

Insights and Commentary from Dentons

The combination of Dentons and Kensington Swan offers our clients access to 10,000+ lawyers in 182 locations and 74 countries around the world.

This document was authored by representatives of Kensington Swan prior to our combination's launch and continues to be offered to provide clients with the information they need to do business in an increasingly complex, interconnected and competitive marketplace.

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7 August 2019

Committee Secretariat
Primary Production Committee
Parliament Buildings
Wellington

By email:
PP@parliament.govt.nz

Submission to the Primary Production Committee by Kensington Swan on the Farm Debt Mediation Bill (No 2)

Introduction

Thank you for the opportunity to submit on the Farm Debt Mediation Bill (No 2) (**Bill**). Kensington Swan is a premier New Zealand law firm with over 30 partners and 145 staff based at offices in Auckland and Wellington. The firm has an active Restructuring and Insolvency team that takes a keen interest in developments relating to insolvency law and practice.

Kensington Swan supports the Bill. The primary sector “drives New Zealand’s economy”.¹ High rural debt, however, has been an issue for several decades. In mid-2018, rural debt was estimated to be \$68 billion,² making up 14% of all bank lending in New Zealand.³ The primary sector is vulnerable to seasonal fluctuations and diverse weather conditions, more so than other industry sectors. Climate change and pests loom as present and future challenges. While the banking sector has, in our view, generally acted with responsibility and restraint in respect of distressed rural debt, the Bill may provide additional comfort to farmers who are experiencing difficult financial circumstances.

Our comments

The Bill is a much improved version of the previous private members bill. There are, however, aspects of the Bill that warrant further consideration. Below we set out our comments.

- 1 We are concerned about the system proposed to appoint mediators. Under the Bill, a creditor must agree to one of three mediators nominated by a farmer.⁴ A creditor is not able to nominate a mediator.⁵ A key aspect of mediation is that parties mutually agree on the identity of the mediator. The proposed system is at risk of becoming one sided and mediators who are frequently appointed may be perceived as “farmer friendly”. We recommend that:
 - a The farmer should first propose three mediators.
 - b The creditor can then accept one of those mediators or nominate an alternative three.
 - c If the parties cannot reach agreement over who should be the mediator, then an approved mediation organisation should appoint an authorised mediator.

¹ <https://www.mpi.govt.nz/law-and-policy/legal-overviews/primary-production/>.

² <https://www.stuff.co.nz/business/111547169/banks-powers-to-be-reeled-in-over-farm-debt-foreclosures>.

³ <https://www.rbnz.govt.nz/-/media/ReserveBank/Files/Publications/Financial%20stability%20reports/2018/fsr-nov-2018.pdf>.

⁴ Farm Debt Mediation Bill (No.2), clause 19.

⁵ Ibid.

- 2 We are concerned that the Bill, as it is presently drafted, treats all debts the same regardless of their size.⁶ MPI has estimated that the cost of mediation will be around \$6,000,⁷ an amount that could be considered disproportionate to small debts (and presumably does not include the parties' own costs). We suggest that only debts of \$50,000 or more be captured by the definition of 'farm debt' in the Bill. For debts smaller than \$50,000, parties should not be put to the cost of mediation.
- 3 A farm debt must be incurred by a farmer solely or principally for the purpose of conducting a primary production operation and be secured wholly or partly by a security interest in farm property. We are concerned that the definition of farm debt may, in some circumstances, be too wide and, at other times, too narrow. For example, unless regulations specify otherwise, apiculture (bee keeping) would not be captured by the Bill, despite arguably sharing some similar characteristics to other captured farm activities.
- 4 Clause 6 contains an exhaustive list of what constitutes an insolvency proceeding or process.⁸ While clause 6(2)(h) is a catch-all provision, for completeness, we suggest that a composition or proposal that a farmer is subject to under Part 5 of the Insolvency Act 2006 should also be included.
- 5 Under the present drafting of the Bill, a creditor is unable to urgently appoint receivers to a farmer's assets if the creditor is concerned about animal welfare issues. The Bill should expressly permit the appointment of receivers without prior mediation if a creditor has reasonable grounds to believe that the safety of farm animals has been compromised by the farmer, or where a farmer is selling stock in breach of the terms of a security agreement.
- 6 At present, the Bill does not provide for multi-party mediation and assumes that mediations will only occur between a single creditor and a single farmer. When a farmer is in financial difficulty, debts may be owed to more than one secured creditor. It is inconsistent with the objectives of the Bill for a farmer to be required to invite each creditor to a separate mediation, if the farmer desires a collective resolution of secured debt (accepting, of course, that sometimes a farmer may wish to deal with creditors separately). We consider that a farmer should be entitled to request that more than one creditor engage with the same mediation process.
- 7 We have the following concerns relating to the process to obtain a certificate:
 - a There is discrepancy in the assessment of creditor's and farmer's behaviour when applying for a certificate. A prohibition certificate is issued when the creditor has declined to mediate, or where the creditor has not acted in good faith during the mediation process. An enforcement certificate is issued when the farmer declines to mediate, or the creditor acts in good faith. However, in our view, it should be a prerequisite that the farmer has also acted in good faith in order for a prohibition certificate to be issued.

⁶ Clause 6.

⁷ <https://www.mpi.govt.nz/law-and-policy/legislation/farm-debt-mediation-bill/>.

⁸ Clause 6(2).

- b We consider that a period of 10 working days to apply for a certificate may be too short.⁹ We suggest that this period be amended to 20 working days to match the period given at clause 34(1)(b).
- 8 At the end of mediation, the mediator must give a report to the Ministry's chief executive which must include a summary of the mediation and copy of any mediation agreement entered into between the parties.¹⁰ A key advantage to mediation is the privacy and confidentiality those involved are afforded. While the Bill has provisions that address confidentiality, we consider it unnecessary and contrary to the parties' right to confidentiality that the mediation report be given to the chief executive in every instance. Instead, we suggest that the mediation report should only be supplied to the chief executive when a party applies for a certificate in order for an assessment of good faith to be made.
- 9 In respect of clause 28, we consider that the mediator may not be the best-placed party to prepare the mediation agreement. Mediators do not normally prepare mediation agreements. We suggest that the parties, or the parties' counsel, should be responsible for preparing the mediation agreement in the first instance.
- 10 We would like to draw the select committee's attention to clause 57 of the Bill. As it is presently drafted, the Bill does not prevent a creditor making an in personam claim against a guarantor (as opposed to taking an 'enforcement action', as that phrase is defined in the Bill). It is unclear whether it is intended that lenders will still be able to seek judgment against guarantors once farm debt mediation comes into force.
- 11 Given the changes proposed by the Bill, we recommend that sufficient time be provided to affected parties to adjust to the proposed mediation regime prior to its implementation.

Once again, thank you for providing Kensington Swan with the opportunity to submit on the Bill. We would be pleased to discuss our submission further with you, if any further detail or clarification is required.

Yours faithfully
Kensington Swan



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⁹ Clause 34(1)(a).

¹⁰ Clause 25.