

UNIVERSITY OF WESTERN SYDNEY MACARTHUR

REPORT

RESEARCH INTO FARM DEBT MEDIATION ACT 1994

1. **Outline of project**

In accordance with the instructions given by the Rural Assistance Authority of New South Wales, the aim of the research undertaken was to:

- (a) evaluate the costs and benefits associated with the mediation process
- (b) identify the types of agreements entered into as a result of mediation and examine their impact on both farmers and their creditors, particularly the impact on rural adjustment
- (c) identify cultural changes resulting from, and seek farmers' and creditors' views of the Farm Debt Mediation Act with respect to cultural change
- (d) identify alternative means for achieving the objects of the Act, including non-legislative approaches

2. **Methodology**

2.1 Four different surveys were designed for the purposes of implementing this research project. They were the:-

- * Farmer Survey
- * Representative Survey
- * Creditor/Lender Survey
- * Mediator Survey

In relation to the farmer survey approximately 480 surveys were despatched to farmers throughout NSW based on a list of all farm debt mediations which had taken place since the commencement of the scheme through to approximately April, 1998, the list having been provided by the Rural Assistance Authority (called "the RAA"). Many surveys were returned to sender thus suggesting either that the list was inaccurate or that farmers had changed address. If the surveys returned to sender are excluded, the assumption is made that 405 surveys were received by farmers, and 87 responses received. This is notwithstanding follow-up telephone calls to as many of the non-responding farmers who could be identified and contacted. The response rate represents 21.5 percent of the sample. Given that the sample comprises all farmers who participated in farm debt mediation (called "FDM") a response rate of 21.5% is considered to be a valid one for the purposes of this research.

During the telephone follow-up of surveys, farmers expressed a number of different reasons for not responding including:-

- * the mediation was completed and the farmer wanted to put the experience behind them.
- * the farmer would not derive any benefit from changes to the FDM Act, and therefore did not see any point in participating.
- * the farmer and/or spouse were so emotionally fragile that they did not wish to revisit their experience.
- * the farmer was simply too busy to complete the survey.

With the farmer survey, a pre-test survey was conducted with a sample of 20 randomly chosen farmers. The aim of the pre-test survey was to gather information to aid in identifying ambiguities in the survey instrument itself. Five (5) responses were received and as a result of analysing these pre-test surveys, minor modifications were made to some of the questions in the farmer survey.

- 2.2 There were 27 responses to the Representative survey and the information the representatives provided about their experience in FDM indicates that the survey captured responses from almost all of the people who acted as representatives in FDM since inception. There were 14 responses to the Creditor/Lender survey, and these responses also indicate that having regard to their stated experience in FDM, almost all of the people who represented or acted as creditors or lenders in FDM responded to the survey. There were 25 responses to the Mediator survey and, as with the other surveys referred to in this paragraph, their participation rate in FDM indicates that almost all of the mediators who actually undertook FDM responded to the survey. The validity of these surveys is considered statistically sound.
- 2.3 The surveys used Likert-type rating scales, commonly used in attitude and opinion surveys, allowing respondents to express their opinions on a continuous scale of varying intensities. The surveys did not, however, permit the respondent to be undecided, but some chose simply not to respond.
- 2.4 In addition to the surveys eighty eight (88) randomly selected farm debt mediation files were provided by the RAA for general research purposes.
- 2.5 Finally, there were informal discussions with various farm debt mediators, rural counsellors, lending officers and with Kevin Ekerick of the RAA.

3. **Costs and Benefits of FDM**

Costs

- 3.1 To test views about the cost of participating in FDM farmers and representatives were asked similar questions about the cost of FDM. It should be noted that all of the representatives were farmer representatives.

3.2 The issue of cost, in the present context centres around the actual costs of participating in the mediation (legal or non-legal), the mediator's fees and legal costs saved as a result of FDM. The present section does not explore non-financial costs (eg emotional cost) or benefits.

3.3 The farmers estimated dollar cost of participating in FDM is as follows:

\$3,000 or less:	40%
\$3,000 - 6,000:	19%
\$6,000 - 9,999:	14%
\$10,000 +	25%

Farmers were relatively evenly divided as to whether these costs were acceptable, with a 7% indication in favour of acceptability.

Strongly disagree:	31%
Disagree:	12%
Agree:	35%
Strongly agree:	15%

Again, farmers are almost evenly divided as to whether they had saved or avoided legal cost as a result of FDM.

Strongly disagree:	31%
Disagree:	14%
Agree:	22.5%
Strongly agree:	22.5%

Farmers were given the opportunity to quantify costs saved as a result of FDM. Out of the respondents 32% quantified their savings, the amounts ranging between \$1,000 and \$350,000 with an average saving per respondent of \$46,444. One farmer responded with a figure of \$350,000. As the question specifically asked for saving or avoidance of legal costs, this very high figure suggests that this answer is erroneous and possibly refers to other non-legal cost savings. If that answer is eliminated, the average amount saved by farmers who quantified their savings was \$28,235. A further 4% of respondents believed that mediation had saved them money, but were not able to quantify these savings. However, 23% of respondents believed that mediation saved them nothing in dollar terms, and 23% believe that they lost money as a result of FDM. Farmers were given the opportunity to comment generally; 3 farmers reported that mediation saved them from bankruptcy, 5 reported that it had saved the farm, 1 reported that it saved embarrassment.

3.4 Farmer's perceptions of costs, therefore, are quite varied. Those who report cost savings suggested that the average saving is quite substantial. The actual cost to 59% of farmers of participating in FDM was \$6,000 or less. That there is some dissatisfaction with this cost is noteworthy, but less so when viewed in the context of the broader results of this research. It is understandable that, from the farmer's perspective, to pay anything for mediation out of very limited resources, may seem a big order. Strategies should be implemented, if feasible, to assist farmers with these costs. Options include providing a special grant of legal aid, or some one-off lump sum contribution to or subsidy of the farmer's costs, or the provision of actual legal or other assistance to the farmer, by some third party or agency. One possible way of funding this might be to introduce a levy of a nominal amount, say \$50, payable by each party to FDM. This would be

paid into a special fund perhaps administered by the Rural Assistance Authority (the RAA). Applications for lump sum assistance (say a maximum of \$500) would be means tested. If such a levy had been introduced at the time FDM commenced in NSW, the levies would have totalled approximately \$64,000 as at January, 1999. This could have provided financial assistance in the sum of \$500 to at least 128 farmers at minimal significant cost overall to the participants in FDM and no cost to the service provider.

- 3.5 The farmer's representative's views as to the costs of FDM are more positive. Eighty-two (82%) agreed or strongly agreed that their client had been saved from additional legal expense, 79% agreed or strongly agreed that the mediator's costs were acceptable and 78% either disagreed or strongly disagreed with the statement that compared to legal proceedings the mediation process is a less cost effective method of resolving the dispute. On one view, the farmer's representative's responses on the cost savings to the farmer represent a more objective view of the situation. The intensely emotional context in which FDM takes place for the farmer can easily distort their views.
- 3.6 Creditors and lenders all (100%) agreed that the costs of the mediation were acceptable and 79% agreed or strongly agreed that the lender saved or avoided additional legal expense as a result of FDM. Half of the creditors/lenders (7/14) gave comments as to the amount of money saved through FDM. Two of these responses were \$50,000, one said "between \$5,000 and \$100,000 depending on the complexity of the case" and another response said: "...the bank has saved millions of dollars in legal fees..."

Benefits

- 3.7 The benefits of FDM are very diverse and often difficult to quantify because of their subjective qualities. This section will explore benefits classified as follows:
- * Changes in debt to assets ratios
 - * Personal and lifestyle changes
 - * Communication issues
 - * Emotional and satisfaction issues

Changes in debt to assets ratios

- 3.8 Farmers were asked 3 questions designed to elicit information about whether FDM results in or contributes to changes in their overall debt/asset ratio. The questions compare debt to assets at 3 different times: 3 years prior to FDM, the time of FDM and the date of completion of the survey. Because of the possible complexity of these questions the survey contained special instructions explaining in simple terms what was meant by a debt to asset ratio, and it contained an example. Eighty five (85) farmers responded to these questions and had their answers included in the results. One other farmer's responses were excluded because the answers were so disproportionate to the average (debt to asset ratio of 10 compared to .417 average) as to cast doubt on the accuracy of the data supplied by the farmer. The ratios provided by farmers were converted to a decimal fraction - thus debt of \$70,000 compared to assets of \$100,000 leads to a ratio of .7. Movements in the ratios indicate changes in debt in comparison to assets - thus a decline in the ratio means that debt has decreased in comparison to assets, but an increase in the ratio means that debt has increased in comparison to assets.

Of course the data does not reflect changes to the value of assets during the relevant period as a result of external forces e.g. as a result of farm equity growth due to enhanced real estate values etc.

3.9 The average debt to assets ratio is as follows:

* 3 years prior to FDM:	.537
* time of FDM:	.668
* time of response	.417

It should be of no surprise that debt to assets ratios increase between 3 years prior to FDM, and the time of the mediation. The increase is 24.4% over the original average ratio. The results indicate a significant reduction in debt to asset ratios in the post FDM period - on average a 37.5% reduction in debt to asset ratios from the time of mediation to the time of the survey, and a 22.3% reduction on the original debt to asset ratio.

3.10 This might be considered one of the benefits of FDM - on average farmers experience a significant decline in their debt to asset ratios post FDM.

3.11 In the period from 3 years prior to FDM to the FDM itself 54% of farmers experienced an increase in debt, 30.5 experienced no change in debt levels and of 14% farmers who experienced reduction in debt levels in this 3 year period, only 2/12 (16.6%) experienced corresponding reduction in asset levels.

3.12 Why do debt to asset ratios decline post FDM? Farmers debts decline in 51% of the respondents, there is no change in debt in 20%, and an increase in 26.8% of the respondents. With respect to those farmers who have experienced increases in debt post FDM (22/82) most of them (68%) experienced no corresponding increase in their asset level with some (4/22) experiencing a reduction in their assets level. Just over half of the farmers surveyed, therefore, experienced reductions in debt post FDM. This is consistent with the overall average reduction in debt to asset ratios. It is quite likely that the outcome of the FDM is responsible for the overall level of debt reduction because so few farmers report an increase in their assets level. The farmer's responses indicate that assets generally did not appear to have increased in value during the relevant period.

