

Departmental Disclosure Statement

Farm Debt Mediation Bill (No 2)

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry for Primary Industries.

The Ministry for Primary Industries certify that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

10 June 2019

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Part One: General Policy Statement

The Farm Debt Mediation Bill (No 2) will establish a Farm Debt Mediation scheme that will require creditors with security interests over farm property to offer mediation to farmers before taking any enforcement action in relation to that debt. It will also allow farmers to initiate statutory mediation with a secured creditor.

The Bill is intended to provide for fair, equitable and timely resolution of farm debt issues with 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.

Levels of farm debt have been rising over recent years and farming is vulnerable to factors outside the control of farmers such as climate fluctuations, market volatility, and disease or pest incursions (for example, *Mycoplasma bovis*). Farm debt is often complex, and resolving the debt problems of financially struggling farms can be a challenging and drawn-out process for farmers and lenders, especially as farmers face a significant power imbalance in their dealings with lenders.

Overview of the Farm Debt Mediation scheme

The statutory farm debt mediation scheme will provide a structured and consistent process for resolving farm debt problems that all parties can have confidence in. The scheme applies across all secured lenders, including non-bank lenders.

Under the statutory scheme, secured creditors of farm businesses will be required to offer statutory mediation before taking an enforcement action in relation to debt secured over farm property (including land, chattels, and licences). Farmers will also be able to initiate mediation, without needing to meet any statutory criteria other than having debt secured over an eligible farm business.

There is no obligation on either party to participate in mediation. However, if a farmer declines to mediate, the creditor will be able to apply for an enforcement certificate. An enforcement action allows enforcement action to proceed in line with the terms and conditions of the loan agreement. If the creditor declines to mediate, the farmer can apply for a prohibition certificate. A prohibition certificate prevents the creditor from taking any enforcement action related to that debt for 6 months.

What is farm debt?

The mediation scheme will apply to farm businesses that are solely or principally engaged in 1 or more of the following activities: agriculture (including share-milking), horticulture, and aquaculture. The scheme also applies to a farm business engaged in an activity involving primary production carried out in connection with any of those activities. Wild harvest fishing and the hunting and trapping of animals are excluded.

However, the Bill includes the ability to add a business activity by regulation to reflect possible changes in the farming sector in the future (for example, to include forestry activities). The scheme will not apply to lifestyle farms unless the farmer is solely or principally engaged in a primary production operation as defined in the Bill.

The mediation scheme will apply in relation to loans that are secured against farm property, such as farm land, farm machinery, livestock, and harvested crops and wool.

The Bill applies to all farm debt, including debt that was incurred before the establishment of the scheme. However, the restriction on enforcement actions does not apply if an enforcement action commenced prior to the restriction on enforcement actions coming into force.

Scheme Administration

The department responsible for administering the Bill (the Ministry) will be the administering agency for the farm debt mediation scheme. The department will support the implementation of the Bill by

- ensuring efficient operation of the scheme (e.g. setting rules, issuing certificates)
- having oversight of approved mediator organisations
- Supporting farmers to access and navigate appropriate financial, business planning support
- Raising and maintaining awareness of the scheme
- Monitoring and reporting on the effectiveness of the scheme, with a view to continuous improvement of the scheme's performance.

Oversight of mediators

The Bill provides the Ministry with the power to approve mediation organisations. Mediation organisations will be responsible for the oversight of authorised farm debt mediators. Approved mediation organisations will be required to meet certain standards and criteria, which will be set by the Chief Executive of the Ministry.

Approved mediation organisations will be responsible for authorising and monitoring the performance of farm debt mediators. They must ensure that authorised mediators are qualified and competent to act in this area of expertise, in accordance with standards and criteria set by the Ministry. The Ministry will maintain a list of approved mediation organisations. The standards and criteria set by the Ministry will require approved

mediation organisations to maintain a publicly available list of authorised farm debt mediators.

Ensuring farm debt mediation is fit for purpose for tangata whenua

The scheme has been designed to allow for tikanga principles to be incorporated in the process of mediation where parties consider it appropriate. This approach acknowledges that tikanga differs across regions, and that it is important to provide for relevant and appropriate tikanga to be included in the mediation process.

The role of mediators will be critical to achieving fit for purpose mediation for Māori. It will be important that the Ministry works with Māori and relevant agencies to ensure that mediator skills and knowledge of tikanga are developed further in order to support full Māori participation in the scheme.

