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FARM DEBT MEDIATION

A REVIEW OF THE POSSIBILITIES
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A Discussion Paper based on a study tour of farm debt mediation programs in the United States

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1. INTRODUCTION

1.1 Background

Adjustment has always been a feature of Australian agriculture (see discussion by Stayner & Gow, 1992). However, since the mid-1960s the pressures upon Australian farmers to effect adjustments have increased considerably as the cost-price squeeze has become more acute. In the 20 years from the mid-1960s to the mid-1980s, the number of agricultural establishments in Australia declined by about 29 000 (ABARE, 1990), which is illustrative of the extent and impact of the adjustment pressures that occurred in this period.

Because of the nature of the factors that influence the intensity of the cost-price squeeze, the pressure for adjustment is seldom evenly spread across industries, regions, and farms. The impact on industries is most clearly shown during periods of low commodity prices. For example, low prices caused acute adjustment pressures in the beef industry in the mid-1970s, and the wool industry in the early 1990s. Regional effects are most commonly due to extreme climatic events, such as flood or drought. At present severe drought in parts of central and southern Queensland and in parts of northern New South Wales has resulted in extreme adjustment pressures in these regions.

Variations in adjustment pressures from one farm to another normally result from variations in costs, and the key factors in this instance are usually the level of indebtedness and the rate of interest applying to the debt. Farms with debt levels greater than 20 per cent of the total value of the business and with low income levels may at times have difficulty meeting interest payments, let alone principal instalments. For those farmers with significant debt levels their situation will be made difficult, if not impossible, should their incomes fall due to low prices or yields. When this occurs it is important that these farmers, in conjunction with their creditors, develop mutually acceptable resolutions to the situation.

While many farmers are able to negotiate successfully on their own account with their creditors, some do not have these skills and require assistance in preparing, presenting, and negotiating their cases. During the last ten years it has been recognised by governments, non-government organisations such as producer associations, and community groups that some farmers need assistance in dealing with their creditors. This recognition has resulted in the development of the Farm Assessment Scheme and Mediation Service and the Commonwealth Rural Counselling Program. A brief description of these two programs is provided below.

1.1.1 Farm Assessment Scheme and Mediation Service

This Scheme, which commenced in 1987, was established by the National Farmers' Federation (NFF) and the Australian Bankers' Association (ABA). Under the Scheme experienced agricultural consultants are employed on a case-by-case basis to carry out an independent assessment of any farm either experiencing, or likely to experience, financial difficulties. The consultant provides a report to both the farmer and the lender outlining the options for the future of the business. The costs of the assessment are shared between the borrower and lender on terms agreed before the work commences.
The objectives of the Scheme are as follows.

i. To assess the management and financial status of farms experiencing acute financial problems.

ii. To assist in locating suitable professional consultants to provide advice for a structured recovery of businesses which, without action could fail, either now, or within the foreseeable future, because of accumulating unserviceable debt.

iii. To advise farmers and lenders on the means by which the losses to all parties could be minimised.

iv. To advise on a course of action for the orderly winding up of businesses which are non-viable in the long-term.

v. To utilise appropriate available resources to reduce any individual farmer's personal trauma, and facilitate the acceptance of financial advice.

As implied by the objectives, the Scheme only operates if both the borrower and lender request and pay for the services. While none of the objectives contain specific reference to the use of mediation, the consultant may at times act as an arbitrator between borrower and lender.

1.1.2 Commonwealth Rural Counselling Program

This Program commenced in 1986 as the result of an initiative by the Commonwealth Government. Essentially the Program consists of a number of district services each run by a local group or committee with funding assistance from the Commonwealth Government, State Governments and from local sources and private firms. When introduced the Program not only represented a new service in rural areas but it also adopted an innovative model of service delivery by placing considerable management control of each service in the hands of the local community.

The main objectives of the Program are as follows.

i. To provide a counselling service to farm families under stress which:
   - involves gathering and presenting information on the financial situation of the farm business in a way which enables the family members to make better decisions about their future;
   - assists families identify the financial and adjustment options they have in light of their financial position and future farming options and encourages them to follow their chosen options;
   - identifies assistance measures or agencies relevant to individual farm families, and attempts to ensure that each family understands how to use them and encourages their use as appropriate; and
   - provides on-going support after the family has decided upon a particular course.

ii. To act as a consultant resource to the Local Advisory Group (rural counsellor's employer) where appropriate to assist with submissions, briefings and development of policy initiatives.
iii. To liaise with and provide advice to other staff of the Local Advisory Group, volunteers and community support networks within the region and other professional services.

While these objectives do not make explicit the potential for counsellors to act as mediators between borrowers and lenders, it is now quite common for some counsellors to undertake this form of activity.

1.2 What Is Mediation?

Moore (1986) defines mediation as:

...an intervention into a dispute or negotiation by an acceptable, impartial and neutral third party who has no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in the dispute.

