Farm Business Debt Mediation Bill
Elaboration on evidence provided to Finance and Administration Committee
George Fox

1. I have consulted extensively with Denis McMahon, Senior Lawyer, Farm and Rural Legal Service, Legal Aid (Queensland) and Lee Nevison, mediator, these persons having more experience than anyone else in Queensland Farm Debt Mediations. Lee advises me that the observations and concerns set out below are accurate. Denis is by virtue of his employment unable to make personal submissions but has no issues with any of the below.

2. I have had the benefit of discussion with and background material from a farm debt mediation officer with the New South Wales Rural Assistance Authority.

Queensland Farm Debt Strategy

3. This works efficiently with minimum bureaucracy.

4. Around 80% of the mediations would involve Denis McMahon ("Denis") representing the farmer. Where time and resources permit he will meet the farmer and the farmer's family on the farm prior to the mediation to ensure he has a good understanding of their circumstances and goals, and they have a good understanding of the mediation process and what they might expect.

5. In most cases the farmer will have the support of rural financial counsellors who will prepare cash flow forecasts generally essential for the mediation, and attend the mediation as advisors. The level of trust by the banks in the expertise and independence of the RFC's and the reports they produce, and Denis's experience and professionalism, are significant contributors to the success of the mediation process.

6. The mediators are chosen by the parties. In practice a small group of mediators undertake the bulk of the farm debt mediations. Mediators constituting this group are all senior lawyers, nationally accredited mediators, with rural background or experience. The fact that these are all party selected, suggests that the parties themselves regard these qualifications as appropriate. Denis is also a senior lawyer from a farming background, and his rural knowledge and experience is also conducive to successful outcomes.

7. More than 90% of mediations result in a signed agreement. This suggests an effectiveness of process, and the reality that an agreed outcome is generally to the benefit of both parties. In my experience, the rare cases of inability to reach an outcome were usually a product of some external circumstances such as concurrent litigation (in some cases, the farmer's involvement in Storm Financial associated litigation precluded formal agreement)

8. The process is coordinated by Denis's PA, and, in the absence of Legal Aid involvement, by the mediator.

9. The mediator deals with any preliminary issues by phone or email.

10. The great bulk of mediations are concluded within a day, which includes the preparation of a formal agreement signed by the parties on the day. The agreement is drafted jointly by the bank's lawyers and Denis, with the mediator intervening to break any log jams that arise during the drafting.

11. On the odd occasions the farmer is not legally represented, the mediator will flag the desirability of any agreement being conditional upon the farmer receiving legal advice on the agreement in a reasonable time. Most banks insist on this in any event.

12. The mediator will then issue a certificate (in the Farm Debt Strategy referred to as the S. !2 Certificate) that the bank has participated in the mediation in good faith. This certificate is a precondition to the bank undertaking any further action.

13. I am not aware of any instance where a bank has been refused a S.12 certificate. In a small number of instances where the possibility of refusal has been raised with the bank during the mediation, the mediator's concerns have been addressed by the bank. *Since dictating this, Denis advised me of one occasion where a mediation was not concluded, the bank asked the mediator for a S. 12 certificate, and the mediator refused to provide this.*

14. Prior to the commencement of the mediation it is my practice to explain to the bank's representatives my expectations in relation to good faith, if I have not previously done so. I expect other mediators would do likewise.

Defects in current scheme

15. It does not apply to all lenders.

16. The effectiveness of the process is to a significant extent based on the bank's trust in Denis (I have not yet had a bank, on being told of Denis's unavailability for a period of time, suggest that the farmer should engage another lawyer). There is a no understudy who can step in when Denis is sick, or eventually retires. When he is sick or on leave, the process largely comes to a halt.

17. There is a lack of acceptance by some banks that good faith will require adequate disclosure. Given the discordance of courts around the world on this issue, this is hardly surprising.

18. While some bank representatives are skilled and proactive in the mediation process, some are not and lack familiarity and comfort with the mediation process.

19. There is no review process whereby farmer representative bodies, mediators, Legal Aid etc can meet, say, annually, to express concerns, identify defects, and attempt to achieve common expectations.

20. The cost of mediations and preparation for mediations can be a significant burden for farmers, who may be unable to access their accounting records because of liens held by unpaid accountants.
21. There are no guidelines on where the mediation should take place. Most times banks will agree to mediation in a major regional centre convenient to the farmer, but I understand from time to time lenders have insisted on mediations taking place in Brisbane.

22. There is no "what if" provision in the event that a S.12 certificate is refused.

National consistency

23. It seems that there are a number of legislative reviews occurring independently.

(i) I am told that in September 2014 the Cwlth Minister for Agriculture announced support for a nationally consistent approach to FDM and established a working group within the Agriculture Senior Officials' Committee (AGSOC) to investigate options. In May this year the Agriculture Ministers Forum asked AGSOC to review and refine model FDM legislation and a standard set of FDM principles for Ministers' consideration at the next AGMIN meeting in 2017.

