29 September 2016

Research Director
Finance and Administration Committee
Parliament House
George Street
Brisbane Qld 4000

Email to: FAC@parliament.qld.gov.au

Dear Research Director

Farm Business Debt Mediation Bill 2016

Thank you for providing an opportunity for Queensland Law Society to make a submission to the inquiry on the Farm Business Debt Mediation Bill 2016 (the Bill).

Queensland Law Society (the Society) is the peak professional body for the State’s legal practitioners. We lead a profession of more than 9,500 members throughout Queensland. The QLS is comprised of several specialist committees who provide policy advice to the QLS Council on law reform and areas of concern to the profession. The Society is a non-partisan organisation, advocating on behalf of its membership for good law and good lawyers.

This submission has been prepared with the assistance of the Society’s Alternative Dispute Resolution Committee who have substantial expertise in this area.

Our comments do not address all substantial aspects of the Bill and should not be considered to be either endorsement or rejection of its subject matter.

General comments

Application of legislation

The current drafting of clause 11(2) suggests that if the parties have previously had a mediation under this legislation for a farm business debt, and default has occurred in agreements entered into as a result of that mediation, then this legislation will never apply to a farm business debt between the same parties, notwithstanding that the debt may be quite a different debt entered into and the default resolved years earlier.

If this is not the policy intent of the Bill, it is recommended that the drafting be clarified.
**Good faith**

While the Bill contains references (s21(7), 22(4)) to good faith, and it can be assumed that mediation is always to be conducted in this spirit, the purpose of the Bill would be strengthened if it explicitly set out the requirement that parties participate in good faith.

The current drafting of clause 7 sets out criteria for determining whether the mediation was “satisfactory”. However, the criteria do not actually relate to concepts of appropriate or “satisfactory” behaviour, for example, whether the parties complied with their obligations under the legislation or actually acted in good faith.

To achieve this:

- Clause 7 could be modified to include a sub-clause (d) - “the parties to the mediation have participated in good faith”; and
- Clause 33 (1) could be modified by the insertion of sub-clause (c) - “each party participated in the mediation in good faith.”

Such inclusions would be consistent with the mediator’s requirement to issue a Section 12 certificate under the current scheme.

The Society also queries what is intended by the criterion in clause 7(b) that a mediation has been satisfactory if “the mediation has proceeded as far as it reasonably can but the farmer and the mortgagee have not entered into a heads of agreement.” This is unclear.

To reinforce the need for parties to participate in good faith, and to assure the Minister that the legislation is achieving its purpose over time, a provision similar to section 94P of the *Native Title Act 1993* should be included to require the mediator to report to the Minister any instance in which a party has not participated in good faith.

On a related issue, the Society questions how QCAT will be in a position to determine whether a mediation has been conducted in good faith, given that clause 38 provides that anything said or done at a mediation is not admissible. QCAT has a review role under Part 6 of the Bill, which is enlivened if the authority refuses an application for an enforcement action suspension certificate. One of the grounds on which the authority may refuse is that the mortgagee has failed to take part in mediation in good faith or has unreasonably delayed a mediation requested by the farmer (clauses 40 to 44).

The intended scope of clause 38 and its interaction with Part 6 may need to be revisited.

**Prescriptive mediation process**

As a general comment, the Bill provides for a highly authoritative and inflexible process leaving little scope for the parties or a mediator to determine a process which is appropriate in the particular circumstances.

Clause 85 prohibits any contracting out of the provisions of the Act, notwithstanding that such may well be within the interests of both parties.

For example:

- Under clause 21, the farmer has the right not to require copies of documents from the mortgagee. However, under clause 22, the mortgagee has no right to waive the
farmer’s obligations to provide documents, regardless of whether the mortgagee considers that these may be of no assistance to the mortgagee for the mediation.

- Clause 39 requires that each party to the mediation must pay half of the mediator’s fee and costs. It is not uncommon for the mortgagee to agree to meet the costs of the farmer. The prohibition on contracting out would prevent this in the future, and may then effectively prevent the farmer without financial means from participating in mediation under the proposed legislation.

If both parties feel it is in their interests to achieve resolution outside of some or all of the provisions of the Act, they should not be prohibited from achieving that resolution.

