Farm Debt Mediation Bill

Submission from Resolution Institute

Submitted by:
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About Resolution Institute

Resolution Institute is a professional association and membership organisation of mediators, arbitrators, adjudicators, restorative justice facilitators and other dispute resolution professionals. Resolution Institute was created as a result of the integration of LEADR with LEADR NZ in 2013, and then with the Institute of Arbitrators and Mediators Australia (IAMA) in 2014. Resolution Institute is a not-for-profit organisation with around 4,000 members across Australia, New Zealand and the Asia Pacific region. Resolution Institute members work in a wide range of industry sectors and have diverse backgrounds and experience.

Resolution Institute has been training mediators in Australia and New Zealand for close to 30 years and has a well-recognised accreditation scheme for mediators. Resolution Institute mediation qualifications are also internationally recognised. Resolution Institute is a Recognised Mediator Accreditation Body (RMAB) for accreditation under the National Mediator Accreditation System (NMAS) in Australia, and is also a Qualifying Assessment Programme (QAP) for International Mediation Institute (IMI) accreditation.

In New Zealand, Resolution Institute is an Approved Dispute Resolution Organisation (ADRO) under the Family Dispute Resolution (FDR) Regulations 2013 and as such has responsibility for training and accreditation of FDR Providers. Resolution Institute is also contracted by the Ministry of Justice for training and accreditation of Restorative Justice facilitators.

Resolution Institute offices are in Wellington (New Zealand) and Sydney (Australia).

Resolution Institute promotes the use of a range of alternative dispute resolution approaches. When approaches are of a high quality and fit for purpose, alternative dispute resolution can be quicker, more cost effective, can reduce or repair harm to relationships, and may result in more enduring resolution.

Resolution Institute welcomes this opportunity to make a submission on the Farm Debt Mediation Bill (the Bill). As a trans-Tasman organisation Resolution Institute has long experience with farm debt mediation schemes in Australia, where legislative schemes have been operating since 1994 in New South Wales, 2011 in Victoria and 2017 in Queensland. Resolution Institute believes that in Australia these schemes have provided a useful non-adversarial approach to resolving challenging farm debt situations.

A Resolution Institute mediation trainer and experienced farm debt mediator was involved in the production of NSW videos explaining farm debt mediation https://www.raa.nsw.gov.au/fdm/nsw-farm-debt-mediation-videos. These have been a useful tool for providing parties and others with information about mediation and what to expect.

General Position

Resolution Institute supports the key proposition of the Bill, namely to encourage mediation as a way to resolve farm debt.

The concept of getting affected parties talking through issues arising from difficulties with farm debt servicing and restructuring is one Resolution Institute applauds and thinks would add a very useful tool for enabling such issues to be sorted out for the benefit of all affected parties.

In the interests of brevity, this submission focuses on the general features of the Bill rather than on specific drafting aspects; particularly given that it is appreciated that the Parliamentary Counsel Office will become involved with the formatting and the drafting of specific clauses following consideration of the Bill by this Committee.

Specific Recommendations

SUBMISSION 1 – The Bill should enable mediation to take place earlier than notice of intention to appoint a Receiver

As the Bill reads, the requirement to initiate mediation is triggered on notice of appointment of a Receiver (Clause 46). Resolution Institute submits that the talking that mediation facilitates should be encouraged to occur at a much earlier stage, because as a general rule the later any talking occurs, the fewer options for resolution there will be.

Facilitating mediation at an earlier stage also address the concerns that Resolution Institute mediators hear, namely:

- Farmers sometimes express that the banks/financial institutions "do not or are unwilling to listen" to them; and
- Banks/financial institutions sometimes express that farmers "put their heads in the sand" and will not engage to address the situation.

Resolution Institute suggests that mediation be able to be triggered by:

1. Any farmer who has defaulted on any obligation, or who notifies the bank/financial institution that they anticipate defaulting.
2. Any creditor upon the occurrence of any default or upon any default being likely to occur.
3. The farmer and the creditor agreeing that it would be appropriate to convene a mediation to address any financial issues.

This would require changes to Clause 46 of the Bill so as to provide for notice to be able to be given by Farmers and Lenders that mediation is sought. At present, the Bill provides that, on notice of wish to appoint a receiver, the Farmer "must nominate a mediator". Resolution Institute recommends that the Bill also provides for nomination by either the Farmer or the Lender/s or by them jointly at earlier stages. This would be similar to provisions in the NSW scheme that allow for 'Farmer-initiated Mediation' and 'Creditor-initiated Mediation.'