(ii) The Ramsay national review of the external dispute resolution framework for the financial system is due to report in March 2017.

(iii) The Australian Small Business and Family Enterprise Ombudsman is conducting a Small Business Loans Inquiry and was due to provide an interim report to the Ramsay review in the week commencing 7 November 2016. The terms of reference for inquiry include 'whether additional reform measures should be implemented'.

(iv) Two priority actions in the NSW Rural Assistance Authority's business plan are to review the NSW Farm Debt Mediation Act, and work with the Commonwealth on a national FDM approach. On 25 October 2016 feedback was sought from NSW farm debt mediators, as part of this process and RAA has also identified the need for various minor reforms.

(v) I am told that the South Australian code has broader application than NSW or Queensland, and in July 2016 the SA government advised that it had no plans for amendment.

Benefits of proposed legislation

24. Application to all lenders

25. Provision of mediation information package

26. Provides a framework for the mediation (e.g. disclosure requirements, identification of roles of parties and their advisors and representatives etc)

27. Provides State recognition of the process, and State involvement might provide the infrastructure for periodic meetings of stakeholders to review and reform

Problems/potential enhancements

28. The workability of the legislation would be enhanced if the sections reflected the broad policy intent, with the machinery being in regulations more easily amendable to amendment, as circumstances change and experience is gained.

29. The drafting of the legislation reflects its origins in 1994 NSW legislation, a time at which mediation regulation was infancy, and reflects a "*government knows best (and better than the parties) what the parties' interests are*" approach. This offends the now accepted principle of party autonomy and could not be described as best practice mediation regulation design. *"This represents an outcome-focused and a now outdated view based on simplistic and mechanistic models of economic rationalism, legalism and government control"* (Alexander "International and Comparative Mediation – Legal Perspectives at p. 77). Her illustration at p.112 suggests a mix of mandatory and default rules intended to provide party autonomy in mediation without jeopardising certainty or dispute resolution quality. (Professor Alexander was Queensland's first professor of Conflict Resolution, a member of the Law Society's ADR committee, and writes and advises extensively on international mediation process and design).

The effectiveness of the current Queensland farm debt strategy indicates that the parties are able to reach agreement on the process issues in the great majority of situations.

Adding a qualification to many of the mandatory provisions in this Bill to the effect that those provisions will operate subject to the agreement of the parties or decision of the mediator, would significantly enhance its effectiveness for the benefit of all parties, while not detracting from the integrity of the policy objectives.

30. The requirement for the provision of information packs to the farmer by the bank at the time of offering mediation is laudable. For slightly different reasons, it will also be desirable for the mediators to be required to provide an appropriate information pack to both farmer and bank attendees.

The presumption is however that if the farmer does not respond to an enforcement notice the farmer is presumed to have declined mediation. The information pack accompanies this document. I expect that service will generally be by post. This presumption is based on the further presumption the farmer is both physically and mentally capable of receiving and understanding the information. This presumption is quite often false. Typically farmers in this position are under significant mental stress, and often suffering severe depression. Denis relates that when visiting farmers for the purpose of farm debt mediation, he regularly comes across some months of unopened mail that the farmer is unable to open let alone deal with. Many years as a Lifeline Director tells me that even if the farmer has opened the mail, there is no certainty that he/she has been able to absorb and appreciate its contents.

The presumption that no response gives informed consent is unjustified in these circumstances. The only way to ensure that there is in fact informed consent is by personal contact.

Ideally, if there is not a response from the farmer, then the appropriate officer at DPI should be notified and someone under a duty of confidentiality should make contact either in person (preferably) or at least by voice to ensure that the farmer understands the nature and effect of the notice from the bank, is aware of the advisory support available, and if there is any doubt as to the farmer's mental capacity to make an informed decision, then the farmer's attorneys or Public Trustee should be notified.

If the officer is satisfied that the farmer has made an informed decision not to participate in the mediation, then the lender can be notified accordingly.

31. The preparation of heads of agreement rather than a formal contract is based on the notion that the mediation would be an informal process, at the end of which the mediator would record the broad areas of agreement reached, and these would be reduced to a contract by the parties' representatives at a later stage.

This is impractical because:

(i) There are significant issues of enforceability of heads of agreement, where issues requiring resolution are not expressly mentioned;

(ii) When a formal contract is not entered into mediation, significant delays and disputes often arise in formalising a contract. The parties' recollection of what was said differ, Denis is out in the bush with farmers and cannot be contacted for some time, and matters arise which were not discussed and are re-argued afresh by email without the mediator being present to assist in resolution. As a result, I am told that in New South Wales the parties evolved a "work around" by which the formal contract is annexed to the heads of agreement. If a mediator assists the parties to draft an agreement that would be as a scribe only.

