

5 June 2019

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Farm Debt Mediation Bill

Purpose

1. We have considered whether the Farm Debt Mediation Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO21645/6.12). We will provide you with further advice if the final version includes amendments that affect the conclusions of this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching this conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression) and s 27 (rights to justice). Our analysis is set out below.

The Bill

4. The Bill establishes a Farm Debt Mediation scheme that requires creditors to offer mediation to farmers before taking civil debt enforcement actions on debt secured by way of farm property. The Bill does this by providing that any such enforcement actions are void unless backed by an enforcement certificate. Enforcement certificates are provided by the Chief Executive of the Ministry responsible for administering the Bill and can only be granted if:
 - a. the farmer declined to mediate, or
 - b. despite the creditor mediating in good faith, no agreement could be reached.
5. Any agreement reached between the farmer and the creditor in mediation is binding between the parties and can be enforced.
6. This scheme applies to all current and future farm debt.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

7. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹

¹ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

8. The overall operation of the Bill requires that creditors and farmers mediate in good faith. Any mediation requires a dialogue between the parties in which information and options are shared.
9. With respect of the farmer, failure to enter into mediation could only result in the status-quo, in that the creditor could take an enforcement action on a farm debt according to the terms of the original loan agreement. Without any disadvantage accruing to the farmer from their failure to participate in mediation, the Bill cannot be considered to compel the farmer to provide information. The Bill therefore does not limit the farmers' rights to freedom of expression.
10. However, for a creditor, failure to engage in good faith mediation would result in it being prevented from taking any enforcement action on debt secured by way of farm property. The Bill therefore effectively compels the creditor to participate in mediation. As participation in mediation will necessarily require dialogue between the parties, the creditor's right to freedom of expression is thereby limited.
11. Section 29 of the Bill of Rights Act provides that the Act provisions apply, so far as practicable, to legal persons, as well as natural persons. While many of the Act's provisions can clearly only be applied to natural persons (such as the right not to be deprived of life, at s 8 of the Act), case law exists which clarifies that legal persons may be able to enforce rights under the Act, including potentially under s 14.²
12. A limit on a right may nonetheless be consistent with the Bill of Rights Act if the limit is justified under s 5 of that Act. The s 5 inquiry asks:
 - a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - b. if so, then:
 - i. is the limit rationally connected with the objective?
 - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. is the limit in due proportion to the importance of the objective?³
13. We consider that the objectives of the Bill are important and the limitation on creditor's freedom of expression is rationally connected to the objective.
14. The Bill seeks to redress the imbalance of power that exists between creditors and farmers with respect of farm debt. Farmers' performance and financial position are vulnerable to factors outside of their direct control, such as market volatility and disease or pest incursions, which can put them in a situation of temporary impairment. Mediation provides both farmers and creditors an opportunity to constructively explore options for business turn-around, along with a timely resolution of what otherwise can be complex

² *Living Word Distributors v Human Rights Action Group Inc* (Wellington) [2000] 3 NZLR 570 (CA).

³ *Hansen v R* [2007] NZSC 7 at [123].

and drawn-out processes. It also provides farmers with an opportunity for a timely and dignified exit where few options for business turn-around exist.

15. Further, it could be argued that encouraging constructive dialogue between farmers and creditors will reduce the number of civil debt enforcement actions occurring. This could result in fewer cases of mortgagee action, increasing confidence in the rural lending sector overall, which is in the public interest.
16. Requiring that a more powerful party to an agreement mediate in good faith before enforcing their contractual rights is a proportionate means of addressing the power imbalance that exists between the parties. It does not enforce any outcome or require any specific information be provided. Requiring mediation before a party to a civil agreement can enforce their right or interest is common requirement in analogous contexts (e.g. employment). As a result, such mediations are likely to lead to faster and more expedient resolution of issues, prior to the parties resorting to more protracted legal proceedings.
17. Therefore, it is considered that any limit on the right to freedom of expression is justified under s 5 of the Bill of Rights Act.

Section 27 – Rights to Justice

18. Although the Bill contains some appeal rights to decisions that are made under administrative review processes, these do not affect a person's right to bring a judicial review action with respect to actions made under this Bill.

Conclusion

19. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

Jeff Orr
Chief Legal Counsel
Office of Legal Counsel