

Farm Debt Mediation

This document provides an overview of Farm Debt Mediation in Tasmania.

What is farm debt mediation?

The Tasmanian Farm Debt Mediation (FDM) scheme helps farmers who are struggling with their finances attempt to resolve issues with creditors.

The scheme provides for a structured negotiation process in which a neutral and independent mediator helps farmers and creditors to communicate effectively, to resolve matters relating to farm debts, and to formalise that resolution in an agreement.

This process is cheaper and quicker than going to court and is a way for farmers and creditors to work together to find a solution with the help of a neutral mediator.

The fundamental principles of mediation are that parties are aware of their rights, are fully prepared for negotiation and can reach agreements that satisfy their needs.

The mediator will not make decisions for the parties or impose a solution but may assist by generating options for settlement.

Once an agreement is reached, it becomes a binding contract (subject to a cooling off period).

Remedies available at mediation

The range of solutions available in mediation is very broad as they are consensual/mutual agreements between the parties.

Types of mediation

There are two types of mediation under the Act.

1. **Creditor-Initiated Mediation:** When a creditor invites a farmer to mediate.
2. **Farmer-Initiated Mediation:** When a farmer requests mediation with a creditor.

Both types follow the same procedures and timeframes.

Arranging the mediation

The farmer is responsible for making contact with a mediator that they may wish to use for mediation.

Who are the mediators?

The Farm Debt Mediation Commissioner has a list of accredited mediators. The farmer picks a mediator from this list, and if the creditor rejects the choice, the farmer must put forward three other mediators for the creditor to choose from.

Mediators are strictly neutral – they do not take sides or represent either the farmer or the Creditor. Mediators must not provide legal advice, or act as an adjudicator or arbitrator.

What are the advantages of mediating?

- Mediation is a simple, voluntary, and confidential process that is more accessible and affordable than a court process;
- It helps parties understand how each other sees, thinks, and feels about the problem;
- It may help a business relationship to be maintained as it focuses on ways forward;
- It allows identification and exploration of all issues, including those which may not be revealed through a court process, because of the application of the rules of evidence or the adversarial nature of the process;
- is strictly confidential, so privacy and commercially or personally sensitive information is not publicly disclosed.

Where should mediation take place?

Mediation works best when the parties are in a neutral place. Even if the farmer and Creditor are used to meeting in one party's office, mediation does not need to take place there. The mediator will work with the farmer and creditor to arrange the location and time for mediation.

Pre-mediation preparation

Both parties are encouraged to thoroughly prepare their case before mediation. Preparation will help the mediation to proceed smoothly. There is an Optional Preparation Worksheet on the Department of State Growth's website www.stategrowth.tas.gov.au/farm-debt-mediation.

Getting legal and financial advice prior to a mediation can be highly beneficial to getting a good outcome, even if the advisors don't participate in the mediation.

Who can be at the mediation?

The farmer may bring a solicitor, accountant, rural financial counsellor, or other adviser to the mediation. The farmer may also bring family members for support, with the approval of the mediator. An agent may represent a farmer if the mediator agrees, and the mediator may attach conditions, to prevent any disadvantage to the farmer.

The Creditor may be represented by an officer of the corporation, who may be a lawyer and may bring other advisers if the mediator agrees.

Any agent or representative who attends a mediation on behalf of a party must provide the mediator with a written authority to settle at the mediation that is signed by the party they represent.

If an additional mediation session is required because of one party's failure to give the required authority, the party that failed to give authority is liable for all costs associated with the attendance by the other party at that additional session.

What will mediation cost?

The cost usually includes the mediator's fees, mediator's out of pocket expenses such as travel, accommodation, and phone costs, together with any hire fee for the venue.

The fees charged by the Commissioner's accredited mediators are accessible on the Department of State Growth's website. Some mediator's fees may be negotiable.

Under the FDM Act both parties must share the mediator's costs equally unless they agree otherwise. Parties must pay their own costs associated with participating in mediation, although for the first 12 months of the program the Tasmanian Government is offering a financial hardship support program for farmers involved in mediation – see more details at www.stategrowth.tas.gov.au/farm-debt-mediation.

If the farmer engages an adviser to assist at mediation, a written cost-estimate should be obtained from the adviser beforehand.

What is a Mediation Agreement?

A Mediation Agreement outlines the agreement reached between the parties.

It is the mediator's responsibility to write up the parties' Mediation Agreement under the FDM Act. It should be signed by each party within 24 hours of the mediation.

