Response by the Department of Agriculture and Fisheries to comments made by Mr George Fox (on behalf of Queensland Law Society) at a public hearing on 2 November 2016 by the Finance and Administration Committee for its inquiry into the Farm Business Debt Mediation Bill 2016

Summary of comments made by Mr Fox	Department's response
General criticism of consistency with the New South Wales (NSW) *Farm Debt Mediation Act 1994*. The NSW legislation was drafted in the very early days of regulated mediation. It would no longer conform with what academics consider is best practice in terms of regulated mediation.	The (Queensland) Bill was largely modelled on the NSW *Farm Debt Mediation Act 1994*. The NSW Act has been in operation since 1994 and stakeholders are generally satisfied it operates effectively and efficiently. Many stakeholders have expressed a clear preference for the Queensland legislation to be consistent with the NSW Act. The NSW legislation is the proposed starting point for the proposed national approach to farm debt mediation.
Some banks are not skilled in mediation. Under the current Farm Finance Strategy there is no regulated framework to give banks guidance on how the system is meant to work.	There is sufficient prescription in the Bill to guide farmers, mortgagees and the authority as to their respective obligations. Clause 34 of the Bill provides that the new Queensland Rural Industries Development Authority (the Authority) must make guidelines for the conduct of mediation and further provides an indication as to what the guidelines may concern, including the procedure for starting and arranging mediation meetings. It is considered that the guidelines developed by the Authority would provide sufficient guidance to banks on how the system is intended to operate. In developing these guidelines the Authority must also, under clause 34, consult in part with at least one organization which represents banks or other entities which provide finance to Queensland farmers. It is specifically intended that this consultation elicit information for development of the guidelines and would serve to answer any questions that financial institutions may have on the operation of the mediation process.

There is no review mechanism under the Farm Finance Strategy i.e. there is no review of the process to assess how it is working.	The Authority has administrative responsibilities under the Bill. It is required to provide reports on its activities to the Minister (for Agriculture and Fisheries). Under the Bill the Authority will also be required to carry out research into, develop policies on and give advice to the Minister about issues affecting persons likely to receive assistance under the (amended) *Rural and Regional Adjustment Act 1994* and the financial performance and sustainability of the rural and regional sector in Queensland and in particular primary producers. Farm debt mediation legislation is also going to be subject to scrutiny during the development of the proposed national approach process. The Queensland Government *Guide to Better Regulation* generally also requires all new legislation (post 2010) to be reviewed within 10 years of its commencement. Given the multiple avenues for review, no specific review provision in the Bill is considered necessary.
The Queensland Bill denies the farmer the ability to negotiate the bank payment of mediation costs.	Clause 39 of the Bill requires the sharing of the cost of a mediator's attendance and requires each party to bear their own costs for the mediation. The prohibition on contracting out prevents, for example, mortgagees passing on costs of mediation to the farmer or excluding the rights of a farmer to mediate by including clauses to this effect in the loan contract. The intent is to ensure the farmer, for example, is not indirectly meeting the banks cost of mediation by way of these being added to the money owed against the loan. It prevents an agreement or contract obliging payment but does not preclude one party voluntarily meeting the mediation costs of the other party.
Parties want certainty on the day (of mediation). Farmers may not have the resources to have an agreement drawn up following mediation. The Queensland Bill does not give parties the right to conclude an agreement on the day (if it is in the interests of the farmer). There is a form of cooling-off when no lawyer is present under the Farm Finance Strategy. If a farmer is	Clause 26 of the Bill provides that a heads of agreement between a mortgagee and a farmer is given effect if a signed copy of the agreement is given to the mediator within 10 business days after the end of mediation. There is nothing to prevent an earlier finalization of the heads of agreement. The cooling-off period in clause 27 would extend until the later of either 10 days after the they enter into a heads of agreement (which could be the day of mediation) or another day agreed to by the parties, would still remain. The parties could finalise an agreement before the end of the cooling off period, (e.g. to provide further credit)

