

**Submissions**  
**Primary Production Select Committee**  
**Farm Debt Mediation Bill (No 2)**



**ARBITRATORS' AND MEDIATORS'**  
**INSTITUTE OF NEW ZEALAND INC**

Te Mana Kaiwhakatau, Takawaenga o Aotearoa

## THE ARBITRATORS' AND MEDIATORS' INSTITUTE OF NEW ZEALAND ("AMINZ")

1. AMINZ is New Zealand's largest and leading organisation for alternative dispute resolution professionals. It has over 1600 members, including most of this country's leading mediators.
2. AMINZ is internationally recognised<sup>1</sup>. It trains and credentials mediators<sup>2</sup>. It has robust and long-standing ethics, CPD and complaints-management regimes<sup>3</sup>.
3. AMINZ mediators include many retired High Court judges, mediators in government, and mediators in private practice.
4. AMINZ is referenced in over 40 pieces of legislation to appoint dispute resolvers. The majority of those references are to enable AMINZ to appoint mediators in agricultural disputes<sup>4</sup>.
5. AMINZ has extensive experience in the rural sector. It has a longstanding Rural List, comprised of dispute resolution professionals with proven experience and skills in the rural sector, including rural debt-related issues. It is the only organisation that currently has this type of list.
6. Since 14 September 2006, in conjunction with Federated Farmers, it has solely administered the National Panel of Conciliators for the resolution of sharemilking disputes.
7. AMINZ has a long history of working with Government on best practice dispute resolution.
8. AMINZ has extensive experience in establishing, administering and/or providing mediators for mediation schemes. Recent examples include:
  - (a) By agreement with the EQC, AMINZ independently administers, and provides mediators for, the EQC mediation scheme;
  - (b) AMINZ is an Approved Dispute Resolution Organisation for the credentialing of family mediators; and
  - (c) AMINZ provides mediators for the Retirement Villages mediation scheme.

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<sup>1</sup> AMINZ is the only organisation globally that has reciprocal rights of membership with the Chartered Institute of Arbitrators – the largest dispute resolution organisation world-wide. It is widely recognised nationally as the leading dispute resolution body and internationally as being the voice of dispute resolution in NZ.

<sup>2</sup> See generally [www.aminz.org.nz](http://www.aminz.org.nz)

<sup>3</sup> Ibid

<sup>4</sup> See Appendix 1: List of legislation that names AMINZ

9. AMINZ is an Approved Nominating Authority pursuant to the Construction Contracts Act and as such it appoints adjudicators and it was appointed by the Minister of Justice to make appointments of arbitrators in the stead of the High Court, pursuant to the Arbitration Act.
10. AMINZ welcomes the Farm Debt Mediation Bill (No 2) ("the Bill").

## INTRODUCTORY REMARKS

11. Farm debt is not just a number, for the farmer or the lender. For the farmer, the debt supports not just a business, but a way of family life, a passion, a history and a commitment to the *whenua*. For the lender it represents not merely a commercial transaction, but also a relationship on a personal level, and part of a vital connection to New Zealand's largest economic sector. A farm is often an integral part of the local economy and community.
12. Farm debts can go awry. Farmers over-commit. Drought and other natural disasters can ruin the best-laid plans. Bio-hazards and compliance issues are now adding unexpected costs. Prices are subject to international volatilities over which neither farmers or lenders have control. Farm businesses often have little influence on the price of essential inputs or operating cost structures in general.
13. Lenders have a broad suite of contractual, statutory and court-based means of enforcing farm debts. But, once enforcement action commences, the costs, and the emotional stakes, rise significantly. This can create risks – for the farmer, the lender and the community - that not all options are explored, and not all issues are addressed.
14. The introduction of mediators in this context can help. Mediation involves a neutral dispute resolution expert assisting the parties to talk to each other, and to try and resolve their differences consensually.
15. International research has found mediation to be more likely to achieve settlements than other forms of consensual dispute resolution<sup>5</sup>. It achieves settlements that are more likely to be complied with<sup>6</sup>. It saves time and money<sup>7</sup> even when settlement is not achieved<sup>8</sup>. It allows parties to explore all possible

