FARM DEBT MEDIATION

**OPTIONAL PREPARATION WORKSHEET**

These worksheets are intended to help farmers prepare for a creditor-initiated farm debt mediation. You may or may not find it helpful.

**Start a mediation timeline and return Form 1 within 20 business days**

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| Date *Form 1: Creditor’s Invitation to Farmer to Mediate and Farmer’s Response & Nomination of Mediator* received: |  |
| Date for completing the form by agreeing to mediate and nominating a mediator, or declining to mediate, that is 20 business days after *Form 1* notice received: |  |
| Target date for completing mediation that 3 months from the date *Form 1 Notice* received: |  |

NOTE: If the farmer decides to mediate, they must complete the Form 1 notice and return it to the creditor who sent it, within 20 business days of receipt**.**

If the Form is not returned within time, the farmer may lose their rights under the *Farm Debt Mediation Act 1994* (NSW) (FDM Act).

If an extension of time is required, the farmer or their Rural Financial Counsellor or other supporter or adviser should contact the Farm Debt Mediation Unit at the NSW Rural Assistance Authority (the Authority) E: farmdebt.mediation@raa.nsw.gov.au

**Consider obtaining independent advice**

The farmer is strongly encouraged to obtain independent advice to help decide whether to mediate, and to help them prepare for and participate effectively in the mediation.

The advantages of mediating include:

* having an opportunity to explain a situation and to hear the views of the other parties;
* having a neutral facilitator to ensure that each party has a fair opportunity to explore options and negotiate a way forward;
* participating in a process in which each party is treated with politeness and respect
* being able to negotiate outcomes that may not be available without mediation or litigation.

The Rural Financial Counselling Service (RFCS) provides a free service. Contact information for the RFCS Counsellors is on the Authority’s website in the on-line mediation kit.

The farmer may also wish to instruct a lawyer and/or accountant or other service provider or employee to represent them, or to be with them during the mediation.

The NSW Rural Assistance Authority’s Farm Debt Mediation Unit can also explain the mediation process and answer questions: E: farmdebt.mediation@raa.nsw.gov.au.

It is important that the farmer discusses their expectations about the outcome of the mediation with someone who is familiar with their financial circumstances and the range of outcomes that are reasonably foreseeable, so that they can be prepared to negotiate effectively and realistically. A list of the types of clauses included in farm debt mediation agreements is included in the mediation kit.

**Read the mediation kit**

Within two weeks of returning the Form 2 Notice to the creditor, the NSW Rural Assistance Authority will provide information about the online mediation kit to the parties.

Under the Act, the farmer must nominate the mediator. Contact details and profiles of the Authority’s accredited mediators are accessible on the Authority’s website.

A creditor cannot nominate a mediator. but must accept or reject the mediator nominated by the farmer. If a creditor rejects the farmer’s first choice, the farmer must nominate at least three other mediators. The creditor has to agree to one of those.

**Settle mediation date, time and place**

After agreement has been reached on who the mediator will be, the parties must agree the venue and date for the mediation, and how the costs of the mediation will be shared (usually on a 50/50 basis).

The mediator who agrees to mediate the matter will suggest possible venues and help the parties to settle an agreed date or dates for the mediation. Mediations are very rarely concluded in less than three hours, and can be adjourned as often as is necessary.

The mediator will manage the mediation process and report to the Authority about the mediation so that the Authority can determine whether it was a ‘satisfactory mediation’ for the purposes of the Act. A template ‘Summary of the Mediation’ form is attached to the Intake Agreement.

**Participate in the intake meeting**

The mediator will arrange the preliminary, pre-mediation intake meeting or teleconference. The ‘Intake Agreement’ and the [Mediators’ Practice Standards](https://msb.org.au/resources/documents) document notes the issues that will be discussed. These include:

(a) a description of mediation and the steps involved, including the use of joint sessions, separate sessions and shuttle negotiations

(b) information on how to provide feedback or lodge a formal complaint in relation to the mediator

(a) assessing whether mediation is suitable and whether variations are required (for example, using an interpreter or a co-mediation model in culturally and linguistically diverse communities or introducing safeguards where violence is an issue)

(b) explaining to participants the nature and content of any agreement, or requirement to enter into mediation including confidentiality, costs and how they are to be paid.

(c) identifying who is participating in the mediation and the farmers’ interests (e.g. business partners, guarantors, separated partners, legal interests in land in partnership or trust) and to what extent participants have authority to make decisions

(d) advising participants about the NMAS and how it can be accessed

(e) assisting participants to prepare for the mediation meeting including consideration of any advice or information that may need to be sought and/or exchanged

(f) referring participants, where appropriate, to other sources of information, advice or support that may assist them

(g) informing participants about their roles and those of advisors, support persons, interpreters and any other attendees

(h) advising participants about how they or the mediator can suspend or terminate the mediation

(i) confirming each participant’s agreement to continue in the mediation, and

(j) deciding venue, timing and other practical issues.

In addition, the mediator may ask the parties to disclose to each other any standard clauses that either party would like to see included in the mediation agreement.

