in the draft Bill is consistent with the regime agreed by Cabinet in December 2018. However, there have been some amendments proposed to what Cabinet agreed in order to ensure the system is robust, and in response to stakeholder feedback and targeted engagement on the Bill.
10. Cabinet authorised you and Minister of Consumer Affairs to make minor and technical policy decisions. A table of these decisions will be attached to the Cabinet Paper seeking to introduce the Bill. The Minister of Commerce and Consumer Affairs is currently overseas and will not be returning until 21 May. We are recommending that you make in-principle decisions now to facilitate remaining on track for introducing the Bill in June, with a view to enactment before the end of 2019.

Key themes from targeted consultation

11. Last month, you approved targeted consultation on the draft Farm Debt Mediation Bill. Targeted consultation was carried out in place of a full public consultation on the Exposure Draft. Officials released the draft Bill to Federated Farmers, the New Zealand Bankers Association and the Restructuring and Insolvency Turnaround Association New Zealand.
12. Targeted consultation complements the ongoing stakeholder engagement that has occurred throughout this process, with mediation bodies, rural professionals and organisations, secondary lenders and other government agencies.
13. Stakeholders were selected for targeted consultation due to the technical nature of the Bill and the financial and property law implications of the regime. Feedback was constructive and focused on the technical operation of the regime and streamlining the process for mediation.
14. The key themes from consultation and our proposed response to these are summarised in the table at Appendix One.

Proposed amendments to the draft Bill

15. Last December, Cabinet agreed to the detailed design of the regime. The features Cabinet agreed to include:
 - a 20 working day response period for a mediation request;
 - a maximum of three months overall for mediation to be concluded;
 - the exclusion of personal liability for mediators, and a requirement they must be independent from all parties, including perceived conflicts of interest;
 - a two stage process for selecting a mediator; and
 - a requirement that parties split the costs of mediation equally.
16. During the process of developing the system design and preparing the draft Bill, some of these features no longer fit with the overall operation of the regime.
17. In accordance with Cabinet's direction, officials have developed a 'light touch' system that effectively balances the system's procedural and support requirements, with a cost effective and 'user-led' approach.
18. Final approval for the system design will be sought in the Cabinet Paper accompanying the draft Bill. We are seeking your in agreement to some of the significant elements.

Administration of system and legislation

19. A government agency will need to administer the Farm Debt Act. The agency will ensure farm debt mediation requirements are complied with, and track and assess the performance of the scheme.
20. The system has been designed to be 'light touch' and the decisions required by the agency will be largely procedural. Discussions with colleagues in NSW suggest that these functions are not time consuming and the decisions are generally very clear.
21. It is difficult to estimate the likely annual number of farm debt mediations. This is because it is a new initiative and there is limited data on the amount of enforcement action in the primary industries. Forecasting undertaken as part of last year's regulatory impact analysis suggests that there would be around 50 - 100 mediations per annum. We consider that the administration of farm debt mediation can be carried out within baseline. However, this may change if there was a significant increase in annual mediations.
22. We recommend that the scheme is administered by MPI. MPI has significant understanding and experience with farmers, and the current functions held by MPI means that farmers are likely to consider MPI as the administrator in any case.

Process for selecting a mediator

23. Currently, the process for selecting a mediator is based on the NSW model and is as follows:
 - a. farmer nominates one mediator from register of accredited mediators;
 - b. creditor can accept or reject this mediator; and
 - c. if the creditor rejects the nominated mediator, the farmer must nominate a panel of at least three other mediators from which the creditor must agree to appoint one.
24. In our discussions with stakeholders, they have suggested this process is unnecessarily complicated and will create additional work and stress for farmers. We consider that having a simple system with as few barriers as possible (including perceived barriers) is crucial to encourage farmers to utilise mediation. Therefore, we recommend streamlining this process as follows:
 - a. in the first instance farmers nominate three mediators; and
 - b. creditors must select one of these mediators.
25. This process is similar to the selection processes for other mediation regimes, such as the Construction Contracts Act 2002 mediation scheme. We have discussed this amendment with the Government Dispute Resolution Centre who support the streamlined process.

Equal cost requirement

26. As in NSW, while the legislative presumption will be that parties will equally contribute to mediation costs, parties will be able to agree to their own arrangements. However, parties will not be able to agree to the farmer contributing more than half of the costs. We consider creditors will be incentivised to contribute more of the costs of mediation in order to address debt concerns promptly and without incurring undue enforcement costs.
27. Through the stakeholder engagement process, and the consultation on the draft Bill, a number of stakeholders raised concerns about farmers' access to capital in farm debt mediation. Stakeholders felt that requiring farmers to contribute half of the upfront cost of mediation would likely be a major disincentive for participating in the scheme. We consider allowing parties to agree to different arrangements will help mitigate this.
28. We consider the current provision allows parties to come to the most suitable arrangements for them, while providing adequate protection to farmers.

Approach to conflicts of interest

29. Cabinet agreed to a requirement for mediators to decline where they had any conflict of interest, including a perceived conflict of interest. This requirement is not consistent with other mediation regimes and may be overly stringent. We have discussed this with the Government Dispute Resolution Centre and recommend amending this approach to be consistent with other regimes. Further, the role of mediation accreditation bodies (paragraphs 35-41) will ensure mediators act appropriately, and effectively respond if they do not.
30. We propose requiring mediators to disclose any conflict of interests, including perceived conflicts, and to withdraw unless the parties agree to their continuing.

