NEW ZEALAND BANKERS ASSOCIATION

Submission

to the

Primary Production Committee

on the

Farm Debt Mediation Bill

17 August 2018

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About NZBA

1. NZBA works on behalf of the New Zealand banking industry in conjunction with its member banks. NZBA develops and promotes policy outcomes that contribute to a strong and stable banking system that benefits New Zealanders and the New Zealand economy.

2. The following seventeen registered banks in New Zealand are members of NZBA:

- ANZ Bank New Zealand Limited
- ASB Bank Limited
- Bank of China (NZ) Limited
- Bank of New Zealand
- MUFG Bank, Ltd
- China Construction Bank
- Citibank, N.A.
- The Co-operative Bank Limited
- Heartland Bank Limited
- The Hongkong and Shanghai Banking Corporation Limited
- Industrial and Commercial Bank of China (New Zealand) Limited
- JPMorgan Chase Bank, N.A.
- Kiwibank Limited
- Rabobank New Zealand Limited
- SBS Bank
- TSB Bank Limited
- Westpac New Zealand Limited

Background

3. NZBA welcomes the opportunity to provide feedback to the Primary Production Committee (**Committee**) on the Farm Debt Mediation Bill (**Bill**) and commends the work that has gone into developing the Bill.

4. If you would like to discuss any aspect of the submission further, please contact:

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Introduction

5. NZBA supports the underlying purpose of the Bill, namely to provide a process for mediation to occur before a creditor who holds security over core farming assets seeks to enforce that security. NZBA members recognise the importance of a strong relationship between a bank and its agribusiness customers and are willing to implement mechanisms to support this relationship.

6. NZBA members undertake a very small volume of receiverships and voluntary administrations in the agricultural sector, and its members see these enforcement mechanisms as a very last resort. Significant time and effort is expended by NZBA members to prevent reaching this stage. NZBA members work proactively with the customer to achieve mutual outcomes and in doing so, endeavour to ensure that the customer has access to sufficient working capital to maintain the farming enterprise in a BAU operation. NZBA also notes that RBNZ, as a regulator of NZBA members, spends a significant amount of time addressing concerns around systemic risk in relation to agricultural debt. The RBNZ Asset Quality dashboard points to this sector having higher provisioning than other sectors.[1]

7. When dealing with customers in distress, NZBA members are also very conscious of the impact that enforcement, or potential enforcement action, can have on both customer wellbeing as a whole and the customers' overall financial position.

8. Consistent with its members' pro-active and cooperative approach to dealing with distressed agribusiness customers NZBA had, prior to the introduction of this Bill, been advancing a farm debt mediation scheme with its members based on the Australian experience of farm debt mediation. Most Australian states have legislated to provide for a farm debt mediation scheme[2] and their experience indicates that the farm debt mediation scheme can be effective for both creditors and farmers. On the introduction of the Bill, we changed our focus from developing a voluntary scheme to considering the optimal form and content of equivalent legislation.

9. We understand that non NZBA member lenders to agribusiness operations may not have such processes in place or treat such enforcement mechanisms as last resort and therefore this Bill seeks to set a minimum standard for lenders generally. Given the existing approach of NZBA members to distressed agribusiness customers, NZBA considers that the Bill's application to second and third tier lenders or lenders of last resort is where the real practical benefit of this Bill for farmers lies.

10. NZBA considers that in order for this Bill to have a real impact for farmers, it needs to be extended beyond lenders with a power to appoint receivers and instead apply to all creditors with security over integral farming assets. This issue is explained in more detail below.

11. As is explained in this submission, dealing with a distressed farming operation is often very complex. There are generally a number of interested parties and complex practical issues to overcome. Therefore, NZBA would welcome the opportunity to discuss in more detail its submissions with the Committee.

12. This submission will address the following issues:

[1] https://bankdashboard.rbnz.govt.nz/asset-quality

[2] See for example the Farm Debt Mediation Act 1994 (NSW) and the Farm Debt Mediation Act 2011 (Victoria).

(a) Application of the mediation scheme: which parties will be subject to the scheme and what intended enforcement steps would trigger the mediation requirements.

(b) Good faith and protections for lenders where there is a reasonable suspicion of a lack of good faith.

(c) Appropriate mediators and the role of the Banking Ombudsman in accrediting and appointing mediators.

(d) Various process matters.

13. However, as a preliminary matter this submission addresses the need to clearly frame the issues that this Bill is intended to resolve.