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<sup>5</sup> A 2011 study of civil cases in Michigan found that mediation produced far more settlements and consent judgments (84% of cases) than other approaches - Campbell, T.G. & Pizzuti, S.L. (October 2011), *The effectiveness of case evaluation and mediation in Michigan Circuit Courts*, East Lansing, MI: Courtland Consulting

<sup>6</sup> In a Scottish mediation pilot that ran from 2006 through 2008, 90% of parties that settled at mediation reported that the terms of their agreement had been carried out, while only 67% of litigants who otherwise settled during the course of litigation reported compliance with the agreement - Ross, M. & Bain, D. (2010). *Report on evaluation of in court mediation schemes in Glasgow and Aberdeen Sheriff Courts*. Edinburgh: Queen's Printers of Scotland. Retrieved from: <http://www.scotland.gov.uk/Publications/2010/04/22091346/19>.

<sup>7</sup> See: *A Case for Mediation: The Cost-Effectiveness of Civil, Family, and Workplace Mediation*, Sarah Vander Veen, January 2014 <http://www.mediatebc.com/PDFs/1-52-Reports-and-Publications/The-Case-for-Mediation.aspx>.

<sup>8</sup> A 2001 study of mediated EU commercial cases found that even those that did not settle at mediation were shorter and less costly to the courts and the disputants - De Palo, G., Feasley, A., & Orecchini, F. (2011) *Quantifying the cost of not using Mediation – A data analysis*, Brussels: European Parliament Policy Department C: Citizens' Rights and Constitutional Affairs.

options. Importantly, it also allows parties to feel that they have “had their say” and been heard. There is great psychological and emotional benefit to parties in this process, and it can help to unlock a practical settlement mindset.

16. Mediation is already referred to in 73 New Zealand statutes<sup>9</sup>.
17. Farm debt mediation schemes have been established with success in Australia, Canada and the United States<sup>10</sup>
18. It is for these reasons that AMINZ applauds the government for the introduction of the Farm Debt Mediation Bill (no. 2).

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<sup>9</sup> Grant Morris & Annabel Shaw, *Mediation in New Zealand*, 2018, p365-366

<sup>10</sup>Legislation

- The Farm Debt Mediation Service (Canada)
- Farm Mortgages and The Farm Debt Mediation Act, 2011 (Victoria, Australia)
- Farm Debt Mediation Act, 1994 and Farm Debt Mediation Amendment Act 2018 (New South Wales, Australia)
- Farm Business Debt Mediation Bill, 2016 (Queensland, Australia)
- Farm Debt Mediation Scheme, 2015. (Western Australia, Australia)
- Farm Finance Strategy, 2007 (South Australia) (South Australia has introduced a Farm Debt Mediation Bill to State parliament recently).
- Federal farm Bankruptcy (Frazier-Lemke) Act, Chapter 12 Bankruptcy for Farmers & Fishermen Bankruptcy Law (America)
- Also Section 502 of the Agricultural Credit Act of 1987 (Pub. L. No. 100-233, January 6, 1988) authorized the Secretary of Agriculture to help States develop USDA Certified State Mediation Programs and to participate in USDA Certified Mediation Programs. (USA)

Evaluations

- [Canadian FDMS Review](#)  
Office of Audit and Evaluation, 14 March 2016  
Evaluation of the Farm Debt Mediation Service (2016)
- [FARM MORTGAGES AND THE FARM DEBT MEDIATION ACT 2011 \(VIC\)](#), [Law institute \(VIC\) Review](#)  
G. Browne  
Farm Mortgages and The Farm Debt Mediation Act, 2011. Experiences after 12 months of the act coming into operation (2013).  
Victorian Small Business Commissioner, Mortgage Disputes Legalwise Seminar.
- [RESEARCH INTO FARM DEBT MEDIATION ACT 1994](#) (executive summary) [Research into Farm Debt Mediation Act 1994](#) (Body)  
T. Altobelli  
Research into Farm Debt Mediation Act 1994 for the Rural assistance authority of NSW  
University of Western Sydney MacArthur.

## Executive Summary

AMINZ supports the establishment of a statute-based farm debt mediation scheme.