How it works

Once an invitation to mediate is accepted by the other party, the creditor must agree to one of the 3 mediators nominated by the farmer. Mediation costs will be shared equally between the parties, unless other arrangements are agreed at the start of the process (in a procedure agreement). Farmers and creditors have up to 60 working days to complete the mediation process, although parties can agree to extend. During this time, the restriction on enforcement actions remains in place.

At the end of the mediation process, the mediator provides the Ministry with a summary report. The mediator will also provide a copy of any mediation agreement that sets out agreed actions for future management of the debt, if one has been entered into.

Prohibition and enforcement certificates are an integral part of the scheme. In the absence of a mediation agreement, parties can apply to the Ministry to make a determination on whether a certificate will be issued. This determines whether an enforcement action can proceed or not.

- Farmers can apply for a prohibition certificate, which, if issued, has the effect of suspending any enforcement action for that debt for 6 months.

A prohibition certificate is issued when the creditor has declined to mediate, or the creditor has not acted in good faith during the mediation process.

- Creditors can apply for an enforcement certificate, which allows the creditor to proceed with enforcement actions related to the debt. The certificate has a duration of 3 years.

The farmer will not be able to initiate further mediation processes in relation to that debt during this period.

An enforcement certificate is issued when the farmer has declined to mediate or the creditor has acted in good faith during the mediation process.

Exceptions to the scheme

The restriction on enforcement actions does not apply if the farmer is insolvent (for example, if the farmer is in liquidation).

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	Yes
Private members Farm Debt Mediation Bill Initial Briefing to the Primary Production Committee on the Members Farm Debt Mediation Bill 7 August 2018	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
https://www.mpi.govt.nz/dmsdocument/33010-regulatory-impact-statement (29/11/2018) https://www.mpi.govt.nz/dmsdocument/34845 (05/06/19)	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	No
<p>The two RIA were reviewed by a Panel made up of representatives of MPI, MBIE and Treasury on the recommendation of Treasury.</p> <p>Development of Exposure Draft Farm Debt Mediation Bill – 29/11/2018</p> <p>“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) <i>“Disclosure Statement Template for a Government Bill”</i> 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.</p> <p>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.</p> <p>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”.</p>	

Introduction of Farm Debt Mediation Bill – 29/05/2018

A Quality Assurance Panel with representatives from the Ministry of Primary Industries, Ministry for Business, Innovation and Employment, and the Treasury has reviewed the Regulatory Impact Assessment (RIA) "Farm Debt Mediation" produced by the Ministry for Primary Industries.

The Quality Assurance panel considers that the RIA partially meets the quality assurance criteria.

The Panel considers that on its own, the evidence presented in the RIA on the nature and magnitude of the problem is insufficient to make the case for intervention in relation to the farming sector over other sectors that may face similar challenges. The analysis also has other limitations. The impact analysis, for example, largely relies on the Australian experience of farm debt mediation schemes, and the impact on smaller non-bank lenders has not been fully explored (the cost of mediation could have a greater effect on business decisions for this group).

These limitations, however, are clearly articulated in the RIA and the panel considers they are mitigated by apparent wide stakeholder support for the proposal in the context of social licence for initiatives to support farming communities. If there was more dispute about the proposal, the Panel would consider that more analysis should be provided to inform the debate.

The panel also notes the stated intention to mitigate the risk of any unintended impacts for non-bank lenders through monitoring and evaluation. We recommend that the Ministry for Primary Industries also consider specific monitoring and reporting on the availability of credit to farming businesses in general.

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?

NO

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?

NO

2.5. For the policy to be given effect by this Bill, is there analysis available on:
(a) the size of the potential costs and benefits?
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?

NO

NO

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:
(a) the level of effective compliance or non-compliance with applicable obligations or standards?
(b) the nature and level of regulator effort put into encouraging or securing compliance?

NO

NO

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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Officials consulted with the MPI Trade team and Ministry of Foreign Affairs and Trade (MFAT) who advised the policy is consistent with New Zealand's international obligations.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

Officials engaged with Te Tumu Paeroa, Te Arawhiti, Te Puni Kokiri and the Federation of Māori Authorities (FOMA). A number of Māori farmers and rural professionals were also consulted. 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. Stakeholders noted that the flexibility of mediation process and involving parties in determining this process will allow for engagement and discussion with wider hapū and iwi stakeholders. It will also provide an opportunity for stakeholders to determine mandate for participating in mediation and making decisions, or establishing processes for making these decisions.
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Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

NO

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:
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(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?
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NO

(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?