The creditor may ask for documents before the mediation including a present financial position based on a realistic current market valuation, including livestock numbers and values, plant and equipment, cash flow budgets, work programme for crops and livestock, a map or photo of the property, and copies of the last three years’ taxation figures for the farming operation. Rural Financial Counsellors can help farmers to prepare this information and their financial analysis.

At the intake meeting a farmer can ask their creditor to provide information they might need to negotiate effectively, including information about original loan documents and alleged breaches, bank valuations of the farm enterprise etc.

Intake discussions will proceed more smoothly if the farmer has discussed the situation with their family and/or business partners and broad agreement has been reached on an approach to the mediation. If others participate in the preliminary conference, either put the call on a speaker phone or ask each participant to dial into the conference call.

It is the mediator’s responsibility to ensure that both the farmer and the representative of the creditor have authority to settle the matter on the day of the mediation.

The parties to the mediation must have authority to enter into an agreement that is binding and enforceable. If either party has a limitation on their authority, that should be disclosed during the intake meeting. For example, if a personal or business partner is unable to attend the mediation but has interests in the outcome and wishes to attend, that ought to be disclosed, as any mediated agreement may be subject to their approval. Sometimes new information emerges at the mediation that may make the negotiated outcome different from what might have been expected. It is important that the party entering into an agreement has heard all the arguments discussed.

The party participating in the mediation ought to have sufficient authority to adapt their agreement accordingly.

It is unfair to a party if another party lacks full authority to settle on the day, and it may indicate a lack of good faith during the mediation.

If another mediation is required because a party does not have the required authority, the party lacking authority is liable for all the costs associated with the attendance of the other party at another mediation session.

**Prepare well for the mediation**

Preparing well for the mediation is very important and should commence at the earliest possible time. Parties need to go into the mediation equipped with options and arguments about the issues that are likely to form the mediation ‘agenda’. Parties need to be prepared to negotiate and should think beforehand about their position and the position of the other party or parties. During the mediation the farmer and the creditor will be invited to meet with the mediator privately to discuss how the mediation is going and other matters that you wish to discuss on a confidential basis.

Preparing for the mediation may be difficult, but assistance is available from a Rural Financial Counsellor, accountant, farm consultant, or solicitor.

**Map out a negotiation plan**

It may help to map out a negotiation plan with one or more professional advisers having considered:

1. What has brought you and the creditor to this situation?
2. What are your needs and interests that must be met and what are your creditors’ interests? Note that the creditor is not obliged to offer a debt write-down.

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| **Your interests** | **The creditors’ interests** |
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1. What are the relevant facts? Past, present, future? What needs to change?
2. What are your legal and financial options?
3. What is your best alternative to a negotiated agreement?

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| What alternatives do you have if the negotiation ends without agreement? |  |
| What alternatives do you think the creditors have if the negotiation ends without agreement? |  |
| What is your best alternative to a negotiated agreement (BATNA)? |  |
| What could improve your BATNA? Can you remove constraints and improve your BATNA position?  |  |
| What is the worst alternative to a negotiated agreement? |  |
| What options exist to resolve the matter? How do these options satisfy your needs? Are they practical? Are they likely to appeal to the creditor? Develop arguments for each option. |  |

You will need to agree on a spokesperson for your options during the mediation.

Remember, you as the farmer know the facts and your position best. If you are going to take an adviser or representative into the mediation you should agree beforehand what role that person will take, and be flexible about changing your roles if you think that will be to your advantage during the mediation.

The mediator will ask you to make an opening statement at the start of the mediation. This provides an opportunity for the creditor to hear your perspective and to better understand your circumstances, and how those have evolved. Your statement should be brief and factual, and try to use neutral language. Try to map out some of the words you’ll use to make your key points so that none of the parties become defensive.

As part of your preparation for mediation, you should draw up documents showing your present financial position, details of your property including a realistic current market valuation, a list of plant and equipment with realistic current market valuation, cash flow budgets, livestock programme, cropping programme, shearing programme, a map or photo of your property and copies of the last three years’ taxation figures for the farming operation. Your Rural Financial Counsellor can help you to prepare this information and your financial analysis.

**The big event – mediation day**

Be sure that you know what to expect on the mediation day. If in doubt, contact your Rural Financial Counsellor, mediator or the Authority, and ask. The mediation will be finished sooner if you have prepared your negotiation plan. Ensure that you allow sufficient time for the mediation – sometimes up to eight hours – but the mediation can be adjourned and does not have to finish in one day. Be prepared to learn something new. Be prepared to compromise. Be prepared to accept an agreement that you can live with. Ensure any agreement is realistic.

Mediation has no set outcome but be aware that creditors are not obliged to offer concessions on the terms of the original loan agreement or debt write-downs.

Compromise means giving something up, so both parties can expect to experience some unhappiness if a compromise agreement is reached.

When planning your negotiation strategy aimed at reaching a Mediation Agreement, you may wish to consider the types of clauses to ask the mediator to include in the Agreement. Under the FDM Act the Authority’s accredited farm debt mediator is responsible for preparing the Mediation Agreement if the parties have reached agreement. The parties (with or without advice from their representatives) dictate the terms of their agreement that the mediator will write up.

