
[Slide 1] IAM SYMPOSIUM

**CLIMATE CHANGE AND OTHER COMMON THEMES: RURAL DEBT MEDIATION IN
THE PACIFIC**

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Intro

1. Australians are very charming and lovely. But beware. They do have an acquisitive streak. Particularly when it comes to us kiwis. I just want to show you a video that reflects official Australian policy towards New Zealand **[Slide 2]** [play video: <https://www.youtube.com/watch?v=7xUYbI64QHI>]
2. It is enough to make a flightless nocturnal bird quite anxious. And I for one do not look good in yellow or green. But, while we still can, we do try to acquire things from them too. Which brings me to farm debt mediation. **[Slide 3]** NZ has recently passed a Farm Debt Mediation Act ("FDMA"). We plagiarised our Act almost entirely from the New South Wales legislation. Which means, if they do invade, that is one less law they will need to change.
3. It has been my great privilege to mediate a number of cases under the new FDMA. I want to talk about some of the common themes I see in those mediations, and the climate change context.
4. To set the scene, a little about:
 - (a) Farming in NZ;
 - (b) The key provisions of New Zealand's FDMA.

[Slide 4] Farming in NZ

5. Primary industries are 7.6% of New Zealand's GDP¹. Agriculture employs 6.6% of the workforce². Primary sector exports are 78% of New Zealand's total merchandise exports³. Farming is a vital part of the New Zealand economy.
6. New Zealand farms carry a lot of debt - \$62.8 billion in 2019⁴. Dairy farms hold the most debt, collectively around \$40 billion⁵. The average mortgage for a dairy farm is currently over \$5 million⁶.
7. Beyond the figures, the dynamics are deeply personal **[Slide 5]**:

Farm debt is not just a number, for the farmer or the lender. For the farmer, the debt supports not just a business, but a way of family life, a passion, a history and a commitment to the whenua [land]. For the lender it represents not merely a commercial transaction, but also a relationship on a personal level, and part of a vital connection to New Zealand's largest economic sector. A farm is often an integral part of the local economy and community.⁷
8. Farm debts go awry. Farmers can over-commit. Biohazards and compliance issues can add unexpected costs. Prices are subject to international volatilities over which neither farmers nor lenders have control.
9. The pressures, perceived and real, can be immense. And yet farmers are often the type of self-reliant and indomitable people who are the last to ask for help.

10. These dynamics can create a toxic cocktail, with the potential for tragic results. Recent US research has found that individuals in the farming, fishing and forestry occupation group have a higher rate of suicide (84.5 deaths out of 100,000) than veterans (35.3 out of 100,000)⁸. Rural suicide rates are high in New Zealand too.

Key Provisions of New Zealand's FDMA [Slide 6]

11. Against this backdrop, the FDMA came into force in New Zealand on 1 July 2020. The idea was to create a circuit-breaker in high pressure farm debt situations. A chance for folk to talk before things went too far.
12. These are the key provisions of the FDMA:
- (a) Lenders cannot take enforcement action on farm debt unless they have tried to mediate;
 - (b) Mediations are to be concluded in good time;
 - (c) Only mediators who are accredited to do so can undertake FDMA mediations;
 - (d) Parties must act in good faith;
 - (e) There is no mandate for the mediation to achieve a "result". If a lender attends a mediation in good faith, and it does not settle, the lender is free to enforce; and
 - (f) The mediations are paid for by the parties (although the FDMA provides that the lender should pay most of the mediator's fee).
13. The FDMA is administered and promoted by the New Zealand government.
14. [Slide 7] The FDMA scheme allows for Māori (indigenous New Zealanders) *tikanga* principles to inform the process of mediation, where the parties consider it fitting. What is *tikanga*?
- Māori see the world through a holistic lens where there is an overarching principle of balance. The past, present and future are interconnected and all things have a place and purpose. The spiritual and physical, tangible and intangible are all composite of a Māori worldview.*
- "Tikanga" can be described as a system of values and principles that regulate behaviours, conduct, actions, practices and procedures within a social context.⁹*
15. Mediation pick-up under the FDMA has been quite good. There have been 82 mediations initiated so far, and 27 concluded¹⁰. Numbers are expected to increase as understanding grows in the market.

