Australian Government

Department of Agriculture, Fisheries and Forestry

National better practice guide for farm debt mediation

Cataloguing data

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This publication is available at agriculture.gov.au/FDM.

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Acknowledgement of Country

We acknowledge the Traditional Custodians of Australia and their continuing connection to land and sea, waters, environment and community. We pay our respects to the Traditional Custodians of the lands we live and work on, their culture, and their Elders past and present.

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Introduction

Farm debt mediation (FDM) refers to a structured negotiation process between a farmer and their lender to resolve a farm debt issue. The process uses an independent mediator to assist both parties to communicate openly and effectively, and to identify solutions that are formalised through a written agreement.

This guide focuses on FDM, but it also provides guidance on early engagement prior to FDM and outlines a range of activities that may be used by farmers and their lenders when financial difficulty arises.

'Financial difficulty' refers to:

- a loan in distress – when financial stress arises that may impact a mortgagee's ability to perform obligations under the farm mortgage
- a loan in default – failure to perform an obligation that, under the terms of the mortgage, is a ground for enforcement action.

This guide is for lenders, farmers, support providers and organisations and operators of state FDM arrangements. It aims to:

- provide high-level principles to use when considering how best to approach issues regarding farmers in financial difficulty and FDM
- outline the key principles for fair and effective debt resolution for all stakeholders involved where a farm business is experiencing financial difficulty
- provide high-level guidance rather than prescribing detailed processes and procedures
- encourage transparent and nationally consistent practices of FDM across states and territories, providing farmers and their lenders greater certainty and improved opportunities to achieve an equitable resolution to debt issues
- complement existing state FDM arrangements and the Banking Code of Practice
- encourage outcomes-focused early engagement.

In preparing this guide, we sought views from a range of stakeholders, including the Australian Banking Association (ABA), the National Farmers' Federation, the Rural Financial Counselling Service (RFCS), Legal Aid Queensland, state and territory governments, CPA Australia and other lending organisations. The content in this guide reflects common themes and issues raised by stakeholders.

This guide will be reviewed no later than 3 years after initial publication, and then every 5 years, to determine its effectiveness in meeting its objectives.

Background

History of FDM

States first began legislating FDM over 25 years ago. New South Wales was the first state to introduce legislated FDM in 1994, followed by Victoria in 2011, Queensland in 2017 and South Australia in 2018. Western Australia, Tasmania, the Northern Territory and the Australian Capital Territory do not have legislated FDM, but Western Australia introduced a voluntary FDM scheme in 1985. Tasmania is currently developing FDM legislation.

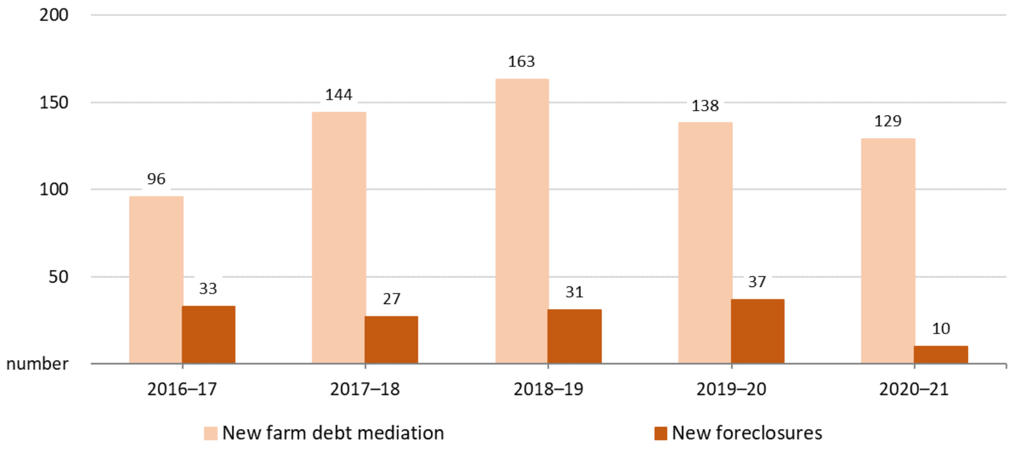
State FDM arrangements continue to evolve through the proposed introduction of new legislation or refinement of existing legislation, based on stakeholder feedback and legislative reviews. The existing Acts are:

- *Farm Debt Mediation Act 1994* (NSW)
- *Farm Debt Mediation Act 2011* (Vic)
- *Farm Business Debt Mediation Act 2017* (Qld)
- *Farm Debt Mediation Act 2018* (SA).