unrepresented then Mr Fox, as a mediator, will generally flag that he would be very uncomfortable having them enter into an agreement on the day without obtaining legal advice. The more experienced banks would insist upon it as a pre-condition anyway. If a cooling-off period is put into legislation it should be something like conveyancing contracts where it is for a fixed period but can be waived by the farmer upon legal advice.	and the mortgagee would be due compensation under clause 30 if the farmer benefited from this agreement but then revoked the heads of agreement. However, the Department of Agriculture and Fisheries (DAF) agrees the complexity of this option for early action on what has been agreed at mediation is undesirable. One option is to allow the parties to waive all or part of the cooling off period in writing, provided the mediator is satisfied that the farmer has had an opportunity to seek legal advice. Another option is to allow a full *substantive agreement* to be concluded at mediation, rather than just a heads of agreement, provided the mediator is satisfied that the farmer has had the opportunity to seek legal advice.
Requiring a mediator to prepare an agreement is dangerous because invariably the mediator will know the least about the underlying circumstances for the parties. Quite often the mediator won't be told all the circumstances related to the farmer or the bank and to prepare an agreement without knowing all the circumstances results in increased liability for the mediator.	The NSW Act requires the mediator to personally prepare a document setting out the main point/s of agreement between the parties. This document becomes the heads of agreement. The Queensland Bill therefore reflects what is provided in the NSW legislation. The alternative would be for the mortgagee, or their representative, to draw up the agreement in conjunction with the farmer's representative (or the farmer if the farmer is unrepresented at mediation). The danger with this alternative is that the mortgagee may arrive at mediation with an agreement already drawn up and the farmer may feel that mediation is a formality with the bank having predetermined the end point. The farmer may very well feel pressured into signing the agreement, particularly if they are not legally advised or represented. Nevertheless, DAF acknowledges the concerns raised about the mediator's capacity to draw up an appropriate agreement and suggests one option is to allow the (impartial) mediator to supervise the drawing up of the heads of agreement to reflect what has been verbally agreed.
Under the Queensland Bill there is no right to agree on amendments to the mediation agreement and the Bill appears to make this a criminal offence. Agreements made in mediation change as circumstances change, e.g. to	Clause 31 of the Bill provides that a heads of agreement must be given effect accurately by any contract, mortgage or other document which the mortgagee may prepare. This clause provides that it is an offence, with a maximum penalty of 100 penalty units, if the mortgagee does not ensure this occurs.

permit extensions of time, different methods of sale. There is nothing which allows this.	DAF acknowledges that when circumstances change following the mediation it may be desirable to vary the terms of the contract which was developed to give effect to the heads of agreement. One option is to include a provision in the Bill which allows variations provided that both parties agree, the farmer has had the opportunity to consult with their legal advisor and the variation generally accords with what was agreed at mediation.
Under the Queensland Bill there are strict timeframes which apply to parties with no ability for these to be waived by either party. There are all sorts of reasons why a farmer may not be able to respond within a timeframe and banks usually take these circumstances into account.	It is important that when someone is subject to an obligation that they are clearly aware of the day by which they must comply with that obligation. If a farmer hasn't responded to an invitation from a mortgagee to mediate within the required timeframe, clause 53(3) allows the authority to take particular circumstances into account when deciding whether they have failed to mediate. One option for additional flexibility about timeframes is to include a provision which allows any timeframe in the Bill to be extended provided both parties agree in writing.
NSW Legislation is doctrinaire in terms of confidentiality.	The written submission by the Queensland Law Society highlighted some problems posed by an "absolute" approach to confidentiality and recommended this should be reviewed in the Bill with particular regard to clauses 38 and 83. In its earlier response to these comments, DAF has suggested that an amendment would be appropriate to clause 38(1)(c) so that it only applies to a document that was created for the purpose of being given to a party under clauses 21 or 22. It further supports adding an exception to clause 38(2) where the proceeding relates to threat of future violence, concealing ongoing criminal activity, or abuse of a child or vulnerable party.
The NSW legislation (and hence the Bill) offends the principles of party autonomy in mediation, i.e. the parties themselves should determine the process as best as possible. There doesn't seem to be any good reason why the parties can't arrange mediation to suit themselves.	The Bill provides flexibility in that the procedure for arranging and conducting mediation will be outlined in guidelines and where a matter is not specifically covered by the guidelines the mediator can decide how it will be dealt with. A skilled mediator would discuss these matters with the parties and allow them to determine the process as much as possible.

