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Committee Secretariat
Primary Production Committee
Parliament Buildings
Wellington

By email: PP@parliament.govt.nz

Farm Debt Mediation Bill

Submission to the Primary Production Committee by Kensington Swan on the Farm Debt Mediation Bill

Introduction

Thank you for the opportunity to submit on the Farm Debt Mediation Bill ('**Bill**'). Kensington Swan is a premier New Zealand law firm with over 25 partners and more than 150 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.

Our concerns

We have several concerns about the Bill, which seeks to amend the Receiverships Act 1993 ('**the Act**'). As the Hon Gerry Brownlee (National, Ilam) said during the first reading of the Bill, it "*...most certainly needs a huge amount of attention from a select committee...*". Below we set out our concerns.

a While rural debt is of significant concern to the New Zealand economy, there is no reason in law to treat rural debt any differently to other debt, or to prefer the interests of farmers over other debtors who have granted general security interests to banks. Over the last few years, both the retail and construction sectors have suffered financial distress. However, we appreciate that there is support in the market for a distinction for the agricultural sector.

b In our experience, banks enter into considered and lengthy discussions with their rural borrowers prior to taking any enforcement steps. There is seldom, as Mark Patterson (MP, NZ First) suggested (when introducing the Bill) "*...an emotional rush into receivership*".

c A formal mediation process may not add much to standard industry practice. The banking industry has demonstrated, over recent years and during the course of two recent crises (kiwifruit and dairy) that it will exercise restraint in circumstances where the rural sector is confronted with financial difficulty. For example, when the dairy price dropped in 2015-2016, there was not a rash of receiverships. More recently, many banks have moved, in the wake of the *mycoplasma bovis* outbreak, to provide emergency assistance packages for their rural borrowers. These packages demonstrate the banks' willingness to constructively engage with their borrowers when borrowers might be facing financial distress.

d Agricultural debt is defined in the Bill as "*lending to farmers by registered banks…*". There is no definition of what a 'farmer' is under the Bill. There is a question mark about whether the Bill applies purely to agricultural debt, or whether it is intended to extend the provisions of the Bill to, for example, horticulture and viticulture (which Mark Patterson (MP, NZ First) indicated when introducing the Bill). If the Bill proceeds, it should also apply to all lenders, not just registered banks.

e We are concerned that, while the Bill provides mechanics for the appointment of a mediator, it does not specify a time period in which a mediation must take place (saying, as the proposed section 48(2) does, that mediation sessions must be conducted with as much "*expedition*" as possible does not provide sufficient certainty). As such, it could take several months for a mediation to occur, potentially jeopardising a bank's security position.

f The Bill does not indicate what the position would be if, prior to a bank considering the appointment of a receiver, the farmer (as shareholder of a body corporate farming enterprise) appoints a liquidator as it would be entitled to do under the Companies Act. In the usual case, the appointment of a liquidator would warrant the appointment of a receiver by the bank. The Bill should make it clear that if a farmer appoints a liquidator first, a bank would not then have to go through the mediation process in order to appoint a receiver. While a secured lender sits outside a liquidation, it would make no sense to defer a secured creditor's rights in such circumstances.

g It appears that the Bill would prohibit the legal representation of either banks or farmers at a mediation. If it is meant that the parties could not have the benefit of legal representation at a mediation, then it is suggested that the Bill in this respect is shortsighted. Most lawyers have considerable experience of mediation and are able to assist their clients (whether they be farmers or banks) to achieve positive outcomes at a mediation. Furthermore, the attendance of lawyers ensures that, if the parties reach an agreement, it can be properly and thoroughly documented before the parties leave the mediation.

h In respect of the proposed section 51, why should a farmer be entitled to an advisor at the mediation, but not a bank? Banks (or farmers at the request of banks) often appoint an investigating accountant (usually an insolvency practitioner) when a farmer or business is in default or financial trouble to undertake an independent review of the business. This often occurs before a receivership is considered. The investigating accountant's report can helpfully assist the parties to understand the cause of the default or financial hardship and can often assist the business restructure. If an investigating accountant has been appointed and has prepared a report, in some cases it could be of assistance to the parties to have the investigating accountant attend the mediation. The investigating accountant could present at the mediation and put forward potential solutions. Banks should be entitled to an advisor at the mediation, or at the very least be entitled to have an investigating accountant attend the mediation, if one has been appointed.

i There is a question mark about what value, if any, the mediation summary would serve. With both parties present at the mediation, they have the ability to appreciate what was discussed. If an agreement is reached at the mediation, presumably it will be documented separately as between the parties. What will happen to the mediation summaries that are kept? Who will hold them? And who will have access to them?

Another concern is that the mediation summary could contain information which is protected by the confidentiality provisions of section 50. Our suggestion would be that instead of the mediator providing a mediation summary, the mediator simply certifies that mediation has been completed within one business day following the mediation.

j From time to time, a farmer will invite a bank to exercise its powers under the relevant general security agreement to appoint receivers. In this instance, a farmer is seeking the immediate assistance of their secured lender to take over the management of their farm. The Bill does not appear to provide a carve-out whereby a farmer who wishes to opt out of the mediation provisions so that it may call upon their lenders to appoint a receiver, can do so.

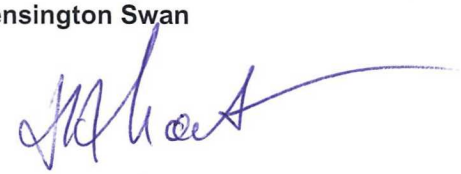
k The Bill may require a bank to continue providing working capital to an insolvent farmer during the mediation process, when the bank has lost confidence in that farmer, or when doing so would unnecessarily extend the life of the farmer's business. It may be a better use of the bank's capital to immediately appoint a trusted receiver who can take steps to mitigate loss.

l If a bank is concerned about animal welfare, it may be particularly unwilling to allow a farmer to continue to manage stock while a lengthy mediation process takes its course. A bank would much prefer that an independent receiver take care of stock. As it is currently drafted, the Bill prevents a bank from promptly intervening to safeguard the interests of livestock.

m It may be, if this Bill passes into law, that banks look to protect their interests in other ways, including by applying to the court, like an ordinary unsecured creditor, for the appointment of a liquidator and (if urgency requires) applying at the same time for the appointment of an interim liquidator to secure the position and to protect the interests of the parties involved. This would particularly be the case if there is a concern about livestock. It is to be noted that the Bill does not prevent a bank taking immediate possession of collateral itself, rather than through a receivership (even though most banks will look to avoid the exposures associated with becoming a mortgagee in possession).

Once again, thank you for 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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