[Slide 8] Common Farm Debt Mediation Themes

16. The farm debt mediations I have mediated have been across a range of farm types, with debt values ranging between \$5M and \$100M+. They have been challenging, emotional, and incredible to be part of. A privilege in fact.
17. I have seen tears, hugs, dreams dashed and new dreams built, seen folk afraid to face facts, heard of animal welfare issues, and watched strong, gnarled, hands tremble with nerves. They are difficult days. But, usually, the collective effort gets folk to a better place, be that a dignified exit, or a restructure.
18. Here are what I think are some of the interesting common themes [Slide 9]:
 - (a) Compulsion seems to be a good thing (but not just for whom you would expect) – The FDMA scheme has a level of compulsion to mediate. You might think this is aimed at the lenders, who are typically in the much stronger position, and so might not see the need to mediate. But, in my observation, the element of compulsion helps most with the farmers. Many have been avoiding the realities of their situation; working ever-more hours, whilst leaving the letterbox to overflow. Being obliged to mediate helps get the farmers to a conversation they need to have;
 - (b) There is actually no dispute – In a legal contest sense, the farmers usually have “0% air force/navy/infantry” – not a leg to stand on. The debt is always owed, interest and penalties are accumulating, enforcement rights are crystal clear. It will be a rare day that there is anything unconscionable, or otherwise unenforceable, about the underlying contracts. The WATNA dynamics for the lenders are only about reputation and enforcement costs. The key differences of opinion tend to be about what a fair level of indulgence by the lender might be in a settlement deal;
 - (c) Power imbalances are acute (but ameliorated in part by situational sensitivity) – There is no getting away from the fact that the power imbalances in these mediations are acute. The legal position, resources, and stress dynamics all heavily favour the lenders. But, in my experience, that is ameliorated in part by situational sensitivity from the lenders, and the professionals involved. To be blunt – everyone appreciates the mental health dynamic. No-one wants a part in another rural suicide. This means that participants approach these mediations with great sensitivity, and that sometimes generous (cf the legal position) compromises can be found; and
 - (d) There is a highly charged emotional dynamic – As mediators, we often work in emotionally charged environments. But these mediations are particularly so. This calls for more pre-loading of the process/preparation/information exchange, a slower/more careful pace on the day/days, more breaks, more private sessions. As mediator, you find yourself doing a lot of looping/reflecting and just listening with the farmers, much less so with the lenders. But you do

also see the classically cathartic effects of the process, as farmers let it out and have their say, before they can move on.

[Slide 10] The Climate Change Context

19. I will talk to the climate change context in two parts:
 - (a) The effect of climate change on farm debt mediations in New Zealand; and
 - (b) Lessons we might take from farm debt mediation for addressing the effects of climate change

[Slide 11] *Effect of climate change on farm debt mediations in New Zealand*

20. Particularly compared to our cousins across the Ditch, New Zealand has a mild and temperate climate. But we are nonetheless still susceptible to climate change, particularly the associated increase in severe weather events. Floods and droughts are major issues for New Zealand farmers.
21. This is an issue that weighs heavily with New Zealand farmers themselves. A 2019 report found that 52% feel their farm is currently being impacted moderately or majorly by climate change and severe weather patterns¹¹.
22. I think we can confidently predict that climate change will lead to more default risks, and more need for farm debt mediations in New Zealand. It will also add yet more stress to farmers.

[Slide 12] *Lessons we might take from farm debt mediation for addressing the effects of climate change*

23. I think there are wider lessons we can take from farm debt mediation in a climate change context. In particular:
 - (a) The power of mediation to promote conversations beyond purely legal contests. As mentioned, in farm debt mediation, in a legal contest sense, the farmers usually do not have a leg to stand on. I expect that low-lying micro-states are also unlikely to have actionable legal rights against big emitters (states or corporations). But mediation might still provide a forum for useful conversations between them;
 - (b) The utility of mediation where there are power imbalances. My sense is that, typically, the victims of climate change have much less power than those who are causing it. But farm debt mediation suggests that might not be a bar to a useful process;
 - (c) The adaptability of mediation for cultural contexts. Other cultures will have their own *tikanga*. Mediation has the flexibility to adapt to such dynamics much more readily than determinative structures. I suspect that many victims of climate change would benefit from the opportunity to express themselves in a culturally comfortable way; and

- (d) The potential for mediations which are “imposed” (by legislation or otherwise), and have an element of compulsion. What if, by treaty, and/or UN resolution, and/or domestic law, those involved in the climate change debate were obliged to mediate? What is the worst that could happen? I suspect there are real opportunities here. I would be very interested in your views.
24. [Slide 13] And finally, just to wrap up, pictures of a couple of things our Aussie mates have already acquired from us. One of them they can probably keep..

Mark Kelly,

15/11/21

¹ https://en.wikipedia.org/wiki/Economy_of_New_Zealand

² https://en.wikipedia.org/wiki/Economy_of_New_Zealand

³ <https://www.nzherald.co.nz/the-country/news/comment-primary-exports-key-to-paying-our-way/DWE4GZCEQFCWE5A4HZJTBYQJGQ/>

⁴ <https://www.nzherald.co.nz/nz/new-zealands-farm-debt-is-close-to-63-billion-a-new-bill-seeks-to-ease-the-financial-burden/S32HD2JMZE62RQX>

⁵ Ibid

⁶ Federated Farmers May 2018 Banking Survey, p5

⁷ AMINZ submissions on the Farm Debt Mediation Bill

⁸ "Farmer Suicide Rate is Concerning, but Resources Are Available" by Jordan Hildebrand, post 19 February 2018, <http://kswheat.com/news/2018/02/19/farmer-suicide-rate-is-concerning-but-resources-for-solutions-are-available>

⁹ <https://www.mpi.govt.nz/dmsdocument/41574/direct>

¹⁰ Email from MBIE to M Kelly 11/11/21

¹¹ Climate Issues Facing Farmers Sustainable Land Management and Climate Change Research Programme Prepared for the Ministry for Primary Industries ISBN No: 978-1-98-859440-8 (online) April 2019