ROYAL COMMISSION INTO MISCONDUCT IN THE BANKING, SUPERANNUATION AND FINANCIAL SERVICES INDUSTRY

ROUND 4 HEARINGS – FARMING FINANCE

RABOBANK AUSTRALIA LIMITED

SUBMISSIONS ON THE GENERAL QUESTIONS

1 INTRODUCTION

1. Rabobank provides these submissions in response to the general questions posed by the Commission (hearing on 6 July 2018) in respect of:

   a. the first general question arising from the ANZ Case Study: What does it mean for a bank to act fairly and reasonably towards a customer in a consistent and ethical manner in the context of community standards and the Code of Banking Practice? (P-4108.14 – 16), which is dealt with in section 2 below;

   b. the seven general questions arising from the Rabobank Case Study, which are designated as questions numbered A – G and dealt with in section 3 below:

      A. Is it appropriate for financial services entities to conduct internal appraisals, as opposed to obtaining independent valuations of farms and other rural property? If so, in what circumstances is it appropriate? (P-4114.12 - 14);

      B. Is it appropriate for staff involved in origination of the loan to conduct or otherwise be substantively involved with such appraisals? (P-4114.14 - 16);

      C. Should there be minimum levels of qualification, skill and experience before a bank employee can be authorised to conduct appraisals? If so, what are the appropriate minimum levels? (P- 4114.16 - 18);

      D. Should there be a code that sets out the requirements for the conduct of internal appraisals by financial services entities, either in respect of rural properties or more generally? If so, what form should that code take? (P-4114.18 - 21);

E. If it is inappropriate for financial services entities to conduct internal appraisals of property to be taken as security, what should be done to stop or discourage that practice? (P- 4114.23 - 25);

F. Are the legislative obligations on financial services entities to provide documents prior to a farm debt mediation, such as the obligation in section 21 of the Farm Business Debt Mediation Act in Queensland, sufficient? (P-4114.25 - 27); and

G. Should they be extended to oblige financial services entities to provide information on request as well as documents? (P-4114.27 - 29).

2 GENERAL QUESTION FROM ANZ CASE STUDY (6 JULY 2018 TRANSCRIPT P-4108)

A. What does it mean for a bank to act fairly and reasonably towards a customer in a consistent and ethical manner in the context of community standards and the Code of Banking Practice?

2. In Rabobank's Submissions Concerning the Brauer Case Study (Rubric 4-16) dated 13 July 2018 (**Rabobank Brauer Case Study Submissions**) it submitted at [5] that its response to the findings sought by Counsel Assisting in relation to its conduct in the Brauer Case Study were made subject to Rabobank's separate submissions on the meaning of "*fairness*" in the notion of conduct falling below community standards and expectations and the proper construction and meaning of clause 2.2/3.2 in the applicable Code of Banking Practice. Accordingly, Rabobank respectfully submits that the following submission on the general question of the meaning of "fairly and reasonably…in a consistent and ethical manner" should be read together with Part B of the Rabobank Brauer Case Study Submissions under the heading "Findings Regarding Conduct by Rabobank in the Brauer Case Study".

3. Rabobank's approach to the question of what it means for a bank to "*act fairly and reasonably towards a customer in a consistent and ethical manner*" has been informed by the Commissioner's comments touching on this question in the course of Counsel Assisting's closing submissions on day 33 of the Commission's hearings (6 July 2018). In particular, the Commissioner said (at P-4102.1-18):

> *And I will be assisted, I think, if both in relation to the particular cases, but more generally, some attention is given to the connection between fairness as a community standard – to which I would have ordinarily thought the other limb was*

honesty, so community expects entities to act fairly and honestly – connect that with Code of Banking Practice, fairly, reasonably, consistent, ethical manner. Although differently expressed, I rather suspect its content is not materially different. Then it may or may not be relevant to go on and observe that both Corporations Act 912A and the Credit Act general conduct provisions talk of efficient, honest, fair.