The legislation does not take into account the potential for multiple parties, e.g. (1) it is not common but it does happen that there may be more than one bank at mediation with competing securities between banks, (2) it is also not uncommon to have separately represented farmers at mediation.	The *Acts Interpretation Act 1954*, section 32C, provides that the singular also includes the plural. This means that more than one farmer or more than one mortgagee may be parties to a mediation, and doesn't negate that all parties are bound to comply with the provisions of the Bill. Where there are multiple parties to a mediation it may make some of the obligations under the Bill more complex. Mediation under any framework is likely to be more complex where there are multiple parties.
Different courts have applied different tests for 'good faith'. There should be guidelines around what it might mean in these circumstances. The absence of guidance places an imposition on mediators to have to give people a lesson on mediation during the mediation. It will assist if there is a framework in the Bill that says good faith means this and it will mean that there will be relevant disclosure. It would enhance the usability of the legislation significantly if we had a framework of behaviour that people could use as guiding principles.	The principle of requiring mediation to be conducted in good faith is considered adequately expressed in clause 3 (Purpose (of the proposed Act)), 21(7) and 22(4) (which concern requirements to provide documents), 32 (When mediation ends), 44 (When a mortgagee has failed to mediate), 49 (Grounds (for issuing an exemption certificate)) and 53 (When a farmer has failed to mediate). However, there is no definition of good faith in the Bill. 'Good faith' is commonly used without definition in legislation because there is a lot of case law about when something has been conducted in good faith. A definition may not pick up the nuances that have been established over time by this case law. Also, examples of what it means to participate in good faith could be included in the mediation guidelines. This could be taken into account by a mediator in deciding whether a person has participated in good faith as it is conduct of which the parties would have prior notice. Again, any examples or guidelines included in the mediation guidelines would not be definitive.
There needs to be an express requirement for disclosure upon request from either side with the mediator to "interfere" if the request is onerous or oppressive.	The document requirements were one of the issues most commonly raised in the submissions. A range of views were expressed – everything from support with a desire for banks to be required to provide a lot more information, to concern that it would take too long to provide the documents and often providing them would be of no purpose related to the mediation. It was suggested in one submission that the mediator be given responsibility for arbitrating document requests in a pre-mediation meeting and should only allow them to be required to be produced where they have a specified purpose and their retrieval will help produce a resolution. Mr Fox has suggested a variation to this approach – that the parties

	should be able to request documents and the mediator should be able to intervene if the document requests are onerous or oppressive. While DAF agrees that Mr Fox's suggestion might reduce ambit requests for all documents to be produced, it may reduce the benefits of including a document requirement. For example, a farmer may remain suspicious that certain documents that the mortgagee has not been required to produce could reveal unscrupulous behaviour by the mortgagee.
The provision of temporary assistance to preserve assets and protect crops etc should not be regarded as a fresh loan otherwise banks are reluctant and the process starts over. Reclassification of loans should not be regarded as a fresh loan because often as part of the deal money will be taken from overdraft and put into a different form of loan.	Subclause 11(2) of the Bill provides an enduring exclusion to the application of the Act where a farmer and a mortgagee have previously taken part in mediation for a farm business debt and the farmer and the mortgagee have entered into a contract, mortgage or other document to give effect to a heads of agreement and the farmer has defaulted under the farm mortgage and the default relates to the contract, mortgage or other document. Although it was not raised by Mr Fox in the hearing, the Law Society's written submission highlighted some ambiguity with this clause and specifically that it should exclude mortgages involving farmers who have previously been involved in mediation for a different debt. DAF agrees that clause 11(2) should be clarified such to provide that the Act does not apply to a farmer in relation to the restructured farm mortgage/debt arising out of mediation if the farmer has defaulted under that mortgage.
The bank's representative should have real authority to settle the issues rather than having to refer to head office and seek approval. The basic principle of mediation is for people representing at mediation to have authority to resolve issues other than to increase the debt level. It is not uncommon for an increase in debt level for a period of time to be negotiated.	Clause 23 (4)-(5) of the Bill already addresses this issue. A representative must be authorised in writing to enter into a heads of agreement and if they are not and another mediation meeting is required as a consequence then that party must pay all the costs for the extra meeting.
Parties should be able to have legal advisers present. Parties shouldn't be legally represented unless there is some particularly good reason why the parties can't speak for themselves. Legal representatives should only speak	The Bill already entitles the farmer to an advisor but restricts representation of either party to when this is approved by the mediator who is satisfied that representation would assist the mediation and the agent has sufficient knowledge of the issues to be able to represent the party effectively.