The farmers reported the main outcomes of FDM as follows:

Farmer refinances debt	37%
Lender allows more time to pay	27%
Lender writes off part debt	23%
No settlement	19%
Farmer sale of real estate	16%
Farmer sale of other property	12%

The farmer's perceptions of the frequency with which lenders write off part of the debt are also consistent with the data about reduction in debt to asset ratios. The mediators also reported high levels of the lender writing off part of the debt (56% of mediators report this happening 60% or more of the time).

Personal and lifestyle changes

- 3.13 This section will examine whether FDM itself offers any benefits to farmers on a personal level or to their lifestyles. There is considerable overlap, therefore, with later sections of this report dealing with issues of rural adjustment. The relationship between the crisis in agriculture the resultant personal and lifestyle impacts, and the benefits of FDM are considered in a brief article on the internet by Mark Galvin, Administrator Nebraska Department of Agriculture Mediation Program entitled: "Using Mediation to Resolve Ag Credit Disputes":

"...these financial difficulties do not happen in a vacuum. They have an impact on farm families. Numerous studies have shown that financial stress can trigger psychological distress including: depression and other mental disorders, substance abuse problems, inter-generational conflict, marital discord, domestic violence etc.

While the financial stress is the trigger, the real concerns for farmers are the consequences that it brings, i.e. the fear of losing their farm. Aside from the more esoteric arguments about farming being a way of life and self identity, losing your business as a farmer is more profound than with other small business owners because of a very basic, yet important distinction - most farmers live on the farm. More than just a consequence of losing your business, (if I don't have my job, how will I make my mortgage payment), a farm foreclosure has the potential to take a persons house away. As such, this direct threat to their business impacts their entire life, eliminating any safe haven to escape.

Mediation may help deal with some of the business concerns and emotions at the same time."

- 3.14 Before exploring the possible benefits of FDM in this context, it is helpful to know something about the farmers surveyed. None were aged under 30, and 84% were over 40. Indeed 46% were over 50, and 22% over 60. Most farmers (85%) report having been in farming for more than 16 years. Thirty eight percent (38%) of respondents were the fourth generation of farmers in their family, and 28% were third generation. In terms of the farm being operated at the time of FDM, 20% of respondents represented the second generation working that farm, 15% the third generation, and 9% the fourth generation working that farm. Perhaps consistent with the farmer's age profiles most (43.5%) had no children residing with them at the time of FDM, 26% had 1 child, 14% 2 children, 16.5% 3 or more children.
- 3.15 Farmers were asked to indicate changes in their life and the life of their families they hoped to achieve before FDM and which in fact occurred after FDM. Farmers were also asked about their feelings about their farm debt situation before and after FDM. Not surprisingly most farmers (57% - 39% no answer) hoped to achieve no changes to theirs and their family's lives prior to FDM, but after FDM, the following changes were reported:
- | | |
|---------------------------------|-----|
| No changes | 41% |
| Standing in community gone down | 27% |
| No longer farming | 16% |
| Unemployed | 15% |
| Marriage broke down | 13% |
| Moved home - new community | 10% |
| Moved home - same community | 6% |
| Farming somewhere else | 6% |
| Children changed school | 6% |

- 3.16 There is much that can be said about this information, but little which is beyond doubt because there can be no certainty that these changes to family and personal life would not have occurred anyway. On one hand it is significant that despite the dislocation and upheaval which is consequential upon farm debt and FDM, 41% of farmers report no changes. The significance of this statistic becomes clearer when the alternatives to FDM are considered - possible mortgagee sale, eviction and legal proceedings. Arguably, FDM offers a more ordered transition in the farmer's economic and personal circumstances but in the absence of data which compares the experiences of farmers who do not go through FDM, this possible benefit of FDM remains arguable but not definitive. On the other hand, however, there are significant social impacts reported which cannot be ignored: decline in community standing, unemployment, divorce and other family upheaval. Even if there is nothing that the FDM Act can do to prevent or minimise these social impacts, it is submitted that it is in society's interests to ensure that adequate support mechanisms are in place for farmers and their families.
- 3.17 Farmer's feelings about their farm debt situation were compared before and after FDM, but it must be acknowledged that this data is unreliable to the extent that it asks farmers to express feelings after the event, in some cases years after the event. Farmers were asked to circle words which describe how they felt. The results are summarised below based on the number of responses and ordered by reference to the ranking of the responses:

	Before FDM	After FDM
Angry	47	35
Anxious	42	23
Uncertain	40	20
Afraid of future	35	26
Determined	32	27
Positive	27	16
Confident	14	13
Relieved	---	29
Happy	---	6
No change	---	6

- 3.18 This data needs to be treated very carefully and conclusions should not be drawn capriciously. There are still high levels of anger, anxiety, fear of the future, and uncertainty after FDM thus giving an insight into the traumatic affects of farm debt on farmers. However, there are also significant reductions in anger (25%) anxiety (45%) fear of the future (25%) and uncertainty (50%). It could be argued, therefore, that one of the benefits of FDM is significant reductions in these adverse feelings for farmers.
- 3.19 Correspondingly, there are significant responses indicating relief (29) and happiness (8). There are slight decreases reported in farmer's feelings of determination (15%) being positive (40%) and confidence (7%). These decreases may perhaps be explained by the sense of loss or desire as regards an unsatisfactory outcome at FDM, or having unrealistic expectations at FDM (see below) or alternatively positive outcomes wherein these feelings were no longer necessary.
- 3.20 Another way of approaching this data is to examine the changes in the feelings of individual farmers, rather than looking at their collective feelings. For present purposes these responses are classified as either positive, no change or negative. A positive response is one where an adverse

feeling (eg anger) reported prior to FDM is absent post FDM and no new adverse feeling is reported, or a new satisfactory feeling is reported post FDM not reported pre FDM. A no-change response indicates that the same feelings were present pre and post FDM. A negative response is where there is an increase in adverse feelings between pre and post FDM. This exercise is indicative and approximate only because it is extremely difficult to categorise some feelings into either adverse or satisfactory (for example, confidence pre FDM changed to relief post FDM is treated as no change, but this is arguable). The results suggest as follows:

Positive response:	51/84	(60.7%)
No change:	18/84	(21.4%)
Negative response:	15/84	(17.8%)

Of the positive responses, the most common change appeared to be the removal of anger and uncertainty as feelings post FDM.

- 3.21 These findings therefore tend to corroborate the earlier statement that one of the benefits which may be attributed to FDM is significant reductions in adverse feelings felt by farmers, and further, significant positive changes in their feelings post FDM particularly as regards anger and uncertainty.

Communication issues

- 3.22 There were several questions in each of the surveys which called for responses in relation to a number of different matters which, for present purposes, are summarised as communication issues. Communication issues are important for a number of different reasons. Inadequate communication is often a major cause of conflict. Furthermore, one of the aims of the mediation process is to facilitate direct communication between farmer and lender.
- 3.23 Farmers were almost evenly divided on the question as to whether the mediator helped the lender understand how they felt: 46% strongly disagreed or disagreed; 44% agreed or strongly agreed. There was greater support for the statement that the mediator helped the farmer to understand the lender's viewpoint: 49% agreed or strongly agreed; 38% disagreed or strongly disagreed. Representatives were asked whether the mediator helped both parties to understand each other's viewpoint, and interestingly 75% agreed or strongly agreed that this was the case. Creditors and lenders were asked the same questions as the farmers, but the level of agreement was 86% and 78.5% respectively for each question. Communication issues are very much a matter of perception for the individual. The farmer's perception may well be shaped by their lack of objectivity and closeness to the issue at hand - nonetheless their perceptions are valid. Perhaps farm debt mediators need to be made more aware of the farmer's perceptions in this regard, and should attempt to emphasise to each of the parties during mediation how each of the farmers and lenders feel.
- 3.24 Communication within the mediation was also tested by a series of questions. Farmers generally agreed (62%) that mediators understood what they had been through. They also agreed (72%) that mediators had made sure that they said what they wanted to say. Lenders also reported that they felt that mediators understood what they had gone through (64%) and that they had their say at the mediation (93%).

- 3.25 One of the benefits of FDM is that it increases the level of communication between farmer and lender. It is submitted that this is a factor contributing towards final settlements and the changes in farmer's feelings referred to at 3.21.

Emotional issues

- 3.26 These are difficult characteristics to monitor. There is certainly overlap between these issues and other matters referred to above. Strong emotional feelings characterise FDM from the farmer's perspective, and some of the changes in these feelings are set out at para 3.17 above. Farmers were asked whether the mediators allowed them to vent any strong feelings held about the problems leading to the mediation. Sixty percent (60%) agreed or strongly agreed, but 31% disagreed or strongly disagreed. Farmers were later asked whether the mediation helped them to deal with the strong feelings held - 47% agreed or strongly agreed, 45% disagreed or strongly disagreed. The farmer's representatives perceptions as to whether the mediator allowed any strong feelings to be vented at the mediation was much clearer: 76.5% agreed or disagreed, none disagreed and the rest did not answer the question. Lenders generally felt that mediators helped them to deal with any strong feelings held: 64%.
- 3.27 The importance of allowing farmers to ventilate any strongly held feelings at mediation should not be underestimated. In mediation experience suggests that it is generally easier to "get down to business" and focus on the issues once the emotional context has been explored and dealt with. It is by no means suggested that mediators should engage in therapy, but perhaps mediators should be more conscious of the emotional context of FDM and strive more to permit farmers to ventilate these strong feelings. The number of farmers who felt that their strong feelings had not been dealt with in one way or another is significant. Consideration might therefore be given to more specific training of farm debt mediators in dealing with emotional issues. It might also be prudent to educate both representatives and lenders about the emotional agenda of FDM, and how that might impact on the mediation process, and on them personally.
- 3.28 Certainly one of the benefits of FDM is that in the majority of cases farmers were able to deal with the strong feelings they held in relation to the issues which brought them to FDM.
- 3.29 Representatives were asked a question about the value of the FDM process for both farmer and lender even when agreement was not reached. This data is valuable because even though it is presented from the farmer's perspective (all representatives acted on behalf of farmers) the representatives were not necessarily as subjective as the farmers in relation to their views about the benefits of FDM. The representatives preferences were as follows:

Brings home realities	78%
More understanding of possibilities	67%
Deals with emotions	37%
Helps decision making	37%
New information available	26%
Prepared for legal proceedings	11%
Increased trust	7%

- 3.30 The personal and lifestyle changes which farmers experience as a result of their underlying farm debt situation is considerable. The emotional issues which arise as a consequence of this are also considerable. These are most important issues which need to be addressed if for no other reason

than farmer's participation in, and therefore the outcomes of FDM will be greatly enhanced if the consequent adverse social and personal impacts on farmers are minimised. The kit which is presently despatched to farmers on receipt of a section 8 notice includes a brochure on support networks for farm families involved in FDM. It refers to a number of resource contacts which can provide limited support to farmers about to undertake FDM. This is a very commendable initiative, but more assistance for farmers in debt situations is required. In some US and Canadian states Farm Stress Units have been established to address these problems. Some of these operate a toll-free Farm Stress Line staffed by farmers who have experience and training in counselling, farm financial issues, stress related problems, and family issues. This may be an initiative which is well worth duplicating in NSW. A safety net also needs to be established, particularly for those farmers who suffer the more drastic social impacts referred to in this report. This safety-net might include retraining etc. Consideration should be given to including in training and academic courses for aspiring farmers (e.g. agriculture etc.) modules on communication and stress management.