4. In response to the Commissioner's comments, Rabobank's submissions below focus on the interaction between the following concepts in the Terms of Reference in the Letters Patent, being:

   a. whether any conduct, practices, behaviour or business activities by financial services entities fall below community standards and expectations (paragraph (b) of the Letters Patent); and

   b. the part of the definition of "*misconduct*" which is conduct that breaches a professional standard or a recognised and widely adopted benchmark for conduct (paragraph (d) of the definition of "*misconduct*" in the Letters Patent) insofar as that standard or benchmark is comprised of the commitments in clause 2.2 of the Code of Banking Practice effective May 2004 (**Code of Banking Practice 2004**) and clause 3.2 of the Code of Banking Practice published in 2013 and as amended effective 1 February 2014 (**Code of Banking Practice 2013**) (together, **the Code**).

5. In relation to "*community standards and expectations*" of conduct, practices, behaviour or business activities by financial services entities, Rabobank refers to the Commissioner's opening comments on the first day of the hearing of the Commission on 12 February 2018 (P-8.20-39). In particular, the Commissioner referred to the Murray Report into the Financial System and said as follows:

   That report said that the ultimate purpose of the financial system is "to facilitate sustainable growth in the economy by meeting the financial needs of its users." The Murray Inquiry said that it believed that the financial system will achieve this goal if it operates in a manner that is efficient, resilient and fair. It concluded that fundamental to fair treatment is the concept that financial products and services should perform in the way that consumers expect or are led to believe. Fairness, understood in this way, may lie at, or at least close to, the heart of community standards and expectations about dealings with consumers.

6. Rabobank accepts the Commissioner's comments that at the heart of community standards and expectations about dealings with customers is the notion that "*fundamental to fair treatment is the concept that financial products and services should perform in the way that consumers expect or are led to believe.*"

7. Rabobank's approach to the Brauer Case Study generally, the concessions made by Mr James in his evidence and the Rabobank Brauer Case Study Submissions adopt and apply the concept of "*fair treatment*" as forming the substance of "*community standards and expectations*" in assessing Rabobank's conduct in the Brauer Case Study. Rabobank also accepts that honesty in dealings with customers also lies at the heart of community standards and expectations.

8. The application of the Code gives rise to further considerations because the concept of acting "*fairly*" is, in the context of that instrument, part of a composite expression. Clause 2.2 of the Code of Banking Practice 2004 and clause 3.2 of the Code of Banking Practice 2013 (which are in the same terms), provide:

> ***We*** *will act fairly and reasonably towards* ***you*** *in a consistent and ethical manner. In doing so* ***we*** *will consider your conduct,* ***our*** *conduct and the contract between us.*

9. The terms in bold above are defined differently in each iteration of the Code but for the purposes of these submissions those definitions and their differences are not relevant. Rabobank's submissions assume that each version of the Code was applicable on and from the dates Rabobank adopted them.[1]

10. Rabobank notes that these provisions of the Code have received widespread judicial consideration in the context of banker and customer disputes litigated in courts. In particular, judicial consideration of the Code appears to arise commonly in cases where banks take enforcement action in relation to customer or third party guarantees. Whilst those cases inform judicial treatment of the Code and the incorporation of the provisions of the Code into contracts with customers, specific judicial consideration of commitment in clause 2.2 of the Code of Banking Practice 2004 and clause 3.2 of the Code of Banking Practice 2013 has arisen in fewer instances.

[1] Rabobank adopted the Code of Banking Practice 2004 on 22 September 2008 and the Code of Banking Practice 2013 on 1 February 2014.

11. In *Sam Management Services (Aust) Pty Ltd v Bank of Western Australia Ltd* [2009] NSWCA 320 the NSW Court of Appeal (constituted by Hodgson and Young JJA and Sackville AJA) considered the issue of clause 2.2 being given contractual force by virtue of the Code being incorporated verbatim into a loan contract.

12. Both Hodgson JA and Sackville AJA considered (without expressly holding) that any breach of the obligation created by clause 2.2 was to be considered as a whole or as a composite phrase, that is, a breach was considered by reference to whether the bank had relevantly acted "fairly and reasonably" toward the customer "in a consistent and ethical manner": see [28] and [55] per Hodgson JA; [77] and [82] per Sackville AJA.

