

Act 1994 No. 91

FARM DEBT MEDIATION BILL 1994*

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The objects of this Bill are:

- (a) to enable a farmer or a farmer's creditor to apply for voluntary mediation concerning farm debts; and
- (b) to make provision for mandatory mediation concerning farm debts before a farmer's creditor can take possession of property or other enforcement action under a farm mortgage.

PART I—PRELIMINARY

This Part (clauses 1–7) contains provisions that assist an understanding of the proposed Act as a whole, as well as certain machinery provisions.

The Part sets out the short title of the proposed Act (clause 1) and provides for its commencement 2 months after the date of assent, unless commenced sooner by proclamation (clause 2). The objects of the proposed Act, which are as stated above, are set out (clause 3). Certain terms used in the proposed Act are defined (clause 4). Among the terms defined are “creditor”, “enforcement action”, “farm”, “farm debt”, “farm mortgage”, “farmer” and “farming operation”. A “farm debt” is a debt incurred by a farmer, for the purposes of the conduct of a farming operation, that is secured by a farm mortgage.

The proposed Act applies only to creditors so far as farm debts are concerned. Circumstances in which the proposed Act does not apply are also stipulated (clause 5).

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

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For example, the proposed Act does not apply to farm debts that have been mediated previously in accordance with its provisions.

Enforcement action taken by a creditor to whom the proposed Act applies is void unless it is taken in conformity with the requirements of the proposed Act (clause 6).

The proposed Act does not affect the Contracts Review Act 1980 or any other law that provides for the grant of relief in respect of harsh, oppressive, unconscionable or unjust contracts or on the grounds of hardship. Further, in so far as the requirements of the proposed Act may impact on the provision of consumer credit, they are in addition to, and do not affect, the requirements of any other law that applies to the provision of such credit. Other than this, the proposed Act is to have effect despite any other Acts (clause 7).

PART 2—VOLUNTARY MEDIATION

This Part (clauses 8–10) enables a farmer or creditor to apply to the New South Wales Rural Assistance Authority (“the Authority’,) for voluntary mediation concerning a farm debt (clause 8), and makes provision as to the form of application for voluntary mediation (clause 9). The Authority may, after evaluating an application, direct a mediator to mediate between the farmer and creditor concerning the farm debt (clause 10). The provisions of Part 5 (General Provisions Concerning Mediation) apply to voluntary, as well as, mandatory mediation under the proposed Act.

PART 3—MANDATORY MEDIATION—PROCEDURE

This Part deals with the circumstances in which mandatory mediation is required and with the procedural steps that must be taken by the parties to mandatory mediation under the proposed Act.

Division 1—Mandatory mediation and mediation notices

This Division (clauses 11–14) sets out requirements for mandatory mediation and commencement of the mandatory mediation process.

The Division prohibits the taking of enforcement action relating to a farm mortgage by a creditor unless the creditor complies with the requirements of the proposed Act as to mandatory mediation, or enforcement action is otherwise authorised by the proposed Act (clause 11). The Division requires a creditor who wishes to take enforcement action to serve a mediation notice on the farmer and the Authority (clause 12). Within 7 business days after being served with a mediation notice, the Authority must provide the farmer concerned with a list of persons or agencies that are available to provide the farmer with free advice and assistance for the purposes of preparation of a mediation request and in subsequent discussions with a financial counsellor nominated by the Authority (clause 13). All mediation notices relating to the same farmer that are served on the Authority before the initial mediation session for that farmer are to be dealt with together (clause 14).

Division 2—Mediation requests

This Division (clauses 15–22) deals with action to be taken following service of a mediation notice or if enforcement action is taken by a creditor who has not served a mediation notice on a farmer as required by the proposed Act.

A farmer served with a mediation notice who wishes to have the farm debt mediated in accordance with the proposed Act must lodge a mediation request with the Authority within 21 days after service of the mediation notice (clause 15). Provision is made as to the form and content of the mediation request (clause 16).

A farmer who fails to lodge a mediation request in the 21-day period is taken to have waived the right to mandatory mediation with respect to the farm debt concerned and the creditor, on being provided with a certificate to this effect by the Authority, is free to commence or proceed with enforcement action concerning the farm debt (clause 17).