Since these FDM arrangements were first introduced, it has become clear that there is a need for greater national consistency to ensure that all farmers have access to FDM and to provide clarity for entities operating across multiple states and territories.

Figure 1 highlights the number of new farm debt mediations and new foreclosures nationally from 2016–17 to 2020–21 as published in the Agricultural Lending Data report. Figure 1 shows that relatively few instances of FDM result in enforcement action, highlighting the effectiveness of FDM at resolving financial difficulty.

Figure 1 New instances of loans and leases under mediation and new agricultural business foreclosures, Australia, 2016–17 to 2020–21



Note: New instances of mediation or foreclosures in each financial year.
Source: APRA, Agricultural Lending Data report 2020–21

Banking Royal Commission (2017 to 2019)

In December 2017 the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Banking Royal Commission) was established to inquire into misconduct in the banking, superannuation and financial services industry. In February 2019 the commission released its final report. Two of the 76 recommendations in the report related to FDM:

- Recommendation 1.11 – A national scheme of farm debt mediation should be enacted
- Recommendation 1.14 – When dealing with distressed agricultural loans, banks should
  - ensure that those loans are managed by experienced agricultural bankers
  - offer farm debt mediation as soon as a loan is classified as distressed
  - manage every distressed loan on the footing that working out will be the best outcome for bank and borrower, and enforcement the worst
  - recognise that appointment of receivers or any other form of external administrator is a remedy of last resort
  - cease charging default interest when there is no realistic prospect of recovering the amount charged.

In its February 2019 response to the Banking Royal Commission, the Australian Government agreed to Recommendation 1.11 and further supported banks acting on Recommendation 1.14:

A national scheme would assist lenders and borrowers to agree on practical measures that may lead to the borrower being able to address financial difficulties that have caused the loan to become distressed. The Government further supports mediation occurring soon after the loan becomes distressed and not as a last measure prior to the lender taking enforcement action.

Implementation of recommendations

The Australian Government has worked with the states to ensure that to the extent possible, state FDM arrangements are consistent. Current arrangements are:

- New South Wales, Victoria, Queensland and South Australia have similar legislated FDM schemes
- Tasmania intends to table legislation based on the New South Wales scheme in the near future
- Western Australia continues to prefer its non-legislated scheme, which it considers to be successful, cost-effective and supported by the WA agribusiness community
- the Northern Territory and the Australian Capital Territory do not wish to implement formal FDM schemes given their low primary-producer numbers and limited evidence of demand.

FDM legislation has been implemented (or will be implemented) by participating states, but differences remain across the state FDM arrangements. These include differences in terminology, procedural requirements, document requests and time frames. A comparison summary of state FDM schemes has been developed as a high-level comparison of key differences between state FDM arrangements. This guide aims to improve on existing FDM arrangements and help achieve greater national consistency.

ABA member banks, which provide more than 90% of farm lending, have adopted their own principles to address recommendation 1.14. Although the principles do not form part of the ABA Banking Code of Practice, member banks have established processes such as regular loan monitoring and review of key financial indicators to identify customers showing signs of distress. These processes enable banks to hold early discussions with customers to seek agreement on a strategy to manage financial difficulty.

Better practice guide FDM principles

These 7 principles have been developed to complement existing state FDM arrangements, the ABA Code of Practice and ABA member principles:

Principle 1 – Early engagement between farmers and lenders is encouraged

Principle 2 – Farm debt resolution activities should be outcomes-focused

Principle 3 – Consider support for personal issues, including mental and physical health

Principle 4 – Information about FDM should be clear and accessible

Principle 5 – Farmers should seek appropriate support and independent professional advice

Principle 6 – FDM should be conducted on an even playing field

Principle 7 – All parties are expected to act in good faith

Principle 1 – Early engagement between farmers and lenders is encouraged

Lenders and farmers should engage as early as possible when financial difficulty arises to reduce the likelihood of more complex and material debt issues occurring later. This principle recognises that the earlier a farmer engages with their lender to address financial difficulty, the better the outcomes are likely to be. Conversations occurring in the early stages of financial difficulty provide parties with a broader range of longer-term strategies to support the farmer through financial difficulty.