13. It is to be noted, however, that at [30] Hodgson JA quoted the primary judge's formulation of the question on this issue as "*whether the Bank was acting unfairly <u>and/or</u> unreasonably must be assessed by reference to all the facts and circumstances*." (underlining added)

14. Young JA also referred to and made some general remarks on the contractual inclusion of clause 2.2 at [72] to [74]:

> *72. This appeal has been made viable because of the inclusion in the contract between the parties of the Code of Banking Practice, a document which was probably never prepared by its drafters to form part of a legal document. It is drafted as a lay person's document to be understood in a quick reading by a person considering dealing with the bank. It thus lacks the precision that one would expect in a term to be included in a contract dealing with megadollars.*
>
> *73. The relevant clause in the Code of Practice is 2.2 which provides:-*
>
> *"we will act fairly and reasonably towards you in a consistent and ethical manner. In so doing we will consider your conduct, our conduct and the contract before us."*
>
> *74. The clause in a legal document is so fraught with ambiguity. Its exact meaning was not canvassed before us so that it would be unwise to attempt to be definitive in its construction. Assuming it must be given some meaning in a commercial document, it probably does not operate beyond requiring the bank to act in good faith towards the customer.*

15. In *Seeto v Bank of Western Australia Ltd* [2010] NSWSC 922 (a judgment on an interlocutory application) Nicholas J expressed a "preliminary view" about the construction of clause 2.2

which had again been incorporated in a contract between a bank and the customer as follows (at [37] to [39]):

> *[37] As cl 1.1 states, the Code is a voluntary code of conduct which sets standards of good banking practice to be followed when dealing with individual and small business customers. Clause 2.2 imposes a standard of behaviour in acting towards the customer which is fair and reasonable, consistent and ethical. In doing so, consideration is to be given to the conduct of both the customer and the bank, and to the contractual arrangements between them. Clause 2.3 states that in meeting the bank's key commitments to the customer (which include the commitments under cl 2.2) regard will be had to the bank's "prudential obligations".*
>
> *[38] These provisions impose standards of behaviour to be observed in the performance of contractual rights and obligations, including the exercise of contractual powers. The unambiguous language of cl 2.2 and 2.3 shows that the manner in which the bank is required to act in the performance of a contract with a customer is to be ascertained with regard to the conduct of the parties in the context of their contractual arrangements. Clause 2.3 recognises that the bank will have regard to its "prudential obligations" in adhering to the standards of behaviour. The effect of this provision, in my opinion, is to preserve the bank's entitlement to act with careful regard to its own interests under the relevant contract(s).*
>
> *[39] Accordingly, in my opinion, adherence to the Code does not require the bank to subordinate its own interests to those of the customer, or to prefer the interests of the customer. These clauses indicate the bank's commitment to have due regard to the interests of both parties in the course of its performance of the terms of the relevant contract. They are directed to the manner of exercise of the contractual right or power. They do not operate to qualify or vary such right or power.*

16. Paragraph [39] of the above was subsequently cited by Sackar J in *Commonwealth Bank of Australia v Geoffrey Anthony Shannon* [2013] NSWSC 1076 at [296].

17. Whilst these passages provide some assistance in considering the meaning and operation of clause 2.2 in a contractual setting, they do not specifically address the concerns raised by the Commissioner as to how community standards and expectations might relate to the expressions contained in clauses 2.2 and 3.2 in each version of the Code respectively and

whether the meaning of those community standards and expectations are substantially the same as the expressions in the Code.

18. Rabobank's submission on this issue is that "*fairness*" (in the sense expressed by the Commissioner at paragraph 5 above) does form the centrepiece of community standards and expectations but is not synonymous or co-extensive with the commitment in clauses 2.2 and 3.2 of the Code.

19. Rabobank accepts that the meaning of the word "*fairness*" when used in clauses 2.2 or 3.2 of the Code should bear the same meaning as articulated by the Commissioner. However, "*fairness*" (which imports a standard of conduct in that sense) appears conjunctively with the term "reasonable". As a matter of textual construction the word "reasonable" should bear a different meaning so as to be given some operation. In its ordinarily understood usage "reasonableness" also bears a different meaning from "fairness" and in Rabobank's submission therefore stipulates a different standard of conduct. It is, for example, conceivable that a bank might act "unfairly" but "reasonably" toward a customer in a particular circumstance.

