

Chapter 4

Dispute resolution and access to justice

4.1 This chapter examines matters relating to dispute resolution and access to justice.

Farm Debt Mediation

4.2 In most parts of Australia, a primary producer with a dispute over a farm debt can seek resolution under a farm debt mediation (FDM) scheme. Creditors can also initiate FDM. FDM schemes aim to provide farmers with rights to participate in mediation before lenders can enforce their rights under a mortgage.

4.3 The New South Wales Rural Assistance Authority, which oversees the New South Wales FDM scheme, emphasised the benefits of farm debt mediation for primary producers:

New South Wales' view is that farm debt mediation is a proven and effective access to justice mechanism for farmers and creditors that has worked well in NSW for more than 22 years.¹

4.4 Ms Amanda Pullinger, policy director for retail policy for the ABA outlined the benefits of farm debt mediation in relation to addressing the power imbalance between a farmer and a bank:

One of the main benefits of farm debt mediation is that it's run by an independent mediator in a neutral environment. The farmer is able to get advice from advisers there. The process is overseen by another government authority, and so it's not the bank necessarily influencing the process. The process does help to redress that power imbalance that some people perceive.²

A national scheme

4.5 There is currently no national FDM scheme. Although there are similarities across some jurisdictions, the approaches taken across Australian states are not consistent. New South Wales, Victoria and Queensland have legislative (i.e. compulsory) schemes, South Australia has a bill before Parliament and Western

1 New South Wales Rural Assistance Authority, additional information received 25 October 2017, p. 2.

2 Ms Amanda Pullinger, Policy Director, Retail Policy, Australian Bankers' Association, *Committee Hansard*, 11 August 2017, p. 62.

Australia has a voluntary scheme. There are no formal arrangements in Tasmania, the Northern Territory, or the Australian Capital Territory.³

4.6 The Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) estimates that the combined reach of the three legislated schemes would cover approximately 77 per cent of Australia's farm businesses.⁴

4.7 Under FDM schemes, a primary producer cannot force a mortgagee to mediate a dispute. However, if the primary producer is in default, refusal by the mortgagee to attend mediation can lead to the mortgagee being prevented from enforcing its rights under the mortgage for a specified period of time (generally six months).

4.8 Under the *Farm Debt Mediation Act 2011* (Vic), if the farmer in default requests mediation and the creditor refuses to mediate (either through declining the request or failing to respond to the request within 21 days), this provides the farmer with grounds to apply to the Victorian Small Business Commissioner for the issue of a prohibition certificate. A prohibition certificate prevents the creditor from commencing enforcement action against the farmer for a period of six months.⁵

4.9 Under the *Farm Debt Mediation Act 1994* (NSW), if a farmer is in default and the creditor declines to mediate, he or she can apply to the NSW Rural Assistance Authority for a section 9B certification of exemption from enforcement action.⁶

4.10 A section 9B exemption certificate prevents a creditor from taking enforcement in relation to a farm debt specified on the certificate for six months from the day on which the creditor declined to mediate, or until the day on which the farmer and creditor enter into mediation about the farm debt.⁷

4.11 Farm debt mediation in Queensland is enabled under the *Farm Business Debt Mediation Act 2017* (Qld). The Queensland Rural and Industry Development Authority outlined to the committee:

If the farmer requesting mediation is not in default under the farm mortgage and the mortgagee refuses the mediation, there are no consequences under the act. However, if the farmer requesting mediation is in default under the farm mortgage, the mortgagee's refusal may be grounds for the farmers to

3 Australian Small Business and Family Enterprise Ombudsman, *Inquiry into small business loans*, December 2016 (released February 2017), p. 60.

4 Department of Agriculture and Water Resources, *Submission 7*, p. 12.

5 Victorian Government, additional information received 6 November 2017, p. 1.

6 New South Wales Rural Assistance Authority, additional information received 25 October 2017, p. 1.

7 New South Wales Rural Assistance Authority, additional information received 25 October 2017, p. 1.

apply for an enforcement action suspension certificate. This stops the mortgage taking enforcement action under the farm mortgage.⁸

4.12 If an enforcement action suspension certificate is issued, it remains in force for six months after the mortgagee gave the farmer a notice refusing the mediation.⁹

4.13 In regard to these three state-based suspension certificates, the ASBFEO observed:

This temporary deferral of enforcement action does not address the underlying problem for the farmer, which is the inability to meet financial obligations.¹⁰

