



Consultation paper: development of a better practice guide for Farm Debt Mediation

January 2022

Introduction

This consultation paper seeks to facilitate stakeholder input to the development and content of a national better practice guide for farm debt mediation (FDM).

This paper outlines the context and rationale for developing a better practice guide for FDM, including the history of FDM in Australia and the outcomes of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Banking Royal Commission).

Progress has already been made by the banking and finance sector, and state governments, to implement the Banking Royal Commission recommendations. A better practice guide would acknowledge and reflect this progress and, where possible, smooth any gaps in the delivery of FDM across jurisdictions to achieve further national harmonisation.

History of FDM

FDM refers to a formal mediation process between a farmer and their lender to resolve a debt dispute. The process uses an independent mediator to assist the farmer and lender to communicate effectively so that workable solutions are identified and formalised in an agreement. FDM aims to facilitate discussions between a farmer and their lender about debts as early as possible when a loan is distressed and before the commencement of any enforcement action.

Australian jurisdictions first began introducing legislated FDM schemes over twenty-five years ago. New South Wales was the first state to introduce a legislated FDM scheme in 1994, followed by Victoria in 2011, Queensland in 2017 and South Australia in 2018. Western Australia, the Northern Territory and the Australian Capital Territory do not have legislated FDM schemes, but WA does have a voluntary FDM scheme that was introduced in 1985. Tasmania is currently developing FDM legislation.

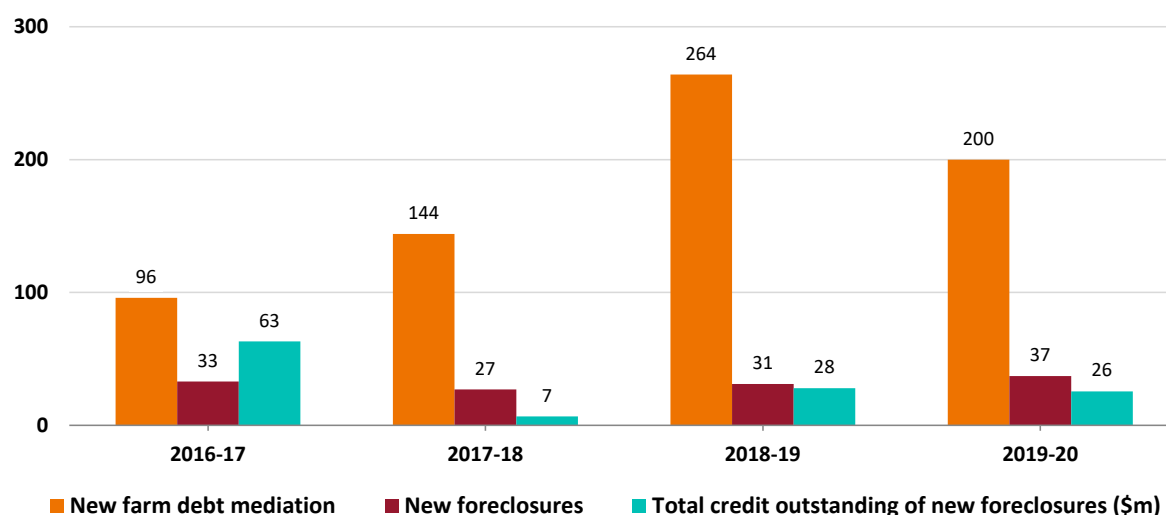
Over the years since these schemes were first introduced, it became clear that there was a need for greater national consistency to ensure that all farmers had access to FDM and to provide clarity for entities operating across multiple jurisdictions. For instance:

- In September 2014, at the Agricultural Finance Forum, then Minister for Agriculture, the Hon. Barnaby Joyce MP, agreed to investigate options for a nationally consistent FDM scheme.
- The May 2016 Parliamentary Joint Committee on Corporations and Financial Services report, *Inquiry into the Impairment of Customer Loans*, recommended establishing a national FDM scheme.
- At the July 2017 Agriculture Ministers' Forum meeting, all jurisdictions, except the ACT, agreed to continue to work towards a harmonised approach to FDM.
- Both the August 2017 Australian Small Business and Family Enterprise Ombudsman report, *Inquiry into Small Business Loans*, and the December 2017 report from the Senate Select Inquiry into Lending to Primary Production Customers recommended the government establish a nationally consistent compulsory FDM scheme.