4. **Agreements reached and impacts**

4.1 This very broad term of reference will for present purposes be subdivided into the following sections:

- * Agreements reached at FDM
- * Impact of agreements on farmers and creditors and on rural adjustment

Agreements reached at FDM

4.2 This section will discuss not only the outcomes of FDM in terms of agreements reached, but explore implementation of and views about the settlements.

4.3 Farmers were asked whether a settlement was reached at FDM. Seventy two percent (72%) responded yes, 25% no and 3% did not answer. The review of the 88 files provided by the RAA on a random selection basis indicated that 64 out of the 81 matters that actually went to mediation settled - a settlement rate of 79%. Representatives were asked what percentage of FDM sessions they had participated in resulted in settlement. Just over half of the representatives (51.5%) reported settlement was always reached. No representative reported a settlement rate of less than 60%, and the average of the responses was that agreement was reached in 92% of the FDM sessions they attended. The slight variances - between these various sources - is probably quite insignificant as the surveys ask for perceptions of settlement which could vary slightly from actual settlements.

4.4 Farmers were then asked to describe the settlement or outcome of the FDM, and they were permitted to choose any of 12 suggested outcomes but also could write in other outcomes. The responses are summarised below:

Farmer refinances farm debt	37%
Lender allows more time to pay	27%
Lender writes off part of debt	23%
Other (see below)	23%
No settlement	19%
Farmer sale of real estate	16%
Farmer sale of other property	12%
Lender sale of real estate	10%
Surrender of real estate to lender	8%
Lender refinances farm debt	6%
Lender sale of other property	4%
Farmer bankruptcy	4%
Surrender of other property to lender	2%

4.5 Farmers were given the opportunity to describe the outcomes of FDM in their own words, but out of the 11 responses only 2 described the outcome in terms of what actually occurred (both were 3 month moratoriums as to payments), whilst the rest described their views of the outcome.

4.6 In terms of describing the outcomes of mediation, mediators were also given the opportunity to describe the frequency of certain outcomes in the mediations they undertook. The question had to be asked in this way to take into account the great variation in the number of FDM undertaken by mediators (lowest = 1; highest = 150) The two variables in this data are therefore response rate (% of mediators who indicated a certain preference) and frequency (of a nominated type of outcome). The highest response rates occurred in the lowest frequencies - thus 76% of mediators reported that there was no settlement in only 0-19% of FDM sessions. Seventy two percent (72%) of mediators reported that there was a surrender of a security property to the lender in only 0-19% of FDM sessions. Fifty two percent (52%) of mediators reported that a sale of a security property took place within 3 months in only 0-19% of FDM sessions. Concentrating now on high frequency outcomes, which will be adopted at > 60% of the FDM sessions conducted, mediators reported the following outcomes:

<u>Outcome of FDM</u>	<u>Response rate mediators</u>
Write off by lender of part of farm debt	56%
Time to refinance through another lender	36%
Refinance of farm debt by the lender	12%
Sale of a security property after 6 months	12%
Sale of a security property within six months	8%
Rescheduling of the farm debt by the lender	8%

The most frequent outcomes of FDM as reported by the majority of mediators is the lender writing off part of the farm debt - this occurring in more than 60% of FDM sessions. The next most frequent outcome is the lender providing the farmer with time to refinance through another lender - this occurring in more than 60% of FDM sessions.

- 4.7 If the parameters of this are changed slightly, and mid-range frequency outcomes (40-59%) are included with the high range outcomes,, mediators report that the following outcomes occur in more than 40% of FDM sessions.

<u>Outcome of FDM</u>	<u>Response rate mediators</u>
Write off by lender of part of farm debt	64%
Time for farmer to refinance through another lender	56%
Refinance of farm debt by lender	24%
Sale of a security property after 6 months	24%
Rescheduling of farm debt by the lender	24%
Sale of a security property within 6 months	20%
Sale of a security property within 3 months	12%

It is interesting to note that in terms of outcomes, there are no significant differences between the mid and high range frequencies. The most common outcomes of FDM as reported by mediators is write off by lender of part of the debt, time to refinance through another lender, or refinance by the lender itself. In terms of outcomes necessitating a sale of a security property, if it happens it generally is after 6 months.

- 4.8 It must be recognised that a settlement at FDM might involve more than one outcome so that, for example, there could be a write off of part of a debt, as well as a refinancing of the debt either by the existing lender, or another lender. Despite some differences between the outcomes of FDM as reported by mediators and farmers, it is clear that the most frequent outcomes of FDM, not arranged in any particular order, are:

- * write off by the lender of part of the debt
- * time to refinance through another lender
- * refinance of farm debt by the lender/lender allows more time to pay.

The reported frequency of lender partial write-offs may well come as a surprise to some observers, but the observations of both farmers and mediators are not inconsistent in this regard - one of the most frequently encountered elements of a mediated FDM settlement is the lender writing off part of the debt. The significance of this is qualitative (i.e. the type of settlement achieved) not quantitative (i.e. the amount of the write-off). The data does not indicate the extent of the write off - it may well be minor or insubstantial compared to the total debt. For example, it was reported anecdotally that one major lender commonly offered a six month interest-free period within which a farmer was to refinance the farm debt. Also it was not uncommon for write offs to include fee waivers, as well as or in substitution for interest concessions.

- 4.9 Were agreements reached at FDM carried out? Farmers reported as follows:

Fully	36.5%
Being carried out	18%
Partly	19.5%
Not at all	17%
No answer	9%

Only 17% reported that the agreement reached at FDM were not being carried out at all, 54.5% either fully carried out or being carried out, and 19.% partly carried out. The provision of time by the lender for the farmer to take action is a common feature of the outcomes of FDM as reported by both farmers (para 4.4) and mediators (para 4.6 and 4.7).

Thus, the high level of agreements either being carried out or partly carried out is not surprising. This explains 18% of settlements still being carried out as at time of response.

- 4.10 What were the perceptions of the various participants in FDM about the outcomes of mediation? The satisfaction level of farmers was not very high. They responded as follows:

Fully satisfied	17%
Partly satisfied	36.5%
Not at all satisfied	43%

Notwithstanding this, farmers do not believe that they would have reached a more favourable settlement if they had gone to court: 60% on one question and 58% when the same question was asked again in a slightly different way. Furthermore slightly more farmers would not have changed their minds after reaching agreement at FDM if they had been able to do so (43%) than those who say they would have (41%). More farmers felt that the agreement reached at FDM was not fair (51%) than fair (42%). Most farmers felt their agreement at FDM was practical (50% versus 30.5%) and workable (52% versus 31%).

Overall, farmers seem to be concerned about the fairness of the agreements reached at FDM (an issue which will be discussed below) and there is a high level of dissatisfaction as to the outcomes of FDM. The latter is perhaps not surprising in view of the emotional context in which farmers participate in FDM.

- 4.11 Lenders were not asked about their level of satisfaction about the outcome of FDM as it was felt that most lenders would be financial institutions, and the officers completing the surveys would not really be in a position to make an assessment of a subjective issue such as satisfaction in any meaningful way. However lenders felt that agreements reached at mediation were practical (100%) and workable (93%). In relation to whether they would have achieved a better settlement by going to court 86% disagreed with this proposition when the question was asked the first time, and 100% disagreed when the same question was asked in a slightly different way later. Eighty six percent (86%) thought that the agreements were fair. Again 86% would not have changed their mind after FDM if they had been given the opportunity to do so. Overall, lenders are quite positive about the outcomes of FDM.
- 4.12 The representatives again provide an interesting and perhaps more objective insight into the outcomes of FDM from the farmer's perspective. Representatives were firstly asked whether agreements reached at FDM were realistic and workable. They responded with 82% agreeing with the statement, and only 7% disagreeing. They were then asked at a later stage what percentage of mediation agreements are realistic and workable, and this time 85% indicated that the mediated agreements were realistic and workable more than half of the time. Ninety six percent (96%) believe that their clients would not have done better if they had gone to court, and 75% felt that the agreement reached was a fair one.

The representatives felt (64%) that their clients would not have changed their minds if they had the opportunity to do so. They were also asked to indicate how satisfied their clients were with outcomes based on the client's comments to them. The responses averaged out indicate as follows:

Not at all satisfied	14%
Somewhat satisfied	22%
Moderately satisfied	38%
Very satisfied	25%

The most obvious difference between these figures, and the farmer's views as to satisfaction set out at para 4.10 is the drastically reduced levels of not at all satisfied: 14% here compared to 43% at para 4.10. It is not known when the relevant comments were made to the representatives so it is not possible to speculate, for example, as to whether farmer's satisfaction rates have declined with the passage of time from the original FDM.

Fairness of Agreements

- 4.13 Farmers have concerns about the fairness of agreements reached at FDM and it is worth exploring the perceptions of the various participants in FDM about fairness issues.

Mediator impartiality was not an issue. Farmers agreed that the mediator was impartial (72%) as did representatives (86%) and lenders (100%). Farmers felt that mediators had not applied pressure on them to reach agreement: (61.5%) and lenders agreed with this (86%). Representatives felt that mediators had not manipulated their clients into reaching agreements they did not want to make (72%).

In terms of the role of the mediator, therefore, there are no issues of fairness.

- 4.14 Farmers were asked 2 questions designed to explore issues of power imbalances in FDM. The first question asked whether farmers believed that the lender had an advantage over them during the FDM. Seventy one percent (71%) of farmers agreed, with a high level of strong agreement with the statement (56%). Farmers were given the opportunity to actually comment on what advantages they perceived the lender to have, and 57/87 farmers (65.5%) responded. These responses were categorised, and the 3 most common responses are listed below in descending order of occurrence.

- * Power imbalance due to lender's experience in FDM and the substantial resources available to them.
- * Mediation was intimidating and emotionally draining
- * Lender did not mediate in good faith and had nothing to lose if settlement was not achieved.