If a creditor who is not otherwise authorised to take enforcement action under the proposed Act does so without first serving a mediation notice, the farmer may nevertheless lodge a mediation request with the Authority. On receiving the mediation request and on satisfying itself that the circumstances are such that service of a mediation notice by the creditor was required, the Authority must serve a notice on the creditor, calling on the creditor to cease taking enforcement action until the requirements of the proposed Act as to mandatory mediation have been met (clause 18). A creditor who does not comply with such a notice is liable to the imposition of a civil penalty by the Commercial Tribunal on the application of the farmer. The maximum civil penalty that the Commercial Tribunal may impose is the amount of all interest charges payable under the farm mortgage from the date on which the creditor commenced enforcement action until a date specified by the Commercial Tribunal (being a date not earlier than the date on which the Commercial Tribunal determines the enforcement action ceased). However, if the farmer satisfies the Commercial Tribunal that the farmer has suffered a loss as a result of the taking of the enforcement action, the civil penalty imposed must be not less than the amount of that loss (clause 19). Provision is made as to the manner in which a civil penalty ordered to be paid by a creditor may be recouped by a farmer (clause 20) and as to the finality of orders made under the Division by the Commercial Tribunal (clause 21).

Within 7 business days after the farmer lodges a mediation request, the Authority must nominate a financial counsellor to meet with the farmer to assist with the preparation of the farmer's financial records for the initial mediation session. The qualifications of financial counsellors are specified (clause 22).

Division 3—Mediation period

This Division (clauses 23 and 24) makes provision for a mediation period of 60 days after the Authority issues a mediation proceeding notice concerning a farmer. The mediation period may be extended by agreement of the parties (clause 23). During the mediation period, an orientation session and an initial mediation session must be held. The mediator may also arrange for the holding of additional mediation sessions (clause 24).

Division 4—Mediation proceeding notice

This Division (clauses 25–30) sets out the steps to be taken after the Authority receives a mediation request. Within 14 days after that event, the Authority must serve a mediation proceeding notice on the farmer and all creditors listed by the farmer in the mediation request, and a claim form on those creditors (clause 25). Provision is made as to the matters that must be included in the mediation proceeding notice (clause 26). These matters include:

- the time and place appointed for the orientation and initial mediation sessions;
- a description of the procedure for selection of the mediator;
- a notification to the effect that creditors are prohibited from taking enforcement action for 60 days after the issue of the mediation proceeding notice (unless otherwise authorised by the proposed Act);
- details of information to be provided by the creditors to the farmer before the initial mediation session.

This Division requires the creditor who served the mediation notice and the farmer, within 7 days after service of the mediation proceeding notice, to take certain steps connected with the selection of a mediator from a panel of 3 mediators nominated by the Authority in the mediation proceeding notice. Alternatively, the farmer and creditor or creditors concerned may jointly select, and pay for, a professional mediator of their own choosing (clause 27).

Creditors served with a mediation proceeding notice cannot take enforcement action for 60 days after the despatch of the mediation proceeding notice unless:

- the creditor and farmer have come to an agreement, under clause 44 of the proposed Act, that permits the creditor to take such action and neither party has rescinded the agreement during the prescribed cooling off period; or
- the creditor is served with a copy of a certificate, under Division 2 of Part 4 of the proposed Act, certifying that the mediator believes that the farmer has failed to mediate in good faith; or
- mediation has ended within the 60-day mediation period without the making of a mediation agreement precluding the taking of enforcement action and the mediator has served a termination statement on the creditor (clause 28).

The Division contains requirements concerning the provision of information relating to farm debts by creditors to the farmer before the initial mediation session (clause 29).

The Division is also expressed to apply subject to Division 2 (Mediation in good faith required) of Part 4 (Mandatory Mediation—Other Matters) of the proposed Act (clause 30).

Division 5—Orientation session and mediation sessions

This Division (clauses 31–34) makes provision as to arrangements for orientation and mediation sessions.

Provision is made for the holding of an orientation session at a time and place appointed by the Authority in the mediation proceeding notice. The farmer and a financial counsellor and mediator nominated by the Authority (who need not be the

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same mediator who is to handle the mediation sessions) are to attend the orientation session. Creditors who have been served with the mediation proceeding notice and who wish to participate in mediation may also attend the orientation session (clause 31).

The purposes of the orientation session are to ensure that the farmer's documentation is in order for mediation and that the farmer understands the procedures involved (clause 32).

The initial mediation session is to be held at a time and place appointed by the Authority in the mediation proceeding notice (clause 33) and additional mediation sessions are to be held, during the mediation period or any extension of it, in accordance with arrangements made by the mediator (clause 34).

Division 6—Lodgment of claim forms by creditors

This Division (clauses 35-41) deals with the lodgment of claim forms by creditors.

The claim form is to be that served with the mediation proceeding notice (clause 35). Creditors who lodge a claim form but who do not choose to participate in mediation are bound by any mediation agreement reached. However, they have the opportunity to lodge an objection to the mediation agreement. Creditors who are served with a mediation proceeding notice but who do not lodge a claim form are bound by the mediation agreement and may not object to it (clause 36).

