

Chair
Cabinet Economic Development Committee

A GOVERNMENT FARM DEBT MEDIATION BILL

Proposal

1. We are seeking approval to establish a statutory scheme for the mediation of farm debt in New Zealand.
2. This proposal is broadly consistent with a priority of the Labour-New Zealand First Coalition Agreement for the 52nd Parliament, namely, the “examination of agricultural debt mediation as well as receivership fees and charges”.

Executive Summary

3. This paper seeks approval to establish a statutory Farm Debt Mediation scheme in New Zealand.
4. The scheme would require secured creditors to farm businesses to offer statutory mediation before taking any enforcement action in relation to debt held over a farm business. It would also allow for farmers to initiate statutory mediation with a secured creditor.
5. The Bill would provide for fair, equitable and timely resolution of farm debt issues. It would have two key objectives:
 - for farmers and secured creditors to meet in an equitable manner to constructively and objectively explore options for business turnaround;
 - to provide for a timely and dignified exit for those where few other options exist.
6. The farming sector is a major contributor to the economy and most New Zealand farm businesses carry some level of debt. Farm businesses are vulnerable to any number of risks outside their control such as climate, biosecurity and market volatility.
7. Targeted consultation indicated widespread support for the introduction of a statutory mediation scheme. Addressing the power imbalance that exists between farmers and their lenders was repeatedly recognised as a likely benefit, alongside the potential to mitigate risks around farmers’ mental wellbeing, animal welfare and environmental harm.

8. The scheme would be based on the New South Wales *Farm Debt Mediation Act 1994* (the NSW Act) which is highly regarded. We are recommending some departures from the NSW Act to provide for a regime that aligns with the New Zealand farming environment and regulatory context.
9. It is difficult to predict the numbers of mediations that might occur in New Zealand under the proposed scheme. There is no quantitative evidence in New Zealand of farmers being treated unfairly by secured creditors, and it is very rare for secured creditors to take enforcement action.
10. To ensure the scheme would be effective, and to mitigate any associated risks, we propose to resolve a number of system design and implementation issues in tandem with drafting the Bill. These include making sure that farmers can access support and counselling, that mediators are appropriately qualified and experienced, and determining who will administer the system.
11. For this reason we propose to report back to Cabinet Economic Development Committee (DEV) in May 2019 with a fully drafted Bill ready for introduction alongside costed options for the implementation of the Bill.
12. Given that there has been no formal public consultation on this proposal to date, we also propose to publicly release an exposure draft of the Bill for further comment prior to its introduction.

Background

13. A Farm Debt Mediation Bill was introduced as a Member's Bill on 15 May 2018 and was unanimously supported at its first reading. The Bill proposed the introduction of compulsory farm debt mediation (FDM) before a bank or non-bank lending institution could appoint a receiver to a farm. The FDM regime proposed in the Member's Bill would have operated through amendments to the Receiverships Act 1993.
14. The Member's Bill had some limitations. In particular, mediation would not be triggered until a lender was intending to appoint a receiver. This is too late in the process to allow any realistic prospects of saving the farm business. The Member's Bill has been withdrawn on the understanding that a government Bill would be introduced in its place.

A Government-sponsored Farm Debt Mediation Bill

15. We are seeking approval to draft a Government-sponsored Farm Debt Mediation Bill (the Bill). The Bill would have two objectives:
 - to provide the opportunity for farmers and secured creditors to meet and discuss options to turn around financially stressed farm businesses in a timely manner;
 - to provide means for farmers to exit with dignity and options where the business is no longer viable.
16. Given the wider application of this regime, it would not be appropriate to

implement it by amending the Receiverships Act. As is the case with overseas FDM regimes (for example, three Australian states and Canada), the Bill is proposed to be stand-alone legislation.

17. The Bill would apply to loans secured by assets that are an integral part of a farming operation (such as farmland and farm machinery). When a farming business is in default, lenders would be required to offer farmers the opportunity to participate in mediation prior to taking any enforcement action.
18. The Bill would also enable farmers to initiate mediation, without having to meet any prerequisites. We consider this would encourage farmers to seek mediation early, before defaulting on a loan, and while they are more likely to have a wider range of options.
19. We are seeking agreement for the inclusion of the Bill in the 2019 Legislation Programme, with a category 2 (must be passed in 2019) priority.