Early engagement should occur before proceeding with FDM, be undertaken without prejudice and should not affect any future FDM that may take place. Early engagement is about building trust and facilitating an outcomes-focused dialogue. It is essential that parties remain committed to identifying possible solutions suitable to both parties' needs. The quality of the relationship between the lending manager and the farmer is critical in this process.

Early engagement needs time and goodwill from both parties to work through issues. It could include a range of activities to address emerging farm debt issues (see Box 1).

The RFCS can also play an important role in early engagement. They provide a free service and are trained to understand the agricultural industry, the finance structures under which they operate and can work closely with other professional services used by the farmer. Seeking guidance from a rural financial counsellor or other trusted professional is recommended to discuss how best to approach early engagement with lenders regarding financial difficulty.

Box 1 Early engagement activities

Early engagement activities for farmers may include:

- contacting their lender to have an initial discussion about their options when financial difficulty arises or circumstances change
- maintaining proactive communication with their lender (for example, responding to correspondence from their lender in a timely manner and updating contact details if required)
- seeking professional support or advice, including from the RFCS, accountants, advisors, farm management consultants, solicitors or Legal Aid
- preparing and providing to their lender and professional advisors up to date financial information about the farm business
- informing their lender of any relevant health issues or changes in personal circumstances affecting their financial situation or that warrant additional support services
- participating in a pre-mediation conference, if offered.

Early engagement activities for lenders may include:

- initiating informal discussions with farmers about their financial situation to better understand their current position, how issues are being addressed within the business and the various options available
- encouraging and facilitating access to debt support and professional services, such as the RFCS, accountants, solicitors or Legal Aid
- discussing any issues of concern arising from lending requests or annual reviews with the farmer
- raising awareness with the farmer of dispute-resolution processes
- the use of financial difficulty programs and practices to assist farmers to get up to date with payments
- accepting early invitations to discuss financial difficulty or to mediate with farmers, if necessary
- participating in a pre-mediation conference, if offered.

Principle 2 – Farm debt resolution activities should be outcomes-focused

Farm debt resolution activities should focus on constructive resolution of farm debt issues for farmers in financial difficulty. Activities should be aimed either at re-establishing or maintaining farm viability or, if necessary, enabling farmers to exit their operation or the industry on terms they have agreed. Parties should be proactive and take appropriate steps to resolve debt issues in a way that achieves the best possible outcome.

This principle seeks to avoid a process or timeline-driven focus that only meets the minimum legislated requirements, or the use of FDM as a last resort without undertaking early engagement or focusing on the intended outcomes of efficient and equitable resolution of farm debt issues.

When FDM occurs, farmers should receive and seek to understand all relevant documentation. Lenders are encouraged to take a proactive approach to ensuring farmers receive notices and have adequate time to review and seek guidance and support if required. This may include follow-up phone calls and in-person visits once documents are issued to ensure that a farmer has been successfully contacted.

Box 2 Outcomes-focused approach to farm debt resolution

An outcomes-focused approach to farm debt resolution may include each party:

- taking adequate time to prepare and present relevant material to assist the FDM process
- identifying and sharing of critical documents ahead of mediation (for example, cashflow budgets, valuations and real estate listing appointments)
- being willing to consider all reasonable options for resolving farm debt issues.

Principle 3 – Consider support for personal issues, including mental and physical health

Experiencing financial difficulty and engaging with lenders about farm debt issues can be stressful. Farmers in this situation are also at an increased risk of experiencing situational distress (a high level of stress arising from temporary circumstances) or mental health issues, which can make it difficult to engage effectively.