**Time for response**

Clause 14(3) of the Bill provides a minimum time (15 days) for response by the farmer to request mediation. That short time frame does not take into account the practical difficulties a farmer may face in adhering to that timeframe: seasonal conditions which may affect mail delivery, seasonal farming commitments which must be met, the need for professional advice, for which delays might occur or for which time-consuming travel from the farm may be required, the availability of advisors, and the need for the farmer to consult family members. The minimum period should be extended to at least 30 days.

**Location**

In farm debt mediation practice at least one bank has insisted that the mediation be conducted in Brisbane, for the convenience of the bank and its representatives. Even though the bank offered to pay for flights and one night’s accommodation for some of the farmer’s representatives, the farmer was greatly inconvenienced and disadvantaged by the need to travel to the capital for the purposes of the mediation.

Although guidelines may be developed by the authority to address this situation, to ensure fairness, the Bill should specifically stipulate that, except at the instigation of the farmer, the mediation will be conducted at a location convenient to the farmer and within close proximity to the farmer’s business.

The inclusion of a subclause 34(2)(c) “the location of the mediation” would also assist the mediator to make practical and fair arrangements.

**No unfair consequences**

Here, we cite one of our member’s reported examples of a farmer who participated in successful farm debt mediation. One element of the agreed outcome was forgiveness of part of the debt. The farmer has subsequently been refused finance by two banks whose local branch managers assessed the farmer’s subsequent application for finance, but were unable to issue approved finance due to the banks’ blanket prohibition on lending to a customer whose debt has been forgiven.

That unfairness and illogicality (which frustrates the purpose of the Bill, stated by its Explanatory Notes to include equitable resolution of farm business debt) could be addressed by the inclusion of a sub-clause 31(3) which sets out similar wording to the following: “where a heads of agreement has been reached, no bank may unfairly disadvantage the farmer in future dealings as a consequence of the fact that the heads of the agreement may include forgiveness of debt or other compromises or actions by a bank.”
Giving/service of notice

The Bill is not specific about the form in which notices are to be given or served. Farmers frequently face extra-ordinary barriers to formal communication; for example, it may not be possible to contact a farmer between the hours of 6.00am and 6.00pm due to their requirement to be working on a remote property. Some farmers do not have a regular mail service or internet facility at their disposal. It is not unusual that, in order to exchange documents, a practitioner is required to leave a message with a telephone service, await a return call, allow the farmer time to turn a generator on to run a fax machine, and then issue the document once this has occurred.

Accordingly, process and procedure around the service of notices should be explicitly described, taking into account the practical difficulties faced by many farmers.

Increased cost of mediation

The current Queensland Farm Finance Strategy (QFFS) process leaves the mediation regulation process in the hands of a mediator, with the trigger for a "satisfactory mediation" being the issuing of a Section 12 certificate by the mediator certifying that the financier has mediated in good faith.

The advantage of this approach for both the farmer and the mediator is that the mediator’s costs can be reasonably ascertained in advance. This allows the farmer sufficient time in advance to provide appropriate security to the mediator by paying the estimated fee into his or her trust account or, as happens from time to time, negotiate with the mortgagee to meet the mediator’s costs.

The Society also observes that some provisions in the Bill increase the administrative and other functions of the mediator. This adds to the complexity of the mediation process and by increasing the workload of mediators, it will likely lead to an increase in mediation costs, including:

- Preparing the heads of agreement and subsequent obligations (clauses 26 to 28)
- Preparing and providing the summary of mediation
- The requirement to give evidence to the authority in any dispute about good faith and perhaps to QCAT in an application for review under Part 6 of the Bill.

The prospect of estimating potential costs to the mediator will be difficult if not impossible in some circumstances. When a farmer is in difficult financial circumstances, the prospect of the mediator being paid by a farmer after the mediation is potentially problematic. The current drafting of the Bill requires the costs of the mediation to be shared equally by the farmer and the mortgagee (clause 39).

It is clear that the cost of the mediator will be greater than under the QFFS and the additional cost will inevitably be borne by the mortgagee and the farmer.

The Society suggests that the costs could be reduced by allowing the mediator greater discretion in determining the mediation process. The Society also recommends revisiting the obligations being imposed on the mediator, with a view to reducing the cost imposts involved with the current drafting.
**Increased complexity of mediation process leading to extended uncertainty for parties**

Under the QFFS, the parties achieve certainty of process within three working days of the conclusion of mediation (the time for provision of the section 12 good faith certificate).