AMINZ respectfully submits that:

- (a) The Approved Mediation Organisations must be independent of farm debt mediation appointments themselves.
- (b) Lenders should not be able to get an enforcement certificate unless they have offered mediation to the farmer and the farmer has either formally rejected mediation or not attended mediation in good faith.
- (c) There should be a simpler and more effective process in which farm debt mediators are selected if the parties can't agree on a mediator; this process should be modelled on how arbitrators are selected under the Arbitration Act - that is, by a single appointing body.
- (d) Farmers and lenders should always have a first option to agree on a farm debt mediator.
- (e) For this scheme to be successful it requires highly-trained and credentialed mediators, who are experienced in both the rural and finance sectors.
- (f) The Bill needs to be amended to make it clear that where there are numerous lender creditors separate proceedings can be consolidated, and where there are numerous entities with interests in the farm, they may also be included in the mediation.
- (g) The Bill should promote full and frank disclosure as between the parties of all relevant, non-privileged, information ahead of the mediation.
- (h) The Bill should allow for co-mediation, conducted by more than one farm debt mediator.
- (i) The information gathered to monitor the success or otherwise of this scheme should be that which is identified as helpful, not simply all mediation settlement agreements.
- (j) It should be mandatory for Lenders to advise farmers that they have will the opportunity to mediate, on signing loan documentation and when they get into debt.
- (k) The government should budget appropriately for the promotion of this scheme.

## Some terminology

19. The Bill is premised on roles and responsibilities being divided as follows:
- a. An Approved Mediation Organisation, (AMO.)  
This is the organisation that may authorise a mediator to mediate under the Act. It is essentially a credentialing body.

In our submission, an AMO must be independent of providing mediation services. This is currently mandated in regulations for those organisations which accredit family mediators. It ensures that there is a separation between credentialing mediators and those persons actually mediating. This is an essential separation of duties, particularly to ensure a high quality of farm debt mediators.

- b. Mediators  
The providers of mediation services.
- c. The Chief Executive  
This person has the tasks to:
  - Give prohibition and enforcement certificates,
  - Appoint AMOs
  - Provide administrative reviews of decisions
  - Set requirements for the manner or content of mediation requests, replies, the content of mediation reports and mediation agreements.
  - Collect information about the mediations.

20. Appointing Body  
We discuss the possibility of a fourth entity in paragraphs 28 – 33 below, being an Appointing Body – i.e. an independent entity that makes appropriate farm debt mediator appointments.

## Mediation mandatory for secured lenders?

21. The explanatory note to the Bill in its opening line, says: “This Bill will establish a farm debt mediation scheme that will require creditors with security interests in farm property to offer mediation to farmers before taking an enforcement action in relation to that debt.”
22. Unfortunately, in its current form the Bill does not in fact make mediation mandatory for lenders.
23. Instead the Bill delays lender enforcement, for 6 months, and then only when and if the farmer applies for a prohibition certificate (in the event that the lender has declined mediation or not participated in mediation in good faith). At the expiration of this 6-month period, it is conceivable that the lender could

continue with enforcement, unless the farmer obtains another prohibition notice.

24. This places the onus on the farmer, at a likely stressful time, to (if necessary to delay lender enforcement) seek and obtain a prohibition certificate every 6 months.
25. In our submission, the lender should not be granted an enforcement certificate unless it/they have first offered mediation to the farmer, and the farmer has either formally rejected mediation or not attended mediation in good faith.

### **Appointing a mediator**

26. The way in which a mediator is appointed under the Bill is, in our respectful submission, overly prescriptive and may lead to the appointment of a mediator who is not the most appropriate for the dispute.
27. Farmers are required to provide 3 mediators from those qualified by an AMO. Lenders will choose from that list.
28. The issues are:
  - a. The appointment process as drafted denies the opportunity for the lender and farmer to, where possible, simply agree a mediator in the first instance. AMINZ submits that this should be rectified providing the agreed mediator is qualified by an AMO.
  - b. In AMINZ's experience, farmers typically have no or little knowledge of how the mediators operate and who might be most suitable for their particular dispute. Lenders on the other hand will, once the scheme is operational, quickly gain such knowledge and create a list of the lenders' preferred mediators. In our view this will create a knowledge imbalance that is undesirable.
  - c. Family Dispute Resolution, on which the farm debt mediator selection process has been modelled, has suffered through confusion at the outset for the mediation client, (families) caused by the number of credentialing bodies. Clients do not know which body to go to. This has necessitated an extra layer of administration – i.e. a list provided by a Ministry. Even if it is well-publicised or utilised, it will operate in competition with the AMO publicised lists, which only adds to market confusion.
29. A simpler and more effective approach to this is the way in which arbitrators are currently selected under the Arbitration Act.