NO

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
<p>The mediator's report and mediation agreement, if one is developed, will include some personal information. The Bill requires that the mediator provides this information to the Ministry, as administering agency for the scheme. The holding and release of this information is subject to the Privacy Act (1993) and the Official Information Act (1982).</p>	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>A wide range of stakeholders have been consulted on the policy and design elements of the scheme. The main stakeholder groups with an interest in farm debt are farmers and secured lenders. Rural support organisations and networks, financial advisors and accountants, and insolvency practitioners also have an interest in the problem. Mediators also have an interest as they are sometimes called on to help with debt resolution (see Appendix for list of those consulted).</p> <p>Stakeholder submissions to the Primary Production Select Committee on the Members Bill all supported a mandatory farm debt mediation scheme with the exception of RITANZ and Kensington Swan (a company specialising in receiverships). Notably ANZ Bank and NZBA supported a mandatory scheme. There was a consistent call for a New Zealand scheme to replicate the Australian mandatory schemes, particularly the NSW Farm Debt Mediation Act (1994).</p> <p>There was also strong support for the scheme to be enacted through standalone legislation, extended to cover other types of secured farm debt, and capture secondary and tertiary lenders. Good faith was noted by many as fundamental to the operation of the scheme.</p> <p>MPI and MBIE consulted with a wider range of stakeholders between October 2018 and April 2019 on the scheme design and options for administration of the scheme. Stakeholders included farmers, RITANZ, Federated Farmers, NZBA, Banking Ombudsman Scheme, AMINZ, Financial Services Federation, FOMA, and Rural Support Trust.</p> <p>Officials also visited NSW and talked to a number of stakeholders there about how the NSW scheme operates and its effectiveness. This provided valuable insights into the design and implementation of the scheme. The NSW Rural Assistance Authority has also provided valuable advice and support throughout the period of drafting the Bill and finalising scheme design.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
<p>MPI and MBIE consulted with NZBA, RITANZ, Federated Farmers, on the draft Farm Debt Mediation Bill (No 2). Legal advice was also sought from Minter Ellison Rudd Watts and Anderson Lloyd (legal firms with extensive experience in farm debt mediation/ negotiations)</p> <p>The purpose of the engagement was to test whether the Bill was fit for purpose, i.e. delivered on the decisions made by Cabinet and addressed the concerns stakeholders had with the earlier Members Bill.</p> <p>Feedback was supportive of the Bill as drafted, in particular noting that how it largely reflected issues they had raised with the Members Bill (e.g. extending to all enforcement action, modelling the Bill on the NSW legislation, acting in good faith as central to the scheme). There were a number of legal drafting, technical and lower level policy improvements identified which were incorporated as much as possible.</p>	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	Yes
<p>Section 60(1) The Governor-General may, by Order in Council, make regulations for 1 or more of the following purposes:</p> <p>(b) requiring the payment to the Ministry of fees and charges for applications under sections 31, 32, and 48:</p> <p>This relates to the costs of applications for Enforcement and Prohibition Certificates or for an Administrative Review.</p> <p>It is not proposed to introduce charges for these applications. The costs of administering the mediation scheme, including applications, are expected to be small and will be met out of the Ministry's baseline. The inclusion of this regulation-making power is to provide the Ministry with the ability to respond to changing circumstances without requiring amendments to the primary legislation.</p> <p>Any proposal to introduce charges will be subject to stakeholder consultation, Executive approval, and oversight by Parliament's Regulations Review Committee.</p>	

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	YES
<p>Schedule 1 Clause 1 <i>This Act applies to any farm debt, whether that debt was incurred before or after the commencement of section 10 [of the Act]</i></p> <p>The obligation to mediate, with associated staying of enforcement action, applies to farm debt that exists prior to the commencement of the Act. This is to ensure that the benefits from the scheme are able to be realised promptly. Farm debt agreements, particularly larger land and capital item related debt, are generally long term (10 or more years). If the scheme only applied to new debt it could be some years before the scheme was able to be fully utilised. It is expected that the main beneficiaries of the scheme in the near term will be those that already have farm debt and are facing difficulties in servicing this debt due to circumstantial changes. Problems with servicing new debt are not likely given the scrutiny in place at the time of lending.</p>	