Under the process in the Bill, the parties may not have certainty until the following process is completed –

- mortgagee applies for exemption certificate
- authority issues a show cause notice (20 business days)
- farmer makes written representations
- authority provides copy of representations to mortgagee
- authority makes decision (20 business days after end of show cause period)
- application for internal review (20 business days)
- CEO reviews original decision (30 business days)
- potential application to QCAT for review of authority’s decision.

The Society appreciates that both farmer and mortgagee are entitled to procedural fairness throughout this process, however, it may be that there are improvements which can be made to reduce the significant period of uncertainty which will be legislated as a consequence of the Bill in its current form.

**Confidentiality and disclosure of information**

Clause 38 is headed “confidentiality” but in fact refers to admissibility of evidence.

Clause 83 is headed “Disclosing information” but in fact deals with confidentiality.

Clause 83 prohibits disclosure of information obtained in a mediation meeting or in connection with the administration of the legislation subject to some exemptions, including (e) “as otherwise... allowed by law”.

The common law allows disclosure, unless there is a contractual prohibition which often appears in a formal settlement agreement.

If such a provision in a mediation agreement could be seen as changing the operation of the legislation then it would have no effect by reason of clause 85 of the Bill. The context suggests that this may not be the policy intent of the legislation.

When read together with clause 83, clause 38 is drafted in such a way as to provide an “absolute” approach to confidentiality that has over the years been found to be unworkable or contrary to public policy. If it is intended that there be a “blanket” approach to confidentiality, then, for example, police investigating a violent assault may be dismayed to be told they could not be informed of threats of violence made during the mediation, and the mediator would be understandably concerned if he or she was prohibited from informing the police of credible threats to do harm made during the mediation.

Read literally, the prohibition of admissibility in civil proceedings of documents given to a party pursuant to clause 21 of the Bill would prohibit the mortgagee from ever enforcing its
mortgage in a court of law, as the mortgage document (being one of the documents referred to in clause 38(1)(c)) would no longer be admissible in any civil proceedings.

The modern exceptions to confidentiality both in Australia and other jurisdictions are set out in some detail in Professor Alexander’s "Mediation Process and Practice in Hong Kong" (LexisNexis 2010). These include:

- pre-existing information (e.g. the bank’s mortgage)
- information open to the public
- breach of duty or professional misconduct
- threat of future violence, concealing ongoing criminal activity, or abuse of child or vulnerable party
- to prove or challenge the existing settlement agreement and to interpret disputed provisions
- cost determinations – courts in Queensland have considered the behaviour of parties in mediation in considering costs orders in subsequent litigation between parties

There is a risk that a failure to permit such exceptions could result in injustice to a party, permitting mediation confidentiality to conceal inappropriate behaviour.

The Society recommends that clause 38(1) be amended to:

(a) Remove the reference to “criminal” proceedings – this would address the concerns outlined above in relation to information about criminal behaviour that arises during a mediation meeting; and

(b) That the following words be added to the end of clause 38(1), to appear in line with the opening words of the subclause, as follows:

“unless the information is permitted to be disclosed pursuant to section 83.”

Specific comments - Part 3 Division 3 – Conducting mediation

Obligations of parties to provide documents – both farmer and mortgagee

Under clause 22, the farmer must provide certain financial documentation.

Practically, this can be difficult if the farmer is in arrears with their accountant who will not release this information until the bill is paid.

A farmer will often not have the personal or financial capacity to prepare cash flow projections without the assistance of a farm financial counsellor. These people are in short supply, and it may well prove impossible for the farmer to obtain this assistance, have the work undertaken, and provide this information within the time required.

The consequences for failing to provide this information or make reasonable efforts are significant – it will result in a deemed failure to take part in mediation in good faith.

The Society notes that the practical effect of clause 21(2)(b) is that a farmer has a right under clause 21(2)(b) to make this request, say, half an hour before the end of the mediation conference, at which time the conference would need to be adjourned for at least a month,
and a fresh date arranged. The drafting should be clarified to avoid unintended consequences.

Clause 53 includes other deemed circumstances of failure to mediate including failure to take part in the mediation in good faith. This, by reason of clause 49, will be grounds for the issuing of an exemption certificate to the mortgagee. This would require the authority to give a show cause notice to the farmer, and then potentially make a decision as to whether or not the farmer took part in the mediation in good faith. The Society considers that practically, this is a difficult matter to adjudicate by one or more persons who did not themselves attend the mediation.