The need for a compulsory farm debt mediation scheme in New Zealand

20. The farming sector is New Zealand's largest merchandise export producer and is an essential part of New Zealand's economy, society, culture and environment.
21. Most farm businesses in New Zealand carry some level of debt. The Reserve Bank of New Zealand data shows agricultural debt at \$62 billion as at September 2018. The dairy farming sector in particular is highly indebted, and the Reserve Bank notes in its May 2018 Financial Stability Report that this sector is currently 'vulnerable to a future down-turn in dairy prices'.
22. New Zealand farm businesses are susceptible to conditions outside their control, including climate change and adverse weather events. They have unique exposure to international markets making them susceptible to international market volatility and the impacts of disease or pest incursions.
23. Biosecurity incursions can have widespread and dramatic impacts on farming sectors. A number of New Zealand's trading partners are particularly sensitive to changes in biosecurity status. In the event of an incursion, markets can close to all New Zealand product from that sector either within a geographical range or entirely, whether or not the product has been directly affected. This has immediate consequences on product value and it could take some time before market credentials and product value can be restored.
24. Farms are often family businesses that have complex structures involving multiple parties, some of whom are untitled in contractual documents. The failure of a farming business can result in the farmer and their family losing not only the business, but also the family home and in many cases, a connection to the land developed over multiple generations.
25. Debt-stressed farmers can lack the capacity to enter into significant business

negotiations or transactions with sufficient objectivity to represent their interests effectively. In these situations the lender is usually well resourced and has a clear understanding of the most optimal outcomes from the lenders' perspective. This power imbalance can make it difficult for farmers and their lenders to collaborate in exploring all options available to the business and resolve issues in a fair and timely manner.

26. The largely seasonal nature of cashflows in combination with climate and price volatility can mean that the resolution of debt issues associated with farm businesses can be a long and drawn-out process. For some businesses, the determinant of a successful season can come down to a short seasonal window that is a culmination of a year or more of preparation. Stakeholders noted that lenders will support farmers through a loss-making season, but this can sometimes lead to a number of years of financial stress while debt continues to accrue and equity is eroded.
27. We believe there is a good case for introducing a compulsory FDM regime at this time. Uncertainty exists in the sector due to the impact of tighter environmental regulations, climate change and restrictions on foreign investment. Recent biosecurity incursions such as *Mycoplasma bovis* in cattle, and more historically PSA in the kiwifruit industry, have had a significant impact on some farm businesses.
28. This uncertainty has led to subdued farm sales activity and prices in some sectors. In our view, establishing a compulsory FDM scheme will support rural communities as they adjust to more enduring management of these risks and challenges.

Outcomes that can be expected from a compulsory FDM scheme

29. Reviews of statutory schemes in Australia and Canada give some indication of what outcomes can be expected from FDM in New Zealand. A review of the NSW Act in 2017 stated that of the 2,522 processes commenced under this act between 1995 and 2016:
 - 1659 were completed satisfactorily, that is, a mediation agreement was negotiated (1,487) or the mediation proceeded as far as it reasonably could in an attempt to reach agreement (172); and
 - of the remaining 863 where satisfactory mediation did not take place, more than half of these were because farmers had notified relevant parties that they did not wish to enter into or proceed with mediation.
30. Of 1,666 farm debt mediation agreements reached in Canada between 2008 and 2014, the three most common outcomes were debt restructuring, a satisfactory exit arrangement or disposal of some assets.

Extensive consultation and widespread support

31. Officials from the Ministry for Primary Industries (MPI) and Ministry of

Business, Innovation and Employment (MBIE) have met with a range of stakeholders in New Zealand, and have also travelled to New South Wales (NSW) to gain an in-depth understanding of how a similar statutory scheme operates there.

Benefits for borrowers

32. The strongest support for a statutory regime in New Zealand comes from farmer support groups (Rural Support Trust, Rural Women New Zealand, Primary Sector Chartered Accountants), mediators (Arbitrator's and Mediators' Institute New Zealand, Resolution Institute) and the ANZ Bank (New Zealand). These groups see mediation as an effective means of addressing the power imbalance between farm debtors and lenders; and consider that mediation provides an opportunity for the holistic resolution of a number of issues impacting debt-stressed farmers.
33. Although there is no clear evidential link between debt stress and farmer suicide, the link was drawn anecdotally by a number of people that officials met with; and the clear view was expressed that the opportunity to mediate the management of farm debt before the farm hits crisis point could be material in promoting better mental wellbeing amongst rural communities.
34. It was also clear from discussions that effective management of farm debt mitigates other poor outcomes particularly in relation to animal welfare, and environmental standards. These things often suffer when a farm business becomes distressed.

