

FARM DEBT MEDIATION ACT 1994 No. 91

NEW SOUTH WALES



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FARM DEBT MEDIATION ACT 1994 No. 91

NEW SOUTH WALES



Act No. 91, 1994

An Act to make provision for mediation concerning farm debts, and for other purposes. [Assented to 12 December 1994]

The Legislature of New South Wales enacts:**PART 1—PRELIMINARY****Short title**

1. This Act may be cited as the Farm Debt Mediation Act 1994.

Commencement

2. This Act commences 2 months after the date of assent, except in so far as commenced sooner by proclamation.

Object

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

Definitions

- 4 (1) In this Act:

“**Authority**” means the New South Wales Rural Assistance Authority constituted by the Rural Assistance Act 1989;

“**creditor**” means a person who provides financial accommodation to a farmer that creates or increases a farm debt and includes a bank, or a credit provider within the meaning of the Credit Act 1984;

“**enforcement action**”, in relation to a farm mortgage, means taking possession of property under a farm mortgage, the sale of property under a farm mortgage, or any other action to enforce a farm mortgage including the continuing of action already commenced to enforce a farm mortgage but does not include:

- (a) the completion of the sale of property held under a farm mortgage in respect of which contracts were exchanged before the commencement of section 6; or
- (b) the enforcement of a judgment that was obtained before the commencement of that section;

“**farm**” means land on which a farmer engages in a farming operation;

“**farm debt**” means a debt incurred by a farmer for the purposes of the conduct of a farming operation that is secured wholly or partly by a farm mortgage;

“**farm machinery**” means:

- (a) a harvester, binder, tractor, plough or other agricultural implement; or

- (b) any other goods of a class commonly used for the purposes of a farming operation that are prescribed by the regulations as being farm machinery for the purposes of this Act,

if the goods are acquired for the purposes of a farming operation;

“farm mortgage” includes any interest in, or power over, property (comprising a farm or part of a farm or farm machinery used by a farmer in connection with a farming operation, or both) securing obligations of the farmer (whether as a debtor or guarantor);

“farmer” means a person (whether an individual person or a corporation) who is solely or principally engaged in a farming operation and includes a person who owns land cultivated under a share-farming agreement and the personal representatives of a deceased farmer;

“farming operation” means:

- (a) a farming (including dairy farming, poultry farming and bee farming), pastoral, horticultural or grazing operation; or
- (b) any other operation prescribed by the regulations for the purposes of this definition;

“function” includes a power, authority or duty;

“mediator” means a mediator for the time being accredited by the Authority pursuant to arrangements instituted by the Authority under this Act, and **“mediation”** means mediation by such an accredited mediator.

(2) This Act extends to:

- (a) a farm mortgage that was entered into before the commencement of section 6; and
- (b) a liability or obligation that arose under a farm mortgage before the commencement of section 6.

Application of Act

5. (1) This Act applies in respect of creditors only in so far as they are creditors under a farm debt.

(2) This Act does not apply in respect of:

- (a) a farmer whose property is subject to control under Division 2 of Part X of the Bankruptcy Act 1966 of the Commonwealth; or
- (b) a farmer whose property is the subject of a bankruptcy petition presented by the farmer or the creditor; or
- (c) a farmer, being a corporation, that is an externally administered corporation within the meaning of the Corporations Law.

Enforcement action in contravention of Act void

6. Enforcement action taken by a creditor to whom this Act applies otherwise than in compliance with this Act is void.

Relationship with other Acts

7. (1) Nothing in this Act affects the operation of the Contracts Review Act 1980 or any other Act or law that deals with the granting of relief in respect of harsh, oppressive, unconscionable or unjust contracts or on the grounds of hardship.

(2) Nothing in this Act is to be construed as affecting the operation of the Banking Act 1959 of the Commonwealth and, in particular, the duty of the Reserve Bank under Division 2 of Part II of that Act.

(3) The requirements of this Act, in so far as they apply to the provision of consumer credit, are in addition to, and do not affect, the requirements of the Credit Act 1984 or any Act or law amending or replacing that Act.

(4) Other than as provided in this section, this Act has effect despite any other Act.

PART 2—MEDIATION**No enforcement action until notice of availability of mediation given**

8. (1) A creditor to whom money under a farm mortgage is owed by a farmer must not take enforcement action against the farmer in respect of the farm mortgage until at least 21 days have elapsed after the creditor has given a notice to the farmer under this section.

(2) Notice to the farmer is to be in writing in a form approved by the Authority (informing the farmer of the creditor's intention to take enforcement action in respect of the farm mortgage and of the availability of mediation under this Act in respect of farm debts).

(3) This section does not apply if the Authority has given a certificate under section 11 in respect of the farm mortgage concerned.

Farmer may request mediation

9. (1) A farmer to whom notice has been given under section 8 may, within 21 days after the notice was given, notify the creditor in writing that the farmer requests mediation concerning the farm debt involved.

(2) The Authority may approve a form for the purposes of a notification under this section and a notification given to a creditor in that form is sufficient notification for the purposes of this section. Failure to use the approved form does not of itself invalidate a notification given by a farmer.