**Representation at mediation meetings – clause 23**

Our members report occasions where mortgagee representatives at mediations are not authorised to reach agreement on the terms of the proposed agreement, or sign the settlement agreement, without first obtaining authority, usually by way of a telephone call to a more senior representative who has not participated in the mediation.

It is a fundamental proposition of mediation theory that those with sufficient authority to settle the dispute participate in the mediation. It would be unfortunate if clause 23(4) "must be authorised by writing to enter into a heads of agreement" were to be construed narrowly. It is suggested that the provision be strengthened to ensure that the mortgagee representative at the mediation has authority to settle the dispute, and sign any agreement reached.

**Farmer entitled to advisor - clause 24**

To avoid misunderstanding, clause 24 of the Bill should explicitly state that the parties are entitled to representation by "advisers, including legal representatives, farm finance counsellor/s, financial advisors or other advisors who the mediator reasonably considers may assist in the mediation" rather than "an advisor".

It would be concerning if this was to be construed as an entitlement to a single adviser. Generally, farm mediations work well when the farmer is accompanied by both legal and financial advisers, commonly, the Legal Aid specialist legal officer, and a farm financial counsellor.

It happens from time to time that a party using an advisor other than Legal Aid, attends with a representative/advisor unskilled in mediation, who might wish to treat the process as adversarial, who wishes to speak at the mediation to the exclusion of the farmers, and act as representative, rather than advisor.

The Society understands that some jurisdictions provide a mediator with the right of removal of party’s representatives/advisors if a mediator believes their presence is not conducive to a negotiated agreement.

**Heads of Agreement – clauses 26 and 31**

Clause 26 of the Bill requires the mediator, in the event of agreement being reached, to prepare a document, in the approved form, that states the main points of agreement. If the parties are satisfied the document sets out the main points of their agreement, the parties may enter into a heads of agreement by each signing the document.

In practice, our members report that:
in the majority of mediations conducted under the Queensland Farm Debt Mediation Scheme Protocols, pursuant to the QFFS, the farmer is represented by a specialist legal officer from Legal Aid;

- A very high percentage of these mediations result in agreement;

- Where agreement is reached, usually a formal settlement agreement (not a heads of agreement) is prepared and signed on the day of the mediation;

- If the farmer is not legally represented, then the bank usually insists (which the Society considers is entirely appropriate) that the agreement is conditional upon the farmer receiving independent legal advice on the agreement within a certain timeframe of about a week.

The Society is concerned that:

- The Bill’s use of the term "heads of agreement" could create confusion. A document described as a "heads of agreement" is generally considered to be non-binding and not containing the final terms of a transaction, because the parties intend that the final terms will be subject to further negotiation. A great deal of litigation has ensued around whether or not particular heads of agreement have been legally binding, usually requiring an analysis of the parties’ intent along the lines set down by the High Court in Masters v Cameron.

- The definition in the Bill does not clarify whether or not the "heads of agreement" to be prepared by the mediator is intended to be legally binding. The phrase does not appear in the QFFS.

- If it is intended that the parties have the right to enter into a concluded agreement at mediation, then the legislation should specifically address this outcome. It would be unfortunate if the Bill was interpreted as precluding an enforceable settlement agreement being reached at mediation.

- The requirement for the mediator to draft the heads of agreement does not reflect usual mediation practice. In most mediations, where both parties are legally represented, the parties’ legal representatives negotiate the final terms of agreements themselves, and one of them drafts the final terms of the agreement. This enables the mediator to continue discussions with parties to address any other outstanding issues, avoids the potential of the mediator being liable for any defect in the document, and reduces the overall time taken to finalise the document and the mediation.

In summary, the Society recommends that clause 28 be reconsidered as follows:

- The drafting should allow for a process whereby the parties can enter a legally binding, final settlement agreement at the mediation; and

- It should not be the obligation of the mediator to prepare the settlement agreement or heads of agreement. Such a practice will delay the finalisation of the mediation (thereby increasing the cost of the mediation) and potentially expose the mediator to liability (unless clause 84 can be successfully relied upon).