- 4.15 Farmers were also asked whether they were able to participate in mediation as an equal to the lender. Fifty eight percent (58%) of farmers did not believe that this was the case, again with high levels of strong disagreement (39%). They were again given the opportunity to comment and 47/87 (54%) did so. The responses were categorised and the 4 most common ones are listed below in descending order of occurrence:

- * Lender did not mediate: outcome fixed prior to FDM
- * Farmer lacked experience and resources of the lender
- * Farmer intimidated by the whole process and by lender
- * Farmer felt powerless and had no ground to stand on

- 4.16 Lenders were asked the same question as farmers, but of course from a reverse viewpoint. Thus 100% of lenders disagreed with the proposition that farmers had an advantage over them at mediation and 93% felt that they were able to participate in the FDM as an equal to the farmer.
- 4.17 The representatives strongly support the farmer's perceptions with 89% feeling that the lender had an advantage over the farmer at mediation (68% strongly agree), and 68% disagreeing that farmers are able to participate as equals to lenders at the mediation.
- 4.18 This data should raise quite some concern, and any perception which farmers hold in relation to the fairness of FDM needs to be taken seriously. The practical issue, however, is whether anything can be done about it. The imbalance which exists between farmer and lender is a structural one arising out of the very relationship created by a loan and the giving of security. It is unlikely the FDM Act can remedy this sort of structural imbalance, but perhaps something can be done to ensure that the procedure becomes even more sensitive to power imbalance issues. Close scrutiny of the farmer's comments as to why they felt that there was imbalance (para 4.14 and 4.15) suggests a few possible interventions. Procedural balance might be improved if it were possible to ensure that farmers were represented at FDM by representatives who were experienced in FDM. Thus, even though farmers themselves lack experience in FDM, their representatives can make up for this. Some comments are made below about representation at FDM. In addition, farmers and their representatives should be more prepared for FDM. Furthermore, mediators need to be even more sensitive to farmer's perceptions that the whole FDM process is very intimidating and emotionally draining. There is very little criticism of farm debt mediators as a result of this research, but there are indications that the FDM process needs to take into account the feelings of farmers set out above, and the emotional context of FDM referred to at para 3.17 in this report. Perhaps mediators need to be even more conscious of intimidating behaviour on behalf of lender and to intervene appropriately if the need arises.
- 4.19 It is convenient to explore the role of representation at FDM at this point and mediators observations about preparation for FDM, in case it provides another possible intervention to deal with the problems referred to above.

Farmers were not specifically asked whether they were represented by some other person at FDM as the survey was designed on the preconceived idea (based on anecdotal evidence) that most farmers were represented. The mediators tended to confirm this by indicating that the farmer was represented by their lawyer (64% of mediators indicated this) rural counsellor (44%) and/or accountant (32%). The responses suggest that often the farmer was represented by more than one person. Farmers themselves indicated that they were represented by rural counsellors (42%) lawyers (34%) and/or accountants (20%) and also family or relative (12.5%). Most farmers were satisfied with the standard of representation at mediation (75%). Lenders were always represented at mediation, and had a high level of satisfaction with the standard of that representation (93%).

- 4.20 As indicated above, all of the representatives surveyed (27) represented the farmer. Their professional backgrounds are quite diverse including rural assistance, lending, law and accounting. In terms of experience in their professional field, 48% had 5 years experience or less with the rest having 6 years experience or more, and 19% having more than 15 years experience. The representatives came mainly from rural areas and work in population areas of less than 50,000 people. Over 60% spent more than half their time in farm related lending, borrowing, debtor/creditor matters. They are, therefore, quite an experienced group, 67% of whom have had formal training in mediation, mainly through UNIFAM (88%) but also through LEADR (12%). The average FDM experience of the group of representatives surveyed was 20 mediations.
- 4.21 As all of the lenders were always represented at FDM by a representative, generally one of its officers, it is also possible to obtain a profile of the lender's representatives through the lender's surveys. Fourteen surveys were received. The representatives had, on average, attended 36 mediations each. All of them had more than 6 years experience in the lending/finance sector, with 57% having more than 15 years experience. Specifically, the experience in question was in rural finance in 93% of those surveyed. The level of legal representation by lenders was only 21%.
- 4.22 A comparison of these two groups of representatives indicates that lender's representatives are almost twice as experienced as farmer's representatives at mediation.
- 4.23 The mediators provide some insight into the role played by representatives at mediation. Rural counsellors played a positive role in FDM (52% agreed versus 20% disagreed) Specifically the private rural counsellors played a positive role (48% versus 20%) and lawyers representing farmers appeared to be of assistance in the mediation (76%) as were lawyers representing lenders (80%). The mediators therefore present a positive picture of the role of the various representatives at FDM.
- 4.24 An interesting related issue, however, is mediator's perceptions about the level of preparation for and on behalf of the farmer and lender at FDM. Whilst the level of preparation was adequate for lenders 100% of the time, it was adequate for and on behalf of farmers only 56% of the time. Mediators seem to be of the view, therefore, that farmers were inadequately prepared for FDM 44% of the time. This is a high figure, and probably unacceptable when viewed in the context of farmer's perceptions that FDM results in unfair agreements, and issues of power imbalance discussed elsewhere.

An issue related to preparation for FDM is expectation of what outcomes can be achieved at FDM. The representatives were closely divided as to whether their client's expectations at the commencement of the mediation were unrealistically high - 53% disagreed and 47% agreed. As for mediators they were much clearer in suggesting that farmer's expectations were unreasonably high - 64% with only 28% disagreeing. The data does not reveal precisely what these unrealistic expectations are alleged to be. Informal discussions with farm debt mediators suggest that one such expectation was that the lender would write off part of the debt. Paragraph 4.8 of this report suggests that this outcome, in qualitative terms, in fact occurs quite often, but in terms of the amount of the write off, this is far less certain.

It seems, therefore, that the effectiveness of FDM will be enhanced by more effective preparation by farmers, and the adoption by farmers of more realistic expectations as to outcomes. The key to achieving this is improved education of farmers and other participants in FDM.

- 4.25 To summarise, farmers have concerns about the fairness of agreements reached at FDM. Those concerns are both structurally and procedurally based. Mediators may be able to do more to address farmer's concerns that FDM is a process which is both intimidating and emotionally draining. The structural and procedural unbalances may also be attributable, at least in part, to the comparative inexperience of farmer's representatives at FDM compared to lender's representatives, and to a perceived lack of preparation on behalf of the farmer in 44% of the cases. It may well be that the RAA may facilitate intervention in addressing these issues by helping farmers and their representatives to really focus on preparation for FDM. Perhaps literature, or even a kit, could be prepared to assist in this regard. Furthermore, increased education of farmers is necessary so that their expectations going into FDM are not unrealistic.
- 4.26 The pre-mediation conference should be used to deal with some of these issues. Whilst high levels of attendance by farmers and their representatives was reported (mediators reported that the farmer was there at least 80% of the time) perhaps it should become compulsory. The mediator may be able to deal specifically with issues of preparation, normalise the presence of emotion and thereby prepare the participants in FDM for it, and urge the adoption of realistic expectations particularly by or on behalf of the farmer. There is some suggestion from the surveys that lenders were reluctant to deal with emotional issues at FDM. One farmer reported that the lender was reading a newspaper during his opening statement, and another farmer referred to a lender doing a crossword at this time. The importance of communication and emotional issues in FDM cannot be over-emphasised, and the correct time for dealing with this is in the pre-mediation conference.

Impact of agreements on farmers and creditors and on rural adjustment

- 4.27 There is considerable overlap between this issue and other issues already considered in this report. In particular the impact of FDM and its outcomes has been explored in the context of debt to asset ratios at para 3.8 - 3.12. Farmer's personal and lifestyle changes are explored at para 3.13 - 3.21, and communication issues at 3.22 - 3.29. Here the focus will be on the impact of FDM and its outcomes on the relationship between farmers and lenders, and on rural adjustment generally by which is meant changes in the rural sector.
- 4.28 Farmers were asked to give information about how much of their income was derived from farming activities 3 years before FDM, at the time of mediation, and at the time of completing the survey. The results can be seen from the following table:

Percentage income from farming

	100%	99-95%	74-50%	49-25%	< 24%
3 years before FDM	44	23	16	2	15
Time of FDM	43.5	16	15	6	19.5
Time of survey	35	10	16	9	30

Regrettably there was a typographical error in the farmer surveys - the second column which reads 99-95% should have read 99-75%. Whilst this is less than ideal, only 1 farmer did not answer the questions in rows 1 and 2, and 2 farmers did not answer row 3.

The first 2 columns are treated as farmers who derive almost all of their income from farming. The group represented 67% of respondents 3 years prior to FDM, 59.5% at the time of mediation, but only 45% at the time of the survey. This is a significant 32.8% drop in income from farming activities. If the class is broadened to include the third row i.e. all farmers deriving more than one half of their income from farming, then this group comprises 83% of respondents 3 years prior to mediation, 74.5% at the time of mediation, but only 61% at the time of survey, a drop of 26.5%.

There is a corresponding increase, however, in the number of farmers who derive less than half of their income from farming activities. Three years prior to mediation, this group consisted of only 17% of respondents, at the time of FDM it had risen to 25.5%, but by the time of survey it was 39% an increase of 129%.

It is to be noted in each case that the most dramatic changes occurred in the period from the time of FDM to the date of the survey, not beforehand.

- 4.29 The changes observed in the income derived by farmers from their farming activities are sometimes quite dramatic. Of course it is not possible to be definitive and to state that the cause of declining income from farming is attributable to the outcomes of FDM. Common sense suggests that declining income is attributable to the underlying farm debt situation, not to the outcome of FDM itself. There may well be other operative natural, social, economic, local and international factors which have an impact in these changes. Nonetheless the changes observed have as their pivotal point the time of the FDM suggesting that the outcome of the FDM had some impact on the changes to farmer's income which are observed in this study. In short farmers are deriving much less of their income from farming activities. However, despite these overall changes to farmer's income as a group, it is noteworthy that 54% of farmers experience no change in the level of income from farming activities (whatever that was) at the three intervals covered by the survey.
- 4.30 Farmers were also asked to give information about how much of their personal time and effort expressed as time, was expended on farming activities 3 years before FDM, at the time of mediation, and at the time of the survey. Regrettably the typographical error referred to in para 4.29 was repeated in this survey question. Nonetheless, the results are still useful and are summarised below:

Percentage time expended on farming activities

	100%	99-95%	74-50%	49-25%	< 24%	NIL
3 years before FDM:	48%	23%	15%	6%	8%	0
Time of FDM:	48%	17%	15%	6%	14%	1%
Time of survey:	43%	9%	11.5%	9%	16.5%	11%

Again the first 2 columns are treated as farmers who spend almost all of their time in farming activities. Three years before FDM this group represented 71% of the respondents, at the time of mediation 65% but at the time of survey only 52%, a decline of 26.7%. If the class is broadened to include the 3rd column, ie all farmers who spend more than half of their time on farming activities, this group comprises 86% of respondents at 3 years before FDM, 80% at mediation, and 63.5% at the time of survey,, a decline of 26.2%.

