

Farm Debt Mediation Act 1994 No 91

[1994-91]



New South Wales

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The provisions displayed in this version of the legislation have all commenced.

Notes—

- **Does not include amendments by**
 - [Justices Legislation Repeal and Amendment Act 2001 No 121](#) (not commenced)
 - [Farm Debt Mediation Amendment Act 2002 No 82](#) (not commenced — to commence on 3.1.2003)

Authorisation

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Contents

Long title	4
Part 1 Preliminary	4
1 Name of Act	4
2 Commencement	4
3 Object	4
4 Definitions	4
5 Application of Act	6
6 Enforcement action in contravention of Act void	6
7 Relationship with other Acts	6
Part 2 Mediation	7
8 No enforcement action until notice of availability of mediation given	7
9 Farmer may request mediation	7
10 Enforcement action postponed to allow for mediation	7
11 Certificate that Act does not apply to farm mortgage	7
11A Cooling off period after mediated agreement	9
11B Rights during cooling off period	10
Part 3 General provisions concerning mediation	11
12 Arrangements for mediation	11
13 Functions of mediators	11
14 Conduct of mediation sessions	11
15 Confidentiality of mediation sessions	12

16 Disclosure of information.....	12
17 Representation and assistance during mediation.....	12
18 Exclusion of personal liability of mediators and certain other persons.....	13
Part 4 Miscellaneous	13
19 Act binds the Crown	13
20 Contracting out prohibited.....	13
21 Waiver of rights void.....	13
22 Notices by mortgagee	14
23 Manner of giving notice or other document	14
24 Date notice or other document is given	15
25 Proceedings for offences	15
26 Double jeopardy	15
27 Aiding, abetting and attempts.....	15
28 Offences by corporations.....	16
29 Limitation	16
30 Regulations.....	16
31 Savings and transitional provisions	16
Schedule 1 Savings and transitional provisions	16

Farm Debt Mediation Act 1994 No 91



New South Wales

An Act to make provision for mediation concerning farm debts, and for other purposes.

Part 1 Preliminary

1 Name of Act

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

2 Commencement

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

3 Object

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.

4 Definitions

(1) In this Act:

Authority means the New South Wales Rural Assistance Authority constituted by the *Rural Assistance Act 1989*.

creditor means a person to whom a farm debt is for the time being owed by a farmer.

enforcement action, in relation to a farm mortgage, means taking possession of property under the mortgage or any other action to enforce the mortgage, including the giving of any statutory enforcement notice, or the continuation of any action to that end already commenced, but does not include:

- (a) the completion of the sale of property held under the mortgage in respect of which contracts were exchanged before the commencement of this Act, or
- (b) the enforcement of a judgment that was obtained before the commencement of this Act.

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, any farm property securing obligations of the farmer whether as a debtor or guarantor, including any interest in, or power arising from, a hire purchase agreement relating to farm machinery, but does not include:

- (a) any stock mortgage or any crop or wool lien, or
- (b) the interest of the lessor of any farm machinery that is leased.

farm property means:

- (a) a farm or part of a farm, or
- (b) farm machinery used by a farmer in connection with a farming operation.

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.

hire purchase agreement has the same meaning as it has in the [Duties Act 1997](#).

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.

statutory enforcement notice means:

- (a) a notice under section 57 (2) (b) of the *Real Property Act 1900*, or
- (b) a notice under section 111 (2) (b) of the *Conveyancing Act 1919*, or
- (c) a notice, given under any Act or statutory instrument, that is prescribed by the regulations as being within the scope of this definition.

(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.

5 Application of Act

- (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 any person, or
 - (c) a farmer, being a corporation, that is an externally administered corporation within the meaning of the *Corporations Act 2001* of the Commonwealth.

6 Enforcement action in contravention of Act void

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

7 Relationship with other Acts

- (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

8 No enforcement action until notice of availability of mediation given

- (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 a certificate is in force under section 11 in respect of the farm mortgage concerned.

9 Farmer may request mediation

- (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.

10 Enforcement action postponed to allow for mediation

- (1) 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 a certificate is in force under section 11 in respect of the farm mortgage.
- (2) This section does not invalidate any statutory enforcement notice or other process given, served or executed in order to fulfil a condition precedent to the taking of any enforcement action, but operates to prohibit the taking of the action concerned, or the enforcement by a court or tribunal of any such process, except as provided by section 11 (6).