The mental and physical health of farmers and broader personal issues should be considered by lenders, mediators and other parties when engaging with farmers on their debt and throughout the FDM process. Farmers are encouraged to inform their lender if they are experiencing situational distress or mental or physical health issues that may affect their ability to engage in debt discussions. Lenders should be mindful of such circumstances and respond in a fair and reasonable manner. Farmers are encouraged to seek additional support as needed.

Flexibility is an important factor in delivering effective farm debt resolution when farmers are experiencing situational distress, mental or physical health issues, or other challenges. This may include the flexible application of time frames and processes. In some cases, mediation could be postponed by mutual consent to allow farmers the opportunity to seek additional support, such as from a trusted rural financial counsellor or financial advisor.

Customers may experience distress due to the loss of a loved one, separation or a business dispute, leading to a farm debt issue. In these circumstances, customers may require additional consideration by their lenders, but FDM may not be appropriate if the customer remains financially sound and alternative solutions can be put in place (for example, loan restructuring).

Box 3 Support for personal issues

Examples of farmers seeking support include:

- reaching out to their rural financial counsellor for assistance
- requesting a flexible approach to the mediation processes to help them participate.

Examples of lenders offering support include:

- moving face-to-face meetings to regional areas to reduce travel costs or stress for farmers
- offering mental health awareness training for staff involved with farm debt issues
- having on the ground, dedicated agribusiness bankers and financial difficulty teams trained to identify signs of distress and ensure customers are aware of the option to engage FDM where appropriate
- when made aware, taking the physical and mental health of farmers into account and encouraging farmers experiencing physical or mental health issues to obtain additional support.

Principle 4 – Information about FDM should be clear and accessible

Information provided to farmers about FDM should be clear, accessible and easy to understand. Farmers should be advised during early engagement that their rights under FDM are not affected by first attempting other resolution. The immediate and longer-term impacts of any proposals for farm debt resolution should be outlined in writing. This principle complements Guiding Principle 4 in the ABA Code of Practice on transparency and accountability of banks to customers.

Mediators and state regulators should:

- provide farmers with access to simple, clear and sufficient information about the mediation process
- provide farmers with advanced notice of mediation proceedings and the roles, rights and responsibilities of parties
- ensure robust review and complaint mechanisms are in place and clearly communicated to farmers so that they can address any concerns with the FDM process.

Lenders should:

- communicate the availability of FDM to farmers at relevant times across the life of the loan
- make farmers aware that FDM is available and will remain available to the farmer despite any early engagement activities
- provide required documentation to the farmer in a timely manner (including documents requested by the farmer relevant to their interaction with their lender that may assist in preparing for debt resolution activities)
- provide covering letters with details of support services, including the RFCS and state regulator, when issuing FDM notices

- be aware of accessibility issues or language barriers and take reasonable steps to ensure information is provided in a suitable format for the client
- have a consistent point of contact to communicate with the farmer and their advisors
- encourage farmers to obtain independent legal and financial advice and professional representation to support them before and during the mediation process, recognising that legal representation is not essential and mediation could still proceed if the farmer declines representation.

Each state has their own requirements for provision of information to farmers. Principle 4 complements these existing provisions by providing high-level guidance on how parties can ensure information is clear and accessible.

State regulators, lenders and support services should apply this principle by providing accessible online publications and being available to talk to farmers about any concerns they may have about FDM.

Box 4 Pre-mediation conferences

If offered, pre-mediation conferences provide an opportunity to ensure farmers are adequately prepared for mediation. The process and requirements should be clearly articulated by the mediator to all stakeholders, and potentially give the parties prior knowledge of issues likely to be discussed. Pre-mediation conferences can assist farmers and lenders to:

- understand the scope of the issues the parties wish to resolve in mediation
- undertake a range of activities to ensure that all participants are making an informed decision to participate in the mediation
- understand the scope and extent of information required
- understand what their participation entails, including costs involved
- ask any clarifying questions.

Principle 5 – Farmers should seek appropriate support and independent professional advice

The efficiency and effectiveness of early engagement and FDM is improved if farmers receive appropriate professional advice and support. This may include the farmer seeking professional support before and/or during FDM.