4.14 Numerous submitters expressed support for farm debt mediation and recommended the implementation of a national FDM scheme, including the big four banks (the ANZ, the National Australia Bank, the Commonwealth Bank of Australia, and Westpac) and the Australian Bankers' Association (ABA).¹¹

4.15 ABA chief executive officer, Ms Anna Bligh made the following comments regarding the need for a national approach to farm debt mediation:

...the ABA strongly encourages this committee to consider recommending a national model of compulsory farm debt mediation to help ensure all farmers are treated fairly across Australia. Mediation can help farmers in financial difficulty to re-establish financial viability or to exit the industry with their heads held high. It is a less expensive, more accessible and quicker way of resolving a dispute than through the legal system. Currently, the process varies between states and territories, and the ABA and its members believe that a national system would provide greater certainty for farmers, especially when their properties cross multiple states.¹²

4.16 Insolvency practitioners informed the committee of their support for a national FDM scheme. For example, Mr Stephen Longley, a partner and head of restructuring at PPB Advisory stated:

In my discussion with the banks, they are just as vocal about it as us – that, if we get a national farm debt mediation, a consistent scheme across the country, and have someone monitoring that centrally, you can sit there and

8 Queensland Rural and Industry Development Authority, additional information received 11 October 2017, p. 1.

9 Queensland Rural and Industry Development Authority, additional information received 11 October 2017, p. 1.

10 Australian Small Business and Family Enterprise Ombudsman, *Submission 17*, p. 3.

11 See ANZ, *Submission 8*, p. 2; National Australia Bank; *Submission 10*, p. 3; Commonwealth Bank of Australia; *Submission 11*, p. 3; Westpac, *Submission 13*, p. 2; Australian Bankers' Association, *Submission 12*, p. 8.

12 Ms Anna Bligh, Chief Executive Officer, Australian Bankers' Association, *Committee Hansard*, 11 August 2017, p. 62.

say, 'If it's got to this point, a receivership or an enforcement – or the farmer might even appoint an administrator soon', so you have a bit of oversight in it happening. It's difficult looking back at the past and trying to fix things in the past. We have to try and sort things out in the future. This is a way of looking at it and saying. 'Here are the warning signs'.¹³

4.17 The Financial Ombudsman Service also indicated that it supports calls for a nationally consistent approach.¹⁴

4.18 Legal Aid Queensland recommended a nationally consistent FDM process be adopted which included provisions:

- a. that heads of agreement reached at a farm debt mediation conducted in one State, which considered matters relating to the farmer's default under a farm mortgage secured over a farm proper in another State, is recognised by all jurisdictions; and
- b. that the process provide that the mortgagee must produce all documents to the farmer before mediation relating to the loans and banking relationship including all documents required to be produced by the mortgagee/financier to either a court of law or the Financial Ombudsman Service should either of those institutions be required to consider farm debt matters.¹⁵

4.19 Legal Aid Queensland noted that jurisdictional recognition as proposed in the above mentioned provision (a) is contained in the *Farm Business Debt Mediation Act 2017* (Qld) and the *Farm Debt Mediation Act 2011* (Vic).¹⁶

4.20 In regard to the above mentioned provision (b), Legal Aid Queensland also observed that in order for parties to mediate in good faith, free and open disclosure of all relevant documentation by both parties is necessary. This ensures power imbalances between parties are minimised and that the basis of the legal positions of each party is fully disclosed. In this regard Legal Aid Queensland stated:

...banks and credit providers rely on legislation and contract law in order to enforce their rights against the mortgagor. In creating the contractual relationship with the mortgagor, the mortgagee is required to have complied with relevant laws and codes of conduct. The only way that a mortgagor can ensure that the mortgagee has acted lawfully is by having access to

13 Mr Stephen Longley, Partner and Head of Restructuring, PPB Advisory, *Proof Committee Hansard*, 20 October 2017, p. 30.

14 Financial Ombudsman Service, *Submission 9*, p. 5.

15 Mr Denis McMahon, Senior Lawyer, Farm and Rural Legal Service, Legal Aid Queensland, answers to questions on notice, 2 August 2017 (received 28 August 2017), p. 9.