Framing the issues

14. NZBA considers that a necessary first step for the Committee is to:

(a) consider and identify the issues and risks this Bill is intended to resolve; and then

(b) assess whether the proposals outlined in the Bill will, in fact, address those issues and risks.

15. As explained in this submission, NZBA considers that the proposals outlined in the Bill will not adequately address the issues that we expect the Bill seeks to resolve. However, until those issues/risks have been clearly identified, it will be difficult to put forward alternative proposals or assess the effectiveness of the proposals in the Bill against its objectives.

16. Dealing with a distressed farming operation is frequently very complex and there will be a number of different stakeholders to consider. A farming operation will generally have a number of different creditors, some of whom will be secured and others unsecured. Some will be lenders, some will be trade creditors, others will be related (or family) entities. The nature of the securities held by those creditors will differ, as will the enforcement steps available to them.

17. For example, in any farming operation there will frequently be:

(a) A primary lender, usually either a bank or a second or third tier financier. This party will likely be secured. The likely security interests will be a General Security Agreement (**GSAs**), a mortgage over the farming property or other land and guarantees provided by related parties including the farmer, family trusts and the like.

(b) Secondary lenders and trade creditors. These creditors may be unsecured or secured. They may have similar security interests to that of the primary lender, but also may have Specific Security Agreements (**SSAs**) over particular assets, Personal Money Security Interests (**PMSIs**) and related party guarantees.

(c) Other creditors, including IRD and related party creditors (including for example, debt owed to family members, family trusts and the like).

18. There is likely a strong positive correlation between the quality of credit and the nature of the creditor. That is, farming operations with good quality credit are likely to be funded by the banks, whereas farming operations with low quality credit are more likely to be funded by second and third tier financiers.

19. There may also be arrangements with associated parties which need to be considered as part of this regime; for example, arrangements with sharemilkers.

20. NZBA submits that the Bill needs to more explicitly acknowledge and address those complexities in a farming operation. It currently seems to assume that the primary risk to be addressed by the Bill is a lender appointing a receiver. However, as will be apparent from the above list, a number of these creditors could take enforcement action which would be significantly detrimental to the farming operations, without appointing a receiver. By way of example, a mortgagee could sell the farming property by way of mortgagee sale, or a SSA or PMSI holder could seize some integral farming machinery or livestock. Neither of these examples would be captured by the Bill in its current form.

21. A necessary part of framing the issue will involve a consideration of why farms are of such a special nature, such that a bespoke regime should be applied to them, where it does not apply to other businesses. The reasons for the differential treatment of farms will shape the form of resolution required in any legislation and, if outlined in the legislation or accompanying materials, will aid interpretation of the final statute. By way of example, NZBA considers that debt mediation is especially appropriate for farmers for the following reasons:

    (a) Farmers are especially vulnerable to business down-turns as a result of their susceptibility to periods of unfavourable climatic conditions, commodity cycles and other conditions outside of their control (for example agricultural disease). Therefore, there is a heightened risk of lenders and other creditors seeking to enforce their debts and/or securities promptly, without first exploring whether creditor support could enable the farmers to recover from those downturns.

    (b) Farmers are not only resident on their properties, but frequently farmers are inter-generational owners, with deep emotional attachments to the land. The need to manage farmers' emotional welfare justifies differential right and protection of their interests, especially in situations where that emotional connection means they may try to ride out any adverse conditions longer than would be prudent, to their ultimate financial (and emotional) detriment.

22. These issues will impact, in particular, the way in which a "farm", "farmer" and "farming operations" is defined for the purpose of the Bill. We discuss this in more detail below.

23. Further, it will be important to ensure that any mandatory mediation process does not have the unintended consequence of escalating enforcement action where, in the absence of such a scheme, the parties would have had a productive ongoing dialogue on the issues.

24. NZBA's submissions are based on those overarching considerations.

Application of the scheme: parties and enforcement steps

25. The Explanatory Note provides that the purpose of the Bill is to introduce mediation as a mandatory step before the appointment of a receiver in respect of agricultural debt. This gives rise to two key issues:

    (a) The mediation scheme is only triggered upon an intended receivership. However, as explained above, receivership is not the only form of enforcement over a farm or core farming assets. NZBA considers that the underlying policy behind the Bill would not be appropriately met if it was limited to receiverships and this could lead to secured creditors circumventing the mandatory process by selecting alternative forms of enforcement.