Currently, the Bill provides for mediation to be mandatory at the instigation of the Farmer ("must' in Clause 46) which raises issues, in that ordinarily mediation is an entirely voluntary process requiring an agreement between all affected parties to engage in mediation. However, Resolution Institute sees merit in making exploration of mediation mandatory at this stage by ensuring the appointment of a mediator (in general terms in the manner Clause 46 proposes) who could then discuss with the parties whether mediation would be appropriate in pre-mediation meetings. It is the experience of Resolution Institute mediators that once parties are engaged in discussion about mediating, the parties generally see advantages in sitting down and talking about their respective issues.

An important skill and practice requirement for mediators is assessing the suitability of mediation for a dispute. Resolution Institute submits that Clauses 47 and 48 of the Bill be amended to make provision for mediators being able to assess suitability to mediate, and at the "pre-mediation conference" stage (Clause 48) or during the mediation itself, being able to not only "adjourn" (Clause

48(1)(b)) but also being able to terminate the mediation process if, in the view of the mediator after having consulted the affected parties, it would be appropriate to do so.

It is appreciated that the Bill would need to address how the triggering of mediation would interface with the other provisions of the principal Act, including what impact invoking mediation would have on the suspension of appointment of a receiver or of other legal steps. Further, the deferral provision of the Bill (Clause 44) might need to have some flexibility because, as some Resolution Institute mediators have pointed out, it is not uncommon with family farms for family members such as retired parents to be second tier lenders of substantial sums and there might be situations where the overall family position favours urgent appointment of a Receiver as that might better protect or preserve the interests of the wider family. Perhaps the solution is to incorporate the ability to seek leave to the Court to address urgent matters that have the potential, if not urgently dealt with, to adversely affect not only the bank/ financial institution but the rest of an affected farming family. While Resolution Institute strongly supports the use of mediation, it is appreciated that there might, on occasion, be circumstances where the immediate, rather than the suspended oversight or intervention of a receiver or the courts will be required.

SUBMISSION 2 – Mediators should hold mediation accreditation from a professional mediation organisation

Farm debt mediation is a complex and highly skilled area of mediation work involving financial issues, family, inheritance and emotional issues. Resolution Institute suggests that it will be important that experienced and expert mediators undertake this work. As the Bill stands, it appears that only mediators from AMINZ would be eligible to be included in a list of persons to be accredited by the Banking Ombudsman (Clauses 43 & 46). This misses the expertise of mediators belonging to New Zealand's other major professional mediation organisation, Resolution Institute.

Resolution Institute notes that specific training in mediation along with accreditation by a professional mediation organisation – either Resolution Institute or AMINZ - should be a requirement for mediators doing farm debt mediation. Both accreditations are widely recognised in New Zealand. Resolution Institute questions if the cost of an additional accreditation administered by the Banking Ombudsman (or another service) (Clause 45(1)) is warranted.

Resolution Institute does, however, recommend that careful consideration is given to the skills required for farm debt mediation. Experience in both New Zealand and Australia suggests that while core mediation skills are critical, a wide range of other skills are also important, including the ability to understand financial and legal documents, ability to respond to emotional and power dynamics occurring in the mediation, and ability to understand the challenges of the agricultural sector. Farm debt mediation can also require skills to deal with multiple parties, older parties (elder mediation) and cross cultural issues.

Resolution Institute and AMINZ could provide the Banking Ombudsman with advice on the skills required and a process for determining the skills of suitable mediators. Both Resolution Institute and AMINZ have members who have significant experience and expertise to bring to farm debt mediation.

SUBMISSION 3 – Consideration needs to be given to the approach for implementing and administering the scheme

Resolution Institute suggests that consideration needs to be given to the role of the Banking Ombudsman in the current Bill (Clause 45). Trust may be instilled in the service if the mediation service itself is independent. Neutrality and independence are fundamental principles of mediation.

Further we suggest that the mechanisms for compiling and maintaining a list or panel of suitable mediators be kept as flexible as possible, rather than forming part of the legislation itself (Clauses 45 & 46).

