

[Act 2001 No 14]



New South Wales

# Agricultural Tenancies Amendment Bill 2001

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.\*

### Overview of Bill

The object of this Bill is to amend the *Agricultural Tenancies Act 1990*:

- (a) to simplify and restate the objects of the Act, as well as to include an object relating to the encouragement of sustainable agricultural production and the prevention of the degradation of the environment, and
- (b) to make amendments to clarify provisions of the Act and to rearrange provisions relating to compensation and rights of landlords and tenants, and
- (c) to clarify the matters that may be referred to arbitration, and
- (d) to enable disputes between tenants and owners to be referred to mediation before arbitration proceedings commence, and

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\* Amended in committee—see table at end of volume.

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- (e) to make procedural changes relating to arbitration of disputes, including clarifying the functions of the Director-General of the Department of Agriculture (the *Director-General*) relating to pre-arbitration conferences and other matters related to arbitration procedures and providing for the appointment of technical assessors, and
- (f) to confer on the Director-General a power to refer a dispute between a tenant and an owner to a court rather than having the matter determined by arbitration, and
- (g) to clarify the application of the provisions of the *Commercial Arbitration Act 1984*, and
- (h) to repeal savings provisions relating to pre-1990 tenancies, and
- (i) to enact consequential provisions of a savings and transitional nature.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation, except in relation to an amendment consequential on the commencement of Part 11 of the *Rural Lands Protection Act 1998*.

**Clause 3** is a formal provision giving effect to the amendments to the *Agricultural Tenancies Act 1990* (the *Principal Act*) set out in Schedule 1.

### **Objects of Act—Schedule 1 [2]**

**Schedule 1 [2]** substitutes section 3, containing the objects of the Principal Act. The new objects simplify the existing objects and contain, for the first time, a reference to encouraging owners and tenants to have regard, in farming practices, to maintaining sustainable agricultural production and preventing the degradation of the environment. They also include the object of attempting to resolve disputes between parties to agricultural tenancies by mediation.

### **Definition of “improvement”—Schedule 1 [5]**

**Schedule 1 [5]** makes it clear that an improvement does not include anything on a farm when the tenancy commences.

### **General rights of tenants and owners and rights to compensation—Schedule 1 [7] (proposed Parts 2 and 3)**

Currently, the provisions relating to entitlements to compensation and rights to carry out improvements (of both tenants and owners) are both located in Part 2 of the Principal Act, while other rights of tenants and owners are located in Part 3.

**Schedule 1 [7]** separates these provisions so that the general rights of tenants and owners, including rights related to improvements, are set out in Part 2 (proposed sections 5–14) and rights relating to compensation for improvements and other rights to compensation are set out in Part 3 (proposed Divisions 1 (proposed sections 15–17) and 2 (proposed sections 18–19A), respectively). The purpose of the amendments is to enable all rights to be in one Part and compensation issues to be dealt with separately. The amendments re-enact the existing rights of tenants and owners, with minor clarifications, including the following:

- (a) proposed section 5 (2) makes it clear that the terms of an agreement creating a tenancy may be determined by arbitration if the tenant and owner cannot agree,
- (b) it is provided that rights relating to improvements, keeping and inspection of accounts, fair compensation for general improvement of the farm and other matters are terms of the tenancy,
- (c) a record of the condition of the farm is to include other works and things on the farm in addition to the items currently required to be included,
- (d) the period of notice for a yearly tenancy is to be at least 6 months before the end of the tenancy period.

### **Disputes between tenants and owners—Schedule 1 [8] (proposed Part 4)**

**Schedule 1 [8]** re-enacts Part 4, which currently relates to arbitration, to include provisions relating to mediation and to expand the Director-General's functions in relation to disputes, as well as to make other changes.

Proposed Division 1 of Part 4 (proposed section 20) contains definitions.

Proposed Division 2 of Part 4 (proposed sections 21–26A) contains provisions relating to applications for arbitration, and re-enacts the provisions of the current Part 4 setting out the matters that may be the subject of an application for arbitration and the matters in which a court has no jurisdiction. It also contains the following additional matters:

- (a) a provision providing for the manner in which an application is to be made (currently in the regulations) (proposed section 23),

- (b) a provision enabling the Director-General rather than the Supreme Court to extend the time for making an application for arbitration (proposed section 24),
- (c) a provision conferring additional functions on the Director-General relating to arbitration, including powers to arrange pre-arbitration conferences, to encourage mediation and to appoint technical assessors (proposed section 25),
- (d) a provision enabling the Director-General, by order in writing, to refer matters to a court rather than for arbitration, if the Director-General is satisfied that the court would have jurisdiction (apart from restrictions in the Principal Act), the parties consent and that it is in the public interest or the interests of justice to do so (proposed section 26),
- (e) a provision conferring on a party to a dispute or matter a right to apply to the Administrative Decisions Tribunal for a review of a decision by the Director-General to extend or not to extend the time for making an application for referral of the dispute or matter for arbitration or a decision to refer or not to refer the dispute or matter to a court (proposed section 26A).