The process of mediation may embrace some or all of the following characteristics:

• a systematic isolation of points of agreement and disagreement;
• the development of options for potential agreement;
• an ordered movement toward a final agreement;
• a 'helping' intervention which is goal-directed and oriented toward problem solving;
• a focus on a group process which examines facts, feelings and behaviour;
• an emphasis on participants' responsibility for making decisions which affect their lives;
• a flexible process which allows participants to use outside experts (for example, lawyers, accountants) in order to reach the best possible solution; and
• a process which is able to keep conflict at a manageable level.

The goals of mediation may include any or all of the following:

• to help the involved parties resolve conflict in a manner which is compatible with their abilities both to commit themselves and to follow through on an agreement;
• to identify facts and feelings which are relevant to the conflict and to establish a plan for resolving the conflict;
• to encourage the involved parties to work further on those issues which cannot be resolved in individual negotiations;
• to identify the communication patterns which emerge during the mediation, and to note the destructive behaviour which results; and
• to offer the parties an alternative to the court and legal system in resolving the conflict.
Compared with the alternatives, mediation is considered to have the following positive features (Moore 1986; Thompson 1990):

- effectiveness in resolving both factual and emotional issues;
- low cost;
- maintains confidentiality as only the parties concerned and one other person, the mediator, are involved;
- speed and ease of use;
- flexibility, the parties can 'tailor' their negotiations;
- the participatory nature of the process usually results in a strong commitment by the disputants to adhere to the agreement reached;
- the disputants maintain control over negotiations and, therefore, outcomes, rather than having a third party impose a decision;
- the process is usually able to preserve ongoing working relationships; and
- the process empowers the disputants to take control of their own situations.

1.3 Purpose of this Discussion Paper

The main purpose of this Discussion Paper is to promote the establishment of a farm debt mediation service in Australia. The information has been presented in a form so that it may be used by farmers and farmer organisations, those who lend to farmers, and professionals who may be involved in resolving disputes over farm debt, in raising an awareness of the need for a debt mediation service and in promoting the establishment of such a service.

The process of farm debt mediation was pioneered in North America in the mid-1980s. Chapter 2 provides a brief review of the development of farm debt mediation processes and services in several states within the United States. In some of these states the farm debt mediation services have already been reviewed and, where available, summary results of these reviews are provided.

Chapter 3 begins with a description of the changes that have occurred in Australia in the relationship between farmers and their creditors (especially financial institutions) in the last decade. It is suggested that these changes have resulted in a change in the general nature of the relationship between farmers and financial institutions and that, as a result, conflicts will sometimes occur that may not be readily resolved by traditional means. An alternative to the traditional means is mediation and the process of mediation is discussed in some detail in the balance of this chapter.

It is proposed that farmers and their creditors who are considering entering mediation should spend some time in preparing themselves. In Chapter 4 the matters each party should give thought to prior to mediation are identified and discussed. Finally, in Chapter 5 the benefits of farm debt mediation are identified and the application of the process in an Australian context discussed along with some concluding comments.
2. FARM DEBT MEDIATION IN THE UNITED STATES: A BRIEF REVIEW

2.1 History of Development

The severe rural crisis in the United States during the early 1980s created pressure on the American farm sector to consider innovative ways to deal with the escalating number of both farm and bank business failures. Two states, Iowa and Minnesota were the first to launch farmer-creditor mediation services. In Iowa a number of community leaders representing farmers, lawyers and creditors, created a non-profit organisation to provide mediation services, while in Minnesota, the Department of Agriculture's Extension Service sponsored a pilot mediation program. As both of these commenced as voluntary programs, this left potential participants with the option of not having to comply with the outcomes of the mediation process. Both states soon legislated for mandatory mediation, which required that creditors participate in mediation with farmer borrowers before they could foreclose, or commence legal action on non-performing loans.

By late 1986 farmer-creditor mediation services had been established in Alabama, Iowa, Kansas, Minnesota, Mississippi, Nebraska, North Dakota, Oklahoma, South Dakota, Texas, Wisconsin, and Wyoming (Thompson 1990). The development of these programs was assisted by input from specialist organisations which provide dispute resolution services. Most of the newly established services were voluntary in nature. Around 90% of cases were successfully resolved for both mandatory and voluntary programs (Thompson 1990). Some were established within state government departments, for example, Agriculture, Farm Extension Service, and Attorney-General’s departments, and others within community-based organisations such as religious groups.

At the federal level, the Farmers’ Home Administration (FmHA) — the United States’ counterpart to the Australian Rural Adjustment Scheme — ruled that it did not have to participate in state legislated mediation services.