    (b) The application of the mediation scheme is defined by reference to the definition of "agricultural debt". However, there is some ambiguity in this definition, particularly in respect of to whom the scheme would apply (both "farmer" and "lender") and what types of "debt" are captured. It will also be necessary to consider scenarios where agricultural debt is included within a broader security pool, or cross-collaterised with, non-agricultural assets, including the rights of any guarantors to the primary borrower forming part of the security matrix.

26. These two issues are linked. If the mandatory mediation scheme is only triggered by the intended appointment of a receiver, the definition of agricultural debt would likely be different to that which would be appropriate where the mediation scheme is triggered by other forms of enforcement of a security over core farm assets.

27. Accordingly, these submissions first address the restriction of the scheme to receiverships before considering the definition of "agricultural debt".

Bill should have wider application than receiverships

28. NZBA considers that the Bill should have a wider application beyond simply the intended appointment of a receiver and should extend to all intended enforcement of a security interest in farmland or an asset that is an integral part of a farming operation.

29. As outlined in paragraph 23(a) above, in NZBA's view, it would be inconsistent with the overarching policy of the Bill to require a lender to proceed with mandatory mediation prior to the appointment of a receiver, where, for example, that same lender could proceed to sell the farming property by way of mortgagee sale without triggering the mandatory mediation process. The same detrimental effect could arise in respect of enforcement over key farm machinery or assets, including livestock.

30. Accordingly, NZBA considers that the Bill should extend the mediation scheme to any instance whereby a secured creditor is intending to:

    (a) appoint a receiver; or

    (b) sell, take possession of or seize any farm land or farming machinery or assets which is integral to the farming operations.

31. NZBA appreciates that there may be a question as to what is "integral" machinery or assets in a particular circumstance. In most occasions this will be obvious and the resulting statute could itself give some examples as guidance. For example, livestock should be specifically included as an example of an asset integral to a farming operation. However, we consider some form of distinction is required. This would ensure that a creditor with a PMSI over equipment which is not integral to farming operations, such as a photocopier or a vehicle, is not required to go through the mediation process. In contrast, a secured creditor with a PMSI or SSA over integral milking equipment, irrigation systems, stock or necessary feed supplies would trigger the mediation scheme if they intended to seize that equipment or stock.

32. NZBA has considered whether application of the scheme should be expanded further to enforcement avenues available to unsecured creditors, including liquidation or bankruptcy proceedings. By way of example, we have considered the position of Inland Revenue, related family debt obligations (secured or unsecured), sharemilker agreements and land leases, all of which through dispute, can have a detrimental effect on the farming operation. Ultimately it will be a judgment call as to which entities the scheme would apply to – there is no obvious line. However, we appreciate there may be some practical issues with extending the scheme too far, at least in the first instance. The extension of the scheme to these entities could be considered as part of any review of the scheme in say five years.

33. We have also considered whether a secured creditor who has triggered the mediation scheme must defer calling up personal guarantees while the mediation process is ongoing. Provided that a mediation was required to be carried out promptly, we consider this issue is not likely to raise in practice. However, in such a circumstance, it may be appropriate for guarantors to be involved in the mediation process. This is addressed at paragraph 77 below.

34. If Parliament decided to extend the scope of the proposed mediation scheme beyond receiverships, NZBA considers the best approach to implement the scheme would be a bespoke statute. This is the approach adopted in Australia.[3] This would ensure that the scheme was applied consistently across all relevant Acts as the bespoke Act could detail the scheme and the relevant Acts could simply provide that the enforcement options available under those Acts would be subject to the provisions of the bespoke Act. The alternative would be to amend multiple Acts to expressly provide for the scheme including, for example, the Receiverships Act, the Property Law Act, the Companies Act, the Personal Property Securities Act and potentially also the Insolvency Act and the Tax Administration Act. However, this could become unwieldly and result in unforeseen inconsistencies between how the scheme applied to different statutory processes.

35. Finally, if Parliament were to extend the scheme to include an intended mortgagee sale, there is a question as to how the mediation scheme impacts on the issue of a notice pursuant to s 119 of the Property Law Act 2007. NZBA considers that the mediation process should not prevent a mortgagee issuing a Property Law Act notice at the same time, or following the issue of a notice advising of the intention to enforce the mortgage, but that the property could not be sold until both the notice had expired un-remedied and the mediation provisions had been complied with.

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[3] The states in Australia which have adopted a farm debt mediation scheme have done so by way of a bespoke Act. See for example the Farm Debt Mediation Act 1994 (NSW) and the Victoria Farm Debt Mediation Act 2011.