Benefits for lenders

35. Banks noted that although they undertake a very small number of receiverships and voluntary administrations in the agricultural sector, s 9(2)(ba)(i) [REDACTED] They also noted that a statutory scheme would assist lenders to constructively engage with farmers and could help to mitigate the reputational risks associated with debt recovery.
36. The Australian Banking Association noted that in its experience of the New South Wales scheme, both bankers and borrowers tended to achieve better and more enduring outcomes through mediation, although this is difficult to quantify because mediations are, by their nature, confidential.

Australian statutory schemes

37. New South Wales (1994), Victoria (2011) and Queensland (2017) have enacted FDM legislation. The introduction of a statutory scheme in Queensland was a response to concerns that an existing voluntary scheme was not sufficiently effective.
38. Officials have consulted with officials in NSW and with key Australian interest groups. Those meetings indicated that the the NSW Act is regarded as best practice by Australian farming, banking, and mediation interests. It is simple

and provides mediators with the flexibility to facilitate agreements to meet individual circumstances.

39. We propose that the Bill should be based on the NSW Act, with some modifications.

An FDM scheme that is fit for purpose in New Zealand

40. We propose some departures from the NSW Act to ensure that the FDM regime aligns with the New Zealand farming environment and regulatory context. The key features of these departures are:
- Key feature 1: The farming activities that should be covered by the Bill;
 - Key feature 2: The type of assets that should be covered by the Bill;
 - Key feature 3: The criteria for triggering mediation; and
 - Key feature 4: The rules for the conduct of mediation.
41. We are also seeking agreement to some secondary features that are discussed in Appendix Two.

Key feature 1: The farming activities that should be covered by the Bill

42. A foundational matter for the Bill relates to what kinds of farm or farmer it should apply to. The following criteria are relevant for determining this:
- Criterion 1: The level of vulnerability to business down-turns as a result of susceptibility to conditions outside the farmer's control (e.g. adverse weather and climate fluctuations, biosecurity incursions or volatile global market conditions);
 - Criterion 2: The extent to which the form of farming usually means that the farmer lives on the farm or the location of the home is integral to the business;
 - Criterion 3: The potential for mental wellbeing, animal welfare or environmental issues as a result of financial stress; and
 - Criterion 4: A significant imbalance in negotiating power between the borrower and lender.

Farming activities which should be included

43. We propose that business undertakings that are solely or principally engaged in agriculture (including sharemilking) should be included. Criteria 1-4 are met for owner-operated agriculture businesses:
- climate, weather, biosecurity and global markets can all have significant impacts on farm businesses. For sharemilking businesses, global market fluctuations can have immediate impacts on asset values thereby impacting equity;
 - it is typical for the family home to be on the farm, and animal welfare can be of great concern when a farm business is financially distressed. An example is a drought situation where a lack of cash flow can prevent a

- farmer from adequately feeding and caring for the animals;
 - in the situations mentioned above it is likely that the farmer will not be able to enter into significant business negotiations with their lender on an equal footing.
- 44.** We propose that business undertakings that are solely or principally engaged in horticulture should be included. Criteria 1-4 are met for owner-operated horticulture businesses:
- horticulture is particularly vulnerable to adverse weather and climate fluctuations. Hail and storm events at critical times such as bud-burst and picking can have significant impacts on both volume and quality of product. Horticulture industries are particularly vulnerable to biosecurity incursions both from a market access perspective and a productivity perspective. The spread of PSA in the kiwifruit sector is one recent example;
 - owner-operators would typically reside on horticultural farms; and
 - for owner-operators, criterion 3 in relation to mental wellbeing and criterion 4 are likely to apply.
- 45.** We also propose including aquaculture which also meets criteria 1-4.
- climate fluctuations and biosecurity incursions can be catastrophic to aquaculture businesses;
 - for owner-operated businesses, the family home is often located in remote locations that are close to boat access to designated aquaculture areas;
 - environmental sustainability and fish welfare can become compromised when a business is under financial stress; and
 - criteria 4 is also likely to be met for owner-operated businesses.
- 46.** In addition, we propose including:
- any activity involving primary production carried out in connection with any of the included activities. This will avoid the risk that a farming business is excluded because it also undertakes secondary activities, such as having a plant nursery as part of an orchard; and
 - a business where two or more of the included farming activities will, taken together, meet a “primarily involved” test; for example, a farm that is 40 percent dairy, 40 percent horticulture, and 20 percent plant nursery.

Activities which should be excluded

- 47.** We recommend that the following categories of activities be excluded from the scope of the regime:
- lifestyle farms because they are not intended to be operated as true commercial businesses that provide a primary household income;
 - forestry because criterion 2 is rarely met and the risks in relation to criterion 1 are not as high. Forestry is a long term investment and is less vulnerable to business downturns. For example, forestry business operators have choices about when to harvest trees. Agriculture,

horticulture and aquaculture businesses do not have those same options in relation to their primary production activities; and

- wild harvest fishing, and the hunting or trapping of wild animals because criteria 2 and 3 are not met and such activity is less susceptible to the risks associated with criterion 1.

