

Farm Debt Mediation in New Zealand

Farm Debt Mediation Act 2019

Grow | Protect | Operate | Finance | August 2024

Overview

The [Farm Debt Mediation Act 2019 \(FDMA\)](#) is designed to assist creditors and farmers resolve farm debt through mediation before enforcement over farm property.

Creditors can only take enforcement action if there is an enforcement certificate in force for the relevant farm debt.

The scheme applies to **farmers** who are engaged in a **primary production business** including, but not limited to, agriculture, horticulture and aquaculture. The scheme does not apply to businesses which primarily provide materials or labour for a primary production business.

A creditor cannot contract out of the FDMA (section 58).

This paper summarises the key provisions of the FDMA. Key terms are defined in the **Appendix** to this paper.

Eligibility

Farmers are eligible for the scheme if they are involved in a primary production business. This includes any business that mainly produces unprocessed materials (e.g., agriculture, aquaculture, horticulture), but does not include businesses that provide materials or labour.

The debt must also be incurred by the farmer in connection with their primary production business and secured over farm property. This includes loans that are secured against farmland, farm machinery and livestock, harvested crops and wool.

The scheme does not apply for business activities such as lifestyle farming, forestry, mining, wild harvest fishing, or the hunting or trapping of animals.

The Mediation Process

1. Request to Mediate

The **farmer** may request mediation in relation to their farm debt at any time (section 15) unless there is an enforcement certificate in place (see the section on *Enforcement Certificates* below).

The **creditor** may request mediation at any time after the farmer is in default of the farm debt (section 16) unless there is a prohibition certificate in place (see the section on *Prohibition Certificates* below).

To initiate the mediation process, one party to the farm debt must send the other party a request to mediate. Once the other party receives the mediation request, they must reply in writing within 20 working days (section 17).

The creditor must agree to mediate unless they have a good reason to decline (section 18). In their reply, the creditor must state their reason for declining mediation.

2. Appointment of a Mediator (section 21)

If the parties agree to mediate, the farmer must nominate a panel of three authorised mediators and the creditor must accept one of those mediators.

3. Procedure Agreement (section 22)

The parties must enter into a procedure agreement. This must address how mediation costs and related expenses will be shared between them, subject to the restrictions in section 23 (see the section on *Costs of Mediation* below).

The procedure agreement may also outline any of the following matters:

- who has authority to represent and bind the parties;
- who may attend mediation (including any guarantors, interested parties, legal counsel, and experts).
- confidentiality and privilege requirements in respect of the mediator, parties, and any other persons attending the mediation;
- whether the mediator may engage an expert assessor;
- methods of varying and/or terminating the procedure agreement;
- any other matter that the parties agree is appropriate to meet the needs and interests of the parties.

This agreement will be binding on the parties in accordance with its terms.

Cost of mediation (section 23)

The farmer and creditor share the cost of mediation, but the farmer is not required to pay more than \$2,000 excluding GST towards the costs and expenses of the mediator. Each party still has to pay for their own costs – accountants, travel, etc.

4. Mediation

The parties must proceed to mediation as soon as is reasonably practicable once they have signed a procedure agreement.

As long as the mediator follows the procedure agreement made by the parties, the mediator may follow any procedures that they consider appropriate to resolve the issues between the parties promptly and effectively (section 24(1)).

The mediation process may not continue for any longer than 60 working days after the date of the mediation request, unless the parties agree otherwise.

The parties must participate in the mediation process in good faith (section 26).

5. After Mediation

Mediation Report (section 27)

At the end of the mediation, the mediator must give a report to the chief executive, including:

- (a) a summary of the mediation process;
- (b) the names of the parties to the farm debt;
- (c) each party's address for service; and
- (d) any other information specified by the chief executive in published requirements.

The mediator must give the parties a copy of the mediation report.

Mediation Agreement

Any agreement reached between the parties during the mediation must be recorded in a mediation agreement. The mediator prepares a draft mediation agreement to be signed by the parties.

A farmer may cancel a mediation agreement by giving written notice of the cancellation to the creditor within ten working days after the agreement is signed (section 32). If cancelled, a mediation agreement is treated as if it had never been entered into (section 33). Cancellation of a mediation agreement under section 32 does not, by itself, demonstrate that the creditor did not participate in the mediation process in good faith.

A mediation agreement is binding on the parties who enter it. However, the creditor cannot enforce the agreement until 10 working days have passed since it was signed (provided the farmer has not cancelled it). If the parties agree to do so, the mediation agreement can be varied or replaced.

What if there is no agreement?