16 Mr Denis McMahon, Senior Lawyer, Farm and Rural Legal Service, Legal Aid Queensland, answers to questions on notice, 2 August 2017 (received 28 August 2017), p. 9.

relevant documentation relating to the creation of the contractual relationship.¹⁷

4.21 The Department of Agriculture and Water Resources informed the committee that the government is continuing its process to develop a nationally consistent FDM scheme, with the intent being to provide an efficient and equitable process to resolve farm debt disputes. It advised that the government's preferred model for achieving a national scheme is through the harmonisation of legislation across the country and its implementation at the state and territory level.¹⁸

4.22 It also noted that at a meeting of the Agricultural Finance Forum in September 2014, the then Minister for Agriculture confirmed his commitment to the development of a nationally consistent scheme.¹⁹

4.23 The ASBFEO small business loans report, released in February 2017, recommended that a nationally consistent approach to FDM be introduced in order to ensure that all farmers in all states and territories have access to FDM, and reduce confusion of both small business and banks over when a small business owner can seek assistance.²⁰

4.24 ANZ noted that it seeks farm debt mediation in all cases involving agriculture customers prior to taking any action under its security documents, even in jurisdictions where FDM is not compulsory.²¹

4.25 The Department of Agriculture and Water Resources advised that anecdotal information provided by rural financial counsellors to the New South Wales Government for its 2017 review of the *Farm Debt Mediation Act 1994* (NSW) indicated that:

- the process of FDM, particularly through legislated processes, is valuable and preferable to rapid foreclosure decisions; and
- financial institutions do operate within the intent of existing farm debt mediation legislation.²²

4.26 This feedback also identified improvements that could be made to the FDM process, particularly when considering legal aspects. For example:

17 Mr Denis McMahon, Senior Lawyer, Farm and Rural legal Service, Legal Aid Queensland, answers to questions on notice, 2 August 2017 (received 28 August 2017), p. 9.

18 Department of Agriculture and Water Resources, *Submission 7*, p. 3.

19 Department of Agriculture and Water Resources, *Submission 7*, p. 12.

20 Australian Small Business and Family Enterprise Ombudsman, *Inquiry into small business loans*, December 2016 (released February 2017), p. 54.

21 ANZ, *Submission 8*, p. 11.

22 Department of Agriculture and Water Resources, *Submission 7*, p. 7.

The days of farmers negotiating 'in good faith' with their local bank representative have lapsed. In some instances, banks appear to outsource their credit/control and direct recovery to their legal representatives much earlier than previously.

While it is anticipated that banks attend mediation with their legal representatives, there have been instances where the bank's legal representatives has attended as their sole agent. This often places the farmer at a disadvantage as they have to make the decision as to whether or not to have legal representation, generally when they are in a position of severe financial disadvantage.

Legal costs incurred by banks through the farm debt mediation process should, in the spirit of the legislated process, be borne by the banks, just as the farmer would be expected to meet any legal costs they incur in supporting themselves through farm debt mediation.²³

4.27 The New South Wales Rural Assistance Authority indicated strong support for a national scheme:

Harmonised FDM legislation would benefit lenders, borrowers and other decision-makers across Australia by enabling a consistent interpretation and application of FDM legislation. This would reduce the inefficiency, inequity and costs for stakeholders of engaging with different statutory requirements, and improve equality under the law...

If FDM legislation were to be harmonised, the primary production sector and sectoral representatives could share learnings and experience, facilitating access to justice for farmers across Australia.²⁴

Committee view

4.28 The committee believes that farm debt mediation is a valuable tool that will assist in partially addressing the power imbalance between primary producers and banks, as well as facilitating access to justice.

4.29 The committee notes that the government has indicated it supports the creation of a nationally consistent farm debt mediation scheme and urges it to prioritise this task. The committee considers that such a scheme should incorporate features such as a \$10 million limit on loan amounts, recognition of heads of agreement across states, and the production of all relevant documents to the farmer by the bank before mediation.

23 Department of Agriculture and Water Resources, *Submission 7*, p. 7.

24 New South Wales Rural Assistance Authority, additional information received 25 October 2017, p. 2.

Recommendation 12

4.30 The committee recommends that the government establish a nationally consistent compulsory farm debt mediation scheme, based on the NSW model, with a \$10 million limit on loan amounts that includes the following provisions:

- that heads of agreement reached at a farm debt mediation conducted in one state, which considered matters relating to the farmer's default under a farm mortgage secured over a farm proper in another state, is recognised by all jurisdictions;
- that the process provides that the mortgagee must produce all documents to the farmer before mediation relating to the loans and banking relationship including all documents required to be produced by the mortgagee/financier to either a court of law or the Australian Financial Complaints Authority should either of those institutions be required to consider farm debt matters; and
- that refusal by the mortgagee to attend mediation results in the mortgagee being prevented from enforcing its rights under the mortgage for a minimum 6 month period.

