Queensland Law Society

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Office of the President

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Our ref: KB-ADR

Jim Groves
Principal Policy Officer
Department of Agriculture and Fisheries

By email [redacted]

Dear Mr Groves

Review – *Farm Business Debt Mediation Act 2017*

Thank you for the opportunity to contribute to the Review – *Farm Business Debt Mediation Act 2017*.

The **enclosed** submission has been prepared with the assistance of Queensland Law Society (**QLS**) member George Fox, who regularly mediates matters under the Act. Mr Fox is also a former President of QLS and former Chair of the QLS Alternative Dispute Resolution Committee. He is as an adjunct professor of law in alternative dispute resolution and has worked internationally as a part time consultant to national courts and the World Bank in teaching training and designing dispute resolution frameworks.

The submission has been endorsed by the QLS Alternative Dispute Resolution Committee and by members of the Banking and Financial Services Law Committee and the Water and Agribusiness Law Committee.

If you have any queries regarding the submission, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

[redacted]

Kara Thomson
President

QLS Submission

Review of *Farm Business Debt Mediation Act 2017*

"*You will never know how many lives have been saved by this initiative*"

(Comment made by a Lifeline representative to a mediator during discussions on Queensland farm debt mediation).

Preliminary Comments

The fact that the great bulk of farm debt mediations achieve resolution indicates that not only are there practical incentives for each of the parties to achieve resolution, but also that the principal actors in the process work effectively to enable these outcomes to be achieved.

Since the inception of the current legislation, the staff at QRIDA have been unfailingly courteous, supportive and consultative. They deserve congratulations for their efforts in making this process work.

Other necessary participants in the process provided by government are the Rural Financial Counselling Service and the Farm and Rural Legal Service provided by Legal Aid Queensland. The farm financial counsellors play an essential role in providing financial counselling to the farmer, preparing financial reports sufficient to appraise farmers of their own financial position, and also to provide financial statements, objectively prepared, to assist banks in making concessions and proposals as part of the mediation process.

Similarly, the banks typically place a great deal of trust and confidence in the proposals made by the Legal Aid lawyers from the Farm and Rural Legal Service in moving negotiations forward.

If banks were not able to have confidence in the material supplied by the farm financial counsellors and the Legal Aid lawyers, the resolution rate would be much smaller. Reflecting the quality and experience of the legal services provided, farmers' private solicitors typically suggest to their clients that representation in the mediation be by the Farm and Rural Legal Service.

Over recent years we have seen specially trained bank officers representing their bank in mediations. This innovation has enhanced the effectiveness of banks' participation in the mediation process, and contributes to the high rate of resolutions.

Issues as set out in the review issues paper

4.1 Coverage. The Queensland Law Society (**QLS**) supports the proposition that coverage of the legislation should be as broad as possible. The question should not be, "why should mediation take place?" but rather, "why should mediation not take place?"

Where disputes are being litigated, it is now only in exceptional circumstances that a court will permit a matter to go to trial unless satisfied that a mediation has already taken place. It is difficult to justify as a matter of logic that disputes being litigated will, as a matter of course proceed via mediation, but mediation would not be required in the forced dispossession of people of their homes and businesses outside the court framework.

4.2 Encouraging early mediation. As a matter of general principle, early mediation of a dispute is to be encouraged.

It might be potentially misleading to characterise mediations not under the Act as "informal".

FBDM mediations constitute a very small fraction of mediations conducted in Queensland. These other mediations will have a greater or lesser degree of formality than FBDM mediations, depending on the substance and context of the dispute.

While QLS supports the principal of early mediation, it is important to ensure that the protections envisaged by the legislation are not diminished.

Protections might include:

- The farmer is not required to participate in the mediation because of any contractual or other compulsion;
- The farmer receives legal advice before entering into the mediation;
- The cooling-off provisions apply;
- An exemption certificate will not be provided save on the lodging of a mediator's report certifying that the mediation has been conducted in accordance with the principles of the Act (eg adequate disclosure, good faith, etc).

4.3 Principles of Mediation

More guidance on the principles of mediation?

QLS does not consider this is necessary for the following reasons.