Proposed Division 3 of Part 4 (proposed sections 26B–26H) inserts new provisions setting out mediation processes. The Director-General may, if the Director-General considers it appropriate, refer a matter for mediation with the consent of the parties and if the parties have agreed on a mediator (proposed section 26B). Mediation is to be voluntary and costs are to be borne as agreed or in equal shares (proposed sections 26C and 26D). The Director-General is to compile a list of mediators for disputes but may only include a person if the person consents and agrees to comply with the proposed Division (proposed section 26E). Admissions or statements made in mediation sessions are not admissible in proceedings before any court, tribunal or body and documents prepared for mediation sessions are also not admissible, unless the parties consent or in proceedings relating to a permitted disclosure (proposed section 26F). The circumstances in which a mediator may disclose information obtained in connection with the mediation are limited (proposed section 26G). A mediator is not liable to any action, liability, claim or demand in respect of any matter or thing done or omitted to be done in good faith for the purposes of a mediation session and if the mediator was on a list of mediators under the proposed Division when the matter was referred to mediation (proposed section 26H).

Proposed Division 4 of Part 4 (proposed sections 26I–26M) contains provisions relating to the appointment of arbitrators and the application of the provisions of the *Commercial Arbitration Act 1984*. An arbitration is to be conducted by a single arbitrator (who is to be a legal practitioner within the meaning of the *Legal Profession Act 1987*), rather than the committee of 3 persons currently provided for (proposed section 26I). A committee of arbitrators, consisting of a legal practitioner

and 2 other members having appropriate knowledge and experience, may be appointed if the Director-General is of the opinion that it is appropriate in the circumstances. The Director-General is to notify the parties of the appointment of the arbitrator and any technical assessor. The Director-General may appoint a person as a technical assessor to assist the arbitrator, if of the opinion that the person has knowledge and experience that may assist in the arbitration of a dispute or matter (proposed section 26J). A technical assessor may assist and advise but may not adjudicate on an issue. The provisions of the *Commercial Arbitration Act 1984* are, as they currently do, to apply to the conduct of arbitrations under the Principal Act (proposed section 26K). Clarifications have been made to the application of those provisions. Provisions relating to the power of arbitrators to order the payment of compensation in the nature of damages (proposed section 26L) and making amounts awarded to tenants a charge on the farm (proposed section 26M) have been re-enacted.

**Schedule 1 [12]** enables regulations to be made for or with respect to mediation sessions for the purposes of the Principal Act.

#### **Delegation by Director-General—Schedule 1 [10]**

The Bill inserts a provision enabling the Director-General to delegate any functions of the Director-General to an authorised person under the Act (proposed section 27A). An authorised person is an officer of the Department of Agriculture or a person of a class of person prescribed by regulations.

#### **Savings and transitional provisions—Schedule 1 [16] and [17]**

**Schedule 1 [16]** enables savings and transitional regulations to be made consequent on the enactment of the proposed Act.

**Schedule 1 [17]** repeals a savings provision that continued the application of the repealed *Agricultural Holdings Act 1941* to tenancies existing when that Act was repealed or created under an option granted before that repeal and replaces it with a provision that applies the provisions of the Principal Act to such tenancies.

#### **Minor, consequential and ancillary provisions—Schedule 1 [1], [3], [4], [6], [9], [11], [13], [14], [15]**

**Schedule 1 [1]** inserts a reference to mediation in the long title to the Principal Act.

**Schedule 1 [3]** updates the definition of *Director-General* for the purposes of the Principal Act.

**Schedule 1 [4]** inserts definitions of *exercise* a function and *function* for the purposes of the Principal Act.

**Schedule 1 [6]** makes it clear that notes included in the Principal Act do not form part of the Act.

**Schedule 1 [9]** makes it clear that the prohibition against contracting out does not apply where a provision of the Act expressly allows it.

**Schedule 1 [11]** makes a consequential amendment.

**Schedule 1 [13]** updates a reference to reflect changes made by the *Rural Lands Protection Act 1998*.

**Schedule 1 [14]** amends a term for consistency with other expressions in the Principal Act.

**Schedule 1 [15]** clarifies the operation of a provision.