Australian Financial Complaints Authority

4.31 The Australian Financial Complaints Authority (AFCA), a 'one-stop-shop' external dispute resolution framework, was announced as part of the 2017-18 Budget. AFCA will resolve disputes about products and services provided by financial firms, replacing the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal. It will be established as part of the Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017, and following the passage of the legislation, a not-for-profit company will be authorised as AFCA by the Minister for Revenue and Financial Services. It is expected AFCA will commence operations on 1 July 2018.²⁵

4.32 AFCA will be based on an ombudsman model and will be established by industry as a company limited by guarantee. Various categories of financial firms will be required to be members of AFCA, and members will be contractually bound to comply with AFCA's operating rules. AFCA will be required to comply with a number of mandatory requirements, including:

- that operations of the scheme must be financed by contributions made by members of the scheme;

25 Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017, *Explanatory Memorandum*, pp. 3, 9 and 65.

- that the scheme must have an independent assessor, to focus on reviewing the handling of complaints;
- that customers must be able to access the scheme cost-free;
- that the complaints mechanism under the scheme must be accessible to people who are dissatisfied with the response of a member of the scheme to their complaint; and
- that the scheme must resolve dispute in a way that is fair, efficient, timely and independent. ASIC will have regulatory oversight and undertake action where necessary to ensure that disputes are resolved in this way.²⁶

4.33 For issues related to small business credit facilities, a small business will be able to lodge a dispute where the credit facility is of an amount up to \$5 million, and will be able to receive compensation of up to \$1 million.²⁷ FOS can currently only look at small business facilities up to \$2 million, and the claim must be under \$500 000. In addition, the maximum amount of compensation FOS can award is \$309 000.²⁸

4.34 FOS advised the committee that based on data it had sought from ABARES, the \$5 million AFCA limit would cover around 99 per cent of loans in the rural sector.²⁹

4.35 FOS also noted that under the legislation to establish AFCA, the terms of reference for the body will be able to be altered in order to allow for continuous improvement to the scheme.³⁰

4.36 The explanatory memorandum provided further detail on AFCA's arrangements:

ASIC will be responsible for ongoing monitoring of AFCA to ensure that it meets the standards set out in legislation. In addition, AFCA will be subject to periodic independent reviews. AFCA will also be required to establish an

26 Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017, *Explanatory Memorandum*, p. 9.

27 The Hon. Kelly O'Dwyer MP, Minister for Revenue and Financial Services, 'Putting consumers first – improving dispute resolution', *Media release*, 14 September 2017.

28 Mr Shane Tregillis, Chief Ombudsman, Financial Ombudsman Service, *Proof Committee Hansard*, 18 September 2017, p. 20.

29 Mr Shane Tregillis, Chief Ombudsman, Financial Ombudsman Service, *Proof Committee Hansard*, 18 September 2017, p. 20.

30 Mr Shane Tregillis, Chief Ombudsman, Financial Ombudsman Service, *Proof Committee Hansard*, 18 September 2017, p. 21.

independent assessor who will assess the processes by which AFCA makes decisions.³¹

Interaction with FDM

4.37 The committee heard evidence that indicates that farmers who had been through farm debt mediation and then attempted to lodge the matter with the Financial Ombudsman Service (FOS) had been turned away.³²

4.38 Mr Philip Field, lead ombudsman for banking and finance from FOS confirmed his organisation's position to the committee:

The position to date has been that, where a matter has been through farm debt mediation, a certificate is issued at the end of that process, so we've taken the view that the matter has been through an alternative dispute resolution process.³³

4.39 However, he also advised that this may change in the future:

There's a proposal in the code of banking practice review that came out recently that the banks agree to allow unresolved farm debt mediations to come to external dispute resolution, and we're happy to work with stakeholders about implementing that.³⁴

4.40 Legal Aid Queensland observed that in its experience FOS had appeared reluctant to become involved in matters after farm debt mediation had taken place. It noted that in such instances, the internal dispute resolution process within the bank could be the only financially viable option available to a farmer with limited funds.³⁵

4.41 The ASBFEO touched on this matter and asserted that the asymmetry of power between banks and their customers was a significant problem regard access to justice. This was due to the 'sheer firepower' of legal representation banks had access to in contrast to an individual farmer in financial difficulty.³⁶

4.42 The ASBFEO also emphasised the importance of mediation being conducted in good faith and noted that this was not always the case:

31 Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017, *Explanatory Memorandum*, p. 65.