This principle seeks to ensure that a farmer is not disadvantaged by a lack of knowledge, understanding, experience or support in the process of resolving a farm debt issue. The lender may have extensive experience in FDM, but the farmer is likely to be facing this situation for the first time. Farmers need to be fully informed about the process and how it relates to their situation as soon as possible.

This principle acknowledges the role of funded services in providing support to farmers undertaking FDM, particularly the RFCS (located in 12 predefined service regions across Australia) and legal aid services (currently funded for farmers engaged in the mediation process in Queensland). The RFCS bring a wholistic, coordinated approach between all service providers, the farmer and the lender to maximise positive outcomes.

The parties' advisors are responsible for preparing their clients for mediation. Advisors must be appropriately qualified to provide advice, have sound financial skills and a clear understanding of the mediation process. When seeking independent legal advice, the farmer should consider the qualifications, experience, fee structure and expertise of the advisor.

Box 5 Professional advice and support

When seeking support and independent advice, farmers should:

- consider the qualifications, experience and expertise of the advisor, noting that receiving advice from persons that are not appropriately qualified may lead to poor outcomes for the farmer
- provide as much detail as possible about their situation to assist support providers and organisations understand how issues can best be addressed.

When offering support, lenders should:

- promote their policies, programs and practices to support customers during times of financial difficulty
- encourage farmers to contact the RFCS or other appropriately qualified professionals for information if financial difficulty arises (including solicitors or Legal Aid, advisors and accountants)
- undertake relevant training to ensure they are equipped to recognise debt issues early, evaluate options and help negotiate outcomes at an earlier stage
- provide financial assistance to farmers to obtain independent professional advice, on a case-by-case basis based on specific circumstances (such as compassionate grounds).

Principle 6 – FDM should be conducted on an even playing field

This principle recognises the gap that can exist between farmers and lenders in terms of their financial capacity to pay for and attend mediation and obtain advice, and their understanding and experience in mediation processes. Parties can work together to ensure that, to the extent possible, farmers and lenders are operating on an even playing field when participating in farm debt resolution activities.

Careful consideration should be given to the composition of attendees at a mediation session to ensure both parties are able to express their views freely, and with the aim of all attendees participating constructively. Lenders should have one or 2 experienced representatives present. Likewise, farmers may wish to invite an advisor or rural financial counsellor to participate and assist them with the negotiations. When lenders or farmers invite lawyers to the mediation, it can reasonably be expected that the other party is likely to decide to engage lawyers as well. Where possible, all relevant parties should attend the mediation onsite to avoid the potential need for external discussions or approvals outside of the mediation forum.

FDM should take place in a central location close to the farmer's address (such as the nearest regional town centre). In-person mediations are preferred, but if this prevents participation, then alternate formats such as teleconference and videoconference should be considered. These alternative formats must be agreed by both parties and there must be arrangements to overcome any technological barriers. Regulators should have clear policies about the use of mediations carried out remotely, to avoid confusion or delays.

Mediation conducted outside an FDM scheme should closely adhere to the protections offered to farmers under FDM. Lenders should:

- use an independent and appropriately skilled mediator
- encourage farmers to seek appropriate professional advice
- make it clear to the farmer that it does not replace the option of FDM
- include clear and transparent reporting to ensure clarity of expectations by all parties.

The Victorian Government currently subsidises the costs of FDM for both parties, and their 2017–2018 evaluation of the scheme showed this subsidisation to be highly effective in encouraging farmers to participate in FDM.

Box 6 Online mediations

In the case of some online mediations, the primary producers were able to attend an RFCS regional office and sit with their rural financial counsellor. This saved travel and accommodation costs, and made the clients feel more comfortable.

Mediators can mitigate some limitations of remote FDM by explaining the use of remote mediation to the farmer at the pre-mediation conference and suggesting that:

- everyone in the room should be visible on screen
- everyone in the room should identify themself at the start and when speaking
- if the screen is on one person, that person should state to whom they are speaking.

Principle 7 – All parties are expected to act in good faith

All parties are expected to undertake mediations honestly, cooperatively and with sincere intentions to achieve an outcome. This includes:

- the absence of unconscionable conduct such as dishonesty or fraud
- the willingness to consider the options proposed by either party and to put forward options for consideration
- the intention to resolve issues speedily and efficiently.