Enforcement action postponed to allow for mediation

10. Once a farmer has given a creditor a notification in accordance with section 9 requesting mediation, the creditor must not take enforcement action in respect of the farm mortgage concerned unless and until the Authority has given a certificate under section 11 in respect of the farm mortgage.

Certificate that Act does not apply to farm mortgage

11. (1) The Authority must, on the application of a creditor under a farm mortgage, issue a certificate that this Act does not apply to the farm mortgage if the Authority is satisfied that:

- (a) satisfactory mediation in respect of the farm debt concerned has taken place; or
- (b) the farmer has declined to mediate in respect of the farm debt; or
- (c) 3 months have elapsed after a notice was given by the creditor under section 8 and the creditor has throughout that period attempted to mediate in good faith (whether or not satisfactory mediation has taken place during that period).

(2) A farmer is presumed to have declined to mediate if any of the following circumstances is established:

- (a) the farmer has failed to take part in mediation in good faith or has unreasonably delayed entering into or proceeding with mediation;
- (b) the farmer has indicated in writing to the Authority or to the creditor that the farmer does not wish to enter into or proceed with mediation in respect of the debt concerned;
- (c) the farmer has failed to respond within 28 days to an invitation in writing given to the farmer by the creditor to commence mediation in respect of the farm debt.

(3) The regulations may make provision for or with respect to what constitutes satisfactory mediation.

(4) A certificate may be given under this section (except under subsection (1) (c)) whether or not any notice has been given under section 8.

PART 3—GENERAL PROVISIONS CONCERNING MEDIATION

Arrangements for mediation

12. (1) The Authority is to institute arrangements for the accreditation of suitably qualified and experienced persons as mediators for the purposes of this Act and is to consult with the Australian Bankers Association and the NSW Farmers' Association on those arrangements.

(2) The Authority is to make arrangements for the referral of parties to mediation for the purposes of this Act. The Authority is not liable for any of the costs of or associated with mediation for the purposes of this Act.

Functions of mediators

13. (1) The functions of a mediator are as follows:

- (a) to listen to the farmer and creditor; and
- (b) to attempt to mediate between the farmer and creditor; and
- (c) to advise the farmer and creditor of programs that are available to assist them; and
- (d) to advise, counsel and assist the farmer and the creditor in attempting to arrive at an agreement for the present arrangements and future conduct of financial relations among them.

(2) It is not a function of a mediator:

- (a) to advise a farmer or creditor about the law; or
- (b) to encourage or assist a farmer or creditor in reserving or establishing legal rights; or
- (c) to act as an adjudicator or arbitrator.

Conduct of mediation sessions

14. (1) The procedure for commencing and conducting a mediation session is to be as determined by the Authority.

(2) Mediation sessions are to be conducted with as little formality and technicality, and with as much expedition, as possible.

(3) The rules of evidence do not apply to mediation sessions.

(4) A mediation session is to be conducted in the absence of the public, but persons who are not parties to a mediation session may be present at or participate in a mediation session with the permission of the mediator.

Confidentiality of mediation sessions

15. (1) Evidence of anything said or admitted during a mediation session and a document prepared for the purposes of, in the course of or pursuant to, a mediation session are not admissible in any proceedings in a court or before a person or body authorised to hear and receive evidence.

(2) In this section, “**mediation session**” includes any steps taken in the course of making arrangements for a mediation session or in the course of the follow-up of a mediation session.

Disclosure of information

16. A person must not disclose any information obtained in a mediation session or in connection with the administration or execution of this Act unless the disclosure is made:

- (a) with the consent of the person from whom the information was obtained; or
- (b) in connection with the administration or execution of this Act; or
- (c) as reasonably required for the purpose of referring any party or parties to mediation to any person, agency, organisation or other body and, with the consent of the parties to the mediation, for the purpose of aiding in the resolution of an issue between those parties; or
- (d) in accordance with a requirement imposed by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth; or
- (e) with other lawful excuse.

Maximum penalty: 20 penalty units or imprisonment for 6 months, or both.

Representation

17. (1) A party to mediation is not entitled to be represented by an agent unless it appears to the mediator that:

- (a) an agent should be permitted to facilitate the mediation; and

- (b) the agent proposed to be appointed has sufficient knowledge of the issue concerned to enable the agent to represent the party effectively,

and the mediator so approves.

(2) Subsection (1) does not prevent a corporation within the meaning of the Corporations Law that is a party to a mediation from being represented at the mediation by an officer of the corporation.

(3) If the mediator approves of the representation of a party by an agent, the approval of the mediator may be given subject to such conditions as the mediator considers reasonable to ensure that the other party to the mediation is not substantially disadvantaged by the agent appearing at the mediation and, if the mediator does so approve, the entitlement of the agent to represent the party is subject to compliance by the agent with the conditions.

(4) A contravention of this section does not invalidate a mediation.

Exclusion of personal liability of mediators and certain other persons

18. A matter or thing done or omitted to be done by a mediator or any person acting under the direction of a mediator does not, if the matter or thing was done or omitted to be done in good faith for the purposes of executing this Act, subject the mediator or a person so acting personally to any action, liability, claim or demand.