If the creditor mediated in good faith and there was no agreement, the creditor can apply for an enforcement certificate (section 34(b)). This certificate will allow it to take enforcement action.

Good Faith

The farmer and the creditor must participate in each step of the mediation process in good faith (section 26).

The following actions may be used as evidence to suggest that a party has not participated in the mediation process in good faith:

Request to Mediate (section 18)

- **Creditor:** declining a mediation request without a good reason or failing to state a reason for declining an earlier mediation request.

Appointment of a Mediator (section 21(2))

- **Farmer:** failure to nominate three authorised mediators within a reasonable time.
- **Creditor:** failure to accept a mediator within a reasonable time.

Procedure Agreement (section 22(5))

- **Either party:** Failure to enter into a procedure agreement within a reasonable time.
- **Either party:** Failure to comply with the provisions of a procedure agreement without a good reason.

The contents of a mediation report may also be used as evidence that a party has not participated in good faith (section 27).

Each of the following actions do not, on their own, demonstrate that the parties have not participated in the mediation process in good faith:

- failure to reach agreement or enter into a mediation agreement (section 29);
- declining to reduce or forgive a debt, or vary its terms (section 26(2)); or

- cancellation of a mediation agreement (section 32).

Enforcement Action

Enforcement Certificates

A creditor can only take enforcement action in relation to a security interest in farm property if there is an **enforcement certificate** for the relevant farm debt (section 11). However, the creditor does not need an enforcement certificate before taking enforcement action if:

- (a) the parties enter a mediation agreement, the farmer defaults, and the creditor's proposed enforcement action will occur within three years of the mediation agreement being entered into (section 12); or
- (b) the farmer under the relevant farm debt is subject to an insolvency process (section 13).

A **creditor** may apply to the chief executive for an enforcement certificate on either of the following grounds (section 34):

- the farmer declined to mediate; or
- the creditor participated in the mediation process in good faith.

The chief executive must issue an enforcement certificate if all of the following conditions are met (section 38):

- (a) the farmer is in default of the farm debt; and
- (b) there is no prohibition certificate in force in respect of the farm debt; and
- (c) the chief executive is satisfied that the grounds set out in the creditor's application are established.

Prohibition Certificates

Even if mediation does not result in an agreement, a creditor cannot take enforcement action if there is a **prohibition certificate** in force in respect of the relevant farm debt (section 11(2)).

A **farmer** may apply to the chief executive for a prohibition certificate on either of the following grounds (section 35):

- the creditor declined to mediate; or
- the creditor did not participate in the mediation process in good faith.

The chief executive must issue a prohibition certificate if both of the following conditions are met (section 39):

- (a) there is no enforcement certificate in force in respect of the farm debt; and
- (b) the chief executive is satisfied that the grounds set out in the application are established.

Applying for a certificate

If a certificate is being applied for on the grounds that the other party **declined to mediate**, the application must be made within ten working days after mediation was declined (section 36).

If a certificate is being applied for **on good faith grounds**, the application must be made:

- (a) within ten working days after being given the mediation report; or
- (b) in the case of an application made following cancellation of a mediation agreement, within 20 working days after being given notice of the cancellation.

The chief executive may extend these time periods if they consider it reasonably required in the circumstances.

The chief executive must notify the other party to the farm debt if an application for a certificate is made (section 37).

Once the chief executive has decided whether to issue a certificate, they must give written notice of their decision to both parties (section 40).

Duration of certificate (section 42)

A certificate takes effect from the date stated in the certificate. Enforcement certificates remain in force for three years, while prohibition certificates remain in force for six months.

Administrative Review

A creditor or farmer who is affected by a decision about whether to issue an enforcement or prohibition certificate may apply for administrative review of the decision. An application must be made within ten working days after notice of the is given, unless an extension is granted (section 50).

The chief executive must review the legal basis of, and any assessment or other matters relevant to, the decision under review. The chief executive must determine the review on the papers (meaning without a hearing), unless they consider it not appropriate to do so, and must consider (section 53):

- (a) the application;
- (b) any written submissions made by the applicant or by the other party;
- (c) any further information provided by the applicant under section 51(3); and
- (d) any other information that the chief executive considers relevant.

The other party will be notified once this application has been made and will be given the opportunity to make a written submission (section 52).

A decision will be made within 20 working days of the application (section 54). The chief executive may decide to either confirm the decision under review or withdraw it, substituting a new decision in its place (if appropriate).

There is a right to appeal to the High Court, on any question of law only, against any determination under section 54 (section 57).