I. There exists a multiplicity of legislation requiring mediation (e.g. legislation governing QCAT, residential tenancies, retail shop leases etc.). FBDM mediations constitute a very small part of mediation practice in Queensland. There are far more mediations conducted under or in tandem with the *Uniform Civil Procedure Rules 1999*. These Rules do not purport to set out the principles of mediation, and the term is not even defined. It provides a brief statement of the statutory powers provided to mediators under the Rules.

   Proceeding down the path suggested would result in a myriad of legislated principles of mediation, all no doubt differing to a greater or lesser extent.

II. Knowledge of the principles of mediation is a matter for education, not a matter for legislation. Mediators go through a national accreditation process, pursuant to which they should receive an appropriate level of knowledge and practice in mediation. They are also required to undergo continuing professional development. If mediators involved in FBDM do not have a clear understanding of the principles of mediation, then the selection process and accreditation process for mediators under this legislation is seriously in error.

III. The practice of mediation is continuously evolving. It is unlikely that legislation would be amended in lock step with this evolution and in tandem with this evolution.

In practice, is lack of "good faith" an issue for the operation of the Act?

The comments above in relation to statutory guidance on the principles of mediation, also apply to "good faith".

The statutory obligation to participate in good faith is an essential component in the effective working of the legislation. It is by its nature, difficult to define. It has proved in practice much more difficult to identify good faith, than to recognise examples of bad faith. The **attached** article

by Professor Alexander, Queensland's first professor of dispute resolution, illustrates the difficulties, and the approach generally taken.

This is recognised by QRIDA's information sheet on good faith. Section B4 illustrates the difficulties in attempting to define good faith. This section sets out an example of acting in good faith –

> *Attending with the preparedness and capacity to act and reflect on all of the propositions put forward by the other side with an open mind and genuine consideration.*

Does this mean that if a mortgagee's representative attended at a mediation and behaved in this manner, but had previously received instructions from their superiors limiting the scope of concessions they can make, then this would still qualify as good faith?

Over the years, it has been suggested, anecdotally, that this is not an uncommon circumstance, and many would regard it as participation not in good faith.

The position is not straight forward, and depends on the context. For example, it is not uncommon in the course of these mediations for a possible resolution to include a further advance from the lender, for a limited period. In these cases, we have seen the bank's representative advising the parties that they have authority to settle the current dispute, but do not have authority to offer a new loan. Some might take the view that, if this was a possible mechanism for resolving the dispute, then the representative should have attended with this authority. Others might take the view that it was not reasonably foreseeable that a possible resolution of a dispute arising out of the borrowers' default might include a further advance to the borrower. In practice, these issues have generally been resolved by the lender's representative quickly obtaining authority from superiors to make the advance contemplated.

The practical difficulty that arises in this area is evident in the Form 2 summary of mediation, where the mediator is required to provide a yes / no answer to the question, **"In the mediator's opinion did the parties participate in mediation in good faith?"**

The answer to this is important, because QRIDA will take the answer into account when considering whether or not to approve an application for an exemption certificate.

This has the potential to bear unfairly on the farmer. The issues which might face the mediator in this area are complex, and the mediator will rarely have full information. It then becomes difficult, if not impossible, for the mediator to make the very serious finding, without qualification, that the lender has not acted in good faith. It may be, psychologically, much easier or attractive for the mediator to certify that the parties have acted in good faith. In this event, the potential for this to impact unfairly on a farmer opposing an exemption certificate, is significant.

It is desirable that the form recognise that it will often be impossible for a mediator to provide, with any level of certainty, a yes / no answer as to whether a party has acted in good faith.

It is suggested that the range of answers be expanded to reflect academic and judicial opinion, for example, the addition of boxes titled, "*no evidence of bad faith*" and "*comment if the above are not applicable*".

Should parties be required to agree on the existence of a debt prior to the mediation commencing?

Requiring the parties to resolve whether or not a debt existed, prior to entering upon mediation, may force them to litigate this issue. Invariably the court would require a mediation prior to hearing the matter, and in the majority of cases, the matter would be resolved at mediation, but only after much cost and delay.

Disputes as to the existence of a debt have occurred regularly in farm debt mediations over the years, and in the great majority of cases, mediations including such disputes have resulted in settlement agreements.

There can be no sound basis for refusing a mediation on the basis of a dispute as to the existence of a debt.

Should the role of advisors be clarified?

Typically, at a FBDM mediation, the farmer will have, a lawyer (in the great majority of cases from Legal Aid) and a farm financial counsellor. From time to time, the farmer's own accountant will also be present. The banks representative will, from time to time, have an in-house or external lawyer acting as advisor and often another bank officer.