The Agricultural Credit Act of 1987 was enacted at the federal level in order to overcome this anomaly. This Act provided for matching federal funds of up to $500 000 to assist the development of statewide mediation programs. It also required that major financial institutions serving agriculture (including the FmHA and Farm Credit Services) make a reasonable effort to contact and encourage creditors to participate in a debt restructuring plan; to offer delinquent borrowers a chance to participate in mediation or a ‘voluntary meeting of creditors’; and finally, in states where no mediation program existed, the FmHA to begin a program of engaging contractors to provide mediation services. By late 1989, eighteen states had certified, federally-funded programs and arrangements had been made with contractors to provide mediation services in an additional ten states.

Early in 1988 when the program was formally implemented, the FmHA faced a daunting situation: 85 000 delinquent borrowers and another 33 000 in an ‘inactive’ status such as bankruptcy or foreclosure. The loan portfolio of the delinquent FmHA borrowers totalled $11.4 billion out of the total FmHA portfolio of $26 billion (Riskin 1991).
2.2 How State Farm Mediation Programs Work

In addition to the federal laws, there are state laws governing mediation, which vary from state to state. In most of the states which have mediation programs, a creditor is required to notify a farmer that mediation services exist before the creditor can take formal legal action to foreclose on a loan. The farmer usually has a limited period of time to request mediation or waive the opportunity to use the service. If the farmer requests mediation, the mediation service contacts the farmer to obtain a complete list of creditors and suggests the steps the farmer should take to prepare for mediation. The mediation service then assigns one or more mediators to the case.

Farmers and creditors in some states have the right to choose whether or not they will participate in mediation. In those cases in which mediation is to occur, a mediator or mediator team is selected and all known creditors are advised that a mediation process is being started. If a meeting is scheduled, the parties are then informed of the time, place and nature of the mediation process. Ground rules are set to ensure that the meetings are productive.

In some states, farmers are assisted in preparing for mediation, and a team of three 'negotiators' are assigned to negotiate on behalf of the farmer. The communication processes involved in the actual mediation process are outlined in Section 3.

The flow chart presented in Figure 2.1 reflects the steps followed in the Nebraska Farm Mediation Program. However, the process is similar in the other states. If no agreement can be reached within mediation, both parties are free to resume the legal options which are available to them for further action.

2.3 Success of Farm Debt Mediation

Many of the state mediation programs have been reviewed in an attempt to quantify the success of mediation in resolving disputes between farmers and their creditors. The results of four of these reviews are summarised below.

2.3.1 North Dakota

Baltezore et al., (1990) in a study of the North Dakota Agricultural Mediation Service, found that generally the 180 farm borrowers who were surveyed had a friendly relationship with their creditors in mediation, but they had doubts about their creditors' flexibility. Most knew what mediation was about, but were fearful of the process. The main reason they participated in mediation was in the hope that a quicker and more private settlement would be reached than would be likely to occur if they were forced into bankruptcy. The borrowers rated mediation as a good way of resolving financial problems, and generally believed that the mediation procedure was fair.

The 250 creditors who were surveyed in the study also perceived their relationship with their borrowers as friendly, but generally doubted their flexibility. They felt confident in the mediation process. In the main, they participated in the process because the borrower had requested it. Creditors rated mediation less favourably than borrowers as a way to resolve financial problems. Most of the borrowers and creditors who had participated in mediation had reached a settlement.
FIGURE 2.1: Farm mediation flow chart.

- Party calls or writes requesting mediation
- Mediation request form mailed to party
- Request form returned to mediation service
- Notification of the availability of financial analysis
- Potential parties notified of request to mediate

- 20 days
  - Parties consent to mediate
  - Parties contacted to set up mediation meeting
  - Mediation meeting notice sent to parties
  - Financial analysis completed
  - Initial mediation meeting conducted
  - Further sessions as necessary and desired
  - Agreement reached

- 60 days
  - Parties refuse to mediate
  - Follow-up refusals and no responses
  - No mediation
  - No agreement reached

Source *Farm Mediation and Debt Restructuring in Nebraska*, Nebraska Dept of Agriculture (Undated)
At the time that Baltezore et al. undertook their study, the North Dakota program had approximately 1400 requests for mediation. Fifteen per cent of these cases were still open. Of the 85 per cent which were resolved, half of these were solved eventually without mediation. Of the half which went to mediation, 65 per cent ended with a formal agreed settlement.

2.3.2 Minnesota

Mold and Pederson (1989) conducted a study of Minnesota's program, and found that in that state during the period from March 1986, (when the program began) to August 1989, creditors had sent 15,000 mediation notices to farmers, and 7400 farmers had requested mediation. Of those that progressed further into some action, 783 cases had been settled prior to mediation, 2666 ended in no agreement, and 2803 cases concluded with agreements.

The Minnesota program which is run by the Minnesota Department of Agriculture has also been reviewed by that Department. This review concluded that the program was successful and cost-effective for the following reasons:

- farmers who had participated in mediation were better equipped to make decisions on any future actions they may consider to be relevant to their particular situations;
- mediation resulted in better communication between farmers and creditors; and
- the program fostered peaceful change within communities, as the process provided a constructive process for resolving farm debt.

