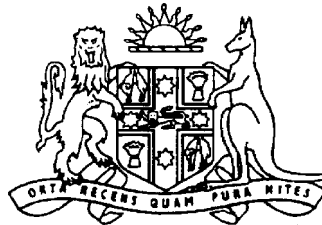


[Act 2002 No 82]



New South Wales

# Farm Debt Mediation Amendment Bill 2002

## 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 *Farm Debt Mediation Act 1994*:

- (a) to enable a farmer to initiate mediation in respect of a farm debt even though the farmer is not in default under the farm mortgage concerned, and
  - (b) to provide for the issue of certificates of exemption from enforcement action and clarify the operation of certificates under section 11 of the Act, and
  - (c) to establish a procedure for nominating and choosing a mediator, and
  - (d) to provide for review by the Administrative Decisions Tribunal of certain decisions of the New South Wales Rural Assistance Authority (*the Authority*), and
  - (e) to make other minor and consequential amendments.
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## 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.

**Clause 3** is a formal provision giving effect to the amendments to the *Farm Debt Mediation Act 1994*.

## Schedule 1 Amendments

### Mediation and certificates

**Schedule 1 [2]** inserts definitions that are used in the following proposed provisions. In particular, it inserts the definition of *default* as a failure to perform an obligation that, under the terms of a farm mortgage, is a ground for enforcement action.

**Schedule 1 [3]** inserts a definition of *satisfactory mediation* and clarifies that satisfactory mediation may have taken place despite the fact that the dispute between the parties to the mediation remains unresolved.

**Schedule 1 [5]** inserts proposed section 9 (1A) to allow a farmer who has not been given notice under section 8 of the Act (informing the farmer of the availability of mediation under the Act) to request mediation concerning the farm debt involved. A farmer may request mediation whether or not the farmer is in default. If a farmer requests mediation but subsequently refuses to mediate, the farmer loses the protection of the Act (**Schedule 1 [6]**).

At present, no penalty or other consequence attaches to a creditor's refusal of a farmer's request to mediate in respect of a farm mortgage under which the farmer is in default. In contrast, a certificate under section 11 of the Act to the effect that the Act does not apply to a farm mortgage (*section 11 certificate*) can be issued if a farmer declines a creditor's request for mediation. **Schedule 1 [7]** inserts proposed sections 9A and 9B to address this.

Proposed section 9A clarifies that a creditor may agree to or decline mediation requested by a farmer and that no consequences flow from a creditor's refusal to mediate, except if the farmer is in default. If the farmer is in default under the farm mortgage involved, a refusal by a creditor to mediate may result in the issuance by the Authority of an exemption certificate under proposed section 9B. An exemption certificate prevents the issuance of a section 11 certificate and prohibits the creditor from taking any enforcement action while the exemption certificate is in force.

**Schedule 1 [8]** adds the following requirements before a section 11 certificate can be issued to a creditor by the Authority:

- (a) the farmer must be in default under the farm mortgage involved,
- (b) no exemption certificate is in force in relation to that farm mortgage.

**Schedule 1 [12]** provides for the effect of a creditor's failure to mediate in good faith. In addition to having his or her application for a section 11 certificate denied, a creditor who fails to mediate in good faith is prohibited from giving a notice under section 8, or inviting a debtor to mediate, for a period of 12 months (unless the farmer agrees to a shorter period).

### **Mediators**

A mediator who fails to prepare Heads of Agreement or to complete a summary of mediation may have his or her accreditation withdrawn by the Authority (**Schedule 1 [26]**).

**Schedule 1 [27]** establishes the procedure for choosing a mediator for the purposes of the Act.

**Schedule 1 [29]** specifies the functions of mediators to include calling pre-mediation conferences and adjourning mediation sessions.

**Schedule 1 [31]** requires a person representing a party to a mediation to have adequate authority to enter into Heads of Agreement. Failure by a party to properly authorise a representative renders the party liable for all costs associated with the attendance by the other party at any additional session.

**Schedule 1 [32]** inserts proposed section 18A to require a mediator to fill in a summary of mediation form at the end of a mediation.

**Schedule 1 [24] and [28]** are consequential amendments.

### **Review of decisions**

**Schedule 1 [30]** exempts from the confidentiality requirements under section 15 of the Act the Heads of Agreement, summary of mediation and any instrument entered into as a result of, or pursuant to, Heads of Agreement.

**Schedule 1 [33]** provides for review by the Administrative Decisions Tribunal of the following decisions of the Authority:

- (a) a decision to issue, or to refuse to issue, an exemption certificate,
- (b) a decision to issue, or to refuse to issue, a section 11 certificate,
- (c) a refusal to accredit a person as a mediator,
- (d) a decision to withdraw the accreditation of a mediator.

The Administrative Decisions Tribunal may award costs in respect of review proceedings.

### **Miscellaneous**

**Schedule 1 [1]** makes it clear that the object of the Act is to provide for the efficient and equitable resolution of farm debt disputes. Mediation continues to be required before a creditor can take enforcement action under a farm mortgage.

**Schedule 1 [4]** provides that notes included in the Act do not form part of it.

**Schedule 1 [9] and [13]** are minor amendments consequential on the addition of the requirements referred to in Schedule 1 [8].

**Schedule 1 [10]** extends to the whole of section 11 of the Act the principle that a failure by a creditor to agree to reduce or forgive a debt does not, of itself, demonstrate a lack of good faith on the part of a creditor in attempting to mediate. **Schedule 1 [11]** reinforces this principle by inserting a note to the effect that satisfactory mediation may in fact be possible despite such failure to agree to reduce or forgive a debt.

**Schedule 1 [14]** introduces the term *Heads of Agreement*, being the term by which the “mediated agreement” referred to in section 11A of the Act is to be known. A Heads of Agreement document sets out the main points of agreement on issues between the farmer and creditor. **Schedule 1 [15]–[22]** are consequential amendments arising from the introduction of that term.

**Schedule 1 [23]** makes it an offence for a creditor to be a party to an instrument which purportedly results from, or is pursuant to, Heads of Agreement between the creditor and a farmer but which fails to reflect the Heads of Agreement.

**Schedule 1 [25]** provides that the Authority’s exemption from liability for any mediation costs does not apply if the Authority is acting in the capacity of creditor under the Act.

**Schedule 1 [34]** enables regulations of a savings or transitional nature to be made as a consequence of the proposed Act.

**Schedule 1 [35]** enacts a provision to extend the application of the amendments being made by the proposed Act to certain defaults occurring before the commencement of the application provision.