36. The legislation should also provide that the time to comply with the notice can run concurrently with the mediation process. This is because the two regimes complement each other, with each providing for a period in which enforcement is prohibited, to allow the parties to explore a way forward. If a way forward is not achieved at the mediation, in practical terms the mortgagor will not be able to remedy the default within the 20 working days prescribed by the Property Law Act. Accordingly, requiring a mortgagee to defer enforcement for a further 20 working days after the mediation fails will only cause the situation to deteriorate further.

"Agricultural Debt"

37. "Agricultural Debt" is defined in the Bill as:

> *Lending to farmer(s) by registered banks and non-bank lending institutions as defined by the Reserve Bank of New Zealand.*

38. This gives rise to three key issues:

(a) Who is a "farmer".

(b) The types of lending classified as "agricultural debt".

(c) Which types of creditors are captured by the scheme.

These three key issues are less likely to arise in practical terms, if the scheme remains restricted to receiverships as the triggering enforcement process.

The definition of "Farmer"

39. "Farmer" is not defined in the Bill. In many cases, whether someone is a "farmer" for the purpose of the Act will be apparent. In others, it may be less clear. Consider for example, a full time employed accountant who has a lifestyle block maintaining five cows. It is not clear whether this person would be a "farmer" for the purpose of the Bill. In NZBA's view, applying the mandatory mediation scheme to this scenario would broaden the scheme into a consumer context.

40. NZBA considers that "Farmer" should be defined as being a person (including corporations or other entities) who is *solely or principally engaged* in a farming operation, but excluding institutional farmers and farming operations owned or controlled by a listed company.

41. NZBA proposes excluding institutional farmers and farming operations owned or controlled by a listed company from a definition of "Farmer" in the Bill as these entities do not need the protection mechanism this Bill offers. They already have extensive resources and sufficient bargaining power to negotiate with the lender their own protections. This exclusion for institutional farmers could potentially be defined with reference to either a net asset test, debt level or a turnover/revenue test, with operations above a certain level, for example, $20 million of debt and/or $10 million of annual turnover, not captured. This exclusion would capture, for example, large corporate owned farming operators.

42. The Bill should also define "farming operation" to clarify whether "agriculture" applies only to livestock operations, or also includes horticultural, viticulture, marine farming operations and apiarists. Again this will be a judgment call linked to the policy behind the Bill. If the policy is to focus on the link to the land on which the farmer

lives, then livestock and horticulture clearly should be captured, but the position is arguably less clear for marine farming operations and apiarists.

43. A definition for "farming operation" should include the ability to add other types of farms to the definition by regulation. See for example, the current definition of "farm" and "farming operation" in the New South Wales Farm Debt Mediation Act 1994 being:

(a) "Farm" means land on which a farmer engages in a farming operation.

(b) "Farming operation" means:

(i) a farming (including dairy farming, poultry farming and bee farming), pastoral, horticultural or grazing operation, or

(ii) any other operation prescribed by the regulations for the purposes of this definition.[4]

Types of lending captured

44. The Bill currently captures any lending to a "farmer". Clearly lending to a "farmer" for the purpose of farming operations and which is secured over farm property or farm assets should be captured by the Bill. However, there are two further scenarios to consider.

(a) Whether the Bill should capture lending to farmers which is not associated with their farming operation.

The current draft of the Bill suggests that it does. However, this could create some unintended consequences. It is not uncommon for a farmer to be involved in commercial activities outside of the core farming operations. A loan to a farmer for such purposes might be caught by the definition of "agricultural debt", despite the fact that the particular debt was incurred for purposes entirely unrelated to farming. These debts may however be linked back to the farming operation, if the farming operation is, in some way, security for that lending.

In some cases, it will be appropriate that such debts are captured by the scheme; in other cases it may not. In NZBA's opinion, if the purpose of the Bill is to ensure that the creditor and farmer must mediate before a creditor takes enforcement steps that would be detrimental for the farmer's farming operations, the focus should be on the effect of the intended enforcement step, not the purpose of the lending.

(b) Consider the example of the loan provided to a farmer for non-farming purposes ie a holiday home, rental property or investments in other commercial interests.

(i) It would be anomalous if the mandatory mediation scheme were to apply if a lender intended to use its powers to enforce any security

[4] For completeness, NZBA notes that the definition of "Farming Operation" under the New South Wales Farm Debt Mediation Act will change this year, by significantly expanding the definition. NZBA does not advocate for a definition as extensive as the amended definition, as it significantly extends the scope of the mediation regime beyond farming into areas such as forestry, timber mills and logging.

over a holiday home, rental or commercial property owned by a farmer, which was not integral to any farming operations, by way of appointment of a receiver of rent, mortgagee sale or otherwise.

