
[Slide 1] AMINZ RURAL DAY 2018

FARM DEBT MEDIATION

By

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FARM DEBT MEDIATION

1. **[Slide 2]** Let me start by quoting the AMINZ submissions on the recent Farm Debt Mediation Bill:

Farm debt is not just a number, for the farmer or the lender. For the farmer, the debt supports not just a business, but a way of family life, a passion, a history and a commitment to the whenua. For the lender it represents not merely a commercial transaction, but also a relationship on a personal level, and part of a vital connection to New Zealand's largest economic sector. A farm is often an integral part of the local economy and community.

2. **[Slide 3]** Farm debts go awry. Farmers over-commit. Drought and other natural disasters can ruin the best-laid plans. Bio-hazards and compliance issues can add unexpected costs. Prices are subject to international volatilities over which neither farmers nor lenders have control.
3. Lenders have a broad suite of contractual, statutory and court-based means of enforcing farm debts. But, once enforcement action commences, the costs, and the emotional stakes, rise significantly. This can create risks – for the farmer, the lender and the community - that not all options are explored, and not all issues are addressed.
4. Mediation can help. International research has found mediation to be more likely to achieve settlements than other forms of consensual dispute resolution¹. It achieves settlements that are more likely to be complied with². It saves time and money³ even when settlement is not achieved⁴. It allows parties to explore all possible options. Importantly, it also allows parties to feel that they have “had their say”, and have been heard. There is great psychological and emotional benefit to parties in this process, and it can help to unlock a practical settlement mindset.
5. **[Slide 4]** Statutory farm debt mediation schemes have been established with real success in the United States, Australia, and Canada. It looks like we are going to have one established by here in New Zealand.
6. In this short seminar I will briefly cover:
 - (a) Aspects of “the problem” that farm debt mediation is intended to help address;
 - (b) Aspects of the statutory farm debt mediation schemes set up in the United States, Australia, and Canada; and
 - (c) Progress on, and issues for, a farm debt mediation scheme in New Zealand.
7. Given the wisdom and experience in the room, I would like to finish with a discussion on farm debt mediation, talking about some of the concerns that folk might have about it, and the opportunities it might present.

[Slide 5] Aspects of “the problem” that statutory farm debt mediation is intended to help address

8. The scale of farm debt in New Zealand is staggering. And it keeps growing. Federated Farmers reports agricultural debt rising from \$12 billion in January 2000 to \$61 billion in May 2018, a five-fold increase. Other sectors have seen increases over that period, but not to the same extent – household and personal consumer debt has increased nearly four-fold and business debt has increased early three-fold⁵.
9. Dairy farms hold the most debt, collectively around \$40 billion⁶. The average current mortgage for a dairy farm is over \$5 million⁷.
10. The Reserve Bank has highlighted dairy sector indebtedness as one of the financial sector’s key vulnerabilities. Its May 2018 Financial Stability Report noted:

*“The dairy farming sector remains highly indebted and vulnerable to any possible downturn in dairy prices. The sector also faces a number of long-term challenges, including the impact of tighter environmental regulations.”*⁸
11. A notable proportion of New Zealand farmers feel “undue pressure⁹” from their banks.
12. **[Slide 6]** In a commercial sense, farm debt issues can be complicated by multiple factors, such as:
 - (a) Uncertainty over income;
 - (b) Uncertainty over outgoings;
 - (c) Uncertainty over values;
 - (d) Additional/separate debt owed on stock and plant;
 - (e) Family-based ownership and successions structures that compromise farmers’ ability to restructure; and
 - (f) Variations in financial literacy and competence.
13. On a personal level, farm debt issues can be immensely difficult. Farmers feel a tremendous sense of pride and responsibility. Family, employees, the community, history, the land and the animals all count for so much. The pressures, perceived and real, can be immense. And yet farmers are often the type of self-reliant and indomitable people who are the last to ask for help.
14. These dynamics can create a toxic cocktail, with the potential for tragic results. Recent US research has found that individuals in the farming, fishing and forestry occupation group have a higher rate of suicide (84.5 deaths out of 100,000) than veterans (35.3 out of 100,000)¹⁰.

15. So, we have huge debts, in complicated commercial circumstances, with difficult personal dynamics. Statutory farm debt mediation schemes have been used to help address these problems elsewhere. The next part of this talk takes a brief look at those schemes.

[Slide 7] Aspects of the statutory farm debt mediation schemes set up in the US, Australia, and Canada

16. The statutory farm debt mediation schemes that have been set up in the US, Australia, and Canada have had some common features. They:
- (a) Typically oblige lenders to give farmers notice of their right to mediate before commencing debt enforcement steps;
 - (b) Typically require enforcement steps to be paused while mediation is attempted;
 - (c) Use third party neutral mediators, who act in a facilitative rather than a determinative role;
 - (d) Have tended to have independent or government administration, rather than leaving administration to industry groups;
 - (e) Have been supported financially by governments; and
 - (f) Recognise the unique circumstances that can affect farm debt.