48. In future it might be appropriate to include forestry within the FDM regime if increasing numbers of family-owned farms become more heavily engaged in forestry over coming decades, as the Government introduces pro-afforestation policies to contribute to meeting New Zealand's obligations under the Paris Agreement on Climate Change and the Climate Change Bill.

Large businesses

49. During consultation the New Zealand Bankers' Association and ANZ Bank (New Zealand) both stated that larger businesses such as corporate farms with multiple holdings should be excluded because they could be presumed to be able to engage with their lenders without the support of a statutory regime and owners of large farm businesses are less likely to live on their farms.

50. We do not agree with this argument for the following reasons:

- difficulties could arise in trying to define who would be "in" and who would be "out";
- a number of iwi and hapū own and operate large farm businesses. Any meaningful exclusion for larger businesses is likely to inadvertently exclude some of those iwi-owned businesses. This could be perceived to be discriminating against those businesses on the basis that their owners hold their assets collectively rather than individually. The Government could also be open to criticism on the basis that the Crown, through the Treaty settlement process, has been a major contributor to the collective ownership of assets by iwi and hapū;
- while larger businesses can be expected to be able to engage with their lenders without the support of an FDM regime, officials are not aware of any significant risks in allowing them to also use the regime; and
- the NSW Act places no cap on the size of businesses which may use the FDM scheme and relevant parties in NSW cited no issues as a result.

Key feature 2: The type of assets that should be covered by the Bill

51. We propose that this regime should only apply in relation to loans which are, in substance, secured by assets that are an integral part of the farming operation. Under this approach, the following assets will be included:

- farmland (including buildings);
- farm machinery and plant (such as vehicles or machines commonly used for farming operation purposes, for example, tractors, milking equipment and irrigation systems);
- livestock (so that sharemilking arrangements will be brought within the regime); and

- harvested crops and wool (such as picked fruit, crops held in silos, hay and silage, and shorn wool stored on farm).
52. This would exclude assets that do not form part of the core farming business (such as recreational vehicles). We do not consider that the FDM regime should be used in respect of ordinary consumer debt.

Key feature 3: The criteria for triggering mediation

53. The FDM regime should, among other things, promote farm business turnaround where possible. We propose that the regime should be triggered by lenders where a farmer is in default and a lender intends to take any form of enforcement action in relation to debt secured over farmland or an asset that is an integral part of a farming operation.
54. We consider that the objectives of the Bill would be better promoted if farmers were also able to initiate mediation, without needing to meet any statutory criteria other than having debt secured over the farm business. It is important to encourage farmers to seek mediation early, before defaulting on a loan. When mediation occurs early, farmers are likely to be in a stronger position to mediate at a time when their emotional stress is lower, and business equity remains intact.
55. Restrictions will need to be placed on how frequently farmers will be able to require their lenders to mediate to ensure that farmers do not use the process to defer enforcement action indefinitely.

Key feature 4: The rules for the conduct of mediation

56. The Bill should provide mediators with the necessary flexibility to facilitate a mutually acceptable process and agreement. However, the Bill would also need to set out key procedural rules such as a method for appointing mediators and the time within which mediation should take place, to ensure that the FDM regime is fully effective.
57. We propose that most of the necessary rules should be the same as or similar to the rules that apply under the NSW Act. However, we consider that different rules would need to apply in relation to some procedural matters. Appendix Two discusses these rules in greater detail.

