**FARM DEBT MEDIATION BILL 2015**

**Legislative Council, 2 December 2015, pages 2431-4**

Second Reading

**The Hon. D.W. RIDGWAY (Leader of the Opposition):** I move:

That this bill be now read a second time.

It gives me pleasure in one sense to introduce this bill, namely the Farm Debt Mediation Bill 2015. It has been some while in gestation. Members will recall that the Labor government appointed the former Liberal Premier, the Hon. Dean Brown, as their drought coordinator, I think was the role that the Hon. Dean Brown had back a few years ago during the millennium drought, in the 2006-07 period.

It was in conversations with Mr Brown some time ago, well before the last election, that he suggested we should look, from a beneficial point of view to some of our rural producers, at having mandatory farm debt mediation in South Australia. He thought it would be beneficial for negotiations between farmers and their creditors. I had that conversation some years ago, prior to the last election. Mr Brown and I thought it might be something that we should consider.

More recently, I have had some feedback from rural financial counsellors in the South-East, especially where, as members would know, we have had a particularly tough season. The last 12 months are the driest on record in some parts of the South-East. These rural financial counsellors say that on the Victorian side of the border there is mandatory debt remediation legislation in place—and there are in some other states as well—and that it works really well and that it would be beneficial to have that here in South Australia. I will go into some more detail shortly when explaining the bill.

We do have a sort of code for the Small Business Commissioner but it is not mandatory, so it is not binding on the banks, creditors or farmers to enter into it. As a couple of my farming colleagues have said to me, often this process will make people address certain financial circumstances a little earlier than perhaps they would have if there wasn't a process in place.

Of course, we have had the disastrous fires in the Mid North, and I suspect that some financial concerns will spill out of that disaster as well. It may be important to have this formal mandatory structure in place. I would hope and I suspect that in those circumstances the banks would be very considerate. Nonetheless, it is something that people who are involved in rural financial counselling and rural business support have said to me is something they are very keen to look at.

I did some preliminary consultation earlier in the year and showed the bill to a number of the banking fraternity here in Adelaide. Some were supportive and some were not so supportive. Nonetheless, I think it is important that we look at this particular mandatory framework in the light that it will give our primary producers just a bit of comfort that, if things do come to an awkward and unpleasant financial situation, there actually is a formal structure for them to use.

Federal minister Barnaby Joyce spoke at one stage about having a national farm debt mediation framework or legislation, although that has not been forthcoming as yet. Some would say, 'Why don't you wait until you have a national framework?' Well, the federal government does move a bit more slowly than the state government and we do have it in Victoria.

This is not dissimilar to the poppy situation, where we had poppies able to be grown on the Victorian side of the border but not the South Australian side, and I am delighted that the parliament has seen fit to support that. This is very similar. You will have farmers facing the same circumstances and operating, if you like, under different rules because of an old netting fence that we call the border.

Mediation is a structured negotiation process in which the mediator, as a neutral and independent person, assists the farmer and the creditor in attempting to reach agreement on the present arrangements and future conduct of financial relations between them.

South Australia has no legally enforceable bank mediation mechanism for primary producers. At present, two farm debt resolution procedures exist, including the Financial Ombudsman Service and the voluntary South Australian Farm Finance Strategy 2007, known as the strategy.

The strategy is essentially an agreement between the South Australian Farmers Federation (SAFF) and the Australian Bankers' Association (ABA) formed after a consultative process with the SAFF, the ABA, PIRSA, the Rural Financial Counselling Service SA and the Law Society of South Australia.

Of course, the Farmers' Federation no longer exists, so I am not sure of the actual status of that agreement because we now have Primary Producers SA (PPSA), so I am not sure whether that strategy is still in force. Further, it is not a legal document and does not impose enforceable contractual obligations on any party. The purpose of this document is for financial institutions, assistance authorities, rural organisations and primary producers to work together to improve farm viability and resolve financial problems.

The strategy provides for access to independent professional advice by Primary Producers, early recognition of financial problems, resolving financial problems by negotiation and voluntary mediation. Currently the Rural Financial Counselling Service SA (RFCSSA) (formerly Rural Business Services) provides farmers and other primary producers services in financial counselling and also offers a range of farm business management services to a broader range of agricultural businesses. The RFCSSA is a not-for-profit organisation primarily funded by the state and commonwealth grants until 30 June 2015, which was a few months ago. I think they have been funded on past that.

Legislation exists to facilitate farm debt mediation in New South Wales and Victoria, and the bill was introduced in 2003 in Queensland but for some reason was unsuccessful. The New South Wales relevant legislation is the Farm Debt Mediation Act 1994. The object of the act is to provide efficient and equitable resolution of farm debt disputes, and mediation is required before a creditor takes possession of a property or another enforcement action under a farm mortgage.

The New South Wales legislation establishes a process by which a creditor must not take enforcement action against a farmer until 21 days have elapsed after the creditor has given a notice indicating an intention to take enforcement action and of the availability of mediation. A farmer then has 21 days to notify the creditor that they wish to pursue mediation. Once a farmer has given notice, a creditor must not take enforcement action. There is an exemption. If a creditor refuses to mediate, a farmer may apply for a certificate of exemption from enforcement action.

The act also establishes the functions of the mediator, the process by which the mediator is selected, rules regarding representation and evidence to be presented during the mediation and the rules pertaining to a Heads of Agreement following a successful mediation. The corresponding Victorian legislation is similar to that of New South Wales with variances regarding the rules of mediation and a subsequent Heads of Agreement.

