

Farm Debt Mediation scheme - What farmers and lenders need to know

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The Farm Debt Mediation Bill is predicted to pass into law in New Zealand before Christmas, making mediation compulsory before lenders are able to enforce farm debt. The scheme is expected to be operational by July 2020. Farm debt levels have risen to almost NZ\$63b this year, and farmers are particularly exposed to factors such as climate change, disease and offshore market volatility. Farms are often operated as family business, and many farmers have a strong emotional and historical attachment to their whenua. Decision making about the financial future of farms can be particularly difficult.

So what is farm debt mediation, and how can it be effective?

Mediation is a negotiation facilitated by a third party, a mediator, to assist the parties to negotiate a solution to their disputes. Farm debt mediation is intended to provide a tool for farmers who might be struggling with high debt levels and who want to be proactive about managing their financial position before defaulting on their obligations with their bank. Enforcement action is typically taken by banks only as a last resort, however, the impact of enforcement on both farmer and creditor can be significant. Farm debt mediation can assist the parties to avoid such enforcement taking place.

Mediation aims to assist the parties to find their own solutions to the issues they face. Those solutions might not save the family farm, but could help the parties to define the issues between them, understand the options available and agree a way forward.

The Farm Debt Mediation bill has recently been reported back from Select Committee with some important changes to the scope. The Select Committee noted that the policy intent of the bill is that “anyone with a direct interest in farm debt mediation should be able to access the process.” It is intended to apply to agriculture, aquaculture and horticulture. Hobby and lifestyle farmers, secondary processing operations and contractors are excluded. A “farmer” is defined to be “a person who is engaged in a primary production operation” and includes a “principal debtor under a debt incurred solely or principally for the purpose of conducting a primary production business”. The addition of the “principal debtor under a debt” is intended to capture those who might be jointly liable such as partners or spouses, but who don’t necessarily work on the farm day to day.

Mediation can be proposed by farmers at any stage, and a creditor must agree to participate unless there is a good reason to decline the request. If a creditor doesn’t agree to participate, this is something that may be considered in an assessment of whether the creditor has acted in good faith. A creditor can only request mediation through the scheme following a default by a farmer. They are free to propose mediation outside of the scheme at any stage.

Under the proposed legislation, the farmer nominates a panel of three accredited mediators and the creditor must accept one of the three mediators proposed. The bill proposes that farmers’ contribution to the mediators’ costs is capped at \$2,000. There remains an open question as to who will be responsible for the costs of any independent experts, such as accountants or farm consultants, whose expertise is often crucial to achieving a resolution of the dispute.

The key to effective mediation is in preparation and in the choice of mediator. From a preparation perspective, it is important that participants consider what a good outcome looks like for them, and what a bad outcome would be, as well as what evidence helps their respective positions and what does not. What are the parties’ underlying motivations and interests, and what do they want to achieve from the mediation? What information do they need to bring with them to the mediation, and what external support is required, for example in the form of accounting or environmental expertise? The better prepared the parties are before attending mediation, the more they stand to gain in agreeing a way forward.

As for mediator selection, it is important to choose someone who is well trained in the skills of mediation, whom both parties can trust to work impartially to assist the parties to resolve their disputes. Asking for recommendations from lawyers and accountants, and from those who might have had experience in farm debt mediation, is a good way of gaining feedback about potential mediators.

Similar schemes have been operating successfully in Canada, the United States of America and some Australian states for a number of decades. The introduction of the scheme in New Zealand will assist farmers and their lenders to work constructively through some of the challenges facing the sector now, and into the future.

This article was written by Scott Abel and Bridie McKinnon for the NBR (December 2019).

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