- NSW amended its legislation most recently in 2018 after a comprehensive review. Queensland have indicated there is a 5-year review of the state's FDM legislation due to occur in 2022.

Table 1 below highlights the number of new farm debt mediations and new foreclosures nationally from 2016–17 to 2019–20. Since 2016–17, this data has been published annually in the Agricultural Lending Data report available on the department's website.¹

Table 1: New instances of loans and leases under mediation and new farm foreclosures, Australia, 2016–17 to 2019–20



Source: APRA, Agricultural Lending Data report 2019-2020

The Banking Royal Commission (2017 to 2019)

In December 2017, the Banking Royal Commission was established to inquire into misconduct in the banking, superannuation, and financial services industry. In February 2019, the Banking Royal Commission final report was released, and it made 76 recommendations (of which 29 apply to banks, 7 are for implementation by the Australian Banking Association (ABA) and the remaining are for implementation by regulators and government). Two of the recommendations specifically related to FDM:

- Recommendation 1.11 – Farm debt mediation: A national scheme of farm debt mediation should be enacted
- Recommendation 1.14 – Distressed agricultural loans: When dealing with distressed agricultural loans, banks should:
 - ensure that those loans are managed by experienced agricultural bankers
 - offer farm debt mediation as soon as a loan is classified as distressed
 - manage every distressed loan on the footing that working out will be the best outcome for bank and borrower, and enforcement the worst
 - recognise that appointment of receivers or any other form of external administrator is a remedy of last resort
 - cease charging default interest when there is no realistic prospect of recovering the amount charged.

¹ <https://www.awe.gov.au/agriculture-land/farm-food-drought/drought/agricultural-lending-data>

In its February 2019 response to the Banking Royal Commission, the Australian Government agreed to Recommendation 1.11 and further supported banks acting on Recommendation 1.14:

A national scheme would assist lenders and borrowers to agree on practical measures that may lead to the borrower being able to address financial difficulties that have caused the loan to become distressed. The Government further supports mediation occurring soon after the loan becomes distressed and not as a last measure prior to the lender taking enforcement action.²

Progress to date – implementation of recommendations

To date, significant progress has been made in enacting consistent FDM legislation across participating jurisdictions. The Australian Government's ability to enact a fully comprehensive legislated national FDM scheme is limited, as it could not achieve the same broad scope as existing state legislated schemes. To implement nationally consistent FDM legislation, states and territories are required to enact similar legislation based on consistent principles. Advantages for jurisdictions implementing their own consistent legislation, include:

- flexibility to select delivery agencies
- deciding the appropriateness of subsidisation of mediations
- building on existing state legislation.

Consequently, the Australian Government has worked with state and territory governments to develop a nationally consistent FDM scheme by implementing respective state based FDM legislation, modelled on the *NSW Farm Debt Mediation Act 1994*. This has resulted in the following arrangements:

- NSW, Victoria, Queensland, and South Australia currently have similar legislated FDM schemes
- Tasmania intends to table legislation based on the NSW scheme in the near future
- WA continues to prefer its non-legislated scheme which it considers to be successful, cost effective and could be consistent with a national approach
- The NT and the ACT do not wish to implement formal farm debt mediation schemes given the low primary producer numbers and limited evidence of demand in these jurisdictions.

Although there are minor differences between these existing legislated schemes, they largely meet the intent of enacting a national FDM scheme and fulfilling Recommendation 1.11 of the Banking Royal Commission. The legislated states already cover around 87 per cent of all farm businesses.

ABA member banks have adopted principles to address recommendation 1.14 regarding the early offering of FDM.

A better practice guide for FDM

There are additional non-legislated approaches that could go further in achieving the goal of a nationally consistent FDM scheme. The main approach, and the focus of this discussion paper, is the proposal to develop a better practice guide for FDM.

² <https://bankingroyalcommission.wordflow.info/government-response/1-11-farm-debt-mediation/>

Read in conjunction with relevant state and territory legislation, and the ABA Banking Code of Practice³, a better practice guide would assist farmers and their lenders by:

- contributing to national harmonisation of FDM
- encouraging transparent and consistent practices of FDM across jurisdictions
- raising awareness and providing greater certainty about processes, as well as improved opportunities to achieve a resolution to debt disputes.

The guide would be principles-based and not seek to provide detailed processes and procedures. Jurisdictions may choose to make legislative changes based on the outcomes of the guide.