The main shortcoming of the current South Australian agreement is that it is voluntary; therefore, a bank or other creditor has no legal obligation to enter into mediation with a farmer. The farmer must rely on the goodwill of the bank or other creditor to demonstrate leniency. This is at times to the detriment of the farmer and does not promote an equitable approach aimed at achieving a positive result. The concern is that the bank or creditor will not always act in good faith or in the best interests of the farmer.

The RFCSSA is limited as it is a voluntary service that only 25 per cent of farmers in South Australia utilise. Given its voluntary nature, it is often bypassed or ignored by farmers and creditors, usually to the detriment of farmers. The RFCSSA has acknowledged this and will support proposed legislation enforcing mandatory mediation. It is worthy to note that since the global financial crisis, banks and financial institutions are less likely to lend money and increasingly likely to foreclose on a defaulting property without paying attention to individual circumstances.

Initial consultation with various stakeholders has seen support for the implementation of a legislative framework similar to that in place in New South Wales. The proposal has support from stakeholders on both sides of the mediation process. The view of the RFCSSA is that this legislation is fair and reasonable and they will support proposed legislation enforcing mandatory mediation. Primary Producers SA said the RFCSSA would be best to consult and they would support their position. However, PPSA did question whether the legislation was necessary.

It seems the views amongst banks are divided. The State General Manager of ANZ, Mr Kym Darcy, has signalled his bank would support the proposed legislation given the independence mediation offers. However, initial conversations with Regional Director of National Australia Bank in South Australia, Mr Malcolm Pridham, indicates support for the current model and nervousness that mandatory mediation may drag out the process and cause undue pressure on both parties. So, we are still in the process of consulting with the Australian Bankers' Association on this matter.

A report into the New South Wales act included surveyed data from all parties to the mediation process including farmers, creditors, mediators and representatives. Generally, the report found the act is achieving its objectives, that all participants in the farm debt mediation support the opportunity for farm debt mediation, and that farm debt mediation is cost-effective. The majority of farmers, and overwhelmingly, the majority of lenders, would use and recommend the mediation again.

The results of mediation under this act highlight the benefits of mandatory farm debt mediation, and, more specifically, 72 per cent of farmers reached a settlement. Positive settlements reported by farmers included: 37 per cent of the time farmers refinanced the debt; 27 per cent of the time the lender gave the farmer more time to pay; and 23 per cent of the time, the lender paid off part of the debt. Additionally, 60.7 per cent of the farmers felt positive after the farm debt mediation, and only 17 per cent had a negative response.

It should be noted that at a roundtable in late September 2014, federal Minister for Agriculture Barnaby Joyce flagged his intention to implement a national approach to farm debt mediation. As I said earlier, I have not been able to confirm timing and the details with the minister's office. Notwithstanding this, I believe this is an opportunity for the state Liberals and the state parliament to be on the front foot and implement some positive legislation.

I will summarise some of the key components of this bill. It is my intention to table this today, speak to it, and then certainly go out and consult more widely and obviously speak to the Minister for Agriculture and other members of the government so that we can at least have a debate next year, when parliament resumes. I will reiterate some of the key components.

A creditor who proposes to take enforcement action against a farmer under a farm mortgage must, before doing so, give written notice to the farmer. A creditor must not take enforcement action until the expiry of the period of 21 days from the day that notice is given. The notice must state that, under this act, mediation between the farmer and the creditor is available. A farmer who is liable for debt (whether or not the farmer is in default) may request mediation under this act.

A farmer who is given a notice may, within 21 days from the date the notice was given, notify the creditor in writing that the farmer requests mediation concerning the farm debt involved. A creditor who receives a request for mediation from a farmer may, by written notice given to the farmer, agree or refuse to participate in mediation in respect of the farm debt involved.

If a creditor refuses to participate in mediation with a farmer who has made a request and the farmer is in default, the farmer can apply to the Small Business Commissioner for a prohibition certificate, preventing the creditor from taking enforcement action against the farmer for up to six months.

Conversely, the creditor is entitled to apply for an exemption certificate if the farmer is in default under the farm mortgage, no prohibition certificate is in force against the creditor, and a mediation: has taken place by no settlement was reached; has not taken place due to the farmer's refusal; or has not taken place within three months after the service of the initial notice and the creditor has attempted to mediate in good faith.

The exemption certificate allows the creditor to begin enforcement proceeding and remains in force for varying periods of time depending upon the steps previously taken under the act. If the minister receives notice that a creditor and a farmer have agreed to participate in mediation, the minister must refer the details of the parties to the Small Business Commissioner for mediation as soon as practicable.

These are just some of the key elements of the bill. Given the difficult circumstances in the South-East or the Limestone Coast area, it seems that somewhere in this state each year there is a tough season and variable rainfall. I know the Minister for Environment has been baiting us on this side that we are not interested in climate change and all the other things associated with rainfall variability, but sadly we are seeing a higher variability across the state. The South-East is a good example.

It is very rare to have two poor seasons in a row. Often in those areas where there has been a very rare occurrence of two poor seasons in a row, people have some level of confidence, and banks have a level of confidence in lending quite significantly against the farm assets because there is always next year, or there will be a good season.

I think we need to make sure that we have all the tools in our kitbag for dealing with whatever circumstances may face us in the future. As I said earlier, the Labor-appointed former drought coordinator, the Hon. Dean Brown, had mentioned to me on several occasions that it was something worthwhile and we that should pursue it. Clearly, it works well in Victoria and New South Wales. Rural financial counsellors have said to me that they thought, given the circumstances of the season, we could see a number of defaults on loans in the South-East. It may be an opportunity that, if we have this framework in place and have a mandatory mediation process, it may just help all parties involved. With those words, I commend the bill to the house and look forward to further debate when parliament resumes next year.

Debate adjourned on motion of Hon. G.A. Kandelaars.