with the consent of the mediator. Legal advisers and financial advisers as well as rural financial counsellors should always be present.	
Banks should not add to debt the outlays and expenses of mediation. Parties should bear their own costs. Most banks don't add these costs on to the debt but some still do.	Clause 39 already provides that each party must pay their own costs of mediation and half the mediator's costs. Also clause 85 prevents the mortgage contract or agreement allowing the mortgagee to pass on these costs of mediation to the farmer. The written submissions by Legal Aid Queensland and the Rural Financial Counselling Service North Queensland suggested that under the current voluntary mediation scheme there may have been other costs passed on to farmers. DAF agrees that further clarification could be provided that the requirement on each party to bear its own costs extends beyond the meeting itself if this has been a problem under the current voluntary system. DAF suggests that this could be achieved by clarifying that the costs for the mediation includes costs incurred in relation to the mediation.
The definition of "default" refers only to a failure of a farmer to perform obligations. This has consequences in relation to footnote #1 (refer clause 16). The bank can refuse mediation if the farmer is not in default. The bank's definition of default commonly includes a reduction in the loan to valuation ratio (LVR), i.e. a farmer could default on a loan even though they have consistently made all required repayments. The definition should be changed to include default under the bank's security not just a failure to comply. The alternative would be to provide that a reduction in the LVR would not be a default.	The intent of the Bill is broadly to require a mortgagee to offer mediation and, at the request of the farmer, to participate in mediation in good faith, in all those circumstances in which the mortgagee might be entitled to take enforcement action. To achieve this the definition of 'default' in the Bill needs to be as broad as the triggers for enforcement action are in mortgages. The current definition of 'default' in the Bill is modelled on the NSW Act but DAF agrees it is deficient because it only relates to failure to perform an obligation and not any other circumstances (such as a change in the loan to value ratio) that is grounds for enforcement action under the mortgage. DAF supports amendment of the definition of 'default' to ensure it includes all circumstances that, under the terms of the mortgage, are grounds for enforcement action. Otherwise some farmers might miss out on the opportunity to apply for an enforcement action suspension certificate where the mortgagee is proposing to take enforcement action due to a revised loan-to-value ratio and refuses a request for mediation. DAF does not support amendment of the Bill to provide that mortgagees should not be able to enforce mortgages where the default is caused only by a change in the loan to valuation ratio. DAF suggests this would be a very significant

	change to the finance industry in Queensland and is a matter for Commonwealth regulation of banks rather than farm business debt mediation as such.
Mr Fox would prefer to see the parties indicate times as soon as reasonably practicable. The FFS works without these timeframes currently. Mr Fox has never seen them as an issue because sometimes you need to change them. Giving the mediator the general obligation to do things as fast as reasonably practicable should allow those things to be organised.	This matter is concerned with the level at which delegated legislative power is used. While mediators must maintain accreditation which provides a level of oversight of their activities, there remain some risks associated with giving mediators broad discretion. Section 4(4)(a) of the *Legislative Standards Act 1992* provides that a Bill should allow the delegation of legislative power only in appropriate cases and to appropriate persons. The greater the level of potential interference with individual rights and liberties the greater will be the likelihood that the power should be prescribed in an Act of Parliament and not delegated below Parliament. It is probably justified to give the mediator broad discretion about how a mediation is conducted where mediation is voluntary or represents an alternative dispute resolution method (i.e. each party has the opportunity to pursue other avenues if they are unhappy with the process). In the circumstances covered by the Bill, however, the Parliament is intervening in normal commercial arrangements and there is no effective alternative (for the mortgagee) to mediation if they wish to enforce the mortgage. The inappropriate exercise by a mediator of discretion about how much time the farmer or mortgagee should have to meet various requirements could have serious consequences for them – paving the way for enforcement action against the farmer or a stop on the mortgagee taking enforcement action. In this context, DAF suggests it is inappropriate to give the mediator power to set timeframes. One option which at least provides some guidance to mediators, would be to set timeframes in the Bill but allow mediators to approve variations from them where they are agreed by both parties and are satisfied this will not disadvantage either party.
Common law developed in favour of the banks. Banks don't need a court order to appoint a receiver nor do they need a court order to exercise a power of sale, but the farmer needs a court order to stop that.	Mr Fox suggested allowing a body, such as QCAT, to be able to make a determination that there is a prima facie case of unconscionable conduct or unfair dealing. The mortgagee would then need to institute court action to overcome that determination. This would have a significant impact on the finance industry