20. In addition, the manner in which a bank is required to act under the commitment in the Code is stipulated by the Code to be "consistent and ethical"; hence action by the bank must first meet the standard of fairness and reasonableness and also be done in a manner that is consistent and ethical. Again, it is possible to conceive of instances where the manner in which a bank might act is "consistent" but not "ethical" or *vice versa*. Grammatically, acting in a "consistent and ethical" manner is also used conjunctively.

21. In Rabobank's submission, the expression "*fairly and reasonably….in a consistent and ethical manner*" is a single, composite, requirement, to be applied in the light of all of the circumstances of a particular action.

22. Construing clauses 2.2 and 3.2 in each version of the Code in this manner as outlined above requires banks to adhere to all of these standards of conduct but only gives rise to a breach when all of those elements are not performed. Such a construction recognises that when one or more elements are not met the customer may not necessarily suffer an adverse result, or may suffer an adverse outcome of relatively lesser significance, but nevertheless sets a standard of conduct for banks that is breached when all elements are not met.

23. It follows in Rabobank's submission that when the concept of "*fairness*" is applied as a community standard and expectation in banks' dealings with customers it gives rise to a

likelihood that the failure to meet that standard of conduct will be more prevalent and more readily found in customer dealings than when the concept of "*fairness*" forms part of the composite expression used in the Code.

24. For this reason "*misconduct*" by reference to clauses 2.2 and 3.2 in each version of the Code respectively is a more serious failing because it is a breach of all of the stipulated standards (fairness, reasonableness, consistent and ethical) and therefore less readily found in customer dealings. Such an approach also recognises differing degrees of wrongdoing and seriousness in bank conduct toward customers which reflects the reality of commercial life that not all shortcomings are to be treated in the same manner by the community, the financial services industry, courts and policy makers.

25. In short, while "*fairness*" is at the very heart of community standards and expectations, it is only one part of the commitment in the Code. A finding of "*unfairness*" is necessary to find a breach of the Code, but it is not sufficient of itself to do so. For this reason, the Commission is required to find more than "*unfairness*" to be satisfied that there is a breach of the Code. The fact that such a breach might be characterised as "*misconduct*", which itself is a word that carries notions of unacceptable and improper conduct beyond mere "*unfairness*", reinforces the need to find all standards of conduct in the composite expression in the Code have been breached before such a finding is made.

26. For this reason, in the Rabobank Brauer Case Study Submissions, Rabobank accepts that there has been unfairness in its treatment of the Brauers in various respects but does not accept that such unfairness of itself means that there has been a breach of the Code and therefore misconduct.

3 GENERAL QUESTIONS FROM RABOBANK CASE STUDY (6 JULY 2018 TRANSCRIPT P-4114)

A. Is it appropriate for financial services entities to conduct internal appraisals, as opposed to obtaining independent valuations of farms and other rural property? If so, in what circumstances is it appropriate?

27. Rabobank considers that it is appropriate for financial services entities to conduct internal appraisals of farms and other rural property provided strict ethical requirements and quality controls are imposed and observed to avoid actual, potential and perceived conflicts of interest between the entity and the customer or proposed customer.

28. To meet the strict ethical requirements, both the individual appraiser and the business unit responsible for appraisals and valuations must have financial and institutional independence from other areas of the financial services entity.

29. To have appropriate quality controls, minimum levels of qualifications, skill and experience of individual appraisers should be established, periodic reviews of appraisers and appraisal units should be conducted and a code or an APRA prudential standard for the making of internal appraisals by financial services entities could be introduced.