32 See for example Mr Gerard O'Grady, private capacity, *Proof Committee Hansard*, 6 September 2017, pp. 4–5.

33 Mr Philip Field, Lead Ombudsman, Banking and Finance, Financial Ombudsman Service, *Proof Committee Hansard*, 18 September 2017, p. 22.

34 Mr Philip Field, Lead Ombudsman, Banking and Finance, Financial Ombudsman Service, *Proof Committee Hansard*, 18 September 2017, p. 22.

35 Legal Aid Queensland, *Submission 6*, p. 10.

36 Ms Anne Scott, Principal Advisor, Australian Small Business and Family Enterprise Ombudsman, *Proof Committee Hansard*, 18 September 2017, p. 30.

As with everything, you'll find that there's a large proportion of mediation that are conducted correctly, and then you'll get the off on that has not been conducted correctly and not been done in good faith. This is where a lot of the asymmetry with bank-related activity is. There's a lack of constraint on practice, so it would be around how a mediation would be conducted properly. That's because at the moment, it could be that a mediation is conducted because the bank can immediately then step into enforcement action after the mediation's taken place. If the mediation is not done in good faith, done under duress and basically a take it or leave it kind of situation, then that really doesn't meet the principles of true mediation.³⁷

4.43 As a result of this, the ASBFEO recommended that if a farmer had gone to FDM and the process was not conducted in good faith, they should still have the right to go to AFCA for assistance.³⁸

4.44 Legal Aid Queensland also put forward a view on having an independent authority for farmers to approach if farm debt mediation was not satisfactory:

Legal Aid Queensland has consistently referred to the fact that farm debt mediation may not be able to obtain a satisfactory outcome for a farmer where complex legal issues are in dispute and agreement cannot be reached. In these cases, there is currently no other venue available other than a court determine these issues. Court litigation is outside of the financial capacity of most farmers to fund.³⁹

4.45 To counter these difficulties, Legal Aid Queensland recommended that where a dispute arises between a bank or other financial institution which cannot be resolved by negotiation, or at farm debt mediation, that either party is able to refer the matter to a free independent authority which is appropriately resourced with appropriately trained staff. The result from such an authority could be binding on both parties, thereby avoiding the expensive and lengthy legal battles within the court system.⁴⁰

Committee view

4.46 Based on the evidence, the committee has come to the conclusion that it is extremely important that primary producers are given options to access justice and resolve disputes with banks in a forum outside of the formal court system. Dealing with disputes in the court system is resource and time intensive, and this exacerbates

37 Ms Anne Scott, Principal Advisor, Australian Small Business and Family Enterprise Ombudsman, *Proof Committee Hansard*, 18 September 2017, pp. 31–32.

38 Ms Anne Scott, Principal Advisor, Australian Small Business and Family Enterprise Ombudsman, *Proof Committee Hansard*, 18 September 2017, p. 32.

39 Mr Denis McMahon, Senior Lawyer, Farm and Rural Legal Service, Legal Aid Queensland, answers to questions on notice, 2 August 2017 (received 28 August 2017), p. 12.

40 Mr Denis McMahon, Senior Lawyer, Farm and Rural Legal Service, Legal Aid Queensland, answers to questions on notice, 2 August 2017 (received 28 August 2017), p. 11.

the significant power imbalance inherent in the relationship between banks and their customers.

4.47 As such, the committee supports the establishment of the Australian Financial Complaints Authority as it will to some degree address the power imbalance between banks and their rural customers.

4.48 The committee is also of the opinion that farmers who have been through farm debt mediation should also have access to an external dispute resolution mechanism if the need arises.