One of the processes that could be used to address the inherent power imbalance is something like the Financial Ombudsman Service (FOS) however the interaction between the FOS and the farm debt mediation is problematic in itself. For something like QCAT to be able to say the farmer has established a prima facie case of unconscionable conduct or unfair dealing it would then be on the bank to institute court action to appeal that. It would go some way to evening up the legal power imbalance.	in Queensland and would require careful analysis and impact assessment. It is well beyond the scope of the Bill and no stakeholders have had a chance to comment on the proposal.
The Bill has a lot of machinery provisions to be contained in the Act. One would have thought it would be better constructed if the principles were in the Act and the detail contained in the Regulation so that it could be readily changed, that way it could be adapted to comply with any national or interstate amendment.	Section 4(4)(a) of the *Legislative Standards Act 1992* provides that a Bill should allow the delegation of legislative power only in appropriate cases. The greater the level of potential interference with individual rights and liberties the greater will be the likelihood that the power should be prescribed in an Act of Parliament and not delegated below Parliament. Many of the requirements in the Bill are critical to the obligation to mediate and represent significant imposts on the parties so it is proper that they are specified in the Bill. There is some material in the Bill that could properly be prescribed in regulation. In particular, DAF suggests the detail about the process of nominating a mediator could be prescribed in the regulation. It should be noted that submissions by stakeholders have raised concerns about those current provisions in the Bill that allow regulation to prescribe certain things (e.g. additional documents that may be required and when mediation is satisfactory) and they appear to prefer requirements to be fixed in the Bill.
The practical restrictions in Qld are the resourcing of the farmer's representatives (essentially Dennis McMahon). In an ideal world if we could have farm debt mediation being compulsory, a framework for the conduct for mediation as suggested and the money spent by the bureaucracy financing this scheme being spent on another Dennis McMahon and "beefing up" the rural financial counsellors then farmers would be better placed in Qld.	Legal Aid Queensland does not receive stand-alone funding for either the Farm and Rural Legal Service, or the Farm and Rural Legal Outsourcing Project. It funds the Farm and Rural Legal Service through its recurrent funding. At present, Legal Aid Queensland employs one fulltime lawyer and administrative assistant to assist primary producers who are experiencing financial hardship related to their business. Over the past 12 - 18 months, Legal Aid Queensland has noticed that there has been a marked reduction in foreclosure and enforcement activity by banks and

	credit providers and this is due to a number of non-permanent factors including: the focus on bank activity (particularly in relation to farmers and rural businesses) by the Commonwealth Government, the moratorium on bank foreclosures on rural properties by some major banks, and the drop in market value of farming properties due to drought etc. As drought conditions ease and market values of farming properties recover, Legal Aid Queensland expects banks and credit providers will resume their foreclosure and enforcement activities and the demand for Legal Aid Queensland's services will increase again. Legal Aid Queensland initiated a pilot out-sourcing project in the 2015-16 year funding private law firms to undertake specified numbers of matters. As the funding allocated to the pilot out-sourcing project was not fully expended in the 2015-16 year, the project was rolled over into the 2016-17 year.
Often farmers' have not ability to obtain financial evaluations from their own accountants. Often financial counsellors have trouble accessing this information from accountants because they are exercising a lien and farmers can't pay their account. It would certainly assist the farmer considerably if the farmer could access outlays for proper preparation for mediation and there was legislative authority to require external parties to provide materials, such as if the mediators were able to say "accountant X, subject to your lien, we want the last 3 years tax returns". It would not be a difficult exercise.	Requiring accountants to provide information would be an interference in their rights and normal business activities. DAF suggests it would be inappropriate to include it in this Bill without proper consultation about its impacts. The farmer is best-placed to undertake a separate negotiation with an accountant exercising a lien to explain why they need the information provided to them and how mediation may contribute to the debt owed to the accountant being paid. Another option is to insert a provision in the Bill which could allow a farmer's reasonable attempts to obtain financial documents to provide to mortgagees to be considered when deciding whether they have failed to mediate in good faith.