30. The Arbitration Act model could be applied in the farm debt mediation context could work as follows.
- a. AMOs are selected to certify suitably qualified mediators.
  - b. The parties can agree and select a mediator, as long as that person is certified by an AMO.
  - c. If the parties cannot agree, they can go to a single entity, the Appointing Body. That Body would be appointed by the Minister.
  - d. The Appointing Body would consider all mediators credentialled by the AMOs. The Appointing Body would need to consider the nature of the dispute and any representations from the parties.
  - e. The Appointing Body would then make the most appropriate appointment.
31. The way in which the Appointing Body, being the single entity whom (where necessary) appoints farm debt mediators, is selected would be through a competitive tender process administered by MPI.
32. In this way the Appointing Body selection is straightforward and appropriate. Lenders and farmers would be on a level playing field, with an independent organisation selecting an appropriate mediator. There would be no confusion between different AMOs. There is a single point of entry to disputes. Most importantly, the most appropriate mediator for the dispute is selected by an entity that is well conversant with all of the AMO-credentialled farm debt mediators.
33. We highly recommend this proposed Appointing Body use and selection process for the Committee's consideration.
34. If our submissions concerning the selection and appointment of an Appointing Body are rejected then, again, at a bare minimum AMO's should only be credentialing organisations. Having a credentialing body supplying mediation services is a clear conflict of interest, and is most likely to lead to the diminution of key standards. This important point has already been accepted in the family / whanau disputes area, where a separation between those who credential and the supplier of services is required in the Family Dispute Resolution "ADRO" system.

### **The critical importance of high-quality mediators**

35. Any successful mediation service is under-pinned by high-quality mediators, with proven experience in resolving the specific area of disputes.

36. For this scheme to succeed it must only include mediators who are highly-trained, properly credentialled and experienced in the rural and financial sectors in New Zealand.
37. Farmers and lenders alike will quickly lose confidence in this scheme if they perceive that mediators do not have an excellent understanding of both their industries. Farm debt disputes can be highly complex matters, involving hundreds of millions of dollars of farm assets and financial instruments at risk.
38. In our view the Bill should at least set out the key skills and experience to be considered by an AMO in credentialing farm debt mediators.
39. AMINZ is well placed to assist this scheme to be successful through its existing connections to the relatively few individuals who it considers will have the necessary skills and industry *mana* to maintain farmers' and lender's confidence in this scheme.

#### **Multiple parties**

40. It is often the case that a farmer is in debt to a number of creditors.
41. Farm ownership can also be complex and involve a number of different parties.
42. In our experience it is often fundamental to achieving successful mediation outcomes that all interested parties are party to a single mediation.
43. The Bill is currently silent on what occurs if there are numerous lender creditors or numerous farm-owning entities involved in the farm debt dispute/s, other than saying that the mediation process can be agreed in the procedure agreement.
44. We are concerned that the way in which the Bill is currently framed means a party could sabotage a farm debt mediation by not agreeing to all relevant parties being part of the mediation.
45. In our submission the Bill should be amended to expressly state that if there are a number of interrelated farm debt disputes, then separate dispute proceedings can be consolidated through election by either the farmer or the lenders, and if there are numerous entities with interests in the farm they should be included in any mediation.

### **Full and frank disclosure pre-mediation**

46. In our experience any lack of all relevant information, and/or information asymmetries, can reduce settlement prospects in commercial mediations.
47. In our view the Bill should make compulsory full and frank disclosure of all relevant, non-privileged information between the parties ahead of any farm debt mediation.

### **Procedure Agreements unnecessary**

48. In our view the current requirement in the Bill for a procedure agreement is wholly unnecessary. A skilled farm debt mediator will discuss through and agree the detailed mediation procedure prior to the commencement of the mediation.