30. These matters are dealt with in further detail in turn below.

Independence of individual appraisers

31. To demonstrate individual independence, the following is required of the individual appraiser (or valuer) in relation to every appraisal - the appraiser:

    a. is not involved in the loan origination and processing, loan decision or credit underwriting process of the entity;

    b. is not influenced by the debtor's creditworthiness or status as a customer of the bank;

    c. does not have an interest in the property;

    d. does not have any connection to either the buyer or the seller of the property (in the circumstance of a property purchase/sale);

    e. does not have access to any information held by the entity about the financial position of the buyer or the seller of the property (in the circumstance of a property purchase/sale); and

    f. does not receive a fee or remuneration linked in any way to the carrying out or result of the appraisal.

Independence of appraisal unit

32. The business unit within the entity responsible for appraisals and valuations should be separate from the credit and lending business units of the entity. The critical separation which should be put in place would be a barrier to prevent the appraisals and valuation unit from having any access to credit, lending and loan performance information, in particular the financial information of any customers or potential customers of the entity. This would

be achieved primarily through strict information and data barriers and controls and strictly segregated reporting lines. Limited exceptions to these barriers and controls would only arise when the bank manager (rural manager) would provide the appraiser with factual instructions for the appraiser's valuation and an opportunity to comment on the appraiser's valuation after it has been completed (see paragraphs 42 and 43 below).

Quality of appraisers and appraisals

33. The appraiser must be suitably qualified, skilled and experienced to carry out the appraisals. Those qualifications, skills and experience must be demonstrated before the appraiser is permitted by the entity to carry out any appraisals.

34. The minimum levels of qualifications, skill and experience of individual appraisers could be established by the demonstration of the following:

    a. have the minimum level of educational qualifications which enables the appraiser to carry out the types of appraisals that their role within the appraisal unit requires them to perform. Preferably this would be a registered valuer qualification but because, based on Rabobank's experience, there is a shortage of rural registered valuers across Australia, for practical reasons it may not necessarily be formal external valuation qualifications but instead could be certification through an agribusiness course provided by a registered tertiary educational provider (eg Marcus Oldham). The financial entity should also be required to provide targeted education and training to complement or complete an appraiser's level of experience (as Rabobank does);

    b. have a minimum of 5 years relevant experience either as an appraiser, rural valuer or in the conduct of rural lending;[2]

    c. have appropriate knowledge and experience to perform the appraisal, which would include familiarity with the area and production characteristics of the land within the area in which the appraisal property is located and an understanding of the industry associated with the business undertaken on it;

[2] This is in recognition of the fact that while separation of valuation and credit access is important in individual transactions, experience in lending provides empirical knowledge of, and insight into, the valuation of rural property.

d. demonstrate familiarity with real estate valuation standards that apply to the appraiser and the appraisal in question, such as the Valuation and Property Standards of the Australian Property Institute;

e. demonstrate knowledge of the property to be appraised, the real estate market in which it would trade and the purpose of the appraisal; and

f. demonstrate strong analytical skills.

Continued role for external valuations

35. Within a model which allowed for internal appraisals by a financial services entity, external valuations should still occur. If the property to be valued is of a particular specialised nature and/or the loan secured by it is significant, it is contemplated that a specialist external valuer would be engaged by the financial services entity.

36. For this purpose, the financial services entity's appraisals and valuations unit should maintain a panel of suitably experienced valuation firms, assessed for their qualifications to do particular kinds of valuations.

37. External valuers should also be subjected to the qualifications requirements outlined above.

Periodic review of appraisers and appraisal unit

38. In addition to demonstrating these requirements in individual transactions and at commencement of engagement by the entity, quality control should also be exercised by implementing a dedicated hindsight review which would include comparison with external sales data and examination of evidence relied upon to substantiate opinions.

Considerations supporting internal appraisals

39. Rabobank estimates that the average cost of an external valuation for a large and/or specialised complex asset is about $5,000 and for an external valuation of a non-complex asset is about $3,500. Rabobank currently seeks approximately 11,000 internal appraisals per annum and approximately 400 external valuations per annum.

40. In addition to cost, an external valuation often adds significant time to securing credit as in Rabobank's experience suitably qualified valuers may not live locally and may have commitments preventing them from attending to a valuation immediately.

B. Is it appropriate for staff involved in the origination of the loan to conduct or otherwise be substantively involved with such appraisals?