(ii) However, it is common for a mortgage or GSA to secure all indebtedness of the farmer, regardless of whether that lending was obtained for, or applied to, the farming operations. Accordingly, if the lender intended to recover the amounts owing in respect of the holiday home, rental property or commercial lending by enforcing its security against the farm property, the mandatory mediation scheme should apply.

(c) Similarly, where a creditor is seeking to recover farm debt by enforcing against security over non-farm assets, the policy reasons for the Bill do not apply. By way of example (and assuming the scheme was extended to exercising a power of mortgagee sale) if a lender was intending to recover amounts owing pursuant to a loan incurred for the purpose of the farming operations by mortgagee sale of a holiday home. Again, it would be inconsistent with the policy behind the Bill for the mediation scheme to be triggered in this instance, as the farm property and integral farming assets are not at risk.

Lenders captured by the scheme

45. The current draft Bill defines the types of lenders to whom the scheme will apply; being registered banks and non-banking lending institutions as defined by the Reserve Bank of New Zealand.

46. As outlined above, NZBA considers that the interests of farmers are better protected by the creation of a scheme which applies to all creditors with a right to appoint a receiver or a right to seize or sell any farming land or integral farming asset.

47. Non-Bank lending institutions are defined by the Reserve Bank of New Zealand as being financial institutions with total assets of $5 million or more at the consolidated group level, whose principal business is credit provision and borrowing money from the public and/or other sources. This would not necessarily capture other creditors who had security interests in integral farming machinery.

48. The Bill should also capture lenders who purchase distressed farm debt.

49. Accordingly, NZBA suggests a definition for “Farm Secured Creditor” being any person to whom the Farmer owes a debt and who holds a security over farm land or integral farm assets.

Good faith and protections for creditors where there is a reasonable suspicion of lack of good faith

50. A fundamental feature of any successful mediation is that the parties engage in good faith. The process simply does not work without it. However, there is currently no mention of the obligation of good faith in the Bill. Nor is there any provision for what should happen when one party is not engaging in the process in good faith.

51. NZBA considers that the Bill should provide some guidance of what is and what is not a breach of the obligation to engage in good faith. For example, the Bill could specifically provide that:

(a) it is not a breach of the obligation of good faith if the creditor does not agree to reduce the debt owing; and

(b) it is a breach of the obligation of good faith to unreasonably delay progressing a mediation to frustrate a creditor's ability to enforce its security.

52. There are a number of scenarios which may arise, where the creditor should not be required to engage in a mandatory mediation process. These include, for example, the following:

(a) The farmer refuses to mediate. The Bill provides that if a farmer fails to appoint a mediator within 10 business days, one will be randomly selected. However, if the farmer is failing to engage in the mediation process, the process simply delays the inevitable, while the financial position worsens. If the farmer refuses and/or fails to appoint a mediator within 10 business days, the creditor should be permitted to proceed with enforcement action without going through the mediation process. The Bill could stipulate the form of notice to be given to the farmer to ensure that this consequence is clearly explained. Similarly, if the mediator confirms in writing that after their appointment, the farmer has failed to engage on mediation, the creditor should be permitted to proceed with enforcement.

(b) The farmer consents in writing to the enforcement action proceeding. This is particularly important in the case of appointing a receiver. GSAs typically have a provision whereby the grantor can request the appointment of a receiver. Where a farming company is insolvent and a director cannot, by consent, bypass the mandatory mediation scheme, this could give rise to a breach of directors' duties during the mediation period including, for example, reckless trading.

(c) There are animal welfare issues, biosecurity issues or environmental risks. Creditors should be able to take enforcement steps immediately where they have reasonable grounds to suspect there are such issues on the farm and that enforcement action is necessary to address or mitigate the impact of such issues. On this approach, appointment of a receiver would be permitted immediately, where the receivers would address the animal welfare, biosecurity or environmental issues, but seizing machinery under a SSA would not be permitted, as it would not address those issues.

(d) The creditor has reasonable grounds to believe that the farmer will not, or is not engaging in the mediation process in good faith. This would include, for example, where there is a real risk that:

(i) in the absence of immediate steps to preserve the assets, the value of the security will be significantly eroded; or

(ii) the farmer may try to dissipate or otherwise dispose of assets during the mediation process, outside of the ordinary course of business.