Recommendation 13

4.49 The committee recommends that the Australian Financial Complaints Authority be able to:

- **consider disputes relating to loans of up to \$10 million and award compensation up to \$5 million, with these figures to be reviewed every 5 years;**
- **review a customer's complaint within a three year period after the completion of farm debt mediation if the customer provides reasonable grounds for review;**
- **issue new orders or make any other determination as it sees fit;**
- **subject to the provisions of the bill establishing the authority, hear and collate evidence both for its own use and the use in any court of law with jurisdiction to hear the complaint; and**
- **hear complaints about receiver's fees and charges where they are not justified on the degree of difficulty and complexity of the estate.**

The importance of good advice

4.50 Throughout the inquiry the committee considered the question of how to ensure that farmers are adequately supported and properly advised during the FDM process.

4.51 Evidence received from farmers indicated that they often found FDM to be a stressful experience, and some reported feeling pressured or let down by the other stakeholders involved.⁴¹

41 See for example evidence from Mrs Nolene Bradshaw, private capacity, *Committee Hansard*, 13 July 2017, p. 9; Mrs Catherine Stuart, private capacity, *Committee Hansard*, 2 August 2017, pp. 57–58.

4.52 The committee was informed about the work of the Rural Financial Counselling Service (RFCS), a service funded by the Commonwealth, state and Northern Territory governments. It aims to provide free financial counselling to farmers, fishing enterprises, forestry growers and harvesters, and small, related businesses who are suffering financial hardship. There are strict guidelines on what services a rural financial counsellor can offer their clients. For example, counsellors are not permitted to provide family, emotional or social counselling, or financial advice; rather, they can provide a referral service, allowing clients to obtain professional information and service in those areas.⁴²

4.53 The RFCS is comprised of 12 service providers across Australia, with approximately 100 rural financial counsellors employed in total. The counsellors are based in regional locations and can also travel to meet in person with primary producers.⁴³ Rural financial counsellors are required, at a minimum, to either hold, or achieve within two years of their employment under the RFCS, a Diploma of Community Services (Financial Counselling).⁴⁴

4.54 In regard to the effectiveness of the RFCS, the Department of Agriculture and Water Resources advised that service providers submit annual reports to the department in which they assess their performance against the program's key performance indicators. The department also performs a regular monitoring and evaluation function using data from the program.⁴⁵

4.55 The committee also received evidence about the adverse impacts of some 'non-mainstream' advisers to primary production customers in solving disputes with banks.⁴⁶ 'Non-mainstream' advisers were defined as individuals without appropriate qualifications or experience. By contrast, mainstream advisers were argued to be qualified lawyers, accountants, rural counsellors, mediators or other reputable consultants with appropriate experience.⁴⁷

42 Department of Agriculture and Water Resources, *Submission 7*, p. 6.

43 Mr Cameron Hutchison, Acting Assistant Secretary, Department of Agriculture and Water Resources, *Proof Committee Hansard*, 18 September 2017, p. 54.

44 Department of Agriculture and Water Resources, answers to questions on notice, 18 September 2017 (received 3 October 2017), p. 1.

45 Department of Agriculture and Water Resources, answers to questions on notice, 18 September 2017 (received 3 October 2017), p. 1.

46 See for example Mr Scott Couper, Partner, Gadens Lawyers, *Proof Committee Hansard*, 20 October 2017, p. 47–49. See also evidence from Mr Will Colwell, Partner, Ferrier Hodgson, *Proof Committee Hansard*, 20 October 2017, pp. 4–6.

47 See for example Mr Scott Couper, Partner, Gadens Lawyers, *Proof Committee Hansard*, 20 October 2017, p. 56.

4.56 Mr Scott Couper, a partner with Gadens Lawyers observed:

A matter of concern to us as solicitors acting in this area is the role of and the quality of some advisors to bank customers in financial difficulty. A consistent element of matters which become protracted and difficult to resolve and unfortunately require legal action is that involvement of what can be referred to as non-mainstream advisers. Their modus operandi is often not to seek mutually acceptable outcomes but rather to run interference... This invariably results in the lines of communication stopping, a loss of trust between the parties, an escalation of costs, and the loss of an opportunity to amicably resolve matters.⁴⁸

4.57 Mr Couper further elaborated on the common characteristics of cases where it becomes necessary to have recourse to the legal process to recover assets to repay debt, in particular highlighting the presence of 'non-mainstream' advisors:

Those characteristics include the bank's customer engaging persons who are not objective, professionally qualified advisers with appropriate experience. These non-mainstream advisers can sometimes have experienced their own adverse outcomes with financiers, which can cloud their objectivity.⁴⁹