Claim forms are to be lodged within 10 days after service of the mediation proceeding notice or within any extension of that period allowed by the Authority (clause 37). A creditor served with a mediation proceeding notice may dispute that the debt owed to the creditor is covered by the requirements of the proposed Act. The Authority must decide whether or not the debt is covered and advise the creditor accordingly. The creditor may appeal to the Commercial Tribunal against a determination that a debt is covered by the requirements of the proposed Act (clause 38).

Once a mediation agreement is concluded, the mediator must notify the creditors who did not participate in mediation of the terms of the mediation agreement (clause 39). A creditor who lodged a claim form may then make a written objection to the terms of the mediation agreement if the creditor wishes to do so (clause 40). If this occurs, the mediation proceeding must be re-opened for a period of 10 days during which the parties, including the objecting creditor, are to endeavour to mediate a fresh mediation agreement. Enforcement action may not be taken by the creditors during this period even if the mediation period has expired (clause 41).

Division 7—Mediation agreement

This Division (clauses 42 and 43) deals with the manner of preparation, signing and service of mediation agreements (clause 42) and their legal effect (clause 43). A concluded mediation agreement binds the following persons:

- the farmer
- the creditors who are parties to the mediation agreement
- creditors who were served with the mediation proceeding notice.

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Division 8—End of mediation

This Division (clauses 44 and 45) deals with termination of mediation.

A farmer may, by agreement with a creditor, consent to the taking of enforcement action before the end of the mediation period. Such an agreement may be rescinded by either the farmer or the creditor during a 5-day cooling off period (clause 44).

A mediator is required, before the mediation period ends (or at the end of any extension of the mediation period), to prepare a termination statement that certifies that mediation has ended and describes the agreements (if any) that the parties have reached. Copies of the termination statement are to be served on the farmer, the creditors who participated in mediation, the creditors who were served with the mediation proceeding notice but who did not participate in mediation and the Authority. Once the termination statement has been served, a creditor may proceed with enforcement action if a mediation agreement was not concluded or any mediation agreement reached does not prevent the taking of such action (clause 45).

PART 4—MANDATORY MEDIATION—OTHER MATTERS

This Part makes provision as to the following:

- inspection and valuation of property covered by a farm mortgage
- the requirement for the farmer and principal creditor to mediate in good faith and steps to be taken if this does not occur
- concealment, removal or transfer of property covered by a farm mortgage by a farmer.

Division 1—Inspection and valuation of property

This Division (clauses 46-48) deals with procedures to be adopted for inspection and valuation of property that is the subject of a farm mortgage.

After a farmer lodges a mediation request, a creditor may inspect property that is covered by the creditor's farm mortgage during business hours (clause 46). A farmer who, without reasonable excuse, refuses to permit the inspection or who destroys or damages the property is presumed (in the absence of proof to the contrary) not to have mediated in good faith for the purposes of the proposed Act (clause 47). A procedure is specified for the purposes of the valuation of property covered by a farm mortgage in the event of a dispute as to its value, including the method of selecting a valuer (clause 48).

Division 2—Mediation in good faith required

This Division (clauses 49–59) deals with the requirement for parties to mediate in good faith, the consequences of a failure by a creditor or farmer to mediate in good faith and the review of a finding (or failure to make a finding) as to lack of good faith by a mediator.

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Subdivision 1—General

This Subdivision (clauses 49 and 50) specifies that parties to mandatory mediation are required to mediate in good faith and gives certain examples of behaviour that, if undertaken without reasonable excuse, demonstrates a failure by a party to mediate in good faith. This behaviour includes a failure to attend scheduled mediation sessions or to provide full financial information as required by the proposed Act (clause 49). Provision is made for the issue of a certificate by a mediator stating that a farmer or principal creditor has not mediated in good faith (clause 50).

Subdivision 2—Lack of good faith by creditor

This Subdivision (clauses 51–54) sets out the procedure to be followed if a mediator certifies that the principal creditor is not mediating in good faith. If this occurs, the farmer may request the Local Court sitting in the area in which the farm concerned is located to arrange for court supervised mediation (clause 51). The Local Court is to require the farmer and principal creditor to mediate, under its supervision, for not more than 60 days. The Court may issue such orders as it considers necessary to enable mediation in good faith to take place (clause 52). The creditor must not take enforcement action during court supervised mediation (clause 53). If the Local Court is satisfied at the end of the period of court supervised mediation that the creditor has failed to mediate in good faith, the Court may order that the creditor is not to take enforcement action for such additional period, not exceeding 60 days, that the Court considers appropriate and specifies in its order (clause 54).

Subdivision 3—Lack of good faith by farmer

This Subdivision (clauses 55 and 56) deals with the failure by a farmer to mediate in good faith.