(Minnesota Dept of Agriculture 1990)

2.3.3 Nebraska

A review in 1990 of the Nebraska Mediation Program (which commenced in 1988) showed that of the 393 requests for mediation to that time, 86 did not proceed to mediation and 112 were resolved prior to mediation. Of the 195 cases which were mediated, 167 reached agreement. Assistance in preparing for mediation was given by the Department of Agriculture's extension service to more than half of the cases. This review also indicated that the average length of mediation sessions was 3 hours, with an average cost per participant of $60.

2.3.4 Texas

In the year ending September, 1989, the Texas Agricultural Loan Mediation Program had received 644 requests for mediation, which had led to 227 mediation cases. Of these 79 had closed successfully. The remainder were still being dealt with.
2.4 Summarising the Benefits of Farm Debt Mediation

There has been a rapid development of state farm mediation programs in the United States following the rural crisis of the early 1980s. The most significant factors facilitating this development were the willingness on the part of a majority of both farmers and creditors to participate in mediation and the provision of matching federal funds to assist the development of state programs. A further important feature of this federal funding was that it enabled the federal government to exercise some control over the quality of state programs.

Based on the experience gained across all of the mediation programs in North America, the benefits of farm debt mediation can be summarised as follows.

- Mediation introduces a neutral third party whose function is to re-establish and facilitate constructive negotiations between creditors and their farmer clients.

- Mediation provides the opportunity for a farmer to discuss his/her situation with all creditors at the same time. The development of a plan which is aimed at resolving the situation will require the agreement of all creditors.

- Mediation allows the exploration of a range of alternative solutions. No solution is binding on any of the parties involved in mediation until they sign a formal agreement.

- Mediation provides a moratorium on action by creditors, during which time an orderly communication process can be established.

- Mediation is likely to be much less expensive and take less time than legal action.

- Mediation is confidential, unlike the public record nature of litigation.

- A mediation agreement is a legal document which binds all parties to the agreement and so can take the place of a court order. If mediation ends with no agreement, all parties retain their rights of resort to legal action.

- Mediation provides an environment in which the parties can consider and accept or reject proposals. They remain in control of any decisions made.

- Mediation attempts to create a co-operative environment rather than an adversarial environment which exists in most court hearings.
3. THE MEDIATION PROCESS

3.1 Stages in the Mediation Process

While there is no formalised 'critical path' for the mediation process, a review of the North American mediation schemes revealed the existence of the following stages.

- Intake and contracting.
- Pre-hearing strategy session.
- Introductory statement.
- Information gathering
  - initial statements,
  - clarification,
  - ventilation.
- Problem identification and problem solving.
- Bargaining and negotiations.
- Agreement writing and closure.

This chronology probably represents an ideal flow of proceedings. In reality the parties are likely to move rapidly back and forth through various stages of the process.

3.1.1 Intake and contracting

Commonly, the mediation process begins when one or more of the parties to a dispute decides to ask a third party to assist in resolving an impasse situation. If only one party initiates the process, the remaining party or parties may or may not choose to participate. If both parties have voluntarily agreed to participate, they have taken a co-operative step which suggests that a win/win outcome may be achieved. This step can be seen as a type of 'contract' demonstrating that an effort is being made by the disputants to resolve their conflict.

Before parties formally agree to participate, an opportunity is given for each party to outline her/his view of the conflict. The information presented by the parties at this stage may reflect their polarised positions. The role of the mediator in this stage is to ensure that each party will have an opportunity to be 'heard', and that any agreement achieved will reflect what each party is going to be satisfied with. In addition, the mediator is there to educate the parties of the usefulness and/or advantages of mediation for resolving conflict.

3.1.2 Pre-hearing strategy session

At this stage the mediator will need to determine who is to actively participate in the mediation sessions. In addition, the mediator's suitability for the particular dispute and whether the dispute is to be mediated by one or more mediators needs to be assessed.
Other matters to be attended to at this stage will include:

• setting the time-frame for mediation;
• selection of a location for the mediation;
• determining method for data recording;
• design of a seating arrangement which will maximise communication between the parties (including significant others, for example, lawyer, rural counsellor).

Once these matters have been determined, a meeting between the parties can be arranged.

3.1.3 Introductory statement

In opening the first meeting between the parties, the mediator makes an introductory statement which:

• affirms the goals of mediation;
• explains the concepts of confidentiality and impartiality;
• sets the tone for mediation by welcoming the parties and establishing the level of formality to be used; and
• establishes the ground rules or procedure for the mediation.

In establishing the ground rules for mediation it is important that a process is established which allows the disputants to:

• freely express their feelings, needs and wants;
• control their own actions and behaviour;
• follow guidelines and accept some degree of structure (both in the mediation process, and in any resulting agreement);
• believe that they can, or may be able to, solve the dispute (even though it may look very difficult);
• feel they do not need to rely totally on an advocate (for example, legal representation/rural counsellor) for decision-making; and
• feel that they are going to be physically safe through the process.
3.1.4 Information gathering

This stage is central to the mediation process and it consists of three parts which are described below.