SUBMISSION 4 – That mediation be funded by private arrangement with the mediator with costs met by the lender or as agreed by the parties

At present the Bill appears to suggest that the Banking Ombudsman initially covers the costs of mediation in that the Bill provides for "fair and reasonable cost recovery from a lender" (Clause 45(3)).

Resolution Institute suggests that mediation fees are a direct arrangement between mediator and the parties, with the mediator able to determine the complexity of mediation and approach required, and able to charge fees that allow for the provision of an appropriate service. Resolution Institute mediators are concerned that a fixed fee or other restriction on the cost of mediation would have a significantly negative impact on the quality of the service and therefore its effectiveness.

Default practice for mediation is that parties to a mediation share the mediator's costs equally. This is based on a principle of fairness and all parties' financial investment demonstrating their commitment to the process. It is generally the experience of Resolution Institute mediators that contribution to the cost of mediation by each party involved assists the mediation process as it facilitates greater participation by parties in the mediation process. Equally importantly, in the eyes of the parties, it makes them equal participants. Resolution Institute mediators working in the farming sector point out that in their experience, farmers often want "to pay their own way" and would rather be seen as equal participants in the mediation process.

However, it is also appreciated that in certain circumstances it may be appropriate to vary the proportions of the payment for which parties are liable. In the case of farm debt mediation, a farmer in financial difficulty will struggle to fund an equal share of the cost and this will introduce a barrier to participation.

Resolution Institute recommends retain the intention of the current (Clause 45 (3)) that lenders have liability for costs in the first instance, and allowing for an alternative agreement on the share of costs for which parties are liable.

SUBMISSION 5 – There should be further clarity around timeframes and the links between the mediation process and other actions under the Receiverships Act 1993

Resolution Institute strongly supports the concept of using mediation to create a safe and constructive forum for trying to avert 'financial disaster' for the parties, or at least for mitigating the situation. Certainty will be important for all parties, for example:

- Certainty for the farmer and/or the family of the farmer in terms of their personal future

- Certainty from a commercial or contractual perspective for lenders
- Certainty for family members who are lenders
- Certainty for other affected third parties, whether farm goods suppliers, contractors or other creditors

Such certainty requires clarity as to when it is appropriate to suspend the receivership process and when, and under what circumstances, the intervention of a Receiver and/or of the Courts should be allowed to take their course. Resolution Institute anticipates these are aspects that representatives of the farming sector and of the financial sector will wish to address in their submissions, so Resolution Institute seeks only to flag this concern.

Resolution Institute does note that the timeframe for reporting a 'Summary of Mediation' after the completion of mediation (Clause 53 of the Bill) is considered by Resolution Institute mediators to be too tight. There are occasions where it is appropriate to allow parties time after mediation to consider agreements prior to finalisation.

Resolution Institute also notes that while the Bill specifies a timeframe for nomination of a mediator and reporting of a Summary of mediation, the Bill does not specify a timeframe in which mediation will take place. The overall timeframe for triggering and conducting a mediation should, Resolution Institute submits, strike a balance between the differing interests of the parties, along with the flexibility to have a realistic timeframe for enabling the parties to engage in constructive discussion.

SUBMISSION 6 – The 'Summary of Mediation' should be limited to whether agreements were reached on some, all or none of the issues

Section 57 of the Evidence Act 2006 governs the relationship between what happens in the course of a mediation and civil court proceedings; namely that ordinarily communications made at mediation are legally privileged. Also, in practice the Agreement to Mediate, confirmed with parties prior to mediation, invariably confirm confidentiality and legal privilege.

We acknowledge the need for some reporting that a mediation process has been completed and also note that it could be advantageous to receivers and others to have access to a summary of mediation. This raises the questions as to what any "Summary of Mediation" (Clause 53) should contain and who should have access to it, and what (if any) evidential role it would have.

Generally in mediation practice, a 'mediation agreement' records the agreements made by parties. This is documented in a manner agreed by the parties and whether this document is confidential or not is determined by the parties. This is in effect 'the results' of mediation (Clause 53(1)). Resolution Institute does not see it as appropriate to require mandatory reporting of the 'conduct' or 'results' of mediation as in Clause 53(1).