A mediator is to issue a certificate that a farmer has not mediated in good faith if the farmer conceals, removes or transfers property covered by a farm mortgage with the intention of defrauding, defeating or delaying the interests of a creditor (clause 55). (This behaviour constitutes one example of a failure by a farmer to mediate in good faith. Other examples of such behaviour are set out in clauses 47 and 49.) A creditor served with a mediator's certificate as to a lack of good faith by a farmer may take enforcement action under the farm mortgage concerned (clause 56).

Subdivision 4—Review of good faith findings

This Subdivision (clauses 57–59) deals with the procedure to be followed if a party disputes a mediator's finding (or a failure to make a finding) concerning good faith in mediation. In this event, either party may, in a specified time, request the Local Court sitting in the area in which the farm concerned is located to review the position. The request is to be dealt with within 10 days after its lodgment and, if the request relates to a finding that a farmer has failed to mediate in good faith, operates as a stay of enforcement action by the creditor until the Court determines the matter (clause 57). The powers of a Local Court in relation to the conduct of the review are specified (clause 58) and provision is made that the mediator concerned is competent, but not compellable, to give evidence for the purposes of the review (clause 59).

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Division 3—Concealment, removal or transfer of property by farmer

This Division (clauses 60–62) deals with the concealment, removal or transfer of property covered by a farm mortgage by a farmer.

Provision is made that a farmer who conceals, removes or transfers property covered by a farm mortgage is ineligible, or ceases to be eligible, for mandatory mediation in specified circumstances (clause 60). A creditor who holds a farm mortgage over property that has been concealed, removed or transferred by a farmer may, within a specified time, request the Local Court sitting in the area in which the farm concerned is located to order that the creditor be permitted to take enforcement action despite the fact that the requirements of the proposed Act as to mandatory mediation have not been satisfied. The farmer is to be summoned to appear at the hearing of the request (clause 61). If the Local Court finds that the farmer has acted in the manner alleged, the Court may permit the taking of enforcement action by the creditor immediately (clause 62).

PART 5—GENERAL PROVISIONS CONCERNING MEDIATION

This Part (clauses 63–70) deals with general issues, such as the eligibility and functions of mediators and the disclosure of information obtained during mediation, that relate to both voluntary and mandatory mediation under the proposed Act.

Mediators are required to be impartial (clause 63) and their functions are specified (clause 64). Provision is made as to the manner in which mediation sessions are to be conducted (clause 65). The disclosure of financial information to various persons, including other creditors, who are authorised or required to attend orientation and mediation sessions is specifically sanctioned (clause 66) and provision is made as to the confidentiality of mediation sessions (clause 67) and the disclosure, outside the mediation arena, of information obtained during mediation (clause 68). Representation of parties to mediation is covered (clause 69). Mediators and persons acting under the direction of mediators are excused from personal liability for acts or omissions done or omitted to be done in good faith for the purposes of the proposed Act (clause 70).

PART 6—MISCELLANEOUS

This Part (clauses 71–83) makes provision as to a number of matters relating to the operation of the proposed Act.

The Part provides that the proposed Act binds the Crown (clause 71). Persons are prohibited from contracting out of the operation of the proposed Act and, in the case of a creditor, such action attracts a maximum penalty of 100 penalty units (presently equivalent to \$10,000) (clause 72). A waiver of rights under the proposed Act has no effect unless expressly provided for by the proposed Act (clause 73). Provision is made as to the giving of notice by a mortgagee to a mortgagor of land before an exercise of rights in the event of a default under a mortgage (clause 74). Provision is also made as to service, and the date of giving, of notices and other documents under the proposed Act (clauses 75 and 76).

The Part provides that proceedings for offences against the proposed Act and the regulations are to be dealt with summarily before a Local Court (clause 77). Persons punished for an act or omission that is an offence against another law are not to be

punished for the same act or omission if it also constitutes an offence against the proposed Act or the regulations (clause 78). Provision is made as to the position of persons who aid or abet or are concerned in the commission of, or who attempt to commit, offences against the proposed Act or the regulations (clause 79). The Part deals with the position of officers of corporations that offend against the proposed Act or the regulations (clause 80), and requires that proceedings for offences against the proposed Act or the regulations be commenced within 3 years after the commission of the offence unless the Attorney General agrees to the extension of that period (clause 81).

Provision is made for the Governor-in-Council to make regulations for the purposes of the proposed Act (clause 82) and for the Chairman and any 2 members of the Commercial Tribunal and the Rule Committee established under the Local Courts (Civil Claims) Act 1970 to make rules for the purposes of the exercise of jurisdiction by the Commercial Tribunal and Local Courts under the proposed Act (clause 83).