There is a corresponding increase in the incidence of part-time farmers ie those spending less than half of their time in farming activities. Three years prior to FDM this group consisted of only 14%, by the time of mediation it was 21%, and by the time of the survey 36.5%. In fact the statistics are even bleaker when one considers that 3 years prior to FDM there were no farmers spending no time on farming activities, at the time of FDM it was only 1%, but at survey it was 11%.

- 4.31 The changes observed in the amount of time that farmers expend in farming activities are again, significant. There is a shift away from full time farming, towards part-time farming, but 11% of the group are not farming at all at the time of the survey. The changes may not solely be attributable to either farm debt or to the outcomes of FDM - see comments at para 4.30. Nonetheless there are potential implications of these changes in both social and economic terms which are beyond the scope of this study. For example, this trend away from farming activities has occurred over a period of, at most, 1992 to 1998 ie for those FDM which took place in 1995 the survey asks for information dating back to 1992. In less than a decade there has been a 26% decline in full time farming and at least a 26% decline in farm incomes for those farmers earning more than half of their income from farming activities.
- 4.32 Some interesting observations may be made by looking at both tables (para 4.29 and 4.31) and attempting to correlate farm income to time spent in farming activities. The figures suggest that, perhaps not surprisingly, there is no direct correlation between time spent in farming activities and income derived from farming. Generally, the percentage of time spent in farming was greater than the percentage of income derived from farming, and that gap increases in the period between 3 years prior to FDM and the time of survey. The gap can be noticed when comparing data for farmers who spend almost all of their time in farming activities (> 95%) and farmers who derive almost all of their income from farming activities (> 95%)

	Time expended in farming	Gap	Income derived from farming
3 years before FDM:	71%	4%	67%
Time of FDM:	65%	5.5	59.5%
Time of survey:	52%	6.3	45%

In short there was always greater effort than return in terms of income, but the gap between effort and return increased with the passage of time.

- 4.33 Consideration is now given to the impact of FDM and its outcomes on the relationship between farmers and lenders. There is no data gathered by this survey which suggests that rural lending has been affected in any way as a result of FDM. That data is probably available elsewhere. If there were a decline in rural lending as was suggested could happen at the time the Act was

debated, it would be surprising indeed if that were causally attributable to FDM because of the overall very favourable views expressed by lenders in their surveys (discussed above and below). It is probably the case that the historical relationship of dependence between farmers and lenders will continue irrespective of FDM. There will, of course, be changes based on trends and market conditions e.g. shift from asset-based to repayment-based lending. Farmers were asked 2 questions to explore the impact of FDM on their relationship with lenders. The first question was whether the mediation only worsened the situation with the lender - 52% disagreed with this, but 38% agreed including 23% who strongly agreed. They were then asked whether their relationship with the lender improved as a result of mediation. Only 18% agreed with this, 74% disagreed with a very high level (55%) of strong dissent. Farmers don't regard FDM as a process which enhances their relationship with lenders, but most also suggest it does not make the situation worse. This is quite consistent with the views of representatives 61% of whom disagreed that there was an improvement in the relationship, but 57% of whom also disagreed that there was a deterioration in the relationship.

- 4.34 The relationship with lenders as perceived by farmers is characterised by distrust. Thus only 44% of farmers trusted the integrity of the lender at mediation whilst 49% did not. Only 43% were confident that lenders would present accurate information at mediation, whereas 49% were not. Notwithstanding this, 53% believed it was important to be able to continue a relationship with the lender after mediation. Lenders did not believe that FDM worsened things (86%) but neither do they believe that their relationship was improved (57%). To lenders, continuing the relationship with farmers post FDM was not important (86%). In terms of trusting the integrity of farmers at FDM whilst 57% of lenders had that trust, 43% did not. Only 36% were confident that the farmer would present accurate information at the mediation, but 64% did not share that confidence. Mediators had a much more optimistic view about whether FDM had an impact in the relationship - 64% thought there was an improvement and 88% disagreed that there was a deterioration in the relationship.
- 4.35 Overall the relationship between farmers and lenders is characterised by measures of distrust on both sides, but the impact of FDM is probably neutral in terms of that relationship.

5. **Cultural changes as a result of FDM**

- 5.1 The term "cultural change" can have many meanings, but for present purposes the focus has been on exploring changes in activities and ideas of the participants in FDM which are perhaps attributable, in some way, to FDM and the Act. As with other aspects of this report, there is considerable overlap between this issue and other issues already considered. There are also many background issues which need to be considered in order to properly explore cultural change.
- 5.2 It is disturbing to note that only 56% of farmers reported that they were aware of the right to mediate before receiving notice from the lender advising of that right. This high figure may have been distorted by a high response rate from early participants in FDM when the legislation was new, and the education programs were in their infancy. It could be argued that not knowing of their right to mediate with lenders does not actually prejudice farmers because the Act makes mediation mandatory. However, one wonders whether farmers might not have explored using consensual processes such as mediation at an earlier time, had they know about this. Obviously even more work needs to go into education of farmers relating to FDM. In relation to whether farmers feel that they actually would have benefited from mediation with the lender at an earlier time, 50% agreed or strongly agreed, whilst 43% disagreed or strongly disagreed.

By comparison 76.5% of lenders believe it would have been to their benefit to go to mediation at an earlier time. This issue will be revisited below.

- 5.3 Given the low level of knowledge amongst farmers as to their right to mediate, it is interesting to observe their views about mediation after they had gone through FDM. Fifty eight percent (58%) would recommend mediation to another farmer if they had a debt problem, only 32% would not. Fifty one point five percent (51.%) would use mediation again if they had a legal problem, but only 37.5% would not. These figures should be compared to farmer's satisfaction with the outcome of FDM - 43% not at all satisfied, 17% fully satisfied, 36.5% partly satisfied. On one interpretation of the data, therefore, even some of those farmers who were not at all satisfied with the outcome of FDM would nonetheless either recommend or use mediation themselves. Of course one of the limitations of this data is that it is not known what alternatives to mediation farmers would have used if they had a problem eg avoidance, self-help, negotiation, litigation etc; so it is impossible to measure the true significance of these answers. Nonetheless, it can reasonably be inferred that one of the cultural changes as a result of FDM is that a majority of farmers would recommend mediation or use mediation in the context of debt or legal problems.
- 5.4 The response by lenders in this regard was quite strong - 100% would recommend mediation to another lender in the context of a debt problem, and 86% would use mediation themselves if they had a legal problem. The significance of these responses should not be understated - unlike farmers who are one-off participants in FDM, the lenders are key stakeholders and repeat players, and their overall response to mediation is very positive indeed. The alternatives to mediation available to lenders are somewhat clearer than with farmers - the lender can enforce its security, taking legal action if necessary in order to do so. Perhaps the responses indicate a desire to avoid taking these enforcement steps if at all possible, and a desire to avoid litigation. It would be interesting to know whether the annual number of farm-debt related statements of claim for possession has reduced since the passing of the Act.
- 5.5 With representatives, 75% would recommend mediation in farm debt with a significant 46% strong agreement response, and 93% would recommend mediation generally as a means of resolving disputes with a 61% strong agreement response. This strong favouritism towards mediation is perhaps not surprising given that 67% of the representatives had undertaken formal training in mediation or alternative dispute resolution. Notwithstanding this, representatives were asked whether their attitudes to mediation had changed since first participating in FDM. The responses can be summarised as follows:

No.	I liked it always	52%
Yes.	I liked it before, dislike it now	52%
No!	Disliked it always	7%
Yes.	Disliked it before, like it now	7%

The representatives were then asked to nominate the critical factors which have changed their attitude to FDM. More representatives answered this question than the previous one. The following factors are summarised:

29%	Lenders are inflexible
21%	Lenders use FDM as a mechanism to gain foreclosure
21%	Lender's experience and farmer's inexperience leads to power imbalance.
14%	Allows farmer to view lender's perspective and to consider viability issues.

It would seem that whilst some of the representatives have concerns about FDM, there is still strong support for mediation generally.

- 5.6 It is interesting to note that so far the greatest support for mediation and therefore, to that extent, the greatest cultural change, is not with the farmers but with the lenders and the farmer's representatives.
- 5.7 Most farmers (71.5%) agreed that their case was suitable for mediation whereas 100% of lenders believed the case was suitable. It is interesting to observe such high rates of views as to suitability, given the mandatory nature of FDM. Concerns continue to be expressed elsewhere about the suitability of mandatory mediation.
- 5.8 On the question of whether FDM should become voluntary instead of mandatory, the responses of each group are summarised as follows:

	<u>Agree</u>	<u>Disagree</u>
Farmers	52%	43%
Lenders	57%	43%
Representatives	11%	63%

Thus the majority of farmers and lenders believe that FDM should become voluntary, but the majority of representatives believe it should remain mandatory. What is perhaps a surprising response, however, is that 43% of lenders believe it should remain mandatory. This is surprising given concerns expressed by lenders at the time of the passing of the Act.

Given the overall results of this research, and the positive benefits to all parties involved in FDM, it is difficult to understand the majority view of both farmers and lenders that FDM should become voluntary.

Representatives were asked whether, if FDM became voluntary, they would recommend it to farmers as a first step? The responses were:

Always	26%
Sometimes	69%
Rarely	11%
Never	4%

- 5.9 Farmers certainly considered it an advantage to them that the lender could not take enforcement action before mediation (76%). Lenders were asked about the advantage to the lender that there could be no enforcement action before mediation. Whilst 50% felt there was no advantage, 43% felt there was an advantage to the lender. This further confirms that lenders perceive there to be great value in FDM, even in those cases where there has been a default which would give rise to clear powers of sale.
- 5.10 Several questions were asked about the timing of mediation. Half the farmers (50%) thought it would have been to their benefit to go to mediation with the lender at a much earlier time, compared to 43% who disagreed with this. Of the representatives, 26% responded that FDM should be available before default. The lenders were the group strongest supporting earlier FDM with 76.5% agreeing with the proposition. As to how much earlier, 79% of farmers felt that they

should go to mediation as soon as they had difficulty with their lender, and 64% of lenders agreed with this. It seems, therefore, that the most reluctant group to mediate early are the farmer's representatives.