Initial Statements: Each disputant is asked to give his/her view of the conflict, without interruption from the other party. Ideally, each statement should be exactly that, a 'statement'. It should not be merely a reaction to charges made in an earlier statement by another disputant.

Clarifying the issues of the dispute: The mediator seeks to clarify the issues in the dispute, by asking open-ended or indirect questions. Such questions would include how the disputants feel about certain issues in the dispute. Answering these questions on feelings allows conflicting parties to share the often strong emotions that result from a conflict.

Allowing ventilation of emotions by disputants: The mediator's role in this process is to interrupt only if the level of emotion is disruptive or uncomfortable for the disputants themselves. Often the 'real facts of the matter' are revealed in an emotional environment and the mediator can aid this process by:

- helping the disputants identify the important issues in the conflict; and
- not interjecting with his/her own view of the conflict, even if it appears more sensible.

For the parties involved in mediation to be able to participate effectively it is crucial that they are adequately prepared so that they are able to contribute, at appropriate stages, information which is relevant to the mediation process.

While the information which is relevant will depend to some extent on the particular issue which is the subject of the mediation, there are a range of matters that the parties should give thought to prior to any mediation session. These matters are summarised in the following sections and have been drawn from information supplied by the Iowa Farmer-Creditor Mediation Services.

3.1.5 Farmer preparation

Farmers should consider the following matters prior to entering into mediation.

(i) Current Situation

(a) Financial

- Do you have available an accurate assessment of your current financial situation? (The minimum information you will need will be a current Balance Sheet and a Profit and Loss Statement for the last financial year).
- Have you prepared cash flow budgets for the current year and, preferably, future years? (Ideally, you should prepare three cash flow budgets for the current year based on the best, worst and most likely outcomes).
• Have you obtained an independent analysis of your current financial position? (This may be prepared by an accountant, consultant, or rural financial counsellor).

(b) *Legal*

• Have you considered the likely costs and outcomes of using the courts to resolve your problems with your creditors?

• Are you aware of the options available under the *Bankruptcy Act* and of the implications of these options for you and your family?

• Do you understand both the procedures and your legal rights should a creditor decide to resort to foreclosure and the forced sale of your property?

(c) *Relationship with Creditor*

• What is the nature of your present relationship with your creditor?

• How is that present relationship likely to influence the process of mediation?

• Given what has occurred between you and your creditor in the past, is it likely that your creditor will be willing to negotiate?

• What can you do during mediation that may help reduce any ill feeling that may exist between you and your creditor?

(d) *Family and Social*

• What are the views of your spouse and other family members on the present situation?

• Do they agree with you that mediation may provide solutions that may not be achieved by other means?

• Do the other family members feel that it is imperative that the family farm is retained in its present form?

• How will you and other family members feel if the farm is lost?

• Do you want to end the stress?
(ii) What you could do to resolve the situation

(a) Are you willing to sell the farm?

(b) If you are not willing to sell the farm is it possible to resolve the situation by other means, for example:

- Do you have off-farm assets or other private or household possessions that could be sold?
- Can you sell off a portion of the farm?
- Can you obtain additional government assistance?
- Can you restructure the debt to reduce debt servicing commitments?
- Can you borrow money from family members or friends?
- Can you cut costs, including reducing the size of the farm labour force?
- Can you increase the value of the farm's output, by intensifying production, changing enterprise mix, or introducing new enterprises?
- Can you or other family members take off-farm employment?
- Can you reduce your private expenditure, for example, contributions to private superannuation, cost of private travel, and household costs?

(iii) What you are willing to do to resolve the situation

Having considered all of the actions you could take (see (ii) above), it is then necessary to consider which of them you are willing to take. One way of doing this is to list the possible actions in rank order and then classify them as:

- willing to undertake,
- will undertake only if it is absolutely necessary, and
- will not undertake.

Such a classification sets your initial negotiation position. However, as the mediation process proceeds you may wish to adjust your negotiating position.

(iv) Your expectations of the creditor

It is very important to think about what the creditor is likely to be seeking to achieve in the mediation process and what he/she is likely to accept in developing a solution to the problem. In thinking about this it may be necessary to obtain advice from an accountant and/or solicitor.
3.1.6 Creditor preparation

Creditors are also asked to consider their position prior to entering mediation. The matters they may need to consider include the following.

(i) Resort to legal action

- Have you considered taking legal action to resolve this case?
- Would legal action be likely to result in a reduction in the risks associated with this case?
- Would legal action be likely to cause a reaction by the client that could result in an increase in your risk?
- Is it likely that the client may enter into bankruptcy proceedings?
- Is mediation likely to result in a more satisfactory solution than legal action?

(ii) Factors influencing actions taken by the client

What factors appear to influence the client's actions?