41. It is not appropriate for staff involved in the origination of the loan to conduct, be responsible for or materially influence the internal appraisal.

42. However, staff involved in the origination of the loan (account managers, financiers) should be permitted to be involved in the collection of information (from the client or otherwise) to permit an orderly and timely valuation to be undertaken by the internal appraiser.

43. For this reason, origination staff might be afforded the opportunity to comment on the valuation on particular grounds; for example, if an origination staff member has formed a personal view that a property is likely to have a value within a certain range and the valuation is well outside that range for no reason that is apparent from the appraisal report. In those circumstances it would be appropriate for an escalation process to exist either within the appraisal unit or separate from both the credit and appraisal units. That process might include the production of an external valuation. This would allow anomalies to be addressed in a way that benefits both the entity and the individual customer or prospective customer, while adhering to the principles of independence outlined in Rabobank's submission in response to question A above.

C. Should there be minimum levels of qualification, skill and experience before a bank employee can be authorised to conduct appraisals? If so, what are the appropriate minimum levels?

44. Yes. The minimum levels of qualification, skill and experience required for an employee of a financial services entity to conduct an appraisal should be those outlined in response to question A above.

D. Should there be a code that sets out the requirements for the conduct of internal appraisals by financial services entities, either in respect of rural properties or more generally? If so, what form should that code take?

45. A code or an APRA prudential standard would establish a consistent standard of conduct applicable to the making of internal appraisals by financial services entities.

46. Rabobank agrees that banks should ensure that all appraisers, both internal and external, meet the requirements of independence and qualifications as noted in the response to question A above.

E. If it is inappropriate for financial services entities to conduct internal appraisals of property to be taken as security, what should be done to stop or discourage that practice?

47. For the reasons set out in response to question A above, Rabobank does not consider the practice of conducting internal appraisals to be inappropriate.

F. Are the legislative obligations on financial services entities to provide documents prior to a farm debt mediation, such as the obligation in section 21 of the Farm Business Debt Mediation Act in Queensland, sufficient?

48. Rabobank supports the enactment of a uniform farm debt mediation scheme in all Australian jurisdictions, as recommended by the Commonwealth Senate Select Committee's Report on "Lending to Primary Production Customers" dated 6 December 2017 ("Recommendation 12" at [4.30]). Rabobank also endorses the Committee's recommendation that a uniform scheme be based on the *Farm Debt Mediation Act 1994* (NSW) (**NSW FDMA**).

49. Section 18D of the NSW FDMA, which was introduced by the *Farm Debt Mediation Amendment Act 2018* (NSW) following public and industry consultation by the New South Wales Rural Assistance Authority,[3] was passed by the legislative assembly on 9 May 2018 (but has not yet entered into force):

a. permits a mediator to facilitate the exchange of "information" between the parties to the mediation for the purpose of assisting the parties to resolve the issues between them;

b. for the above purpose, requires a party to a mediation to give the mediator a copy of any request for information before giving the request to the other party; and

c. for the purposes of preparing a summary of the mediation, states that a mediator is to have regard to whether any request for information made by a party was reasonable, and whether information was provided in response to a request within a reasonable period.

50. The Queensland model, set out in sections 21 and 22 of the *Farm Business Debt Mediation Act 2017* (Qld) (**QLD FBDMA**), allows for both the mortgagee and farmer to give notice requesting the other party to provide certain types of documents (as prescribed in those

[3] See https://www.raa.nsw.gov.au/fdm/2018-amendments and also the second reading speech (and response) in relation to the *Farm Debt Mediation Bill* 2018 (NSW), Legislative Assembly Hansard, 2 May 2018 (Mr Paul Toole and Mr Clayton Barr).

same sections of the QLD FBDMA) prior to the mediation. Compliance with such a notice must occur within 30 business days following receipt of the notice, or a longer period as agreed between the farmer and the mortgagee in consultation with the mediator. If the mortgagee or farmer fails to comply, or to make reasonable efforts to comply with those obligations, that party will have failed to take part in the mediation in good faith.