Mediators should remind both parties about the need to act consistently with their obligations of good faith under common law and relevant state legislation. Mediators should also encourage parties to negotiate, communicate, disclose any conflicts of interest and consider a range of options.

In deciding whether a mediation session should continue, mediators must consider factors such as whether the parties are negotiating in good faith and are able and willing to participate. The duty to act in good faith does not prevent a party from withdrawing from the mediation, if appropriate, or require that agreement be reached or that a particular outcome is achieved. In some states, considerations of good faith are also relevant to the decision to grant exemption or prohibition certificates.

This principle does not seek to limit the principles of good faith under common law or to impose limitations on legislative authority of the mediator to certify that participation was in good faith.

Box 7 Acting in good faith

As a guide, a non-exhaustive list of examples of conduct and behaviours generally consistent with farmers and lenders acting in good faith include:

- acting reasonably and fairly throughout the mediation process
- disclosing information in a timely manner
- providing sufficient notice or reason for failure to attend a mediation
- ensuring that the person attending a mediation on behalf of a party has the necessary authority
- treating all parties respectfully
- having an open-mind and willingness to consider the position and options generated by the other side
- proposing options for resolution and discussing their position in detail
- explaining the rationale behind an offer of settlement or the refusal of the other party's offer
- being faithful to any agreement reached in the mediation.

More information

Learn more about farm debt mediation in:

- New South Wales
- Victoria
- Queensland
- South Australia
- Western Australia.

Learn more about the Rural Financial Counselling Service or phone the Rural Financial Counselling Network National Information Line on 1300 771 741.

For mental health support, call Beyond Blue on 1300 224 636. If you need crisis support or are thinking about suicide, call Lifeline on 13 11 14.

Glossary

These definitions are for the purposes of this guide only and do not take the place of definitions or other provisions under relevant legislation.

Term	Definition
early engagement	Activities undertaken between a farmer and their lender to address emerging debt issues, applied when financial difficulty arises and prior to any FDM occurring.
enforcement action	Action taken by a lender to enforce a farm mortgage, including, for example: (a) taking possession of the property under the mortgage (b) exercising a power of sale under the mortgage (c) giving a statutory enforcement notice.
farm	Land on which a farmer engages in a farming operation.
farm debt	A debt incurred by a farmer for the purposes of funding a farming operation that is secured wholly or partly by a farming property.
farm debt issue	Anything that causes or risks a deviation from the agreed terms of a farm debt loan agreement.
farm debt mediation	A structured negotiation process between a farmer and their lender to resolve a farm debt issue, carried out under a relevant state-based scheme. The process uses an independent mediator to assist the farmer and lender to communicate effectively so that workable solutions are identified and formalised in an agreement.
farm debt resolution activities	All activities, both formal and informal, that involve attempts to resolve farm debt issues. This includes early engagement activities and FDM.
farmer	A person (whether an individual person or corporation) who is solely or principally engaged in a farming operation.
financial difficulty	The position a farmer is in when a loan is either in distress or default.
good faith	Requires parties to an agreement to exercise their powers reasonably and not arbitrarily or for some irrelevant purpose. Certain conduct may lack good faith if one party acts dishonestly or fails to have regard to the legitimate interests of the other party.
lender	Financiers such as banks or other providers of finance who provide loans to farmers.
loan in default	Failure to perform an obligation that, under the terms of the mortgage, is a ground for enforcement action.
loan in distress	When financial stress arises that may impact a mortgagee’s ability to perform obligations under the farm mortgage.
pre-mediation conference	An opportunity for parties to discuss matters relating to an upcoming FDM to be better prepared for mediation (also known as a preliminary conference or pre-mediation discussion).
Rural Financial Counselling Service (RFCS)	Jointly funded by the National Emergency Management Agency (NEMA) and state governments, the RFCS provides free, independent and confidential financial counselling to farmers, primarily those experiencing, or at risk of, financial difficulty. Rural financial counsellors are qualified professionals who can provide tailored support. While they do not give advice relating to agribusiness, law, family issues, mental health or financial advice, they can refer you to other professional services as part of their wholistic approach.