### **Flexibility as to process in each mediation, co-mediation in more complex matters**

49. We are pleased that the Bill is not overly prescriptive in terms of what process a mediation under the scheme should adopt. One of the strengths of mediation is its flexibility.
50. However, given the scale and complexities of some New Zealand farming operations, the number of parties who could be involved and the associated farm debt levels, co-mediation – i.e. where two or more mediators with differing expertise (e.g. one in on-farm, one in debt restructuring, matters) – mediate together should be an available legislative option if the parties feel this would be helpful.
51. Consequently, in our view the Bill should expressly allow for co-mediation.

### **A worthwhile reporting and review regime**

52. We agree that reporting and review is important, because it will help the scheme improve and develop towards best achieving its objectives. It will also be important for all stakeholders to determine how well the scheme is working.
53. However, reporting and review needs to be handled sensitively, given the confidential nature of mediation. We are pleased to see the strict confidentiality of mediation maintained in the Bill.

54. However, gathering together mediation agreements is not of itself helpful. This kind of comprehensive data capture can be problematic, providing sensitive information, some of which will not be useful to anyone other than the parties.
55. We respectfully submit that it would be preferable to gather farm debt mediation information that is in fact helpful, such as the number of parties, region of the farm, the amount of secured debt in dispute, whether a settlement was achieved at the mediation, the type of settlement, who the mediator was etc.

### **Promotion of the scheme**

56. In our view, to achieve the wider purpose of the Bill it should be amended to make it mandatory for lenders to advise farmers that they will have the opportunity to utilise this scheme, on signing any farm debt loan and security documentation.
57. This scheme will not operate well unless all of the key parties know about it and know how to use it. It is imperative that the government budgets appropriately for the implementation and promotion of this scheme, particularly to farmers, but also to all rural lenders.

## Appendix 1

### AMINZ is named in legislation.

To appoint arbitrators as follows:

- Fisheries Act 1996
- Fisheries Amendment Act 2011
- Sharemilking Agreements Act 1937
- Sharemilking Agreements Order 2001
- Sharemilking Agreements Order 2011

To appoint independent decision makers as follows:

- Titi (Muttonbird) Island Regulations 1978 and amendments 2007

To appoint mediators as follows:

- Maori Television Service (Te Aratuku Whakaata Iriangi Maori) Act 2003
- Building (Residential Consumer Rights and Remedies) regulations 2014
- Commodity Levies (Arable Crops) Order 2012
- Commodity Levies (Asparagus) Order 2012
- Commodity Levies (Avocados) Order 2013
- Commodity Levies (Blackcurrents) Order 2013
- Commodity Levies (Cereal Silage) Order 2012
- Commodity Levies (Citrus Fruit) Order 2014
- Commodity Levies (Feijoas) Order 2014
- Commodity Levies (Foveaux Starit Dredge Oysters Order 2013
- Commodity Levies (Harvested Wood Material) Order 2013
- Commodity Levies (Kiwifruit) Order 2012
- Commodity Levies (Maize) Order 2012
- Commodity Levies (Meat) Order 2015
- Commodity Levies (Milksolids) Order 2014
- Commodity Levies (Mussels, Oysters, and Salmon) Order 2013
- Commodity Levies (Nashi Pears) Order 2012
- Commodity Levies (Non-proprietary and Uncertified Herbage Seeds) Order 2014
- Commodity Levies (Onions) Order 2013
- Commodity Levies (Paeonies) Order 2012
- Commodity Levies (Passionfruit) Order 2014
- Commodity Levies (Paua) Order 2013
- Commodity Levies (Pipfruit) Order 2012
- Commodity Levies (Potatoes) Order 2013
- Commodity Levies (Rock Lobster) Order 2013
- Commodity Levies (Summerfruit) Order 2014
- Commodity Levies (Tamarillos) Order 2010
- Commodity Levies (Vegetables and Fruit) Order 2013
- Commodity Levies (Wheat Grain) Order 2014
- Commodity Levies (Winegrapes) Order 2016
- Wine (Grape Wine Levy) Order 2005
- Wine (Grape Wine Levy) Order 2016
- Wine (Non-grape Wine Levy) Order 2008
- Maori Reserved Land Amendment Act 1997
- Commodity Levies (Eggs) Order 2010

- Commodity Levies (Nashi Asian Pears) Order 2006
- Commodity Levies (Naval Oranges) Order 2012
- Commodity Levies (Satsuma Mandarins) Order 2008
- Commodity Levies (Southern Scallops) Order 2007