11 Certificate that Act does not apply to farm mortgage

- (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).
- (1A) If the creditor has (in whatever terms employed) agreed in writing to extend the period that will be available to the farmer for the conclusion of mediation between the parties to beyond 3 months, the reference in subsection (1) (c) to a period of 3 months is taken to be a reference to the extended period.
- (1B) For the purposes of subsection (1) (c), a failure by a creditor to agree to reduce or forgive any debt does not, of itself, demonstrate a lack of good faith on the part of a creditor in attempting to mediate.
- (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 in writing, within 28 days, to an invitation that:
 - (i) is made in writing by the creditor and is identified as an invitation under this paragraph, and
 - (ii) invites the farmer to attend a mediation session, and
 - (iii) indicates that a failure of the farmer to respond in writing to the invitation might be taken to be an indication that the farmer declines to mediate 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.
- (5) A certificate under this section remains in force until the date specified by the Authority in the certificate. The date specified is to be calculated on the basis that the period for which the certificate is to be in force is:
- (a) if satisfactory mediation in respect of the farm debt concerned has taken place,

the period commencing on the date of its issue and ending on the third anniversary of the last date of the mediation, or

- (b) if the farmer has failed to take part in mediation in good faith, the period commencing on the date of its issue and ending on the third anniversary of the last date of the mediation, or
- (c) if the farmer has indicated in writing that the farmer does not wish to enter into or proceed with mediation, the period commencing on the date of its issue and ending on the third anniversary of the date the indication was given to the Authority or creditor, or
- (d) if the farmer has failed to respond in writing, within 28 days, to an invitation referred to in subsection (2) (c), the period commencing on the date of its issue and ending on the third anniversary of the date that is 28 days after the invitation was given to the farmer, or
- (e) if a notice was given by the creditor under section 8, the period commencing on the date of its issue and ending on the date that is 3 years and 3 months after the date the notice was given, or
- (f) in any other case in which a certificate is issued, the period of 3 years commencing on the date the certificate was issued.

(5A) A certificate may not be issued after the date on which any such certificate would, if issued, expire under subsection (5).

(6) The expiry of a certificate under this section does not affect any proceedings for recovery of a farm debt, or for the exercise or enforcement of any right of the creditor, already taken or commenced by a creditor while the certificate was in force, and any such proceedings may be continued and concluded as if the certificate were still in force.

(7) The reference in subsection (6) to the commencement of proceedings does not include a reference to the giving of any statutory enforcement notice or other action taken in order to fulfil a condition precedent to the enforcement of a right otherwise than through proceedings in a court or tribunal.

11A Cooling off period after mediated agreement

- (1) There is to be a cooling off period for any written agreement entered into by a farmer during, or at the conclusion of, a mediation session between the farmer and a creditor. The cooling off period may be extended by agreement between the farmer and the creditor.
- (2) The cooling off period commences when the agreement is entered into and ends at 5 pm on the 14th day after the day on which the agreement is entered into, or at such

later time on that or another day, as may be agreed by the farmer and the creditor.

- (3) A statement in the form approved by the Authority, relating to the cooling off period, is required to be included in every written agreement entered into by a farmer during, or at the conclusion of, a mediation session.
- (4) If an agreement does not contain a statement required under subsection (3), the cooling off period is extended until such time as a statement, in the form approved by the Authority, relating to the cooling off period, is given to the farmer by the creditor for the purposes of this subsection. The cooling off period, as so extended, ends at 5 pm on the 14th day after the statement is given.
- (5) The Authority may not issue a certificate under section 11 to a creditor on the ground that satisfactory mediation in respect of a farm debt has taken place if:
 - (a) a written agreement relating to the farm debt was entered into during, or at the conclusion of, the mediation session concerned, and
 - (b) the cooling off period has not expired.
- (6) For the purposes of this section, an agreement is taken to be entered into at the conclusion of a mediation session if it is entered into within 24 hours of the end of the session and relates to matters the subject of the mediation session.