4.58 Representatives from Ferrier Hodgson also detailed their experiences with non-mainstream advisers and the detrimental impact such advisers can have on the prospects of farmers in financial distress:

Unfortunately, there is a very small minority of borrowers who are unable to accept their financial position, who adopt unconventional positions and who maintain legal arguments that have no chances of success. It is usually the case that those borrowers are represented by unqualified advisers as opposed to well-credentialed lawyers, accountants or specialist debt advisers from reputable firms. Such advisers only gift false hope to those borrowers, who are understandably desperate and potentially vulnerable to such false hope. Further, the borrowers will often change advisers on multiple occasions, when their advisers failed to deliver on what they may have promised or because the borrowers themselves do not like the advice they are receiving. The outcome is often a long, protracted dispute with the bank and only leads to further costs being incurred.⁵⁰

4.59 KordaMentha also provided evidence on their interactions with non-mainstream advisers:

Our experience is that 'non-mainstream advisers' to farmers are often advising on multi-million dollar financial outcomes but these advisers have no qualifications and there is no recourse for bad advice. They are not required to hold insurance to cover losses for negligent advice...

48 Mr Scott Couper, Partner, Gadens Lawyers, *Proof Committee Hansard*, 20 October 2017, p. 47.

49 Mr Scott Couper, Partner, Gadens Lawyers, *Proof Committee Hansard*, 20 October 2017, p. 47.

50 Mr Stewart McCallum, Partner, Ferrier Hodgson, *Proof Committee Hansard*, 20 October 2017, pp.1–2.

We consider the growth in 'non-mainstream advisers' reflects the lack of access to rural financial counsellors.⁵¹

4.60 The ASBFEO highlighted the need for education, advice and early intervention in farm debt disputes to ensure that farmers are aware of all their options and are able to make informed choices at the best possible time. For example, principal adviser Ms Anne Scott observed:

If you were looking at a farm debt mediation scheme, then you would need to look at it holistically from beginning to end. One of the issues that rural counsellors have raised with us is that farmers often don't come to see them until it's too late, or they don't go to mediation until it's too late and that early intervention would be far better.⁵²

4.61 Ms Scott also emphasised that farmers may benefit from increased education around how the process of farm debt mediation works and the options available to them:

..there's an educational, 'You're not going to lose face', aspect for a farmer who feels that he or she is getting into difficulties by approaching things early rather than when things have turned to custard.⁵³

Committee view

4.62 During the course of the inquiry the committee was made aware of a number of individuals who had acted as 'non-mainstream' advisers to primary producers, providing unqualified advice which hindered the possibility of a successful resolution of the dispute.

4.63 Due to the nature of their circumstances, primary producers and their families who find themselves in dispute with their banks are often highly stressed, vulnerable and unsure of the processes to be followed. The committee is concerned that such 'non-mainstream' advisers take advantage of these farmers, and in addition to extracting money from them, behave in such a way that ultimately thwarts the prospects of the farmer and bank reaching an amicable, or at least mutually agreed upon resolution.

4.64 However, the committee also observed instances where appropriately qualified advisers were able to meaningfully assist primary producers to negotiating and mediating with their bank to reach a mutually beneficial outcome.

51 KordaMentha, *Senate Committee: Lending to primary production customers*, p. 5, (tabled 17 November 2017).

52 Ms Anne Scott, Principal Advisor, Australian Small Business and Family Enterprise Ombudsman, *Proof Committee Hansard*, 18 September 2017, p. 32.

53 Ms Anne Scott, Principal Advisor, Australian Small Business and Family Enterprise Ombudsman, *Proof Committee Hansard*, 18 September 2017, p. 32.

4.65 As such, to complement recommendation 12 (i.e. a nationally consistent FDM scheme), the committee sees the need to ensure that primary producers involved in FDM have access to the right kind of advice and support. This will ensure that farmers have adequate access to justice in resolving their dispute, and assist in combatting the asymmetry of power and resources that favours the banks. It may also mean that farmers do not become so desperate as to rely on potentially ineffective and harmful advice from 'non-mainstream' advisers.

Recommendation 14

4.66 The committee recommends that the government commit funding to train rural counsellors in mediation (or existing mediators in rural practice) to ensure that all farmers have access to appropriately qualified and experienced representatives during farm debt mediation.