As to specific circumstances, 71% of farmers felt that they should be able to go to mediation with their lender as soon as drought, flood, hail or storm leads to non-payment to the lender, but only 36% of lenders agreed. Again, what is perhaps surprising is the high level of lender support for the proposition.

- 5.11 There is clear support from all participants in FDM for bringing forward the opportunity for and time of FDM, but there is no consensus as to precisely what event should trigger this. This is an issue which should be revisited in any future review of the FDM Act, or as part of any legislative review of dispute resolution policies.
- 5.12 When FDM is compared to the alternative of going to court, the results of all the groups are interesting. The groups were first asked whether they felt that they could have reached a more favourable settlement by going to court.

	<u>Agree</u>	<u>Disagree</u>
Farmers	31%	60%
Lenders	---	93%
Representatives	4%	96%

All parties were then asked whether they would have been better off going to court.

	<u>Agree</u>	<u>Disagree</u>
Farmers	29%	58%
Lenders		100%
Representatives	4%	96%

Clearly mediation is perceived by all participants in FDM as a better alternative than going to court, irrespective of any other concerns held about FDM or its outcomes.

- 5.13 The representatives were specifically asked a series of 11 questions asking them to compare mediation to legal proceedings. The following propositions emerge from their responses. Compared to legal proceedings the mediation process:
- * allows parties to create tailor made settlements (93%)
 - * encourages communication and information sharing (81%)
 - * is not less fair for all parties (74%)
 - * allows parties to take part meaningfully (89%)
 - * maintains privacy (93%)
 - * is convenient and easy to use (82%)
 - * is a more cost effective method of dispute resolution (78%)
 - * is quicker (100%)
 - * encourages negotiation outside of the mediation (59%)
 - * does not help to preserve ongoing relationships (55%)
 - addresses all aspects of the conflict including emotional needs of the parties (52%)

Perhaps the only surprising result here is that there was a perception that mediation did not help to preserve the on-going relationship. This is certainly the case in FDM as the data at paragraph 4.34 indicates. The outcomes of FDM generally, also suggest that an on-going relationship post-FDM is rare. Also, the relatively low agreement rate (52%) to the issue of addressing all aspects of the conflict including emotional needs, also confirms the problem referred to elsewhere in this report.

- 5.14 Very few representatives advised their farmer clients to waive their right to mediation - only 30%. Of that 30%, the critical factors on which the representative based their advice to waive mediation is summarised as follows:

37.5	Agreement already reached
25%	Farmer refinanced
25%	Farmer did not wish to proceed
12.5%	Lender perceived to be too inflexible

Overall, there appear to be very few situations when a farmer is advised not to mediate in a situation where the farmer has not already made other arrangements.

Good Faith

- 5.15 One of the underlying concerns which emerges from the surveys, both directly from answers, and indirectly from comments made in the surveys, is whether the FDM was satisfactory in the sense that there was good faith. The concept of 'good faith' is an extremely difficult one to define or measure. There is no definition of the concept in the FDM Act. Looking firstly at the farmer's perspective, the comments made indicate that their perception of lack of good faith on the part of the lender involved:

- * use of dubious figures and charges to arrive at debt figure
- * having a set agenda prior to mediation and sticking to it
- * lack of authority to settle at the mediation
- * not negotiating because lender had nothing to lose
- * lender forcing choice of mediator

In terms of frequency of similar responses, the most common concern expressed by farmers in relation to good faith is that the lender was inflexible, or had a set agenda, and thus did not really negotiate.

Of the lenders, none reported that they had experienced the refusal of a s11 certificate on the grounds that satisfactory mediation did not occur, but 36% had been involved in mediations where s11(2)(a) of the FDM Act was activated due to a farmer's lack of good faith. When asked to describe in a few words what they perceived to be 'lack of good faith' the responses can be summarised as follows:

36%	failure to negotiate in a manner leading to agreement
36%	dishonesty and presenting false information
14%	lack of integrity
7%	failure to agree to mediation dates and times
7%	having unrealistic expectations

It is interesting to note the commonality between both farmers and lenders as to the most prevalent form of conduct which exemplifies lack of good faith - a negotiating behaviour which does not lead to settlement. Both groups perceive each other to be guilty of this conduct. It is probable that both groups provide highly subjective views on the topic of good faith.

- 5.16 The representatives were specifically asked whether they felt that the other side in the mediation (the lenders, as it turns out) did not negotiate in good faith. The majority (54%) agreed, 35% disagreed. Comments from the representatives surveys suggest that lack of good faith on the part of the lender was characterised by inflexibility, and to a lesser extent, lack of authority to settle.

The mediators perhaps provide a more objective insight into the problems perceived above. Only 20% felt that the issue of authority to negotiate was a problem at the mediation. Ninety two percent (92%) of mediators agreed with the statement that lack of good faith on the part of the lender was rarely a problem, whilst 80% agreed that lack of good faith on the part of the farmer was rarely a problem. Furthermore, only 20% formed the impression that the farmer as using mediation for delay purposes.

- 5.17 As the concept of 'good faith' is a nebulous one, and largely based on perception, it is not surprising that there is such lack of consistency between the four groups surveyed as to the incidence of it. The mediator's responses are totally alien to the other groups, but having regard to the level of experience of the mediators (average of 24 FDM and 93 mediations overall) one possible explanation is that they do not regard hard bargaining or inflexibility in negotiation as lack of good faith. In any event, the mediator's responses suggest tentatively that lack of good faith is an issue on both sides of FDM ie farmer and lender.

- 5.18 An issue related to lack of good faith is to explore why matters don't settle at FDM. It must be remembered that the lowest settlement rate reported in the surveys was by farmers who indicated settlement 72%, no settlement 25%. The focus here is on the 25%. The farmer's perceptions as to why matters did not settle are extrapolated from general comments they were invited to make at several points in the survey. The comments in relation to the farmer's perception of the lender's lack of good faith are set out at para 5.15 and so will not be repeated, but they are apposite in this regard. Other comments included that the bank didn't accept its responsibilities as regards commodity price collapses, drought, and refusal to assist with interest subsidy applications.

The lender's comments which might be related to why matters don't settle, apart from good faith issues discussed at para 5.15 above, suggest concerns as to the farmer's expectations. In the general comments section of their survey, 86% of lenders made comments to the effect that rural counsellors gave farmers unrealistic expectations such as the lender writing off part of the debt.

- 5.19 The representatives were asked a specific question about the possible reasons why clients do not reach settlement in FDM. Their responses are summarised as follows:

37%	Agreement reached always
33%	Financial inflexibility
22%	Emotional attachment
22%	Lack of good faith
14%	Personal ill-will
11%	Legal proceedings more attractive
7%	Insufficient information
7%	Other

Nonetheless, it must be noted that the representatives also indicated that there was value in the FDM process for both parties, even when agreement is not reached - see para 3.29.

Answers from the mediator's surveys may also be extrapolated in order to explore possible causes of non settlement. Whilst mediators had no real concerns either about the level of cooperation from both farmers and lenders, or the level of preparation by lenders, only 56% felt that the farmer was adequately prepared for FDM. This may well call for great detail and assertiveness at preliminary conferences as to what farmers need to do in advance of the mediations. The mediators also felt that the farmer's expectations at the commencement of mediation was unreasonably high (64%). It has been suggested in this report that this is a matter which the mediator should address at the preliminary conference but the mediator must be conscious of the risk of perceived bias. It could also be addressed in literature.

- 5.20 To the extent that cultural change involves potential changes in the way in which the participants in FDM either deal with conflict, or inter-relate with each other, there is more than ample evidence to demonstrate this change. Mediation, therefore, has an important educative function for all those involved in FDM, including the "repeat players" such as the lenders, and the representatives. The issue of lack of good faith is a difficult one to deal with by legislation, and it is suggested that the existing s.11 mechanism of declining to issue a certificate because to 'satisfactory' mediation took place, is adequate.

6. **Identifying Alternative Means**

- 6.1 One aim of this research was to identify alternative means for achieving the objects of the FDM Act, including non-legislative approaches. This section will draw on the view of the respondents, but will also refer to external views obtained by the writer. Before doing this however, the report will focus on the actual mediation process used in FDM and report on the respondents' views in this regard.

The Mediators and the mediation

- 6.2 Farmers selected a mediator on the basis of recommendation (53%), experience (33%), reputation (19%), cost (17%), and other factors (16%) which included background, unavailability of first preference, location and proximity. Most farmers felt that the mediator was impartial (72%), helped them to reach agreement (58%), and handled the mediation skilfully and professionally (77%). Farmers reported that mediators were aware of their needs and concerns (69%), knew enough about farming (57%), and felt that the mediation was organised and took place in a timely fashion (77.5%). Farmers found it helpful for mediators to suggest possible options for settlement (53.5%), but disagreed that the mediator gave legal advice during the mediation (64.5%). Most farmers (70.5%) felt that the mediator had allowed enough face to face discussion with the lender.

Most mediations (80%) take place during one session with only 9% of FDM taking less than 4 hours, 48% between 5-8 hours, 25% between 9-12 hours and 13.5% more than 12 hours. In terms of distance from the farmer's home only 7% took place <50 km, 26% <100 km, 37.5% <500 km and 25% more than 500 km from the farmer's home.

- 6.3 The lenders had similar positive views about mediators and the FDM process. All lenders (100%) agreed the mediator was impartial, 86% felt that the mediator helped them to reach agreement, 93% felt that the mediation was handled skilfully and professionally, and 71.5% felt that the

mediator knew and understood enough about farm lending. There was satisfaction about the timeliness and organisation of the FDM (71.5%) and with the amount of face to face time permitted with the farmer (86%). Half the lenders found it helpful for the mediator to suggest options to reach agreement, and all (100%) indicated that the mediator did not give legal advice during the mediation. There was no pressure felt to reach agreement in 86% of the cases.