51. Section 20 of the *Farm Debt Mediation Act 2011* (Vic) and section 20 of the *Farm Debt Mediation Bill 2018* (SA) (which appears to be modelled on the Victorian Act) could also be construed as conferring on the Commissioner (as defined in the Bill) a broad power that could go to production of documents and information in advance of mediation sessions.

52. However, Rabobank agrees with the Senate Committee that an express provision requiring production of information upon request is important to the utility and success of farm debt mediations.

53. In Western Australia and Tasmania there is no legislative provision for farm debt mediation and in the Australian Capital Territory (ACT) and Northern Territory (NT) there is no legislation provision or voluntary scheme.

54. The farm debt mediation legislation and schemes in the States and Territories of Australia are set out in the table below.

Jurisdiction	Legislation or voluntary scheme
New South Wales	*Farm Debt Mediation Act 1994* (NSW) (recently amended by the *Farm Debt Mediation Amendment Act* 2018 (NSW))
Queensland	*Farm Business Debt Mediation Act 2017* (QLD)
Victoria	*Farm Debt Mediation Act 2011* (VIC)
South Australia	*Farm Debt Mediation Bill 2018* (SA)
	SA Farm Finance Strategy (voluntary farm debt mediation scheme between the Australian Bankers Association and the SA Farmer's Federation)
Western Australia	Farm Debt Mediation (WA) Scheme (voluntary farm debt mediation scheme administered by the WA Government)

Tasmania	*Ad hoc* farm debt mediation co-ordinated by Rural Financial Counselling Service Tasmania, a not-for profit organisation funded by the Commonwealth and Tasmanian governments (no relevant legislation or voluntary scheme)
Australian Capital Territory	No relevant legislation or voluntary scheme
Northern Territory	No relevant legislation or voluntary scheme

55. The introduction of a statutory basis for requesting and providing documents prior to the conduct of a farm debt mediation is a positive addition to the mediation process in both Queensland and New South Wales. The provisions enable a more meaningful mediation process, in accordance with the legislation's overarching purpose of providing for an "*efficient and equitable*" resolution of farm debt mediation disputes – see section 3, QLD FBDMA and section 3, NSW FDMA.

56. A uniform approach could be achieved by the inclusion of similar provisions in the current Victorian *Farm Debt Mediation Act 2011* (VIC) and the South Australian *Farm Debt Mediation Bill 2018* (SA), as well as in legislative schemes in the ACT and NT.

57. Should a uniform law be developed for adoption in all jurisdictions, it should include provision for the request and production of documents by the parties.

58. In this regard, Rabobank notes that the information disclosure provisions in the New South Wales and Queensland schemes provide for the mediator to strike the balance between necessary disclosure while avoiding the complexity, formality and expense of court procedures like discovery.[4]

59. Given the pivotal role that mediators would have in information disclosure, Rabobank considers that the development of updated mediator training requirements and practice

[4] See the objects clauses at s 3, NSW FDMA, s 3, QLD FBDMA, s 1 *Farm Debt Mediation Act* 2011 (Vic), s 3 *Farm Debt Mediation Bill* 2018 (SA).

guidelines by regulatory bodies[5] would provide mediators with a framework within which parties to mediations can expect a consistent approach.

G. Should they be extended to oblige financial services entities to provide information on request as well as documents?

60. Yes, for the reasons stated in response to question F above.

61. Section 18D of the NSW FDMA, the model for national uniform legislation, expressly provides for a party to a mediation to provide "information", as well as documents, upon request of another party.

62. The QLD FBDMA - and the farm debt mediation legislation in Victoria and South Australia - do not presently contain comparable provisions, in that they do not expressly contemplate production, on request, of "information".

16 July 2018

A McGrath, T Hollo
Counsel for Rabobank Australia Limited

Baker McKenzie
Solicitors for Rabobank Australia Limited
(Contact: David Walter, Partner)

[5] Being, at present in terms of the legislated farm debt mediation schemes, the New South Wales Rural Assistance Authority, the Victorian Small Business Commissioner, the Queensland Rural and Industry Development Authority and the South Australian Small Business Commissioner.