(e) The farmer is already subject to an insolvency process either directly or indirectly via a guarantor liability, for example, bankruptcy, receivership, voluntary administration or liquidation. In such a situation, mediation with the farmer is unlikely to advance matters.

53. NZBA considers that the Bill should expressly provide that in these instances, the mandatory mediation scheme does not apply.

54. The exceptions proposed at (c) and (d) above are consistent with the exception in the Personal Property Securities Act 1999 which provides that a secured party may take possession of and sell collateral where collateral is at risk (as defined) even if there is no default under the security agreement.[5]

55. Similar exceptions are provided under the Australian rural debt mediation schemes. For example, under the New South Wales Farm Debt Mediation Act 1994, the creditor can apply to the Authority (being a Government body) for a certificate that the provisions of the Act do not apply to the farm mortgage where the Authority is satisfied that (amongst other grounds) the farmer has declined to mediate or failed to mediate in good faith.[6] A similar provision is in the Victoria Farm Debt Mediation Act 2011.[7]

56. NZBA has considered whether such a certification scheme would be of benefit in this Bill. NZBA acknowledges that if the Committee had concerns about some creditors using the good faith provisions to unjustifiably circumvent the scheme, certification by an independent body would mitigate against this risk.

57. If the Committee were considering certification by an independent body, it would need to consider which independent body would be appropriate for such a role. Issues such as animal welfare or biosecurity risks will require some specialist knowledge and will need to be determined urgently, raising a question as to how such a scheme would be administered under the current draft Bill. We expect this particular role would not be appropriate for the Banking Ombudsman due to the lack of specialist farming knowledge required to make such decisions urgently.

58. These issues have the potential to make an independent certification process quite onerous for the administering body and raises a risk that issues requiring urgent attention are unnecessarily held up by the independent certification process. For this reason, NZBA's preference would be for a self-certification process.

59. Additionally, there may be circumstances whereby the farming operation is operated by two or more persons (whether by way of a partnership, company or otherwise) and one of the partners/shareholders wants the lender to appoint a receiver, while the other does not. It is not clear how the mandatory mediation scheme would apply in that situation. We consider that the Bill should make clear that an internal dispute as to the appointment of a receiver or the secured creditor having the ability to exercise their security rights and remedies, should not hold up the mediation process.

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[5] See s 109 of the Personal Property Securities Act 1999. "At risk" is defined in that section as if the secured party has reasonable grounds to believe that the collateral has been or will be destroyed, damaged, endangered, disassembled, removed, concealed, sold or otherwise disposed of contrary to the provisions of the security agreement.

[6] See s 11 of the Farm Debt Mediation Act 1994 (NSW).

[7] See ss 16 and 19.

60. Finally, distressed farming operations will likely have cash flow issues – almost invariably by the time the parties reach an imminent enforcement stage. Therefore, an issue in a mediation may be how the farmer will continue to fund key farming operations while the parties work through the mediation process. As we have outlined above, NZBA members routinely work with farmer to provide the necessary funding while the parties are trying to achieve a longer term resolution. However, the Bill should make clear that nothing in the good faith obligations require any creditor to continue to provide further funding to the farming operation.

Mediators

61. The Bill currently provides that a mediator is an independent AMINZ mediator appointed by the Banking Ombudsman. However, it may be difficult to locate such persons in some rural areas. Therefore, NZBA proposes two options to deal with this issue:

    (a) Where the creditor and the farmer both agree on a person to act as a mediator, that person ought to be able to so act, even if they were not an AMINZ mediator and/or accredited by the Banking Ombudsman.

    (b) That members of the Restructuring, Insolvency and Turnaround Association of New Zealand (**RITANZ**) could be specifically trained in mediation and then become accredited for the purpose of this scheme only.

The Role of the Banking Ombudsman

62. The Bill, as drafted, anticipates that the Banking Ombudsman would be the "person" responsible for accreditation and default appointments of mediators. There are a number of practical issues that will need to be considered if this element of the Bill is retained.

63. First, there is a risk that lenders or creditors subject to the mediation scheme may assume that as they are not participants in the Banking Ombudsman scheme, the farm debt mediation scheme likewise does not apply to them. The legislation would need to make these jurisdictional points clear.

64. Secondly, and related to the point above, the involvement of the Banking Ombudsman in this mediation scheme could have ramifications for the Banking Ombudsman scheme more generally. The Banking Ombudsman scheme is a voluntary scheme with no other statutory role or recognition, with its participants submitting to the jurisdiction and funding the role of the Banking Ombudsman.