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	Yes
<p>The rights of creditor to pursue enforcement action relating to a farm debt that is in default may be prohibited for six months if, after offering mediation, the Ministry issues a Prohibition Certificate.</p> <p>10 (2) A creditor must not take an enforcement action under a security interest in farm property if there is a prohibition certificate in force in respect of the relevant farm debt.</p> <p>32 A farmer who owes farm debt to a creditor may apply to the chief executive for a prohibition certificate on either of the following grounds:</p> <ul style="list-style-type: none"> (a) that the creditor declined to mediate (see section 17): (b) that the creditor did not participate in the mediation in good faith (see section 23). <p>36 The chief executive must, after receiving an application under section 33, issue a prohibition certificate in respect of farm debt if—</p> <ul style="list-style-type: none"> (a) there is no enforcement certificate in force in respect of the farm debt; and (b) the chief executive is satisfied that the grounds set out in the application are established <p>Prohibition (and enforcement) certificates are an integral part of the scheme. In the absence of a mediation agreement, parties can apply to the Ministry to make a determination on whether enforcement action can proceed or not. A Prohibition Certificate is issued when the creditor has declined to mediate or the creditor has not acted in good faith during the mediation process.</p> <p>Once the prohibition certificate expires the creditor will need to go through the mediation process again if they wish to take enforcement action.</p>	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	Yes
<p>Section 60(1) The Governor-General may, by Order in Council, make regulations for 1 or more of the following purposes:</p> <p>(a) specifying a kind of business undertaking for the purposes of the definition of primary production operation in section 6:</p> <p>The Bill includes the ability to add a business activity by regulation to the definition of Primary Production Operation. This is to allow possible changes in the farming sector in the future to be captured (for example to include forestry activities) and ensure the Bill is fit for purpose in a dynamic environment. Proposed additions will be subject to stakeholder consultation, Executive approval, and oversight by Parliament's Regulations Review Committee.</p>	

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>Clause 46 of the Bill empowers the Chief Executive of the Ministry to issue notices that set out the requirements relating to:</p> <ul style="list-style-type: none"> • criteria for approving organisations as approved mediation organisations; • grounds for this approval to be suspended or cancelled; • requirements for individuals to be authorised mediators; and <p>These notices are disallowable instruments but not legislative instruments for the purposes of the Legislation Act. The instruments are made by the Chief Executive, must be notified in the Gazette and published on the Ministry's website. Because they are disallowable instruments, they must be presented to the House.</p> <p>Clause 46 of the Bill empowers the Chief Executive of the Ministry to issue notices that set out the requirements relating to the form and content of mediation requests and replies; mediator reports and mediation agreements.</p> <p>These notices do not meet the definition of legislative instrument under the Legislation Act 2012. These notices must be notified in the Gazette and published on the Ministry's website. Because they are not legislative instruments or otherwise disallowable, they do not need to be presented to the House.</p> <p>Empowering the making of these instruments is appropriate and consistent with the relevant principles for making such instruments because:</p> <ul style="list-style-type: none"> • Each instrument relates to matters that are technical in nature and/or that require flexibility; • Each instrument applies only to the Bill and the operation of the Farm Debt Mediation Bill (No 2); • The subject matter of the instruments is limited because they cannot be inconsistent with the relevant provisions of the Bill; and • The power to create such instruments is vested in the most appropriate person to make it: the Chief Executive of the Ministry which will administer farm debt mediation. 	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO

Appendix One: Further Information Relating to Part Three

External consultation – question 3.6

Stakeholders consulted on Farm Debt Mediation policy

- Federated Farmers
- HortNZ
- DairyNZ
- Beef + Lamb New Zealand
- Aquaculture New Zealand
- New Zealand Winegrowers Association
- Kiwifruit Vine Health Authority
- Deer Industry New Zealand
- Dairy Women's Network
- Rural Women New Zealand
- Rural Support Trusts
- Farmers' advocates
- Te Tumu Paeroa
- The Reserve Bank of New Zealand
- New Zealand Banker's Association (NZBA)
- ANZ and Westpac banks
- Banking Ombudsman Scheme
- The Arbitrators' and Mediators' Institute of New Zealand (AMINZ)
- The Resolution Institute
- Financial Services Federation
- John Deere
- The Restructuring, Insolvency and Turnaround Association of New Zealand (RITANZ)
- Financial advisors and chartered accountants serving the rural sector