Prohibition and exemption certificates

- 58.** Under the NSW Act, the NSW Rural Assistance Authority has an active role in issuing “prohibition certificates” on application by the farmer and “exemption certificates” on application by the secured creditor:
- *prohibition certificates:* If the NSW Rural Assistance Authority concludes that the creditor has failed to act in good faith it may issue a prohibition certificate. If a prohibition certificate is issued, the creditor is unable to enforce its security for six months; and
 - *exemption certificates:* An exemption certificate can be issued when either a satisfactory mediation has taken place; or the farmer does not wish to enter into or proceed with mediation or the NSW Rural Assistance Authority concludes that the farmer has failed to act in good faith. In these circumstances the creditor can exercise their right to enforce, and the farmer is barred from seeking to commence a new mediation process for three years.
- 59.** There is provision to seek an “internal review” against a decision by the NSW Rural Assistance Authority to grant or refuse to grant a prohibition certificate or exemption certificate.
- 60.** The certificate system is critical to the success of the NSW scheme for the following reasons:
- it preserves the independence of the mediators: Mediators have the discretion to call an end to a mediation process if they believe that one or both parties are not acting in good faith. This is not a typical function for mediators and there is a risk that it could compromise their perceived independence. To address this risk, the NSW Rural Assistance Authority determines whether mediation has been completed satisfactorily, based on a summary of mediation provided by the mediator and any further submissions made by either party; and
 - it provides a clear process for situations where mediation is not completed and/or agreements are not reached. Parties can submit their views on application of either prohibition or exemption certificates prior to their being issued.
- 61.** We consider that an equivalent system would also be appropriate in New Zealand, and this will require the system to have an administering body. The system provides a transparent and structured process for determining the outcome of mediation without compromising the independence of the mediator. Further work to assess options for how this system could be delivered efficiently in New Zealand would be completed as part of the ‘system design and implementation’ phase discussed below.

Regulation making powers, offences and penalties

62. We consider that flexibility should be retained for various details of the regime to be set by regulation. For instance, we consider that the criteria for accreditation as a mediator and any necessary prescription as to the default processes for mediation should be able to be set by regulation or notice in the New Zealand Gazette.
63. The development of any offences and penalties will be carried out in consultation with the Ministry of Justice. We consider that relatively few offences will be needed in the FDM regime. The key incentive which parties will have is the application of a stay of enforcement proceedings where the requirements of the regime are met.

System design and implementation

64. There are a number of design and implementation issues that we propose be resolved in tandem with drafting of the Bill. These are:
- determining who will administer the system;
 - the accreditation of mediators;
 - designing the system so that it is inclusive of Tikanga Māori; and
 - ensuring that there is adequate counselling and support available to farmers so that they are able to realise the full benefits of mediation.

Administration of the system

65. Questions about who would be best placed to administer the system remain unresolved at this point.
66. The Members' Bill proposed that it should be administered by the Banking Ombudsman Scheme. However there are problems with this because most non-bank lenders are not members of this scheme. Non-bank lenders belong to other schemes registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008. The Banking Ombudsman Scheme is not currently resourced to take on this function, and a business case would be required to ensure that it had the right capability to deliver the scheme.
67. Options exist for the scheme to be administered by either of the Ministries of Business Innovation and Employment (MBIE) or Primary Industries (MPI), however these need to be fully assessed and costed.
68. We propose that further work is done in relation to each of these options, including the associated costs and benefits; and that this work is undertaken in tandem with the drafting of the Bill, and reported back to Cabinet for decisions when the Bill is ready for introduction in accordance with the process set out below.

Accreditation of Mediators

69. Access to appropriately qualified and experienced mediators is a critical component of any mediation scheme. In Australia, the National Mediation Accreditation Standards (NMAS) sets the minimum standard for mediators to become accredited to deliver mediation services.
70. There is no similar system in New Zealand. Key providers of mediation services (Arbitrators' and Mediators' Institute of New Zealand and the Resolution Institute) provide accreditation and training to their members, with some mediators accredited with both bodies.
71. Further consultation on system design and implementation would assist in determining responsibility for accrediting mediators in a New Zealand scheme.

Tikanga Māori

72. Māori are significant contributors to New Zealand farming industries and as such, providing for Tikanga Māori principles will be a requirement of the New Zealand scheme.
73. Further consultation would be required as part of the system design and implementation phase to ensure that the scheme is inclusive of Tikanga Māori principles. This would include consideration of the potential need for longer deadlines to provide sufficient time for the trustees, board or management to consult with the beneficial owners of the land.

Farmer counselling and support

74. An important component of the system that supports FDM schemes in Australia is the provision of the Rural Financial Counselling Service (RFCS). The RFCS is a Federal Government service that provides financial counselling to farmers in financial hardship and is accessed free of charge. The typical role of the RFCS with regard to farm debt mediation, is to support the farmer to build a clear understanding of their financial position and cash flow situation and the options available to them, and to develop a strategy for negotiating with their lender.
75. All parties consulted in Australia described the RFCS as critical to successful farm debt mediation. Without the additional support and preparation that the scheme delivers, farmers can be poorly equipped to manage themselves or drive for better outcomes in a mediation. This can heighten the power imbalance that exists between the farmer and lender, and lead to poorer and less enduring outcomes for both parties.

76. There is no similar service currently available in the New Zealand setting. Further work is required to identify and cost options within the New Zealand context to ensure farmers can access support of this nature. The most significant risk associated with this is the need to strike the right balance between ensuring that there is adequate support available to farmers prior to mediation, and avoiding the risk of over-investment in a scheme that may not be used a great deal.