    (a) Converting the Banking Ombudsman's jurisdiction from a voluntary regime to a scheme that has specific statutory functions would change the purpose and nature of both the role and relationships with participants.

    (b) The Bill proposes to significantly extend the role of the Banking Ombudsman (in respect of her functions under the intended mediation scheme) to farming lenders more generally. If the role had an expanded statutory function there would be a natural question as to who should bear the additional resulting costs.

    (c) While the Bill provides that in respect of a particular mediation, the Banking Ombudsman can recover her costs from a lender, this does not appear to

cover the costs of the accreditation process more generally. Therefore, there is a real risk that participants in the Banking Ombudsman scheme feel they are funding more than their fair share of the costs associated with the mediation scheme.

65. The Bill provides that it would remove any financial limit from the Banking Ombudsman Scheme. It is not clear to NZBA what is meant by this.

(a) The Banking Ombudsman Scheme Terms of Reference provides that it cannot consider complaints where the compensation sought is in excess of $200,000. It would be very unlikely that a farm debt mediation would result in a payment of compensation. As the trigger event is not a complaint against the creditor, but a secured creditor intending to enforce their security, the ideal outcome would be an agreement that meant it was not necessary for the creditor to enforce their security or, enforcement in a manner which caused the least harm to the farming operation as a whole.

(b) Additionally, the purported removal of this limit in general terms would completely alter the Banking Ombudsman scheme. The scheme is intended to be consumer focused. Removing the compensation cap would mean significant, complex and commercial complaints and disputes could be referred to the Banking Ombudsman.

(c) If that clause is simply intended to confirm that the Banking Ombudsman has the jurisdiction to appoint mediators where the value of the lending is in excess of $200,000, that can be confirmed without significantly and adversely affecting the voluntary scheme as a whole. For example the Bill could provide that:

(i) the role of the Banking Ombudsman under the farm debt mediation scheme is restricted to the accreditation of mediators and the appointment of mediators where agreement cannot be reached;

(ii) nothing in the Banking Ombudsman's Terms of Reference would prevent the Banking Ombudsman from undertaking that role; and

(iii) nothing in the Act alters the Banking Ombudsman scheme, as it applies to a matters outside of the accreditation and appointment of mediators under the farm debt mediation scheme.

Process matters

66. There are seven key process issues relating to the mediation, which NZBA considers ought to be addressed or clarified in the Bill. These are:

(a) good faith (as addressed above);

(b) a moratorium on other creditors taking enforcement steps;

(c) timing for a mediation to occur;

(d) exceptions to the confidentiality provisions;

(e) parties at the mediation;

(f) costs of the mediator; and

(g) process following the mediation.

Moratorium on enforcement by other creditors

67. NZBA has considered whether it would be appropriate to have the mediation process also trigger a moratorium on other creditors taking steps to enforce their security over the same assets, while the mediation process was underway.

68. This would depend, in part, on how far the scheme extended. If the scheme was restricted to receiverships (as per the current draft Bill), there is a greater need for a moratorium. If there were not a moratorium the primary lender could, for example, be proceeding with a mediation while an SSA holder, who held security over some of the same core farming machinery subject to the lender's GSA, is permitted to enforce its security to the prejudice of the primary lender.

69. In contrast, the need for a moratorium may not be as great if the scheme is extended as proposed. In the example above, the SSA holder (and indeed any other creditor with security over the integral farming machinery) would be subject to the same mediation process as the primary lender, meaning they do not have any practical ability to take advantage of the primary lender's inability to enforce during the mediation process. This is the general approach of the equivalent regimes in Australia – see for example the New South Wales and Victoria legislation.

70. A moratorium, or extending the scheme as proposed, may also encourage other creditors to join the mediation process. This could result in multi-party mediations where a number of key creditors would work together with the farmer to achieve a resolution going forward, to the benefit of all involved.

Timing

71. The Bill currently does not specify the time within which the mediation must occur. NZBA considers that the Bill should stipulate that the mediation must be concluded within a specified period of time, failing which the creditor is able to proceed with enforcement action without going through the mediation process.

72. A specified time period will encourage parties to mediate promptly, which is in all parties' interests. In particular:

(a) Where a creditor is considering enforcement action which would trigger the mediation scheme, it is likely that the farmer is insolvent, or close to insolvency, with limited working capital. That situation is unlikely to improve without creditor support, and therefore needs to be addressed promptly.

(b) A specified time period mitigates the risk that a farmer may unnecessarily delay progressing a mediation, to the ultimate detriment of the creditor.