Such factors may include:

- the wish to retain the farm;
- the wish to minimise financial loss;
- the wish to avoid legal action being taken against him/her;
- the wish to avoid being forced into bankruptcy;
- the wish to protect his/her family from the effect of foreclosure and forced sale; and
- the wish to maintain social status and position in the community.

(iii) What you require of the client

Have you considered the range of actions that you may require of the client?

Such actions may include:

- reducing existing debt levels;
- selling some assets (farm and/or non-farm);
- changing the mix and/or types of farm enterprises to increase farm income;
- reducing farm costs;
- reducing personal expenditure;
- seeking government assistance; and/or
- developing a plan of action that will lead to the resolution of the problem.
(iv) Your assessment of the client

Despite the clients' financial situation, how would you rate his/her ability in each of the following areas.

- to develop and carry out a business plan aimed at reducing the severity of the existing problem;
- to manage the financial aspects of his/her business;
- to manage physical production; and
- to apply improved technology in managing production?

(v) Your relationship with the client

- What is the nature of your present relationship with the client?
- How are your feelings towards the client likely to influence the process of mediation?
- Are you able and willing to negotiate to resolve the problem?
- What can you do during mediation that may help reduce any ill feelings that may exist between you and the client?

(vi) The requirements of your organisation

- What are the views of your supervisors regarding this client?
- Do you have a clear understanding of what is required to resolve the problem as far as your organisation is concerned;
- Do you feel confident in your ability to negotiate on behalf of your organisation?
- Do you feel confident that your organisation will stand by the agreement that you negotiate with the client?

3.1.7 Problem identification and problem solving

As the facts, feelings, and behaviour associated with the conflict are elicited, the parties can define for themselves the problems that need to be resolved. The mediator's role is to help the disputants outline the potential choices they may have for resolving the conflict. After potential options have been generated, the mediator helps the disputants review the consequences of each option so they will fully understand what each entails.
3.1.8 Bargaining and negotiation

Once the disputants begin to consider seriously the options for resolving the conflict, they have entered into bargaining and negotiations. This stage in the mediation process involves a 'give and take' approach by both parties.

Bargaining usually follows a sequential order consisting of proposals, counter proposals and concessions. The ultimate goal is to find and agree on options which will satisfy the needs of all parties. It is often during this stage, however, that emotional outbursts may be triggered, requiring further intervention by the mediator to assist the parties to ventilate their concerns. It is also the stage at which an 'impasse' may be reached, and here the mediator's role is to review all of the discussions to this point and to determine whether the parties have completed each of the previous stages of the mediation process.

Once an agreement appears imminent, mediators should help the parties move from a general 'meeting of the minds' to a more specific understanding of the points on which they agree.

3.1.9 Agreement writing and closure

The mediator's role in this final stage is to clarify details so that a draft agreement can be written, and to ensure that the parties to the agreement can work to them in reality. The final agreement needs to be signed in the presence of the other party or parties. The agreement, however, is only as sound as the extent of the commitment given to it by the parties.

3.2 Factors Influencing the Success of Farm Debt Mediation

The prime function of farm debt mediators is to facilitate discussions/negotiations between the farmer and creditor so that an agreement is reached at the least possible cost. While the role of the mediator and the way this role is performed will influence the outcomes of the mediation process, there are several other factors that will significantly influence the success of the mediation process. These are:

- whether the parties have successfully resolved problems in the past;
- whether the parties concerned have a clear understanding of what is involved in the mediation process;
- whether the parties concerned are comfortable with, and are willing to accept, the role of the mediator;
- whether the parties are willing to represent themselves and are able to negotiate and make decisions in resolving the problem;
- whether the parties are aware of their rights and responsibilities in the mediation process;
- whether the parties have realistic expectations of the outcomes to be achieved and a willingness to accept compromises in achieving mutually acceptable outcomes; and
- whether there is mutual trust between the parties.
4. FARM DEBT MEDIATION IN THE AUSTRALIAN CONTEXT

4.1 The Changing Farmer-Lender Relationship

For most of the time in, for example, the last forty years in Australia, representatives of financial institutions and their farmer customers appear to have been able to manage their business dealings in a manner that for the most part suited both parties. By the late 1980s, however, some important changes had occurred in the relationship between at least some institutions and some of their borrowers, including farmers, such that there now appears to be a need to use new processes in resolving disputes between the two parties. Given the experience with farm debt mediation programs in North America, mediation appears to offer a new approach in resolving disputes between financial institutions and their farmer borrowers in Australia.

Traditionally, the relationship between farmers and their lenders in Australia has rested on mutual trust, loyalty, and respect. Most farmers did all of their banking (both deposits and borrowings) with one financial institution and there was an expectation on the part of farmers that the loyalty they showed to these institutions would be repaid during periods of industry recession. Given that farmers did tend to stay with the same financial institution for long periods, it can be concluded that the institutions did repay the loyalty that their farmer clients gave to them.