Any contract, deed, mortgage, or other instrument entered into as a result of the Mediation Agreement must reflect the terms of that Agreement. A penalty applies to breaches of this requirement.

An example of what clauses are typically included in a mediation agreement are outlined in the Mediation Agreements under the Farm Debt Mediation Act (Tas) document.

What if the parties do not reach agreement?

Settlement by mediation is voluntary, and neither party can be forced into an agreement. Under the Act, the parties are required to mediate in good faith, and attempt to complete satisfactory mediation. Satisfactory mediation is defined in section 5(2) of the FDM Act.

If an agreement cannot be reached despite a mediation proceeding as far as it reasonably can in a satisfactory manner, the Creditor may apply to the Commissioner for an exemption certificate. The Creditor must satisfy the conditions set out in the Act to receive an exemption certificate. Once that certificate has been issued, enforcement action can commence.

How long does mediation take?

Mediation takes time, and every mediation will be different. Advice received from other states suggests a straightforward mediation may be worked through in three or four hours, but that parties should allow six to eight hours. The mediator may be able to give some estimation of how long typical mediations take and the time can be extended or the mediation may be adjourned to be completed on another day or days if needed, if the mediator and the parties agree.

As part of the mediation process, the mediator may meet with each party separately in a confidential, private session to explore underlying issues and discuss how mediation is progressing. Proposed settlement options are usually explored during these private sessions. The mediator will not, unless specifically authorised to do so, disclose anything said in a private session during the joint session. The mediation is confidential to those participating.

Farmer's rights and obligations under the Act

Once the farmer has received an invitation to mediate from the Creditor, they have 20 business days to respond to the Creditor, either agreeing or declining to mediate.

In rare and exceptional circumstances, the Commissioner may agree to extend this period. The farmer must advise the Commissioner in writing of the circumstances for the delay and request an extension to provide a response. If the farmer elects to mediate, the farmer must advise the Creditor in writing.

If the farmer fails to respond in writing within 20 business days, the Creditor may apply for an exemption certificate which has the effect that the Act does not apply to the specified farm debt for three years. This enables the Creditor to take enforcement action on the farm debt without penalty. The Commissioner will invite the farmer to comment on the Creditor's application before the exemption certificate is issued.

Cooling off period

There is a mandatory 10 business day cooling off period for any Mediation Agreement entered into by a farmer. The cooling off period may be amended by an agreement between the farmer and the Creditor, but it is suggested that legal advice is sought before the cooling off period is changed.

Rights during cooling off period

During the cooling off period, the farmer may serve a written notice on the Creditor to the effect that the farmer rescinds the Mediation Agreement subject to the cooling off period. The farmer, or the farmer's solicitor, must sign the notice of rescission.

Rescinding the Mediation Agreement has the same effect as not reaching an agreement and may mean that a Creditor can apply for an exemption certificate. It is suggested that legal advice is sought before these decisions are made.

Time limits for farmers

As noted above, the farmer must respond to a notice issued under the Act within 20 business days of receiving the notice.

The Commissioner considers it reasonable to expect that the mediation process will be completed within three months from the date the farmer receives an invitation to mediate.

This period can be extended by agreement between the farmer and the Creditor.

Record keeping

Both the farmer and the Creditor should keep accurate records and evidence of serving of notices, together with copies of all notices served on each other. Please ensure that any forms and other documents sent to a party have been received by that party, preferably with an acknowledgement in writing.

Types of certificates issued under the Act

- **Exemption Certificate:** Allows creditors to start enforcement action if mediation doesn't resolve the issue. This certificate states that the Act does not apply to a specified farm mortgage for three years.
- **Prohibition Certificate:** Stops creditors from taking legal action for six months if mediation has not been agreed to.

Internal review

The Act provides that a farmer or guarantor whose obligations are secured by a farm mortgage, or the Creditor may apply to the Minister for an internal review of a decision to:

- grant, or refuse to grant a prohibition certificate
- grant or refuse to grant an exemption certificate.

An application for review must be lodged on the Commissioner's approved form within 20 business days of the Commissioner's decision, or such longer period as the Minister allows.

It is highly recommended that farmers contact their local Rural Financial Counsellor, accountant and/or solicitor for advice or further information if you wish to appeal against a decision of the Commissioner under the Act.

The Minister should make a decision within 30 business days of receiving an application. The Minister may confirm, amend or substitute another decision.

Further Information

For further information about the Act please visit www.stategrowth.tas.gov.au/farm-debt-mediation or contact:

Email: FDMTasmania@stategrowth.tas.gov.au

Phone: 1800 440 026