32. Often the farmer requires a speedy agreement so they can make plans for the future, or obtain further accommodation from the bank to have cheques honoured for matters such as fertiliser, paying of rates, insurance etc. There seems to be no good policy reason for the mediator preparing the agreement, particularly when there are in the great majority of cases lawyers representing both parties. Typically, the mediator will be unaware of all the farmer's circumstances and preparing an agreement of fundamental importance to a family, absent such knowledge, is fraught with danger for the mediator and the farmer and would be contrary to NMAS standards. The process which currently applies under the Queensland Farm Debt Strategy outlined above works efficiently and is the best interest of the parties.

33. I support the notion of a mandatory cooling off period, providing that this can be waived by the farmer upon the production of a certificate from a lawyer representing the farmer; to the effect that the farmer has been informed of and appears to understand the nature and effect of the waiver.

34. There appears to be no sound policy reason supporting the filing of the agreement with the appropriate authority, and I am advised that the New South Wales authority destroys all such agreements received after issuing a s 11 certificate that the Act does not apply for 3 years because a satisfactory mediation has occurred (whether or not an agreement has been reached). Issues surrounding privacy and confidentiality were discussed in the QLS submission.

35. It is not uncommon to have multiple farmers with different interests at the mediation. I have also had multiple lenders at least one mediation. Mediation timetables should be sufficiently flexible to permit a process with multiple parties meeting together and separately as appropriate, as each may have both common and discrete and potentially conflicting interests.

36. I have drawn attention to the fact that note 1 at the bottom of cl.16(6) would mean that a farmer in default under a lender's security solely because of a reduction in the value of the secured property, would not come within the definition of default in the

dictionary, and would be not in default (i.e. the mortgagee can refuse mediation without consequences) under the Act.

37. As many of the submissions have pointed out the review process is cumbersome and inappropriate for a commercial resolution process of this kind. I see from the submissions that a number of submitters have misunderstood the intent of this process, and talk about appeals against mediator's decisions. I presume legislative standards require this process. It may be feasible to incorporate by reference an external gatekeeper process (such as the current S.12 certificate by the mediator) in the same way as the national mediator accreditation system is incorporated by reference in cl.60. It would be appropriate however to have some review or "where to from here" process in the event that the mediator's certificate is not forthcoming. (see below).

Desirably any framework should include.

38. There should be some expressed articulation of elements of good faith (respect for the parties, respect for the process, disclosure of relevant material, attending with a preparedness to consider all propositions put forward by the other side with an open mind and give genuine consideration).

39. Express requirement of disclosure of particular documents upon request by either side, with the mediator to interfere if the disclosure request is oppressive or onerous.

40. A provision of temporary assistance to preserve assets, protect crops etc should not be regarded as a fresh loan.

41. Reclassification of loans during mediation without increasing total indebtedness is not a fresh loan.

42. Consistent with NMAS National Practice Standards the lender's representative is to have real authority to settle the issues, and should not have to seek authority from someone not present to reach a settlement, other than for the purposes of increasing the total debt level.

43. The parties may have legal advisors, but not have legal representatives save with the consent of the mediator. (From time to time parties will attend with a lawyer who represents the parties, rather than advises them, and intends to do all the speaking and all the responding on behalf of the client (farmer or banker).This is not conducive to a mediated outcome, and can degenerate into simply a step in the litigation process). Nevertheless there may be circumstances where a farmer is not participating effectively on his or her own behalf, and in such a case a legal representative may be appropriate.

44. The mediator should have the right to remove from the mediation any advisor who in the mediator's opinion is not contributing positively to the mediation process.

45. A lender's costs in relation to the mediation and preparation for the mediation (travel costs, outlays, external lawyer's fees) should not be added to the farm debt.

Possible review process

46. If the current concept of the mediator's section 12 good faith certificate as the key that the bank must be given to open the door to proceeding further, is to be retained, then there should be a review process for this. An appropriate review process (having discussed this with Denis and Lee) could be:

(i) A mediator will not refuse to issue a S.12 certificate without the approval of another mediator practicing in the farm debt mediation area;

(ii) If the view of those mediators is that a S.12 certificate should not be issued, then they should offer to meet with a senior lender representative to explain the reasons why, and allow the lender the opportunity to address the mediator's concerns if feasible. The lender then having the right after, say, 3 months to a fresh mediation with a different mediator with all costs being borne by the lender, or alternatively seeking a finding in QCAT that the lender did in fact participate in good faith in the mediation, and should be provided a certificate. History suggests that the need for a QCAT review would be extremely rare.
Such a process would overcome the objection that a party could misuse the review process simply as a weapon to delay.

gcf 7/11/2016