The concern of Resolution Institute is that if any party to a mediation thinks that anything they say at mediation might end up being referred to in the Summary of Mediation, then that would very likely affect what that person might be prepared to freely discuss at the mediation and so would adversely affect the conduct of the mediation even if, as Clause 49 of the Bill is taken to provide, what is in the Summary is not admissible in evidence. For this reason, it is submitted that the Summary, if there is to be one, should only record:

- Whether any agreements were reached or not
- Whether agreements were reached on some or all of the matters considered in the mediation

- Any specific agreements or agreed statements reached that the parties agree should be included in the Summary

This would preserve confidentiality and is consistent with the leave of reporting to the Ministry of Justice on Family Dispute Resolution mediation.

It is important to ensure that the parties to the mediation feel able to have realistic and constructive discussions. If parties think what they say in the course of mediation can be 'used against them' following the mediation, they understandably feel constrained as to what they are prepared to say in the course of it. Accordingly, Resolution Institute submits that preservation of the confidentiality and legal privilege of what occurs in mediation is fundamental to it, and that the only exception to this should be if the affected parties specifically agree to waive confidentiality and privilege.

SUBMISSION 7 – Attendance at mediation should be agreed by the parties

Clause 48 (5) states that persons who are not parties to the mediation session may be present if authorised to be so by the mediator. It is not usual mediation practice for the mediator, who is a neutral facilitator, to take the role of authorising or determining who can attend a mediation.

Usual mediation practice is that with the agreement of the principal parties, any other persons can attend (although there is sometimes some constraints around the basis of such attendance such as attendance but no speaking rights). For example, if a farmer has a spouse/partner who is not a borrower or guarantor but is involved in, or affected by, the farming operation, one would ordinarily expect that this spouse/partner would be able to attend mediation by agreement between the parties.

The attendance of lawyers can often be important, particularly where a settlement reached would not be binding in the absence of independent legal advice. Many provincial farming families have long and trusted relationships with their solicitors. Resolution Institute mediators also note that farm management consultants are also often very useful and constructive professionals to have a involved as advisors.

Clause 51 refers to representation of a party by an agent and the mediator determining if it is appropriate for an agent to 'be permitted to facilitate the mediation'. The wording, in particular the use of 'facilitate' appears unclear about the expectations of the agent's role. Resolution Institute's view is that the mediator 'facilitates' the mediation and that the role of an agent in this clause is to 'represent' or support a party. The mediator's responsibility in considering an agent representing a party is to determine if it is still appropriate to mediate with an agent representing the party.

SUBMISSION 8 – Wider or more detailed definition of functions and process in the Bill would assist

In Clause 47 (2) of the Bill, Resolution Institute submits that a simple statement that the mediator 'will not give legal advice or impose any solution' would suffice.

Resolution Institute submits that it would be useful for the Bill (Clause 47) to further clarify the mediation process, including positively stated objectives of assisting the parties.
For example, the mediator may assist the parties by:

- Identifying the issues in dispute

- Assisting the parties to achieve an understanding of each other's point of view
- Encouraging the parties to develop and explore options for resolution

Although perhaps better addressed at a regulatory level, Resolution Institute sees merit in a standard form of 'Agreement to Mediate' being adopted for farm mediations, containing standard clauses in respect of the general conduct of the mediation, including on confidentiality, adjournment, timetabling and termination.

Conclusions

Resolution Institute supports the introduction of a legislative requirement to fully consider mediation as a way to resolve farm debt. Resolution Institute notes that there are some challenges to the introduction of mediation as a mandatory process, however on balance believes that it is best to mandate people to participate in considering if mediation is a suitable process for resolving their issues.

Resolution Institute submits that:

1. The Bill should enable mediation to take place earlier than notice of intention to appoint a Receiver – allowing for earlier initiation by either the farmer or creditor
2. Mediators should hold mediation accreditation from a professional mediation organisation – either AMINZ or Resolution Institute
3. Consideration needs to be given to the approach for implementing and administering the scheme
4. Mediation should be funded by private arrangement with the mediator with costs either equally split between the parties or as agreed by the parties
5. There should be further clarity around timeframes and the links between the mediation process and other actions under the Receiverships Act 1993
6. The 'Summary of Mediation' should be limited to whether agreements were reached on some, all or none of the issues
7. Attendance at mediation should be agreed by the parties
8. Wider or more detailed definition of functions and process in the Bill would assist

Resolution Institute applauds the Bill's intent to increase use of mediation to find solutions to farm debt and Resolution Institute would be happy to draw on the expertise of its members to assist in further developing approaches for farm debt mediation, including expertise from those working in this area in New Zealand and in farm debt mediation in Australia.