Provision for tikanga

31. 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.
32. We have engaged with the Federation of Māori Authorities and Te Puni Kōkiri (TPK). The Federation of Māori Authorities have indicated strong support for the Bill. We are working with TPK to ensure there is a consistent approach between farm debt mediation and the proposed changes to the Māori land court, and its dispute resolution mechanisms.
33. In line with these discussions, we want to ensure the farm debt mediation process allows for the inclusion of tikanga where parties wish to have this as part of the process. Further flexibility is important as tikanga differs from region to region, and parties must determine the appropriate principles for the particular dispute.
34. To ensure the farm debt mediation regime allows for the inclusion of tikanga, flexibility has been built into the process, including:
 - a. the ability to agree longer timeframes to allow for engagement and discussion with wider hapu and iwi stakeholders;
 - b. flexibility of timeframes to allow parties to determine that mediators with sound understanding of tikanga are available, and allowing parties to select mediators from their local area; and
 - c. flexibility of mediation process and involving parties in agreeing to this process, for example of which language mediation will take place in, and speaking rights in the mediation process.

Administration and the appointments of mediators

35. Well qualified and experienced mediators are key to the success of farm debt mediation. Due to the low number of expected farm debt mediations, ensuring administration is low cost and efficient is important.

36. Currently, New Zealand does not have a national mediation accreditation scheme. Officials do not propose establishing such a regime, as it has not been considered necessary for other existing mediation regimes. There are a number of private mediation organisations in New Zealand that offer their members appropriate training and accreditation.
37. Officials propose using the family dispute resolution model of accreditation, where mediation bodies can apply to the Administration agency to become approved organisations. Approved organisations can then authorise individuals to become authorised mediators. Authorised mediators go onto a public list which is available for farmers to select their preferred mediators from.
38. This allows for effective regulation of mediators, ensuring quality and consistency, with relatively low cost, fitting with the light touch model for farm debt mediation. It also supports a competitive market which is a key factor in minimising costs.
39. The Administration Agency sets the requirements for organisations and mediators. The agency would accredit mediation organisations where they can demonstrate a number of criteria, for example:
 - a. robust qualification;
 - b. an internal dispute resolution and complaints process; and
 - c. on-going training.
40. The criteria that mediation organisations use to assess the suitability of individual mediators to be farm debt mediators would be set in regulations. It is expected that these mediators would be qualified, have experience acting as a mediator, and have experience of working with rural stakeholders and communities.
41. We propose developing the requirements for mediation organisations and for mediators in collaboration with stakeholders.

Transitional period

42. While the administration of the scheme is relatively simple and 'light touch', a transitional period will be required to:
 - a. promote the scheme and educate farmers and creditors about the purpose of mediation and requirements under the scheme;
 - b. ensure there are sufficient mediators to service requests;
 - c. provide creditors, particularly smaller secondary lenders, sufficient time to change their business practices (e.g. timeline for enforcement action, standard contracts) to comply with the Bill.
43. The Act currently provides for a transitional period of 12 months it comes into force, with the ability to shorten the transitional period through an Order in Council. The longer transition period has been proposed to reflect the reliance on the market to ensure there are sufficient mediator to service requests.

Timeline for introduction

44. Officials have engaged with your Office on a revised timeline for the introduction of the Farm Debt Dediation Bill. Compressed interagency and Ministerial consultation will be required to meet this timeframe.
45. The revised timeline would have the Bill be considered at the:
 - Cabinet Economic Development Committee on 12 June; and
 - Cabinet Committee on 17 June.
46. The Bill would then be introduced in the week of 17 June and referred to Select Committee in the week of 24 June.

Proactively Released

Appendix One: Themes emerging from consultation

Themes from consultation	Proposed response
Regime needs to better provide for wider affected parties, such as guarantors.	We have instructed PCO to ensure the regime allows for wider affected parties to be involved in mediation, where appropriate. We think this is best achieved by allowing for the creditor and farmer to agree to the involvement of such parties.
There needs to be provision for creditors to 'fast track' the completion of mediation when property is at risk (for example where there is animal welfare or environmental concerns); or where parties are not mediating in good faith.	We do not consider this is necessary, particularly given the default maximum timeframe for farm debt mediation is three months. ¹ Where there are serious concerns during this period, these should be addressed through the relevant authorities (local councils for environmental and MPI for animal welfare). The use of skilled mediators will ensure that the parties address concerns around lack of good faith during mediation.
Mixed feedback on how to best balance certainty and equity in the regime. We received contradictory feedback on what property is eligible for compulsory mediation under the scheme. In particular, whether eligibility should be assessed on entering a contract, or when enforcement action is being considered.	We consider certainty and equity are best balanced by assessing eligibility when parties enter a contract. This will minimise uncertainty, and potential associated costs, for both creditors and farmers. However, there may be some inequity for creditors, such as where a car shifts from farm to personal use over time.
Regime should not apply to large farm entities or small creditors.	We have designed the Bill in accordance with Cabinet's direction that the regime would apply equally to secured creditors and farmers, regardless of their size.
Process for appointing a mediator is unnecessarily complicated and should be streamlined. Cabinet agreed to a two-step process for appointing mediators, with the farmer proposing the first mediator. Where this mediator is rejected by the creditor, they recommend three possible mediators. The farmer then selects from these.	We agree and have heard similar feedback from a number of stakeholders during system design. We propose streamlining this process, with farmers proposing three mediators at the outset and creditors selecting from these mediators. We seek your approval for this change in this briefing.
Requiring mediation costs to be split equally between the parties will be inequitable in some circumstances, and may be a barrier for farmers participating in the scheme.	We propose to provide for parties to agree to different arrangements (see paragraph 22), and seek your agreement to that change in this briefing.
Range of feedback about the mediation timeline, both overall (60 working days) and certain processes throughout (respondent party must reply to mediation request within 20 working days).	We consider the overall timeframe for mediation is appropriate. Simple mediations are likely to be concluded much faster.

¹ As in NSW, the draft Bill states that the mediation process must be concluded within 60 working days, unless parties agree otherwise.