Implementation with a “light touch”, and the need to avoid over-investment

77. Despite the significant body of support for a compulsory farm debt mediation scheme in New Zealand, there is no widespread evidence of farmers in New Zealand being treated unfairly by banks and other secured creditors¹. Consultation with lenders suggests that only a very small number of enforcement proceedings have been taken by primary lenders in recent years, and there are no expectations of this increasing.
78. Data from the New South Wales Rural Assistance Authority shows that only 2,522 mediations have been initiated since the NSW Act came into effect almost 25 years ago. Of the remaining 35 percent where satisfactory mediation did not take place, more than half of these were because farmers had notified relevant parties that they did not wish to enter into or proceed with mediation.
79. Importantly however, even though the scheme has not driven high numbers of mediations, all of the Australian stakeholders that officials spoke to credited it with promoting culture change amongst primary lenders. The number of mediations taking place under the scheme has been declining in recent years and this was mainly attributed to lenders constructively working with customers at earlier stages to resolve issues. Undertaking statutory mediation is now regarded as a last resort by lenders.
80. It is difficult to predict the numbers of mediations that might occur in New Zealand, but there is a risk of over-investment in setting up a scheme that ultimately becomes unnecessary if the scheme is seldom used. We therefore propose that the scheme is implemented through existing networks and infrastructure within New Zealand, with minimal adaptation where possible.
81. Further work would be undertaken to identify and cost options for implementation of the scheme, and these would be outlined in greater detail in the further paper to Cabinet in May 2019 seeking approval to introduce the legislation, alongside options and costings for implementation of the scheme as set out below.

Additional risks associated with the scheme

¹ The Banking Survey published by Federated Farmers in May 2018 states that “farmers’ overall satisfaction [with their banks] remains strong...” The Survey shows that around 80 percent of farmers are very satisfied or satisfied with their banks. This has been consistently the case for the nine Banking Surveys that have been undertaken since August 2015. The only material variation is that share-milkers’ levels of satisfaction have been closer to the 70 percent level since May 2016.

82. Experience of compulsory FDM schemes overseas suggests that there are not likely to be any other significant risks. However, we have identified some possible risks involved in the implementation of a scheme in New Zealand. These include:

Risk	Mitigation
Some businesses that meet the criteria, but are not intended to be included in the scheme, may seek to initiate mediation under the scheme.	This risk will be mitigated in the same way as in New South Wales; where regulations may declare whether a particular business type is, or is not, a farming operation for the purpose of the regime.
Parties failing to enter mediation in good faith, including lenders initiating mediation earlier than they would normally, and using the outcomes as justification for their actions.	Overseas experience suggests this is not common; however the risk is mitigated by the skills of the mediator in the first instance, and by the certificate system described above.
The power imbalance between farmers and lenders may not be adequately addressed.	These risks are mitigated through the design and implementation of the scheme – for example through putting support in place to address the power imbalance, and working with industry bodies and support networks to raise awareness of the scheme, support farmers throughout the mediation process, and encourage farmers to take action early to resolve debt issues.
Parties' unrealistic expectations of what the scheme might achieve.	
Farmers may choose to opt out of mediation; Farmers may not choose to trigger mediation, thus losing the opportunity to take early action while options to save the business are still available.	
Farmers may seek mediation repeatedly to defer enforcement action indefinitely.	These risks will also be managed through the skills of the mediator, both leading up to and during the mediation.
Officials have not yet engaged extensively with the non-bank lending sector, and the impacts of the scheme on that sector are not yet fully understood. For example, the scheme may have an impact on credit availability from this sector.	The issue of an enforcement certificate to the lender at the conclusion of mediation will bar a farmer from initiating mediation for three years.
That a 'light-touch' regime may not contain a sufficiently robust process for internal review of decisions i.e. to issue certificates.	Officials will work with the non-bank lending sector during the system design and implementation work that will occur in tandem with drafting of the Bill, to ensure that the impacts on that sector are understood and appropriately managed.
The existence of the scheme may incentivise farmers to go into business without appropriately managing their key risks and vulnerabilities.	This risk will be mitigated through the robust system design and implementation process.
	This risk is very low. The mediation scheme would not save a business that is not commercially viable or appropriately managed.
The existence of the scheme may	This risk is low. Farm debt mediation is

influence other sectors to initiate implementing similar sector specific schemes	designed specifically around farming because of the heightened risks and vulnerabilities associated with this sector.
s 6(a)	