73. NZBA considers a period of two months from the creditor notifying the farmer of the intended enforcement action, triggering the mediation requirements, would be an appropriate timeframe.

Confidentiality

74. NZBA notes and supports the existing provisions in the Bill relating to confidentiality and the without prejudice nature of the mediation in proposed ss 49 and 50. However, these proposed sections, in their current form, purport to prohibit the disclosure of any evidence of an agreement reached at the mediation.

75. We therefore suggest an exception to the proposed ss 49 and 50, to the effect that those sections do not apply to any evidence or documents required to prove an agreement reached at the mediation.

Representation and parties to the mediation

76. The representation provisions of the Bill seem to suggest that farmers are entitled to have lawyers and other advisers represent in the mediation but the creditors are not. NZBA considers that the Bill should make clear that either party is permitted to have lawyers or other professional advisers present throughout a mediation session, and can call upon the adviser for advice and counsel during the session.

77. NZBA accepts that it may in some cases be appropriate for the farmer to have a support person or an adviser who is not a professional present. However, to ensure that the number of non-party, non-professional advisers/support persons attending does not become unwieldy, we propose that any non-professional advisers or support person attend only with the consent of either the other party or in the absence of consent, as determined by the mediator. This appears to be what is envisaged by proposed s 48(5), but is inconsistent with proposed s 51(2).

78. NZBA suggests a provision that no later than two working days prior to the mediation, each party must advise the mediator and the other party whether any advisers will be attending the mediation and, where the adviser is a professional, their area of expertise. This will enable parties to consider in advance of the mediation whether they wish to have a similarly qualified adviser attend the mediation.

79. There is also a question as to whether the guarantors should be a part of any mediation, given their interest in the outcome. NZBA considers that there may be some merit to requiring the parties to invite guarantors to join the mediation, but without any obligation on a guarantor to attend. Likewise, the Committee may wish to consider whether there should be provision for the guarantors to be informed of any outcome agreed at the mediation and provided with a copy of any documentation arising from the mediation including, for example, varied loan agreements.

Costs of the mediator

80. The Bill is silent on how the costs of the mediator will be funded. NZBA considers that a default position should be expressly provided for in the Bill, to avoid this becoming a process issue. We suggest that unless the parties agree otherwise, the mediator's costs are to be paid in equal shares between the creditor and the farmer.

Process following mediation

81. NZBA considers it would be helpful for the Bill to set out the process following a mediation.

82. While the Bill provides that the mediator will provide a Summary of Mediation to the Banking Ombudsman, it is not clear how that Summary will be used. Significantly, the Bill currently does not expressly provide:

(a) for a process for documenting any agreement reached (it is not clear whether this is the purpose of the Summary of Mediation);

(b) for a process to confirm that a mediation has concluded without agreement being reached;

(c) that if the mediation concludes with no agreement being reached, the creditor can proceed with enforcement action; and

(d) whether a breach in any agreement reached in, or as a result of, the mediation would enable a creditor to proceed with enforcement action, without triggering the mediation process again.

83. In respect of each of these matters, NZBA recommends that the Bill provide that:

(a) A mediation will result in two outcomes – an agreed way forward or no agreement – and that the Summary of Mediation will record the outcome.

(b) Where the parties have agreed a way forward, the mediator's Summary of Mediation will document that agreement. The creditor will prepare any further documentation necessary to document, or give effect, to that agreement including any new contracts, deeds or security instruments, which are to be executed by the parties promptly following the mediation.

(c) If a mediation concludes with no agreement, the creditor can proceed with enforcement action two business days after the conclusion of the mediation. The current Bill proposes 10 days. In NZBA's view, where the parties have mediated and have been unsuccessful in reaching an agreement, the 10 day stand-down period will simply delay the inevitable, while the financial position of the farmer worsens to the detriment of all involved. There is no benefit to such a lengthy stand-down period after the mediation has concluded.

(d) Where the farmer breaches an agreement reached at mediation within 18 months of the mediation (or such longer period as agreed by the parties at the mediation and recorded in the Summary of Mediation) the creditor is entitled to take enforcement steps without triggering the requirement to have a further mediation. NZBA considers that this balances the creditors' concerns in proceeding to enforcement where mediation has ultimately failed to deliver an enduring agreement and a further mediation is unlikely to advance matters, but ensures that where a farmer has complied with such an agreement for a period of 18 months, there would be a further opportunity for the parties to mediate before enforcement action was taken.