With the deregulation of the banking sector in the early 1980s this relationship that had existed for several decades began to undergo some important changes. With the increased competition in the banking sector resulting from the granting of several new banking licences, all financial institutions adopted a range of strategies aimed at increasing their market share. In this new environment there was little room for the old values of mutual trust and loyalty. Rather, the financial institutions began to operate in a manner similar to other commercial institutions in which the onus is on the customers to protect their own interests in their dealings with them. When this fundamental change began to occur, few farmers were probably aware of the ways in which the change would affect them. However, with the rural recession of the mid-1980s farmers soon learned that loyalty and trust were no longer important and what was important was to be willing to 'shop around' and negotiate to obtain the best possible arrangements regarding both deposits and borrowings.

In addition, and largely as the result of the experience of the rural recession in the mid-1980s, important changes occurred in the application of the criteria used by financial institutions in assessing farmers' loan applications. Loan applications are assessed using two main criteria:

- the value of the security offered by the borrower relative to the value of the loan; and
- the assessed ability of the borrower to service the loan (interest and principal repayments).

Prior to the experience of the mid-1980s it was common for financial institutions in assessing loan applications to place more emphasis on the security criterion than on the ability to repay. Such an approach meant that the lender could be reasonably confident of recovering the loan by foreclosure if the borrower defaulted on repayments. However, in the race for market share
that followed deregulation some financial institutions offered loans to farmers on inadequate security and with there being little chance of them being able to service the loan. Property offered as security was at times valued well above reasonable market value to enable the loan to be approved. During the rural recession of the mid-1980s land values fell in some regions which meant that the value of the property on which loans were secured often fell far short of the value of the loans. And to make matters worse, each forced sale of property forced land values lower, thus making it impossible for the lenders to recover the money owing on non-performing loans. Following this experience, the financial institutions now appear to be paying much greater attention to the borrower's ability to repay the loan and so minimise the likelihood of ever having to resort to foreclosure to recoup loan monies.

When borrowers default on loan repayments and there appears to be little chance of them ever repaying the loan, financial institutions have two main options available:

- to recoup the loan funds through foreclosure and sale of the property on which the loan is secured; or
- to negotiate an agreement which avoids resort to foreclosure but which resolves the problem of a non-performing loan.

Provided the value of the security held is greater than the value of the outstanding loan, financial institutions may, in certain circumstances, view foreclosure and forced sale as providing the best solution, at least for them. However, even for the institutions, foreclosure is not without its costs. These costs occur in the form of bad publicity leading to, perhaps, lost business, and the emotional and financial costs of effecting the foreclosure and sale. In rural areas the branch manager of the institution concerned has to continue to live in that community and the emotional costs on the manager and his/her family as well as on other staff may be very high.

For the farm family which has suffered foreclosure and forced sale the costs can be extreme. These are:

- the loss of the family property which in most instances is also the family home;
- the loss of a livelihood — they are forced into unemployment;
- the loss of confidence and self-esteem which accompanies the feelings of failure;
- the emotional and financial costs that are likely to be associated with resisting foreclosure and the forced sale of the property; and
- the negative consequences of distress on children and family relationships.

Because of the costs to both parties which occur with foreclosure and forced sale, the alternative of negotiating an agreement is likely to be appealing to each of them. Provided both parties are in a mood to negotiate then an agreement may be reached by them without the need to introduce a third party. Most disputes between financial institutions and their borrowers are resolved in this way. However, where the dispute has reached a stage at which the two parties are no longer able to negotiate in a constructive manner, the introduction of a third party as a mediator may be the catalyst that is needed to re-start effective negotiations.
4.2 The Limitations of the Existing Programs

Both the Rural Counselling Program, and the Farm Assessment Scheme and Mediation Service have, to varying degrees, been able to provide some form of perceived independent third party intervention in negotiations between farmers and their creditors.

It could be argued, however, that neither program has been able to provide an effective mediation process between farmers and their creditors for the following reasons.

- Only a small number of rural counsellors have been able to establish a reputation for being able to take a neutral position in respect to negotiations between their clients and creditors. Most would be perceived by creditors to be acting in the interests of the farmer client. This is to be expected, given the role of rural counsellors, and effectively prohibits them from acting as mediators.

- Personnel contracted under the Farm Assessment Scheme and Mediation Service are often perceived by the farmers concerned to be acting in the interests of the creditor(s). In any case it would appear that the prime function of the consultant is to provide both the creditor(s) and the farmer with an independent and expert analysis of the situation and recommendations regarding the actions that should be taken by each party in seeking resolutions. While the expert consultants may need at times to act as arbitrators they do not normally function as mediators.

The register of consultants who participate in the Farm Assessment Scheme and Mediation Service is maintained by the Australian Bankers' Association (ABA) and the National Farmers Federation. When advertising for 'mediators' it appears that these organisations give scant regard to applicants' abilities in dealing with the inter-personal conflict which is often associated with farm debt. Rather, emphasis is given to reputation and experience as a farm business/agricultural consultant.

