

MEDIATION UNDER THE FARM DEBT MEDIATION ACT 2019

AMINZ, RI and MPI

17 February 2020

“AN OVERVIEW OF THE ACT”

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Purpose of the FDM Act

s3“:

“The purpose of this Act is to provide parties to farm debt with the opportunity to use mediation to reach an agreement on the present arrangements and future conduct of financial relations between them before an enforcement action is taken in relation to farm property.”

Select Committee:

“The intent of the bill is to provide for fair, equitable, and timely resolution of farm debt problems. It aims to have farmers and lenders explore solutions constructively. Where options are limited, it aims to allow arrangements to be concluded in a timely and dignified way.”

Definition
of Farmer

FARMING

(Farm-ing) n.

**The art of losing money
while working 400 hours
a month to feed people
who think you are trying
to kill them.**

Definition of Farmer

s6(1)

farmer—means a person who is engaged in a primary production business

primary production business—

- (a) means a business undertaking that primarily produces unprocessed materials (including, without limitation, agriculture, horticulture, and aquaculture); and
- (b) includes—
 - (i) sharemilking; and
 - (ii) any business or class of business specified in regulations; but
- (c) does not include—
 - (i) a business undertaking that primarily provides materials or labour to perform a service for a business undertaking of a kind set out in paragraph (a); or
 - (ii) a business undertaking that primarily involves mining; or
 - (iii) any business or class of business specified in regulations

Definition of Farm Debt

s6(1)

farm debt means a debt incurred by a farmer (whether as principal debtor or guarantor) that,—

- (a) at the time it is incurred, is incurred solely or principally for the purpose of conducting a primary production business or any related activities; and
- (b) is secured wholly or partly by a security interest in farm property (whether granted by the farmer or a guarantor)

farm property means any property that is used for or in connection with the primary production business or related activities of the farmer

How will FDMA mediations arise?

- A farmer can request a FDMA mediation at any time in respect of a farm debt (unless there is an enforcement certificate in place) – s15. The farm debt does not need to be in default if it is the farmer requesting.
- A creditor can request a FDMA mediation at any time after the farmer is in “*default*” of a farm debt (unless there is a prohibition certificate in place) – s16.
 - “*Default*” is anything that gives the creditor the right to take enforcement action – s 6.
 - Might not, under many loans, just be missing payments.
- Mediation requests must be in writing, and replied to within 20 days - ss15-17.

Enforcement Certificates

- A creditor cannot take enforcement action arising from a security interest in farm property without an enforcement certificate – s11 (1).
- Under s34, a creditor can only get an enforcement certificate if:
 - The farmer has declined to mediate; or
 - The creditor participated in a mediation in good faith.
- An enforcement certificate lasts for three years – s42.

Prohibition Certificates

- Under s35, a farmer who owes a farm debt to a creditor can obtain a prohibition certificate if:
 - The creditor declined to mediate; or
 - The creditor did not participate in the mediation process in good faith.
- A creditor cannot take enforcement action if there is a prohibition certificate in force – s11 (2).
- A prohibition certificate lasts for six months – s42.

Appointment of the Mediator

s21

- The farmer must nominate a panel of three authorised mediators.
- The creditor must accept one of those mediators.

Procedure Agreement

s22

- Once a mediator is appointed, the parties and the mediator must enter into a procedure agreement.
- The procedure agreement must include agreement on costs (but nb \$2k limit for farmer – s23).
- The procedure agreement may include:
 - Who has authority to represent and bind the parties;
 - Who may attend the mediation;
 - Requirements as to confidentiality and privilege; and
 - “*whether the mediator may engage an expert assessor for a stated or any other purpose*”.
- A failure to:
 - enter into a procedure agreement within a reasonable time; or
 - comply with the provisions of a procedure agreement without a good reason,

may be treated as evidence that a party has not participated in the mediation process in good faith.

Costs of Mediation

- A farmer must not be required to pay more than \$2,000 towards the costs and related expenses of the mediator – s23.

- The select committee stated that:

“We were advised that the mediator’s total costs are likely to be less than \$6,000 for most two-party mediations.”

- Creditors cannot contract out of the requirements of the FDM Act – s58 - so will not be able to recoup mediation costs via “costs of default” terms.