11B Rights during cooling off period

- (1) The farmer may, during a cooling off period arising under section 11A, serve a written notice on the creditor or the creditor's solicitor to the effect that the farmer rescinds the agreement subject to the cooling off period.
- (2) The notice of rescission must be signed by the farmer or the farmer's solicitor.
- (3) On service of a notice of rescission signed in accordance with this section, the agreement is taken to be rescinded ab initio.
- (4) If rescission occurs, the farmer or creditor is entitled to make a claim for such compensation, adjustment or accounting as is just and equitable between the farmer and the creditor where a party has received a benefit under the agreement.
- (5) This section and section 11A do not affect any right or remedy available otherwise than under this section or section 11A.
- (6) A creditor may not make a claim under subsection (4) if the only basis of the claim is the rescission of the agreement under this section.

Part 3 General provisions concerning mediation

12 Arrangements for mediation

- (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.

13 Functions of mediators

- (1) The function of a mediator is to mediate impartially or attempt to mediate impartially between the farmer and creditor for the purpose of arriving 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.

14 Conduct of mediation sessions

- (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 not open to the public.
- (5) Persons who are not parties to a mediation session:
 - (a) may be present at or participate in the session in an advisory or representative capacity if authorised to do so under section 17, or
 - (b) may otherwise be present at or participate in the session with the permission of the mediator.

15 Confidentiality of mediation sessions

- (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.

16 Disclosure of information

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.

17 Representation and assistance during mediation

- (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 Act 2001](#) of the Commonwealth 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 farmer who is a party to mediation is entitled to have present at any mediation session an advisor, who may but need not be legally or otherwise professionally qualified, and is entitled to call upon that advisor for advice and counsel during the session.
- (5) Nothing in subsection (4) affects the operation of section 14 (1)-(3).
- (6) A contravention of this section does not invalidate a mediation.

18 Exclusion of personal liability of mediators and certain other persons

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

19 Act binds the Crown

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.

20 Contracting out prohibited

- (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.

21 Waiver of rights void

A waiver of mediation rights under this Act is void.

22 Notices by mortgagee

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.

23 Manner of giving notice or other document

- (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 delivering it to a director or secretary of the body corporate personally, or
 - (iii) by sending it by post, telex, facsimile or similar electronic facility to the registered office of the body corporate or the address of the place of residence or business of a director or secretary of the body corporate.
- (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).

24 Date notice or other document is given

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.

25 Proceedings for offences

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.

26 Double jeopardy

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.

27 Aiding, abetting and attempts

- (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.

28 Offences by corporations

- (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.

29 Limitation

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.

30 Regulations

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

31 Savings and transitional provisions

Schedule 1 has effect.

Schedule 1 Savings and transitional provisions

(Section 31)

1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of:

the *Farm Debt Mediation Amendment Act 1996*

the *Farm Debt Mediation Amendment Act 1998*

- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later day.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
 - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
 - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

2 Certificates under section 11

- (1) A certificate under section 11 that was issued earlier than 3 years before the amendments made to that section by the *Farm Debt Mediation Amendment Act 1996* took effect is of no force or effect, and any other certificate under that section expires as provided by section 11 (5).
- (2) Section 11 (1A) and (1B) apply to the issue of a certificate under section 11 regardless of whether application was made for the certificate before or after the commencement of those subsections. Those subsections do not, however, operate to invalidate a certificate that was issued before their commencement.

3 Conduct of mediation sessions

The amendment made to section 17 by the *Farm Debt Mediation Amendment Act 1996* has no effect in relation to mediation sessions that commenced before that amendment took effect.

4 Application of Act to hire purchase agreements

- (1) This Act applies to enforcement action taken in respect of hire purchase agreements whether the agreements were entered into before or after the commencement of this clause.
- (2) However, this Act does not apply to any enforcement action taken in respect of a hire purchase agreement before the commencement of this clause.

5 Existing section 11 certificates

A certificate issued under section 11, as in force immediately before the commencement of section 11 (5) as substituted by the *Farm Debt Mediation Amendment Act 1998*, remains in force for a period of 3 years from the date of its issue.

6 Operation of cooling off period

Sections 11A and 11B, as inserted by the *Farm Debt Mediation Amendment Act 1998*, do not apply to agreements entered into in mediation sessions that were concluded before the commencement of those sections.