Process prior to introduction of the Bill

- 83.** Given that we are proposing most of the matters dealt with in the Bill should be drawn from the NSW Act, we propose that work on drafting instructions commence immediately.
- 84.** However, there are two areas where further decisions would be required:
- we propose that Cabinet delegate to us the authority to make minor and technical policy decisions if these arise during drafting. This is common practice;
 - in relation to decisions about delivery and implementation of the scheme, we propose that we make preliminary decisions in relation to these issues as they arise and in consultation with relevant ministers; and that these decisions are brought back to Cabinet for consideration before the Bill is introduced.
- 85.** Cabinet has authority to approve outstanding policy proposals and to approve the introduction of legislation into the House. Accordingly, we propose to report back to Cabinet in May 2019 with:
- a fully drafted Farm Debt Mediation Bill ready for introduction in June 2019;
 - a schedule of minor and technical policy decisions that we have made in accordance with the authority delegated to us for that purpose;
 - a fully costed proposal for the design of the system that will wrap around the Bill on implementation, and any further implementation costs.

Consultation

- 86.** MBIE and MPI have consulted with a wide range of stakeholders in New Zealand from the farming, lending and mediation sectors; and with stakeholders with experience in farm debt mediation in New South Wales and Queensland. A list of parties consulted is set out in Appendix One.
- 87.** Officials have also consulted with the Treasury, Ministry of Justice (including Māori-Crown Relations), Ministry of Foreign Affairs and Trade, Reserve Bank of

New Zealand, Te Puni Kōkiri, Inland Revenue and Parliamentary Counsel Office (PCO).

88. The Department of Prime Minister and Cabinet has been informed.
89. The Reserve Bank of New Zealand considers that there is no strong need for farm debt mediation legislation in New Zealand. While there are unlikely to be large impacts on financial stability if a scheme was in place, there are concerns for how a scheme might have an impact if a large number of farm defaults were to occur.

Financial implications

90. There are no financial implications of a decision to begin drafting a government Bill.
91. There would be financial implications associated with implementation of a Bill, and these would be detailed in the paper that we intend to bring back to Cabinet Economic Development Committee in May 2019 as set out above; seeking permission to introduce a fully drafted Farm Debt Mediation Bill, alongside a fully costed proposal for the implementation of that Bill.

Legislative Implications

92. We intend to bring the Bill back to Cabinet Economic Development Committee for approval to introduce in May 2019.
93. The Minister of Agriculture has recommended that the Bill be given a legislative category of 2 (must be passed in 2019) in the 2019 legislation programme.
94. The Farm Debt Mediation Bill will bind the Crown.

Impact Analysis

95. The Ministry for Primary Industries and the Ministry of Business, Innovation and Employment confirm that the Impact Analysis Requirements apply and, therefore, a Regulatory Impact Assessment is required. This is attached to this paper (Appendix Three).
96. A Quality Assurance Panel with representatives from the Regulatory Quality Team at the Treasury, Ministry for Business Innovation and Employment, and the Ministry for Primary Industries has reviewed the Regulatory Impact Assessment (RIA) "*Farm Debt Mediation*" produced by the Ministry for Primary Industries. The Quality Assurance panel considers that this partially meets the quality assurance criteria at this stage in the process.
97. The RIA is not complete because analysis of the risks facing farming businesses is more developed for dairy than other farming sectors. Further analysis will be required for all sectors, taking into account the outcome of

broader stakeholder consultation in the next stage of the design process.

98. The RIA is clear and concise and the limitations and constraints on the analysis have been well outlined. The problem appears to be small-scale and there is limited local quantitative evidence on the problem. This has been supplemented with some historic and recent evaluations of overseas regimes and insights gained from discussions with overseas stakeholders. There has been initial consultation with a number of stakeholders that could be covered by the scope of the proposed scheme.
99. A further RIA would be provided alongside the Cabinet paper seeking approval to introduce the Bill in May 2019. This would set out the options for implementation of the Bill, and provide an analysis of the costs, impacts and implications of each option.

Human rights, gender and disability implications

100. The proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.
101. No gender or disability implications arise from this paper.

Publicity

102. Subject to Cabinet approval to the drafting of a Bill, the Minister of Agriculture intends to issue a press release advising that a Bill will be drafted that will establish a scheme for the compulsory mediation of farm debt in New Zealand.
103. In the interests of a fully transparent process, we also intend to release a copy of this Cabinet paper via MPI's website at the time that the press release is issued, subject to any necessary redactions.
104. The offices of the Minister of Agriculture and Minister of Commerce and Consumer Affairs will work together to manage communications and media interest as required.