It is also important to mention that the member banks of the ABA are not compelled to participate in the Scheme, nor, if they do participate, to comply with the intent of it. Indeed any individual branch or regional manager can reject all recommendations of the consultant.

- In many cases, the financial institution's representative with whom the rural counsellor/mediator and the client deal, does not possess the authority to make decisions regarding any negotiations that may occur. As this authority usually rests with personnel at higher management levels, the representative may only be able to convey the content of proposals and provide an indication of what the lender may or may not accept. Such a situation limits the opportunities for effective and constructive negotiations and creates the impression that it is the farmer who has to find solutions to the problem, not the lender.

- To date there has been virtually no research undertaken in Australia aimed at examining the relative merits of the various approaches which may be used to resolve the problems that occur between creditors and clients in regard to the non-servicing of debt. As a result, creditors tend to use traditional methods for resolving such conflicts even though these methods may result in sub-optimal solutions for both parties.
Without the existence of legislative and administrative frameworks for the conduct of farm debt mediation, Australian financial institutions are reluctant to apply the method for fear that it may result in the creation of more problems than it may solve. These frameworks are important in protecting the rights of the parties who may participate in mediation. Thus, the provision of a legislative framework by government is a necessary prerequisite to the establishment of mediation as a process for resolving problems between creditors and their clients.

4.3 Establishing Farm Debt Mediation Services in Australia

As was noted in Section 4.1, the changes that have occurred in the last decade in Australia in the relationship between farmers and the financial institutions with whom they deal have resulted in a need to look for new ways of resolving disputes over farm debt. The experience with farm debt mediation in the United States suggests that, given appropriate legislative and administrative frameworks, it should be possible to apply the process in Australia. However, successful application of the process would require a willingness on the part of those concerned to enter into mediation when conflicts occur and to abide by the agreements reached.

It is difficult to predict whether the parties concerned (farmers and their creditors) would be willing to participate in farm debt mediation if the process was established in Australia. The experience in North America indicates that it was farmers and their representatives who applied the pressure to have farm debt mediation services established. While several of the financial institutions appear to have been willing to participate in farm debt mediation (even before State legislation making mediation mandatory was passed), they do not appear to have been involved in initiating the process.

In the case of Australian farmers, it is not unusual to find that they tend to cease communication with their creditors when they have difficulty servicing their debts. Such behaviour suggests that they may be reluctant to enter into mediation. On the other hand, if farmers felt that mediation would improve their chances of negotiating more advantageous arrangements (for them) with their creditors, then they may be quite willing to participate.

In the past decade the negative reaction by the farm community to financial institutions which have resorted to foreclosure as a means of solving the problem of non-performing farm loans has increased the institutions' reluctance to use this solution. If the institutions are to avoid the use of foreclosure, the only alternative available to them is to negotiate a solution and mediation offers a process that may be employed when all other avenues of achieving a negotiated solution have failed. As a result, it is possible that creditors may be willing to give serious consideration to the use of mediation.

The idea for a farm debt mediation service in Australia has been raised on several occasions in the past eight years. One of the reasons why the idea has not been pursued more vigorously in the past was that many people felt that with the existence of the Farm Assessment Scheme and Mediation Service and the Rural Counselling Program, there was no need for a farm debt mediation service as exists in some states in the United States of America. However, the experience of these programs indicates that they do not serve as a substitute for a debt mediation service. While the Farm Assessment Scheme and Mediation Service may allow the opportunity for some mediation between farmers and their creditors to occur, the third party is usually limited to an arbitration role. In any case neither of the parties is bound by any agreement that may result from this process.

In the case of the Rural Counselling Program, most counsellors are not in a position to act as mediators between farmers and their creditors as most creditors would doubt the independence and objectivity of counsellors who attempt to adopt a mediator role. Such doubt by creditors
would be well-founded, given the objectives of the Program and the roles that counsellors are expected to undertake in respect of their farmer clients.

However, while neither of these programs is an effective substitute for a debt mediation service, the establishment of such a service would not be incompatible with them. In fact, both of the existing programs have the capacity to deliver services to farmers and financial institutions that would enhance the operation of a farm debt mediation service.

In the last twelve months several farm communities have demonstrated their support for farmers who have faced foreclosure by banks. Such demonstrations appear to have had little effect other than to deliver a strong message to the financial institution concerned. However, the message that has been delivered is one of hostility which is destructive rather than constructive in terms of finding alternate solutions to the process of evicting families from their farms. The use of confrontation by the farmer groups concerned is not only inappropriate but it is bound to fail given that the financial institutions will always have the full weight of the law on their side.

Perhaps the only viable alternative to confrontation is that of negotiation which, provided it is conducted within an appropriate framework such as mediation, may offer the opportunity to develop innovative solutions to the long-standing and continuing problem of disputes between creditors and their farmer clients.
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