Conduct of the Mediation

s24

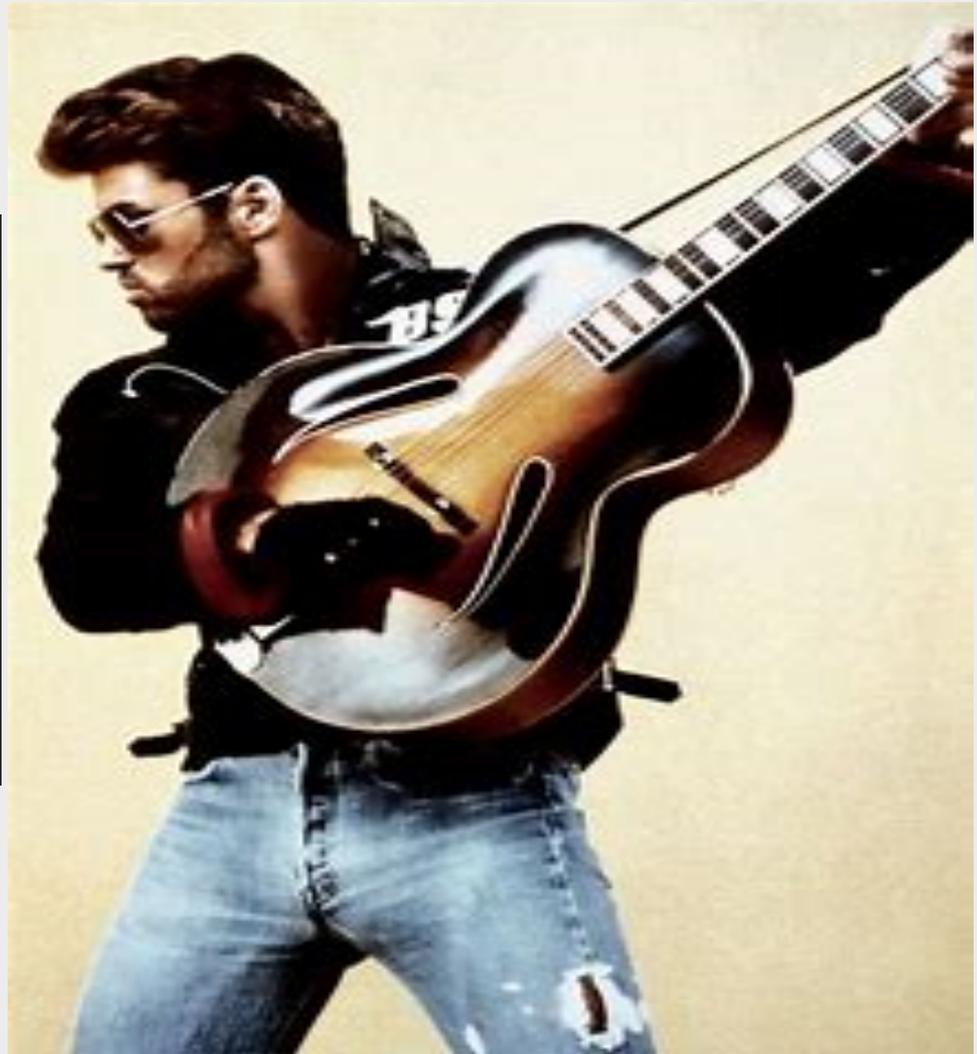
- A mediator may, “*having regard to the purpose of this Act and the needs of the parties*”, follow any procedures, or do any things, that the mediator considers appropriate to resolve the issues between the parties.
- A mediator must discuss the advantages and disadvantages of a multi-party mediation with the creditor and farmer if the mediator considers it appropriate.
- A mediator does not have power to determine any matter, even if the mediator is required to do so by the parties.

Duration of the Mediation

s25

- No prescribed time limit for the mediation itself.
- The parties must proceed to mediation as soon as is reasonably practicable after a procedure agreement is entered into.
- The mediation process may not continue beyond 60 working days after the date of a mediation request, except with agreement of the parties.

Good Faith



Good Faith s26

- Parties must mediate in good faith.
- Express sanctions on creditors – those who do not mediate in good faith will not get enforcement certificates/will be susceptible to prohibition certificates.
- See also ss 4, 5, 18, 21, 22, 27, 33, 34.

Confidentiality and Without Prejudice

- Confidentiality provisions are generally as you would expect. Confidentiality prevails unless disclosure is: *necessary* for reporting/enforcement/certificates, as agreed, or authorised by the Court – s28.
- Evidence Act will also apply.

Multi-party Mediations

s60

- The Act provides for multi-party mediations. Probably particularly pertinent for guarantors, related parties, other lenders.
- Collectively, non-creditor parties cannot be required to pay more than \$2k for the mediator's costs.

Mediation Agreements – Form

ss29-30

- Mediation Agreements are what the FDM Act calls settlement agreements.
- Any agreement reached between the parties must be recorded in a mediation agreement.
- The mediator must prepare a draft mediation agreement (s30(1)).
- Any draft mediation agreement must comply with any requirements published by the Chief Executive (s30(2), s63(1)(d)).

Mediation Agreements – Cancellation

ss32, 33

- The FDM Act has a “cool off” regime.
- A farmer may cancel a mediation agreement by giving written notice of the cancellation to the creditor within 10 working days after the date on which the mediation agreement is signed by the parties.
- If a mediation agreement is cancelled the agreement is treated as if it had never been entered into.
- In a multi-party – any non-creditor can exercise the cancellation right (s60(5)).
- Cancellation of a mediation agreement does not, by itself, demonstrate that *the creditor* did not participate in the mediation process in good faith (s33(2)).

Mediation Report

s27

At the end of the mediation, the mediator must give a report to the chief executive. The report must include—

- A summary of the mediation process;
- The names of the parties to the farm debt;
- The address for service nominated by each party; and
- Any other information specified in published requirements.

The chief executive may require a mediator to give any further information that the chief executive considers reasonably necessary.

The mediator must give the parties a copy of the mediation report.

The contents of a mediation report may be used as evidence that a party has not participated in the mediation process in good faith.

Exclusion of Liability

s48

Unless a mediator has acted in bad faith, the mediator has no criminal or civil liability in respect of—

- Any act done or omitted in the course of performing any of their functions under the FDM Act; or
- Any words spoken or written at, or for the purposes of, a mediation; or
- Anything in any mediation report.

Cracks?

- Eligibility
- Technicalities
- Good faith
- Report content



Questions

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