In mediations not under the Act, the mediator would normally control the number of non-party attendees at the mediation.

The Act permits a farmer to have one or more advisors. If there is evidence that this right is being abused, then it might be appropriate to permit the farmer the right to have a legal and financial advisor and such further advisors as the mediator might approve.

4.4 Cost of Mediations

Costs to the parties is always a matter of concern. If the cost is such that it might prohibit participation, or weigh unfairly upon a party, it is no answer that the costs in mediation are significantly less than the alternative of litigation.

The New Zealand equivalent provides a cap on farmers' fees. In the Queensland context, it is not uncommon for a bank to agree to bear all of the costs of a FBDM mediation, where the farmer is in difficult circumstances.

QLS recommends that mediation costs and their impact on farmers be monitored and reviewed regularly. If costs prove to be a barrier for parties participating in the scheme, QLS recommends consideration be given to a cap farmers' fees, similar to the New Zealand model, after further consultation with Legal Aid and other relevant stakeholders.

4.5 Other Deterrents

QLS has no specific comment on this issue and defers to the views of Legal Aid who is more appropriately placed to provide information.

4.6 Timelines

QLS agrees that mediations are generally resolved in a satisfactory time and hence do not need accelerating. Because of the availability of resources and existence of family considerations, acceleration of timeframes may well result in unfair detriment to the farmer. Conditions such as

adverse weather, illness, mental health etc. often require a level of tolerance in relation to time periods, and QLS is not aware that this is in practice an issue.

4.7 National Consistency

QLS agrees with the comment in the issues paper:

> *"In any case, Queensland should only emulate NSW, or any other jurisdiction, where that is for the net benefit for the Queenslanders, with national consistency as a secondary consideration".*

In the past, we have seen a history of copying, rather than emulating. An example is the requirement for settlement agreements to be lodged with QRIDA.

As a matter of philosophy, private agreements between parties should not, as a matter of cause, have to be disclosed to the state. The reason given for this requirement in the Queensland legislation, was that Queensland was following the New South Wales scheme. The New South Wales Rural Assistance Authority advises that its reason for collecting the agreements was to ensure that they included a cooling off period. This is a legitimate concern, but could easily be addressed in the mediators' report.

The New Zealand farm debt mediation scheme website provides an express assurance to the public that the mediator's report will not contain any private details of the mediation agreement.

Some years ago, however, we were advised that they are.

4.8 Teleconferencing / Video Conferencing

Directing the use of virtual technology over the objection of the farmer can only serve to increase the already serious power imbalance. Invariably the lender and mediator will be well-accustomed to using this technology. It is unlikely that the farmer will be at ease in this environment.

The social dynamics of face-to-face mediation are significantly different, and operate to minimise any power imbalance.

It is much more difficult, particularly if one or both parties are unused to the technology, for parties to effectively engage in the virtual world. There is a commonly expressed view that the chances of settlement decrease significantly with the use of virtual technology. Experience confirms this view in the FBDM context.

The legislation gives the power to the farmer to agree with the use of virtual technology, or disagree. Removing this right would significantly exacerbate the inherent power balance.

4.9 Documentation

QLS is not aware of abuse of the current disclosure requirements. Should this be the case, then the mediator should have the authority to limit disclosure to the extent necessary to provide fairness to the parties.

Position papers be exchanged no less than 5 days before mediation.

The exchange of position papers if required is invariably a matter of discussion between the mediator and the parties, and this is appropriate. Attempting to put a straight jacket around these processes will detract from their effectiveness. In practice, it is unlikely that Legal Aid would

have the resources required to achieve this timeframe. Legal Aid representatives will invariably try to meet the farmer on the farm, generally with the assistance of the rural financial counsellor. Time and resource constraints mean that this often occurs only a matter of days prior to the mediation. Invariably the parties are aware of, and tolerant of, these issues.

4.10, 4.11

These are matters with which Legal Aid will have greater familiarity, and QLS defers to its experience.

Conclusion

QLS assisted with the preparation of the formal Farm Debt Mediation Scheme in 1996, and has maintained a continuing interest in the effective operation of farm debt mediation in Queensland.

QLS applauds the success of the current legislation, and appreciates the opportunity to be part of the review consultation.