Release of an Exposure Draft of the Bill

105. Given that there has been no formal public consultation on this proposal to date, we also intend to publicly release an exposure draft of the Bill for further comment prior to its introduction. We are required to seek Attorney-General approval to release the exposure draft, which will be done in due course. The exposure draft will be released via the MPI website.

Recommendations

106. The Minister of Agriculture and the Minister of Commerce and Consumer Affairs recommend that the Committee:

General

1. **Note** that a statutory regime providing for the mediation of farm debt is consistent with a priority in the Labour-New Zealand First Coalition Agreement for the 52nd Parliament, for the “examination of agricultural debt mediation as well as receivership fees and charges”;

Mediation of Farm Debt

2. **Agree** to establish a statutory regime for the mediation of farm debt, based on the New South Wales Farm Debt Mediation Act 1994;
3. **Note** that the Farm Debt Mediation Bill will establish a statutory framework within which farmers and lenders will be able to participate in mediation;
4. **Agree** that the mediation regime will apply to farm business that are solely or principally engaged in one or more of:
 - 4.1. agriculture (including sharemilking);
 - 4.2. horticulture;
 - 4.3. aquaculture; or
 - 4.4. any activity involving primary production carried out in connection with any of the above activities;
5. **Agree** that the following activities will be excluded from the scope of the regime:
 - 5.1. lifestyle farming;
 - 5.2. businesses engaged in:
 - 5.2.1. forestry;
 - 5.2.2. wild harvest fishing; and
 - 5.2.3. the hunting or trapping of animals;
6. **Agree** that the mediation regime will apply in relation to loans which are secured against the following types of assets:
 - 6.1. farmland (including buildings);
 - 6.2. farm machinery (that is, vehicles or machines commonly used for farming operation purposes such as tractors, milking equipment and irrigation systems);
 - 6.3. livestock; and
 - 6.4. harvested crops and wool;
7. **Agree** that mediation will be able to be triggered:
 - 7.1. by lenders where a farmer is in default and the lender intends to take any form of enforcement action in relation to debt secured over assets of the type described in recommendation 6; and
 - 7.2. by farmers without any statutory criteria but subject to restrictions on how frequently farmers can apply to mediate;

8. **Agree** that a system such as the prohibition and exemption certificate system used in New South Wales will be used by the relevant authority in New Zealand to provide a structured and transparent method for determining the outcome of mediation while also preserving the independence of mediators;
9. **Agree** that decisions made by the relevant authority in relation to the issue of prohibition or exemption certificates be subject to internal review on appeal;
10. **Agree** to the detailed design of the mediation regime set out in Appendix Two;

Financial implications

11. **Note** that there are no financial implications *per se* in deciding to establish a farm debt mediation scheme;
12. **Note** that the Minister of Commerce and Consumer Affairs and the Minister for Agriculture will bring a fully costed proposal for the implementation of the Farm Debt Mediation Bill back to Cabinet in the same Cabinet paper that seeks approval for the Farm Debt Mediation Bill to be introduced;

Legislative drafting

13. **Agree** to include the Farm Debt Mediation Bill in the 2019 Legislation Programme, with a legislative category of 2 (must be passed in 2019);
14. **Authorise** the Minister of Agriculture to issue drafting instructions to the Parliamentary Counsel Office;
15. **Authorise** the Minister of Agriculture and Minister of Commerce and Consumer Affairs to jointly make any minor and technical policy decisions that may arise during the drafting of the Farm Debt Mediation Bill and in relation to its implementation;
16. **Note** that the Farm Debt Mediation Bill should be introduced no later than mid 2019;
17. **Note** that the Farm Debt Mediation Bill should be passed no later than the end of 2019;

Exposure draft

18. **Agree** that an exposure draft of the Farm Debt Mediation Bill be released prior to finalisation of the Bill for introduction;
19. **Note** that the Minister of Agriculture will seek approval of the Attorney-General to release the exposure draft of the Farm Debt Mediation Bill;

Implementation

20. **Invite** the Minister of Agriculture and the Minister of Commerce and Consumer Affairs to submit a further paper to Cabinet Economic Development Committee in May 2019 seeking approval to introduce the Farm Debt Mediation Bill, and detailing implementation options and associated costs;

Publicity

- 21. Note** that the offices of the Minister of Agriculture and Minister of Commerce and Consumer Affairs will work together to manage communications and media interest as required;
- 22. Note** that the Ministry for Primary Industries will publish a copy of this paper on its website, subject to any necessary redactions.

Authorised for lodgement

Hon Damien O'Connor
Minister of Agriculture
/ / 20

Hon Kris Faafoi
Minister of Commerce and Consumer Affairs
/ / 20

Proactive Release