Further Considerations

Urgency (section 61)

A creditor may apply to the High Court for an order allowing the creditor to appoint a receiver, despite the restrictions on enforcement action in the FDMA, if:

- (a) the creditor has reasonable grounds to believe that there is an event of urgency; and
- (b) the creditor would be able to appoint a receiver, or apply for an order to appoint a receiver, but for the restrictions on enforcement action in the FDMA.

The court may make an order if it is satisfied that there is an event of urgency and the appointment of a receiver is necessary or desirable to protect the creditor's interests, or to safeguard the welfare of animals.

An **event of urgency** means one or more of the following:

- (a) the whole or part of any farm property subject to the creditor's security interest has been, or will be, destroyed, endangered, removed, or sold contrary to the terms of the farm debt or security interest;
- (b) the whole or part of any farm property subject to the creditor's security interest has been, or will be, damaged contrary to the terms of the farm debt or security interest, resulting in a substantial decline in the value of the property; or

(c) an animal that is subject to the creditor's security interest has been suffering or will suffer unreasonable or unnecessary pain or distress.

Tikanga

Tikanga (a Māori concept based around customary practices or principles) may be incorporated into the mediation process where the parties agree to it.

A tikanga-based mediation process might include:

- traditional customary practises such as karakia, **pōwhiri, hākari and waiata**;
- **consensual decision-making, based on kōrero**, ensuring the mana of the parties remains intact;
- collective or communal decision-making; and
- multi-party participation and attendance at mediation.

You can read more [here](#) about a tikanga-based approach to mediation (which a farmer or creditor may insist upon) from a document produced by the Ministry of Primary Industries. It includes a glossary defining the terms mentioned above (among others).

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Appendix: Key Terms (sections 6 and 10 of the FDMA) (paraphrased as necessary— click [here](#) to see the FDMA)

Chief executive: the chief executive of the Ministry for Primary Industries (or any other Ministry responsible for the administration of the FDMA).

Enforcement action: an action taken by a creditor to enforce a security interest in farm property following a default. This includes:

- (a) appointing a receiver of the farm property under a power contained in a security agreement
- (b) applying for an order for the appointment of a receiver of the farm property for the purpose of enforcing the security interest
- (c) serving a notice under section 119 or 128 of the Property Law Act 2007
- (d) entering into possession or assuming control of the farm property to enforce the security interest
- (e) appointing a person to enter into possession or assume control as explained in (d)
- (f) exercising a right, power or remedy that exists because of the security interest (whether arising under a security agreement, at law, or otherwise).

Farmer:

- (a) means a person who is engaged in a primary production business; and
- (b) includes a principal debtor under a debt incurred solely or principally for the purpose of conducting a primary production business (whether or not that person is engaged in the business).

Farm debt: debt incurred by a farmer that (including as a guarantor), —

- (a) is incurred, at the time, solely or principally for the purpose of conducting a primary production business or any related activity; and
- (b) is secured wholly or partly by a security interest in farm property (whether granted by the farmer or a guarantor).¹

Farm property: any property that is used for or in connection with the primary production business or related activities of the farmer.

Primary production business:

- (a) means a business that primarily produces unprocessed materials (including, without limitation, agriculture, horticulture, and aquaculture); and
- (b) includes sharemilking and any business or class of business specified in regulations; but
- (c) does not include—
 - (i) a business that primarily provides materials or labour to perform a service for a business undertaking of a kind set out in paragraph (a); or
 - (ii) a business that primarily involves mining; or any business or class of business specified in regulations

Security interest:

- (a) means—
 - (i) a security interest as defined in [section 17](#) of the Personal Property Securities Act 1999;² and
 - (ii) a mortgage as defined in section 4 of the Property Law Act 2007,³ but
- (b) does not include—
 - (i) a charge created by section 169 of the Tax Administration Act 1994 or sections 169 and 184 of the Child Support Act 1991; or
 - (ii) a charge or other interest in property created by or under any other enactment.

¹ Under the FDMA, a debt incurred by a guarantor under a farm debt guarantee is also treated as part of the farm debt (section 59).

² In that section, **security interest** (a) means an interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation, without regard to—

(i) the form of the transaction; and

(ii) the identity of the person who has title to the collateral; and (b) includes an interest created or provided for by a transfer of an account receivable or chattel paper, a lease for a term of

than 1 year, and a commercial consignment (whether or not the transfer, lease, or consignment secures payment or performance of an obligation).

³ In that section, **mortgage** includes—

- (a) any charge over property for securing the payment of amounts or the performance of obligations; and
- (b) any registered mortgage; and
- (c) any mortgage arising under a mortgage debenture.