PART 4—MISCELLANEOUS

Act binds the Crown

19. This Act binds the Crown in right of New South Wales and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

Contracting out prohibited

20. (1) A provision of an agreement or other instrument (whether in writing or not and whether entered into before or after the commencement of this Act) by which a person seeks to avoid, modify or restrict the operation of this Act is void.

(2) A provision of an agreement or other instrument (whether in writing or not and whether entered into before or after the commencement of this Act) by which a person seeks to have a farmer (whether as debtor or guarantor) or a guarantor indemnify a creditor for any loss or liability arising under this Act is void.

(3) A creditor who is a party to any such agreement or other instrument is guilty of an offence.

Maximum penalty: 100 penalty units.

Waiver of rights void

21. A waiver of mediation rights under this Act is void.

Notices by mortgagee

22. If land is subject to a farm mortgage and another Act requires the mortgagee to give notice to the mortgagor before exercising in relation to the land a power or right conferred by the other Act or by the farm mortgage:

- (a) nothing in this Act derogates from the requirement to give the notice under the other Act; and
- (b) a notice required by this Act to be given before the exercise of the power or right does not fail to comply with this Act only because it includes matter required to be specified in a notice required by the other Act to be given before exercise of the power or right.

Manner of giving notice or other document

23. (1) If this Act requires or permits a notice or other document to be given, whether personally or by post, to the Authority or a mediator (whether the expression “deliver”, “serve”, “notify”, “send” or “give” or another expression is used), the notice or other document may be given by leaving it at, or by sending it by post to:

- (a) the office of the Authority; or
- (b) if it has more than one office—any one of its offices.

(2) If this Act requires or permits a notice or other document to be given to a person (other than the Authority or a mediator) (whether the expression “deliver”, “serve”, “notify”, “send” or “give” or another expression is used), the notice or other document may be given:

- (a) to a natural person:
 - (i) by delivering it to the person personally; or
 - (ii) by leaving it at, or by sending it by post, telex, facsimile or similar electronic facility to, the address of the place of residence or business of the person last known to the person giving the notice or other document; or

- (b) to a body corporate:
 - (i) by leaving it at the registered office of the body corporate with an officer of the body corporate; or
 - (ii) by sending it by post, telex, facsimile or similar electronic facility to its registered office.
- (3) Nothing in subsection (1) or (2):
 - (a) affects the operation of another law that authorises the service of a notice or other document otherwise than as provided in subsection (1) or (2); or
 - (b) affects the power of a court or tribunal to authorise service of a notice or other document otherwise than as provided in subsection (1) or (2).

Date notice or other document is given

24. For the purposes of this Act, a notice or other document is taken to be given:

- (a) in the case of a notice or other document given personally—on the date it bears or the date it is received by the addressee, whichever is the later; or
- (b) in the case of a notice or other document sent by post—on the date it bears or the date when it would have been delivered in the ordinary course of post, whichever is the later; or
- (c) in the case of a notice or other document sent by facsimile transmission or some other form of electronic transmission—on the date it bears or the date on which the machine from which the transmission was sent produces a report indicating that the notice or other document was sent to the facsimile or other number of the addressee, whichever is the later.

Proceedings for offences

25. Proceedings for an offence against this Act or the regulations are to be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

Double jeopardy

26. If an act or omission constitutes an offence:

- (a) under this Act or the regulations; and
- (b) under another law of this jurisdiction or a law of another jurisdiction,

and the offender has been punished in relation to the offence under a law mentioned in paragraph (b), the offender is not liable to be punished in relation to the offence under this Act or the regulations.

Aiding, abetting and attempts

27. (1) A person who aids, abets, counsels or procures, or by act or omission is in any way directly or indirectly concerned in or a party to, the commission of an offence against this Act or the regulations is taken to have committed the offence and is liable to the penalty for the offence.

(2) A person who attempts to commit an offence against this Act or the regulations commits an offence and is punishable as if the attempted offence had been committed.

Offences by corporations

28. (1) If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each officer of the corporation is taken to have contravened the same provision if the officer knowingly authorised or permitted the contravention.

(2) An officer of a corporation may be proceeded against and convicted under a provision pursuant to this section whether or not the corporation has been proceeded against or been convicted under that provision.

(3) Nothing in this section affects any liability imposed on a corporation for an offence committed by the corporation against this Act or the regulations.

(4) In this section, “**officer**” means a director of the corporation or a person who is otherwise concerned in its management.

Limitation

29. Despite anything in any Act, proceedings for an offence against this Act or the regulations may be brought within the period of 3 years after the commission of the offence or, with the consent of the Attorney General, at any later time.

Regulations

30. (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

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(2) The regulations may create offences punishable by a penalty not exceeding 10 penalty units.

Expiry of Act

31. This Act expires on the second anniversary of the commencement of section 6.

*[Member's second reading speech made in—
Legislative Assembly on 27 October 1994
Legislative Council on 30 November 1994]*