- 6.4 The representatives felt that the mediators did not take sides (86%), did not hinder negotiations between the parties (72%) and helped the parties to reach agreement (86%). The mediators did not manipulate clients into making an agreement they did not want to (72%) but did ask questions to reality test agreements (93%). Interestingly, the representatives reported that the quality of the mediator varied from mediation to mediation in 42% of responses, but there was a high level of competence in 57% of responses. The representatives too, found it helpful for the mediator to suggest options to reach agreement (71%). There was a very high level of satisfaction (97%) with the organisation of the FDM.
- 6.5 Overall the mediators and the FDM process receive high levels of approval and satisfaction from the farmers, lenders and representatives, though the last group expresses some concern about the difference in the quality of mediators from mediation to mediation. This latter point is perhaps not surprising given the vast difference in the experience levels of mediators (between 12 and 900 mediations generally, and between 1 and 150 FDM). The responses about mediators suggesting options are very interesting. Some models of mediation suggest the mediator should not do this at all, other models concede it can only be done as a last resort, whilst in yet other models of mediation (sometimes called conciliation) it is the responsibility of the mediator/conciliator to suggest options for settlement. Nonetheless, at least half of each group surveyed found this to be a helpful feature of the mediator's role in FDM. The description of the function of mediators contained in s.13 FDM Act is probably broad enough to permit the mediator to suggest possible options for settlement.
- 6.6 The mediators reported that pre-mediation conferences were conducted by telephone conference mainly (64%), and in person 36% of the time. The farmer always attended the FDM but participated in the pre-mediation conference about 80% of the time. Of the farmers representatives, the mediators reported that they were principally their lawyers (64%), the rural counsellors (44%) and accountants (32%). Mediators were very satisfied with the cooperation of staff from the Rural Assistance Authority (84%), and felt that rural counsellors played a positive role in FDM (52% and 48% for private rural counsellors). Mediators strongly reject the proposition that lawyers representing farmers in FDM were of little assistance in the mediation (76%) so too for lawyers representing lenders (80%). Not surprisingly, all mediators felt that FDM helped to clarify parties' viewpoints, interests and positions and helped the parties to identify options and alternatives. It appears that very few mediations (4%) were conducted as shuttle mediations so as to minimise face to face contact between farmer and lender.
- 6.7 In the general comments section 21% of mediator responses favoured rotation of mediators so as to avoid suspicions of lender/mediator bias, 21% expressed concerns about power imbalance and 14% suggested that all rural small business should have the benefit of FDM-type legislation. Furthermore, 14% suggested that the Rural Assistance Authority should not be involved in FDM, though the reasons for this are not apparent.

6.8 Farmers were, of course, also given the opportunity to make general comments, and the most frequent comments are summarised below:

- 9 the lender is too inflexible in FDM
- 9 farmers are disadvantaged by the lender's experience and resources
- 8 farmers should be told of their rights in the mediation process
- 6 no farmer should go into FDM without representation
- 5 mediation was a very distressing experience
- 4 lender does not mediate in good faith
- 4 FDM Act bias in favour of banks
- 3 lenders use FDM only to get certificate so they can seize property
- 3 lender does not have authority to settle
- 3 lender effectively chooses mediator by refusing the mediators chosen by farmer

The more prevalent comments confirm earlier findings about the problem of perceived power imbalance, and farmers lack of fore-knowledge of FDM processes.

6.9 Lenders were also given opportunity to make general comments.

The most frequent comments are summarised below:

Rural counsellors give farmers unrealistic expectations	36%
A time for completion of the mediation should be adopted	21%
FDM is good process when both parties mediate in good faith	14%
FDM allows both parties to put forward issues and concerns	14%
Mediation should be sped up when farmer is indecisive about whether to mediate or not	14%

Concerns about the first point have been noted elsewhere in this report. The second point raises an interesting process issue from the lenders' perspective, but given the very nature of FDM, it is submitted that adequate time is essential from the farmer's viewpoint, in order to deal not only with the factual agenda, but the emotional one. Perhaps lender's representatives need to become more sensitive in this regard.

6.10 Representatives were invited to comment about changes they would like to see made to the current FDM scheme, or comments generally. The most prevalent comments for representatives are summarised below:

- 16% A s.11 certificate should not be issued where there is a dispute over whether the FDM was satisfactory.
- 16% Performance of mediators should be independently monitored.
- 11% Scheme is generally working well.
- 11% Mediators must be neutral and able to listen to both sides.

- 11% Lender's representative should be educated as to the farmer's perspective and be able to communicate better.
- 5% Mediator was influenced by lender.
- 5% Banks can boycott farmer's choice of mediator - this should not happen.
- 5% Farmer should have right to request mediation.
- 5% Banks sometimes have a fixed outcome drawn up before mediation
- 5% FDM brings matters to a head
- 5% Farmers should have to obtain independent legal advice before waiving the right to mediate
- 5% Some farmers waive their right to mediate because of the cost.

6.11 A number of comments can be made in this regard. The suggestion that a s.11 certificate should not be issued when there is a dispute about the satisfactoriness of FDM is one which needs to be examined carefully. This raises the whole issue of good faith, but in the absence of a clear definition as to what this is, it is difficult to envisage a satisfactory procedure for reviewing the decision whether to issue a s.11 certificate and which is not fraught with the prospect of review.

The RAA advises that if there is a dispute about whether satisfactory mediation has taken place, the feedback of all parties is obtained. From the RAA's perspective, it is not unusual to refuse a s.11 certificate.

The suggestion that the performance of mediators be independently monitored is not supported by the overall survey results. The comment that the scheme is generally working well is consistent with overall survey results. The concern about mediators possibly lacking neutrality and not listening to both sides is inconsistent with survey findings overall. The suggestion that lender's representatives be educated about farmer's perspectives and increase their communication skills is a good one, and is consistent with comments made elsewhere in this report, based on findings. There is no overall support for concerns that mediators are influenced by lenders, though some concern was expressed by farmers that lenders were, in effect, exercising a veto on the farmer's choice of mediator. This could be resolved by the RAA simply appointing mediators on a rotational basis. The disadvantage of this is that it detracts from one of the consensual aspects of FDM - that the parties can choose their own mediator. One wonders whether the findings support depriving the parties of their choice of mediator.

Farmers do, of course, have the right to initiate FDM, though the FDM Act is structured in a way that the lender initiates the FDM procedure. The comment that banks sometimes have a fixed outcome prior to FDM is consistent with other comments about good faith mediation. The observation that FDM brings matters to a head is a valid one, and some of the other comments made in the surveys suggest that this is one of the benefits of FDM, even when the matter does not result in a settlement. The suggestion about the need to obtain independent legal advice prior to waiving the right to mediate is an interesting one, but there is nothing in the data to suggest that this is a problem. The concern about the cost of FDM certainly represents the views of 43% of farmers, and perhaps some initiatives could be undertaken to assist those farmers who would not be able to undergo FDM but for the cost. The benefits of FDM, particularly in terms of overall cost saving and as an alternative to litigation, seem to justify the cost in most of the cases.

Alternative Means of Achieving Objects of FDM Act

6.12 The object of the FDM Act is contained in s.3 which states:

"The object of this Act is to provide for mediation concerning farm debt before a creditor can take possession of property or other enforcement action under a farm mortgage."

One of the notable exceptions to the Act is where the farmer is insolvent - either personally or through a corporate structure: s.5(2).

6.13 The critical point about FDM as it presently stands is that it is mandatory. The question arises whether it has been effective using this mandatory model, and whether its effectiveness would change if it were no longer mandatory, or other changes made to its model.

It is respectfully submitted that overall, FDM is working quite satisfactorily in NSW. The data about debt to assets ratio particularly suggests that farmers are emerging from FDM with considerably enhanced debt to asset positions. Of course there are significant changes to rural adjustment and many of these changes are cause for concern e.g. the decreases in farmers continuing to engage in farming, reduced levels of income from farming, and social impacts such as unemployment, divorce etc. One wonders whether these adverse impacts are attributable not to FDM but to the underlying farm debt situation, and would not have been far worse if the FDM had not been in place. Of course it is not possible to say because there is no control group of farmers whose farm debt experiences without the FDM Act or an equivalent, can be the subject of direct comparison.

One possible way of hypothesising about the impacts of the FDM Act is to consider what would have happened without it. It is reasonable to assume that much less mediation would have taken place, that lender enforcement would have proceeded in the normal course, that farmers would have used litigation or negotiation where advised to do so, and that many of the negative concerns expressed by farmers would not have abated. This is pure hypothesis, of course, tempered by common sense by reference to what took place before the passing of the Act.

There is support from both lenders and farmers for FDM to become voluntary (para. 5.8) despite this reports overall satisfactory findings about FDM in its present mandatory form. It is clear from the representatives' answers in para. 5.8 that if FDM were voluntary only 26% would recommend it always, 59% sometimes, 11% rarely and 4% never. This does provide one indicator that if FDM became voluntary, it would certainly not be utilised as much. It is interesting to compare FDM in NSW, to the voluntary mediation programme implemented by the Queensland Farmers' Federation and Australian Bankers' Association, as part of its November, 1996 Farm Finance Strategy. It is reported that the use of voluntary FDM in Queensland is negligible. This in itself a strong indicator against changing FDM in NSW. This issue is discussed further at 6.15.

Alternative Models for Achieving Objects of Act

6.14 There is support for a wider application of the FDM Act - see paragraph 5.10 for example, and in the context of a scheme which seems to be working quite well, it is worth hypothesising about how the objects of the Act could be achieved using a model which permits for broader application. FDM might be activated by either farmer or lender under various physical or climactic conditions such as drought, flood, hail, storm, or infestation by pests, which leads to non-payment. One way

of actually implementing this in a way which reduces the scope for argument as to whether a certain condition exists is for a third party such as the Minister for Agriculture, or the Premier of NSW, to declare for the purposes of the FDM Act, that a certain condition exists. A version of this model is used in Iowa, USA.

FDM might be extended to cover other rural issues including disputes arising out of subsidy applications, access to water, conservation compliance, wetland and environmental issues, pesticides and other agricultural issues. This has occurred in many states in the USA.

- 6.15 One of the possible variations to the FDM Act would be to make it voluntary. This has some support from the respondents to this survey, but not enough, it is submitted, to warrant making such a significant change to FDM. It is interesting to briefly observe the US experience in this regard. Iowa, Minnesota, Colorado and South Dakota adopted mandatory schemes. Arkansas, Indiana, Kansas, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, Wisconsin and Wyoming have adopted voluntary programs. Both Iowa and Minnesota were initially voluntary, but changed to mandatory after some high profile instances of farm foreclosures.

In the USA, it seems that voluntary mediation programs had lower budgets and smaller caseloads but they matched or exceeded the success rates of the mandatory mediation states. This report will discuss comparisons of cost and caseload with the USA below.

In terms of outcomes, however, there is mounting evidence even in Australia that outcomes differ insignificantly as between voluntary and mandatory programs.

With the passage of time, reliable information is becoming available as to the Australian experience with mandatory mediation. The settlement rates for a selection of mandatory mediation schemes is set out below.

