

Detailed design of the FDM regime

No.	Description
1	<p>Counterparty response to a proposal to trigger mediation</p> <p>Consistent with the NSW Act, we are recommending that the counterparty (whether the farmer or a secured creditor) will have 20 working days to decide whether they wish to mediate. The consequences of the counterparty deciding not to mediate would be:</p> <ul style="list-style-type: none">• for the farmer, a prohibition on the lender from enforcing the security interest for six months; or• for the lender, the ability to take enforcement action.
2	<p>Impact on unsecured creditors</p> <p>We also recommend where an unsecured creditor takes enforcement action (e.g. successfully applies to the High Court to appoint a liquidator) that the bar on secured creditors will be lifted. This is important to avoid prejudicing the legal rights of secured lenders while other creditors are able to access the assets of the farmer. It will also protect the overall integrity of the insolvency system.</p> <p>This approach will also serve to protect Crown revenue. The Commissioner of Inland Revenue is the most frequent applicant to the High Court for the appointment of liquidators, by far.</p>
3	<p>Timing of the mediation process</p> <p>We are recommending that the mediation will be required to take place within a three month period. The mediation period would come to an end at an early date if a binding agreement is reached earlier, or the mediator concludes that an agreement is unlikely to be reached.</p> <p>The mediation period could be extended by agreement between parties where the mediator determines that farmers need more time to resolve internal issues or consult with relevant parties within the business.</p>
4	<p>The process for appointing a mediator:</p> <p>If a farmer and a lender agree to enter into mediation, the farmer must nominate the mediator at the time of agreeing to participate. A register of accredited mediators will be maintained by the administering body. If the lender rejects the nominee, the farmer must nominate a panel of at least three other mediators from which the creditor must agree to appoint one.</p>
5	<p>Exclusion of personal liability of mediators</p> <p>We propose that mediators will not be liable for the actions they take, in good faith, for the purpose of performing their role.</p>
6	<p>The mediator's independence</p> <p>We propose that mediators be required to be independent of all parties to a dispute. This will include a requirement for mediators to decline appointments where they have any conflicts of interest (including perceived conflicts of interests) which might undermine their ability to perform their</p>

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7	<p>Confidentiality, information gathering, and formality</p> <p>We propose that the proceedings at mediation will be confidential and that nothing said, whether verbally or in writing, during the course of a mediation process will be able to be used as evidence in a court. This is intended to enable both farmers and lenders to speak freely with each other without needing to be concerned that their conversation or any admissions will be used as a basis for later legal action.</p>
8	<p>Representation and assistance at the mediation</p> <p>We consider that both parties to a mediation process be able to bring any representation or support persons they consider they need.</p> <p>There are arguments that prohibiting legal representation would allow a mediation to proceed more smoothly and without a focus on the strict legal rights of the parties. However, lenders could simply choose for their representative at the mediation to be a lawyer, thereby bypassing this restriction and potentially creating an imbalance between the parties.</p> <p>Barring legal representation could also raise <i>New Zealand Bill of Rights Act</i> and natural justice issues.</p>
9	<p>Cooling-off period</p> <p>In recognition of the fact that farmers will sometimes be participating in mediations under a great deal of emotional and financial pressure, we propose that farmers be given a two week window to reconsider any agreement reached at mediation. Lenders will not have a cooling-off period.</p> <p>This will allow farmers the opportunity to obtain any further advice necessary (for example legal or financial advice) before they are bound by that agreement.</p> <p>In the event that the farmer wishes to reconsider any aspect of a mediated agreement they will be able to renegotiate those terms with the lender. However, having already participated in mediation once:</p> <ul style="list-style-type: none"> • the lender will not be required to participate in mediation again; and • the bar on the lender enforcing their security will no longer apply if the farmer changes their mind and decides not to proceed with the mediated agreement.
10	<p>Implementing the mediation agreement</p> <p>Lenders will be required to ensure that their legal arrangements with farmers reflect an agreement reached between the parties at the mediation.</p>
11	<p>Meeting the costs of mediation</p> <p>As is the case in New South Wales, we propose that the farmer and the lender should:</p>

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- pay an equal share of any fee charged by the mediator for the mediation; and
- meet their own costs associated with attendance and participation at the mediation (e.g. their costs of a lawyer or financial adviser participating in the mediation).

We consider that the farmer should pay half of the mediator's costs:

- to encourage a greater sense of ownership of the process and its outcome by farmers; and
 - to incentivise farmers to not use mediation tactically to defer enforcement action.
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Proactive Release