[Slide 8] The United States

17. Farm debt mediation schemes have been around in the US since 1987, when a federal scheme was initiated under the Agricultural Credit Act of the same year.
18. Cases covered by the federal scheme include agricultural loans, whether made by the US Department of Agriculture or commercial lenders, and a variety of other issues¹¹. The USDA reports that mediation has been utilized in “tens of thousands of disputes over farm credit”¹².
19. Various US states also have their own farm debt mediation schemes.
20. Overall, the US schemes seem to have had success. By way of example, here is a quote from a report on the Minnesota Farm-Lender Mediation Program:

*“The Minnesota FLM Program has proven to be an economic asset to individuals, businesses and communities affected by loans that are mediated...In the fiscal year 2008, the program opened 2,002 mediation cases... Nearly 80 percent of mediated cases reached some kind of settlement, meaning farms stayed in business, lenders got paid, and people stayed in their communities...”*¹³

21. **[Slide 9]** Some take-outs from my reading on the US schemes have included the following:
- (a) It is preferable to use skilled specialist mediators, who are subject to a code of ethics;

- (b) The mediations are more effective if pertinent information is furnished in advance of the mediation;
- (c) Even if mediation does not resolve a dispute, it can still improve relationships and outcomes; and
- (d) There seems to be a recognition that there will not be just one way to mediate these disputes. Mediations may take just a single meeting, or they may take more. Experts and/or lawyers may or may not need to be involved.

[Slide 10] *Australia*

- 22. The first farm debt mediation scheme in Australia was established in 1994 in New South Wales, following a particularly difficult drought. Other schemes have since been established in Victoria in 2011, Western Australia in 2015 and Queensland in 2017. There have been calls for a federal approach¹⁴.
- 23. The NSW legislation seems likely to be what a New Zealand scheme might be based on.
- 24. The NSW scheme has been well-used. Between 1995 and 2016, 1659 “satisfactory mediations” took place, with a settlement rate of nearly 90%¹⁵.
- 25. Interestingly, the NSW scheme has not had the “chilling” effect on finance that some thought it might. Mediator and commentator Geoff Charlton wrote as follows in 2013:

“As it transpired, lending to viable farms has not dried up and interest rates have, if anything, been lower than rates for commercial loans to small business. What is more, the most enthusiastic supporters of farm debt mediation from early times have been bankers. They have recognised that farm debt mediation creates the opportunity for bankers to finally sit down with farmers...”

- 26. **[Slide 11]** The NSW legislation has recently been overhauled and amended. Changes have included¹⁶:
 - (a) An expansion of the range of activities covered by the legislation, to include aquaculture and timber harvesting;
 - (b) Encouraging farmers to seek mediation earlier;
 - (c) Taking steps to sure farmers are fully aware of their rights; and
 - (d) Enhanced penalties for failing to comply, including fines for lenders who take enforcement action in breach of the legislation.

[Slide 12] *Canada*

- 27. At a federal level, Canada has the Farm Debt Mediation Act, enacted in 1997. In the 2000-2010 period the scheme put in place by that Act dealt with approximately 500 cases a year¹⁷. There are also provincial schemes.
- 28. An interesting aspect of the Canadian federal scheme is the provision of an administrator, who can assist the farmer, including by preparing a detailed review of the farmer’s financial affairs.

[Slide 13] Progress on, and issues for, a farm debt mediation scheme in New Zealand

29. There have been previous discussions regarding a statutory farm debt mediation scheme in New Zealand. But they have gone nowhere.
30. This year, however, the Farm Debt Mediation Bill, sponsored by Mr Mark Patterson MP of New Zealand First, went before the Primary Production Committee. Submissions which were supportive of the concept were made to the Committee by AMINZ and Federated Farmers, amongst others.
31. The Bill as originally submitted was brief, and not in great shape. It was withdrawn by Mr Patterson, but is to be reintroduced as a Government bill. I understand that work is now being done on it. The sense is that a farm debt mediation statute will be passed by this government.
32. **[Slide 14]** A useful way of looking at the Bill, and potential within it, is via the key AMINZ submissions on the Bill. They were as follows:
 - (a) A farm debt mediation scheme would be best dealt with in a stand-alone statute, rather than by an amendment to the Receiverships Act (as the Bill had proposed);
 - (b) “Farm”, “Farm Debt” and “Farm Debtor” should be defined terms with broad scope, to allow for the broadest application in the sector;
 - (c) AMINZ should have an exclusive role in the provision of mediators to the scheme;
 - (d) Mediation should be available at an early stage in the deterioration of the relationship between the lender and the farmer. Default, or significant default, however best defined, should be the “trigger point”. Waiting until formal enforcement is imminent will greatly reduce the opportunities for the scheme to be of practical effect;
 - (e) Lenders should be obliged to advise farmers that they have the opportunity to mediate, at the trigger point;
 - (f) Mediation should be mandatory for the lender, where requested by the farmer;
 - (g) Once mediation is in train, all forms of enforcement action, other than for interim relief, should be deferred, pending conclusion of the mediation;
 - (h) **[Slide 15]** On mediation costs:
 - (i) It may be preferable, for the purposes of “buy-in” and perceptions of neutrality, for the costs to be shared between the parties;
 - (ii) However, it may be counter-productive if lenders can reclaim their mediation costs from farmers later as a component of lending costs;
 - (iii) Government may wish to provide for the possibility of financial assistance to farmers to mediate, particularly after natural disasters, and/or bio-hazard events;