Mediation under Farm Debt Mediation Act (NSW) (RAA figures)	89%
Mediation under Retail Leases Act (NSW)	73.87%
NSW Legal Aid Commission Case Conferencing	70%
Queensland Legal Aid Conferencing Scheme	69.75%

By way of further contrast, a selection of settlement rates for voluntary mediation schemes are set out below:

NSW Department of Fair Trading Mediation Service	85.05%
Law Society of NSW Mediation Program	70%
Family Court of Australia Mediation Service	70%
Queensland Settlement Week	80.5%

These figures give much food for thought. The comparatively early experiments in Australia utilising mandatory mediation suggests a settlement rate of between 69.75% and 89% or an average of 79.375%. There is, perhaps surprisingly, little significant differentiation between success rates in voluntary mediation schemes and mandatory schemes. The other interesting factor which is present in this sample is that in all but the Family Court of Australia Mediation Service and the Department of Fair Trading Mediation Service, there is a very high incidence of lawyer representation at the mediation, i.e. the disputants are accompanied by a lawyer who often participates in the mediation process.

The argument based on success rates alone does not justify a change from mandatory mediation.

The author of this report has considered elsewhere the arguments for and against mandatory mediation - see Altobelli "Mediation: Primary Dispute Resolution 1996: Mandatory Dispute Resolution in 2000?" (1997) 11 AJFL 55. No change to the mandatory nature of FDM is warranted either by the findings of this report, or general arguments about the merits or demerits of mandatory mediation.

- 6.16 The recurrent problem of power imbalance is confirmed by this research. The power imbalance is inherent in the relationship between lender and creditor. It must be understood that merely enacting a law which compels a lender to attempt mediation before exercising their enforcement rights does not, of itself, remedy the imbalance in power. Even having adequate representation, being fully prepared and having realistic expectations at FDM do not, ipso facto, remedy any imbalance but these are essential factors in maintaining a level playing field. The frustrations which farmers have expressed in relation to lenders failing to negotiate, or having set agendas, or sending inadequately authorised representatives are all manifestations of this power imbalance problem. In essence, concerns about lack of good faith are power-related. All that mediators can be expected to do under these conditions, and without betraying their neutrality, is to establish the minimum conditions needed to give the FDM a reasonable chance of succeeding.

Perhaps it is trite to say that the best way to deal with power imbalance in FDM is to assist in preventing the farmer from ever having to go to FDM in the first place. This raises many issues which, it is acknowledged, are outside the scope of this report, but if farmers were better equipped in their financial management skills, and if lenders used better business sense when lending, then the impact of the exigencies in agriculture might be mitigated so that fewer farm debt related enforcements became necessary.

It is possible that the introduction of a cooling off period following the entering into of a provisional agreement may assist with the problem of power imbalance - it will probably do no harm. Interestingly, the majority of all of the respondents to the surveys answered that they would not have changed their minds after reaching agreement at FDM had they been able to do so - see paragraphs 4.10 - 4.12.

- 6.17 Should there be consideration given to establishing a consultation service within the RAA to possibly deal with cases which do not necessarily need to go to mediation? Such a service might, for example, make preliminary enquiries of both lender and creditor to see whether, with the benefit of some form of consultation or conciliation using the RAA as the "go-between", it would be possible to resolve the dispute prior to FDM. Such a consultation service is used, for example, by the Ontario Farm Debt Review Scheme. There is little if any evidence in NSW to suggest that cases have inappropriately gone to FDM. All lenders (100%) and most farmers (71.5%) agreed that their case was suitable for mediation. There is an element of self-selection in relation to FDM - farmers can themselves waive their right to mediate if they wish to. Paragraph 5.14 of this report suggests that this rarely happened for the reasons set out therein.

6.18 Some concerns were expressed by farmers and lenders as to the financial information presented by the other party. These types of data conflicts are by no means unusual in disputes, but can fairly easily be dealt with particularly in the pre-mediation conference by the mediator asking questions to ascertain whether these are issues in dispute, and if so, requesting the exchange of information prior to the actual mediation, and if necessary, even facilitating a procedure for the data conflict to be resolved.

7. The cost of FDM in NSW

7.1 The RAA provided financial information indicating that the total cost of administration of the Farm Debt Mediation Unit within the RAA, between 12 February, 1995 and 31 January, 1999, was \$506,059.39 but this appears to include significant direct expenses (\$45,139.00) in 1994-1996 relating to establishment not present in later years. During this period, and remembering that this period is actually at least 6 months longer than the period surveyed in this report, at least 642 mediations had taken place. This results in an average administration cost per mediation of approximately \$788.00 or \$717.94 per mediation if establishment costs are excluded. This is, in effect, the cost to the tax payer, of the RAA providing the infrastructure for FDM to take place.

This figure means little in isolation. It would be interesting to compare it to the cost, for example, of providing the infrastructure for a one-day hearing in the District Court of New South Wales, or providing one bed for one day at a public hospital. Highly subjective considerations apply in determining whether the benefits of FDM to farmers as one part of society, and to society as a whole, justifies the investment.

7.2 Some more objective comparisons can be drawn with the cost of FDM in various states in the USA. The following information was extracted from a report prepared by the Office of the Inspector General, US Department of Agriculture entitled: "Oversight of State-Administered Mediation Programs Needs Strengthening".

Financial Year Caseload Activity and Cost Data for State-Administered Mediation Programs:

<i>State</i>	<i>Number of Cases Mediated</i>	<i>Program Operating Costs</i>	<i>Average cost per Mediation Case</i>
Texas	58	\$545,816.00	\$9,411.00
Minnesota	232	\$382,808.00	\$1,650.00
North Dakota	106	\$543,944.00	\$5,132.00
Michigan 4/	N/A	N/A	N/A
Total	396	\$1,472,568.00	
Average	132	\$490,856.00	\$3,719.00

Financial Year 1995 Caseload Activity and Cost Data for Farm Service Agency (FSA)
Administered Mediation:

<i>State</i>	<i>Number of Cases Mediated</i>	<i>Program Operating Costs</i>	<i>Average cost per Mediation Case</i>
California 5/	0	---	---
Florida 6/	0	---	---
Lousiana 5/	2	\$1,115.00	\$558.00
Maryland 6/	2	\$1,262.00	\$631.00
Michigan 5/	3	\$1,240.00	\$413.00
Mississippi 6/	1	\$787.00	\$787.00
Missouri 5/	3	\$1,500.00	\$500.00
Ohio 5/	0	---	---
Pennsylvania 5/	0	---	---
Washington 5/	0	---	---
Total	11	\$5,904.00	
Average	2.2	\$1,181.00	\$537.00

The costs are in US dollars, but include the cost of the mediator, as well as infrastructure costs. The top table refers to FDM administered by States pursuant to Federal funding, and the lower table refers to FDM directly administered by the Federal Farm Service Agency. The much lower average cost of the latter is noteworthy.

- 7.3 The US figures do not indicate the actual cost to the farmer of attending the FDM including, for example, the cost of representation if any. The information about costs in this report does, however, include the cost of representation and the cost of the mediator, in its findings at paras. 3.3. In striving to ascertain the cost of a NSW FDM to the government provider of the FDM service, clearly the NSW scheme compares favourably to the US schemes having regard to current currency conversion rates. Of course, in NSW the parties bear the cost of the mediator, whereas in the USA it seems that this is not the case in most of the Federally-funded FDM schemes.

From the farmers' perspective, however, NSW farmers pay for their mediator. Paragraph 6.2 of this report notes that 82% of FDM take less than 12 hours and 57% less than 8 hours. Assuming an average cost per hour for the mediator of \$200.00 (this figure is probably high for an average, but it suffices for present purposes) this means that in 57% of FDM, the cost to the parties of the mediator is not greater than \$1,600, and in 82% it is not greater than \$2,400. Anecdotally it seems that in most cases, the costs of the mediator are shared between the parties meaning that most farmers would pay no greater than between \$800 to \$1,200 for the mediator's fees.

8. **Farm Debt Mediation Act Review - Report 1996**

- 8.1 In May, 1996 the Farm Debt Mediation Review Committee delivered its report on the Review of the FDM Act (called "the 1996 report"). For the sake of completeness in this present report, it was considered useful to review some of the comments made in the 1996 report having regard to the data contained in this report. As a general proposition, this report confirms many of the recommendations made in the 1996 report, or provides data of an empirical nature to support those recommendations. However, there are a number of recommendations which seem to be based on perceptions unsupported by the findings of this research. This section will deal with those recommendations only.
- 8.2 Recommendation 10 refers to "concerns of inadequate performance by mediators". In fact, however, paragraph 1.12 of the 1996 report which gives rise to the recommendation does not deal with mediator performance but perceptions of mediator bias. Whilst this is, of course, an important issue, there is little evidence to suggest that mediator impartiality was or is an actual problem in FDM. Paragraph 4.13 of this report sets out that whilst farmers have some concerns about the fairness of agreements reached at FDM, in terms of the role of the mediator, there were no real issues of fairness. All lenders (100%), 86% of representatives and 72% of farmers all agreed that the mediator was impartial.
- 8.3 Recommendation 16 of the 1996 report favours amendments to the Act which, in effect, narrow its application. Paragraph 3.2 of the 1996 report referred to the definition of "farm mortgage", and to a number of submissions which indicated a need to have livestock mortgages, wool and crop liens included within the Act. The Committee appears to have rejected this after discussions with various interested parties. The present report suggests, however, that there is considerable support from farmers and even lenders for the FDM Act to apply at earlier points in time other than default, and in a broader range of circumstances than just farm mortgages - see paragraph 5.10.
- 8.4 Recommendation 20 refers to the perceived need for the function of the mediator to be clarified and paragraph 3.6 of the 1996 report suggests that the reason for any concern is that it is contrary to the normal functions of a mediator to "advise, counsel and assist the parties to a mediation" but not to give legal advice. This report at paragraphs 6.2, 6.3 and 6.4 suggests that all parties actually found it helpful for mediators to suggest possible options for settlement, and that mediators do not give legal advice in FDM.

9. **The United States and Canadian Experiences in FDM**

During the course of researching and preparing this report reference was made to literature which discussed the experiences of many states and provinces in the USA and Canada respectively. This was extremely helpful and interesting. The broad observation can be made that the NSW

experience of FDM compares very favourably to these other jurisdictions, many of whom have had longer and broader experience in FDM, but many of whom are not able to reflect on an experience with FDM which is as satisfactory as that in NSW. There is much benefit to be derived by establishing and fostering closer relations and dialogue with these jurisdictions, and facilitating exchanges of information and ideas. If feasible, the RAA should pursue closer relations with these jurisdictions.