The Department of Agriculture, Water and the Environment welcomes stakeholder views on the development, content and adoption of a FDM better practice guide. Specific areas for stakeholder feedback and discussion are outlined in the table below.

³ <https://www.ausbanking.org.au/wp-content/uploads/2021/10/2021-5-Oct-Banking-Code-WEB.pdf>

Consultation issues – proposed FDM better practice guide			
No.	Issue	Description	Guiding questions
1	Experience of current FDM arrangements	We are interested in better understanding current experiences with FDM arrangements, to identify what is working well, what could be improved and whether there are any gaps in the current national scheme that could be addressed through a better practice guide.	<p>a. <i>What is your experience of current FDM arrangements?</i></p> <p>b. <i>What is working well with FDM arrangements, what could be improved, and are there any gaps that could be addressed through a better practice guide?</i></p>
2	Early engagement	A key principle of focus is that lenders offer FDM as soon as a loan is classified as distressed and view enforcement as a last resort, as recommended by the Royal Commission.	<p>a. <i>How is early engagement in FDM (i.e., lenders offering FDM as soon as a loan is distressed) being currently achieved?</i></p> <p>b. <i>Are there any barriers that you are aware of preventing early engagement in practice?</i></p>
3	Instances of mediation	In line with the current NSW scheme, a better practice guide could state that either party (lender or farmer) may initiate FDM at any time.	a. <i>How should a better practice guide deal with who may initiate FDM, when they may/must initiate FDM, and potential instances of multiple mediation?</i>
4	Timeframes	There should be sufficient and consistent timeframes in place for responding to requests to mediate, and cooling off periods etc.	<p>a. <i>Are current legislated timeframes considered sufficient?</i></p> <p>b. <i>How can timeframes across jurisdictions be made more consistent?</i></p>
5	Access to information	Lenders are encouraged to deliver communication activities and other support services to ensure farmers are aware of, and understand, FDM processes. Regulators should also have information that's readily available and easy to understand.	<p>a. <i>How effective are existing communication activities and support services to ensure farmers get the information they need?</i></p> <p>b. <i>Are there any ways communication could be improved?</i></p> <p>c. <i>Is there anything that could improve pre-mediation assistance between lenders and farmers, and what is considered best practice?</i></p> <p>d. <i>Is there anything government can do to improve access to information?</i></p>

6	Reviews and complaints	Robust review and complaints mechanisms should be in place and communicated to farmers so that they can promptly address any concerns with outcomes of a FDM process.	<p>a. <i>What is your experience with current review and complaint procedures?</i></p> <p>b. <i>Is information about review and complaint procedures readily available and promoted?</i></p>
7	Good faith	Mediation require parties to act in good faith. This includes: honest conduct of parties; the absence of unconscionable conduct such as dishonesty or fraud; the willingness to consider the options proposed by either party and to put forward options for consideration; and the intention to resolve issues speedily and efficiently.	<p>a. <i>In your experience, has the interpretation of good faith been an issue in FDM?</i></p>
8	Costs	If the cost of mediation is seen as a barrier to early participation in FDM, it may be beneficial to develop a principle on costs of mediation.	<p>a. <i>Does the cost of FDM discourage participation in early FDM?</i></p> <p>b. <i>Are any improvements/changes needed to the way costs are currently shared?</i></p>
9	Accessible format of FDM	<p>In the Tasmanian Government's January 2021 Consultation Paper <i>Proposed Legislated Farm Debt Mediation</i>, an issue was raised that the NSW FDM legislation and authorities previously did not recognise mediations conducted online.</p> <p>However, the public health imperatives of the COVID-19 pandemic have significantly increased the use of online communication.</p>	<p>a. <i>What are your views on allowing for FDM sessions to be held online?</i></p> <p>b. <i>What benefits or limitations do you see occurring with online mediation?</i></p> <p>c. <i>Are there any other accessibility issues impacting on FDM?</i></p>
10	Adoption of a better practice guide	Stakeholder views are welcomed on how a better practice guide could be best adopted and implemented.	<p>a. <i>How could the development of a better practice guide benefit you/your organisation/members?</i></p> <p>b. <i>What would be the best way to implement and measure the success of a better practice guide (e.g. endorsed by CEOs, reflected in policies and procedures of lending institutions, further amendments to state legislation etc)?</i></p>