- (i) Parties should be encouraged to provide full and frank disclosure of relevant, non-privileged, information to one another ahead of the mediation;
 - (j) There should be flexibility as to the agreed process in each mediation, and co-mediation should be an available option if agreed to;
 - (k) Parties should be allowed legal representation. If the farmer does not have legal representation, it may be appropriate for there to be a short “cool-off” period, post-mediation, within which the farmer can opt out of any agreement reached;
 - (l) Parties should be obliged to attend mediation in good faith; and
 - (m) The scheme should have a reporting and review regime, such that it can learnt from and further develop.
33. As is apparent, there is a lot to work through, and some variations as to how a scheme might look. But these are exciting times for rural mediation. A New Zealand statute-based farm debt mediation scheme seems imminent, and has some interesting possibilities. Hopefully it represents a real opportunity for dispute resolvers to do great work in the rural world.

[Slide 16] Discussion Points

- 34. Concerns?
- 35. Opportunities?

[Slide 17] CONCLUDING REMARKS

- 36. Concluding remarks

**Mark Kelly,
27/11/18**

¹ A 2011 study of civil cases in Michigan found that mediation produced far more settlements and consent judgments (84% of cases) than other approaches - Campbell, T.G. & Pizzuti, S.L. (October 2011), *The effectiveness of case evaluation and mediation in Michigan Circuit Courts*, East Lansing, MI: Courtland Consulting

² In a Scottish mediation pilot that ran from 2006 through 2008, 90% of parties that settled at mediation reported that the terms of their agreement had been carried out, while only 67% of litigants who otherwise settled during the course of litigation reported compliance with the agreement - Ross, M. & Bain, D. (2010). *Report on evaluation of in court mediation schemes in Glasgow and Aberdeen Sheriff Courts*. Edinburgh: Queen's Printers of Scotland. Retrieved from:
<http://www.scotland.gov.uk/Publications/2010/04/22091346/19>.

³ See: *A Case for Mediation: The Cost-Effectiveness of Civil, Family, and Workplace Mediation*, Sarah Vander Veen, January 2014 <http://www.mediatebc.com/PDFs/1-52-Reports-and-Publications/The-Case-for-Mediation.aspx>,

⁴ A 2001 study of mediated EU commercial cases found that even those that did not settle at mediation were shorter and less costly to the courts and the disputants - De Palo, G., Feasley, A., & Orecchini, F. (2011) *Quantifying the cost of not using Mediation – A data analysis*, Brussels: European Parliament Policy Department C: Citizens' Rights and Constitutional Affairs.

⁵ Federated Farmers of New Zealand submissions on the Farm Debt Mediation Bill, 3 August 2018, p4

⁶ Ibid

⁷ Federated Farmers May 2018 Banking Survey, p5

⁸ Federated Farmers of New Zealand submissions on the Farm Debt Mediation Bill, 3 August 2018, p4

⁹ Ibid, p5

¹⁰ "Farmer Suicide Rate is Concerning, but Resources Are Available" by Jordan Hildebrand, post 19 February 2018, <http://kswheat.com/news/2018/02/19/farmer-suicide-rate-is-concerning-but-resources-for-solutions-are-available>

¹¹ USDA Fact Sheet, "Agricultural mediation Program", January 2018

¹² USDA FSA Handbook

¹³ Federal Reserve Bank of Minneapolis, "Community Dividend", Joyce Hoelting, 1 May 2009

¹⁴ "Farm Debt mediation Act 1994 (NSW): a different landscape", by Mark Hilton, in Australian Banking and Finance Law Bulletin, June 2018

¹⁵ NSW Government, RAA, *Farm Debt Mediation Act 1994 (NSW) Review*, Consultation Paper, 23 March 2017

¹⁶ See Hilton article, note 14

¹⁷ Westlaw, Farm Insolvency in Canada. I.I.C. Art. Vol. 2-3, p10