In relation to clause 27, the cooling-off period allows for no flexibility if the parties wish to enter into a different arrangement. There is often some urgency around the timing for the mediation
agreement taking effect. This can occur, for example, where the farmer needs finance urgently to plant a crop. The Bill should allow for the parties to waive the cooling-off period. It may be appropriate to allow for this only if the farmer obtains a legal advice clearance certificate.

In relation to draft clause 31, the Society notes:

- The serious criminal consequences that flow from clause 31(2) of the Bill will likely result in the mortgagee taking significant time in negotiating a heads of agreement. This will increase the cost of and time taken for the mediation.

- It is not clear why the mortgagee should face criminal penalties in the event that both parties, legally advised, wish to enter into a settlement agreement subsequent to mediation which varies (or which might be regarded by a prosecuting authority as varying) from the heads of agreement reached at the mediation.

The Bill should allow for this potential outcome.

**Summary of mediation – clause 33**

Clause 33 requires among other things, the mediator to prepare a summary attaching the heads of agreement if any, and provide copies of this to the parties and to the authority.

The Explanatory Notes do not explain the policy reason for requiring a copy to be provided to the authority or the purpose for which the authority might use the document.

Requiring a copy to be provided to a third party, the authority, immediately raises concerns about the lack of confidentiality of the arrangements recorded in the heads of agreement and the purpose to which the authority can put the document.

The Society questions the need for the document to be provided to the authority.

If the policy objective is to keep the authority informed of the fact that a mediation has occurred, the Society suggests that this could be achieved by the mediator providing the information outlined in clauses 33(1)(a), (c) and (d).

The Society also questions the need for the information in clause 33(1)(b) to be provided to the authority. This clause requires the summary (to be provided to the authority) to include the reason the mediation ended if the parties did not enter into a heads of agreement. This will in most cases involve details of the dispute between the parties which the Society considers should be treated as confidential information, at least to the farmer, and also likely to be commercial-in-confidence to both the farmer and the mortgagee.

The Society expects that both the farmer and the mortgagee would prefer the arrangements recorded in a heads of agreement to remain confidential. The farmer is entitled to confidentiality, given the very personal nature of a debt mediation, and will not wish the wider community to know that a mortgagee has considered enforcement action.

In addition, mortgagees often make significant financial concessions to the farmer as part of the settlement. Mortgagees are usually concerned to ensure these concessions are kept confidential, so that other mortgagors do not develop an expectation of similar concessions.

The Society also notes that if the parties already have a heads of agreement, there seems little advantage to the additional requirement for a summary. This requirement simply adds to further cost and time in the mediation process.
Guidelines for conducting mediation (clause 34) and Mediation information package (clause 35)

The Society notes that the legislation provides for the authority to prepare guidelines about the conduct of a mediation and also to prepare a mediation information package to be provided to a mortgagee and farmer at no cost.

Clause 34 requires that when preparing the guidelines, the authority must consult with at least 1 organisation that represents the interests of Queensland farmers and at least 1 organisation that represents the interests of banks or other entities that provide finance to Queensland farmers.

The Society would welcome the opportunity to be involved and consulted by the authority when developing the mediation guidelines and the information package. The Society has significant experience in the design of effective mediation processes, including members with internationally recognised experience in preparing mediation guidelines and procedures.

Short Title

The Society raises concern that the short title of the Bill is inconsistent with the long title of the Bill and that this has the potential to mislead. While the short title is confined only to the subject matter of farm business debt mediation, Part 9 of the Bill makes amendments to a number of other unconnected pieces of legislation.

In the Society's view, Bills should either be omnibus or single focus instruments. An omnibus Bill should be styled as 'and Other Legislation Amendment Bill' to signal to the public that the Bill speaks to a variety of subject matter. A single focus Bill should be styled as a new standalone enactment as this Bill is largely meant to be.

The Society recognises that Part 9 of the Bill amends the long title following the disparate amendments. However, the practice of using a single focus Bill as a vehicle for other legislative amendments is undesirable due to its potential to mislead the public or the Parliament about the scope of the instrument.

The Bill is a good step towards compulsory farm debt mediation. The Society recommends, however, amending the Bill to reflect some practical issues which have arisen in the practice of farm debt mediations.

If you wish to discuss this submission please call our Government Relations Principal Advisor, Mr Matt Dunn on 3842 5862 or m.dunn@qls.com.au.

Yours faithfully

Bill Potts
President