If the parties are satisfied that the document sets out the main points agreed by them, they may sign it at the mediation and it can be formalised within the next 24 hours.

If the agreement is to be signed by a person representing one of the parties, the FDM Act requires that the representative have written authority to enter into the agreement.

Common types of clauses in Mediation Agreements negotiated under the FDM Act include:

Preliminaries

* the date of the agreement
* the names and roles of the parties and possibly the guarantor(s)
* that the mediation has been conducted under the FDM Act
* that the agreement is governed by the FDM Act and other NSW law
* that the agreement is intended to be binding and is enforceable
* that default of the agreement constitutes a default for the purposes of the FDM Act
* the statutory cooling off period of 10 business days, within which time the farmer may rescind the agreement in writing to the creditor (unless that period has been varied by agreement in writing)
* the mediator or either of the parties must provide a copy of the agreement to the RAA so that the RAA can be satisfied that the agreement includes the cooling off period statement
* interpretation (e.g. words in the singular includes plurals); agreement can be comprised of several documents etc

Acknowledgement

* details of the farm debt, including securities, property over which security is held, the facilities in default and the parties’ acknowledgements of any default
* acknowledgment that the rights and obligations of the parties to the primary security documents continue except as varied by the Mediation Agreement

Options/ specific agreements about future actions by the parties (these are entirely at the discretion of the parties and these options should only be regarded as an indicative range of basic options)

* amount and frequency of debt repayment
* relinquishment, listing for sale, or sale of all or part of the secured property or other assets and the manner of sale (auction, listing with real estate agent etc) and the timeframes applicable
* actions in relation to any tenancy, agistment or other agreement affecting the mortgaged property
* a life tenancy if the farmer is terminally ill or in very poor health and has no descendants or family wishing to work the farm
* actions in relation to property registered on the Personal Property Securities Register
* details of any preconditions to future actions by any of the parties e.g. to obtain legal advice in relation to the agreement; to sell or refinance the secured property
* agreement to draw up later contract, deed, specific security instrument over crops, mortgage or other instrument
* who should execute the subsequent contract, deed, mortgage or other instrument
* confidentiality (subject to the FDM Act and other law, any consent to communication about the agreement)
* consequences of default (vacating property at the request of the creditor, creditor to take vacant possession of the property etc)
* that the creditor may apply for an Exemption Certificate after the mediation (provided for under the FDM Act so not strictly necessary)
* obligation to give the creditor a copy of the listing agreement with the real estate agent
* reporting obligations (e.g. fortnightly updates to the creditor about efforts to sell property)
* effect of a failure to sell all or part of the secured property such as a reversion to penalty interest rates
* variation of the interest rates payable on the debt

Releases

* if the farmer performs all of their obligations under the agreement the creditor will release and discharge the farmer from current and future actions, suits, causes of action, proceedings, claims, costs and expenses both at law and in equity arising from their relationship up to the date of the agreement
* release in the event of the bankruptcy of any party to the agreement
* agreement to compensation, adjustment or accounting as is just and equitable amongst the parties if the agreement is breached

Costs

* that each party will meet its own costs in terms of the mediation, unless the parties have agreed that the creditor will meet the farmer’s costs.

Signatures of the parties

* the mediator may witness the parties’ signatures

**What is a “satisfactory mediation”?**

Remember that nobody can force you to sign any document or do anything against your will. However, be aware of the possible consequences if you fail to reach an agreement at mediation.

You do not have to reach an agreement at mediation to have had “satisfactory mediation”.

The Act defines “satisfactory mediation” as

*(a) a mediation that has achieved a resolution of a matter involving a farm debt, or*

*(b) a mediation that has proceeded as far as it reasonably can in an attempt to achieve a resolution of a matter involving a farm debt but has nevertheless failed to resolve the matter, or*

*(c) a mediation specified or of a class described in regulations made for the purposes of this subsection to be a satisfactory mediation.*

At the completion of the mediation the creditor will most likely apply for a certificate under Exemption Certificate under the Act on the grounds that “satisfactory mediation” has occurred.

Once in possession of that Certificate, the creditor is free to commence enforcement action at any time during the three-year lifetime of the certificate. If you have entered into a binding mediation agreement, enforcement can commence as soon as that agreement has been breached.

If you do fail to resolve your dispute at mediation, how are you going to resolve the matter? Litigation? Further negotiations? A quick sale of your farm?

**A cooling off period is mandatory**

Please ensure that a 10 business-day cooling off period statement is included in any Mediation Agreement reached at mediation, using the words approved by the Authority. The cooling off period may be waived or varies by the parties, but this is a risk that should rarely be agreed to. The cooling off period will give you time to seek legal advice regarding the agreement if you haven’t already, and to re-open the mediation to re-negotiate the agreement is you feel that is necessary.

If you decide to rescind the agreement you or your solicitor must sign the rescission notice, and if any benefits have been received during the cooling off period they may have to be accounted for.

If another mediation is required, the other party may ask you to cover the costs of that.

If you have any questions about Farm Debt Mediation or this information, please contact your Rural Financial Counsellor, a solicitor or the Authority.

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