

# Farm Debt Mediation Act 1994 No 91

[1994-91]



New South Wales

## Status Information

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### Provisions in force

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### Authorisation

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# 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 the efficient and equitable resolution of matters involving farm debts. Mediation is required before a creditor can take possession of property or other enforcement action under a farm mortgage.

### 4 Definitions

(1) In this Act:

**approved form** means the form approved by the Authority.

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

**business day** means a day that is not a Saturday, a Sunday or a public holiday throughout New South Wales.

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

**default**, in relation to a farm mortgage, means failure to perform an obligation that, under the terms of the mortgage, is a ground for enforcement action.

**Note—**

Examples of default on the part of a farmer include failure to pay the principal, interest or other money the payment of which is secured by a farm mortgage; failure to keep the property subject to the farm mortgage

insured; and failure to submit financial statements required by the creditor.

**draft mediation agreement** means a draft agreement prepared under section 18j.

**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.

**exemption certificate**—see section 13.

**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 any of the following things that are commonly used for the purposes of a farming operation:

- (a) a vehicle, machine or other implement,
- (b) any other thing of a class prescribed by the regulations.

**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.

**farming operation**—see section 4AB.

**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, or
- (c) an access licence (within the meaning of the [Water Management Act 2000](#)) held 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.

**function** includes a power, authority or duty.

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

**mediation**—see section 4AA.

**mediation agreement** means an agreement entered into under section 18K.

**mediation request**—see section 18B.

**mediator** means a person accredited as a mediator under section 16.

**notice inviting mediation**—see section 18A.

**prohibition certificate**—see section 9.

**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
- (b1) a notice under section 71X (1) (b) of the [Water Management Act 2000](#), 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.

(1A) A reference in this Act to **satisfactory mediation** is a reference to:

- (a) a mediation that has achieved a resolution of a matter involving a farm debt, or
- (b) a mediation that has proceeded as far as it reasonably can in an attempt to achieve a resolution of a matter involving a farm debt but has nevertheless failed to resolve the matter, or
- (c) a mediation specified or of a class described in regulations made for the purposes of this subsection to be a satisfactory mediation.

(2) (Repealed)

#### **4AA Mediation**

- (1) **Mediation** is a structured negotiation process in which a mediator, as a neutral and independent party, assists the participants in the process:
  - (a) to communicate effectively with each other, and

(b) to reach agreement on the issues in dispute, and

(c) to achieve their own resolution of the dispute.

(2) The regulations may declare that any process of a specified kind is, or is not, mediation for the purposes of this Act.

#### **4AB Farming operation**

(1) A **farming operation** is a business undertaking that primarily involves one or more of the following activities:

(a) agriculture (for example, crop growing and livestock or grain farming),

(b) aquaculture,

(c) the cultivation or harvesting of timber or native vegetation,

(d) any activity involving primary production carried out in connection with an activity referred to in paragraphs (a)–(c).

(2) A **farming operation** does not include a business undertaking that primarily involves wild harvest fishing or the hunting or trapping of animals, birds or reptiles in the wild.

(3) The regulations may declare that any business undertaking of a specified kind is, or is not, a farming operation for the purposes of this Act.

#### **4A Notes**

Notes included in this Act do not form part of this Act.

#### **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.

(3) This Act does not apply in respect of a farm debt secured by a farm mortgage if:

(a) the farmer is in default under the farm mortgage, and



(b) the farm mortgage secures all or part of the balance outstanding under an earlier farm mortgage, and

(c) the farmer and the creditor have previously entered into a mediation agreement under this Act in relation to the farm debt.

## **6 (Repealed)**

## **7 Relationship of Act with other laws**

- (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) Except as otherwise expressly provided by this Act, this Act does not affect or limit a civil right or remedy that exists apart from this Act, whether at common law or otherwise.
- (4) Other than as provided in this section, this Act has effect despite any other Act.

## **Part 1A Enforcement action**

### **Division 1 Prohibition on enforcement action**

#### **8 Exemption certificate required for enforcement action**

- (1) A creditor must not take enforcement action in respect of a farm mortgage unless an exemption certificate granted to the creditor is in force in respect of the farm debt concerned.

Maximum penalty:

- (a) for a corporation—2,500 penalty units, or
  - (b) for an individual—500 penalty units.
- (2) Enforcement action taken by a creditor in respect of a farm debt in contravention of this Act is void.
  - (3) 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 and the enforcement by a court or tribunal of any such notice or process.
  - (4) Subsection (3) does not affect any proceedings authorised under section 15 (5) to be

continued or concluded after the expiry of an exemption certificate.

## **Division 2 Prohibition certificates**

### **9 Application for prohibition certificate**

- (1) A farmer who is in default and who has requested a creditor to mediate in respect of the farm debt concerned may apply to the Authority for a certificate prohibiting the creditor from taking enforcement action (a ***prohibition certificate***).
- (2) An application for a prohibition certificate may be made whether or not the farmer has been given a notice inviting mediation in respect of the farm debt.
- (3) An application is to be in the approved form.

### **9A, 9B (Repealed)**

### **10 Grant or refusal of prohibition certificate**

- (1) The Authority may, on application, grant or refuse a prohibition certificate.
- (2) The Authority must grant a prohibition certificate if:
  - (a) the farmer is in default under the farm mortgage, and
  - (b) the farmer has given the creditor a mediation request in respect of the farm debt concerned, and
  - (c) no exemption certificate is in force in relation to the farm mortgage, and
  - (d) the Authority is satisfied that there is at least one additional ground for granting the prohibition certificate.
- (3) Each of the following is an ***additional ground*** for granting a prohibition certificate:
  - (a) the farmer has attempted to mediate in good faith throughout the period of 3 months commencing on the day on which the mediation request was given, but no satisfactory mediation has taken place,
  - (b) the creditor has failed to respond to a mediation request in respect of the farm debt within the period required by Part 2 (or within such longer period as the Authority considers is reasonable in the circumstances),
  - (c) the creditor has indicated in writing to the Authority or the farmer that the creditor does not wish to enter into or proceed with mediation,
  - (d) the creditor has, in any other manner, declined to mediate (whether under this Act or under a corresponding law of another State or Territory).
- (4) However, the Authority may refuse to grant a prohibition certificate where the creditor

has failed to respond to a mediation request if the Authority is satisfied that:

- (a) the creditor's failure to respond is justified in the circumstances, and
- (b) the creditor intends to mediate within a period that is reasonable in the circumstances.

### **11 Prohibition certificate not to be issued while exemption certificate in force**

No prohibition certificate can be issued by the Authority in relation to a farm mortgage while an exemption certificate is in force in relation to the farm mortgage.

#### **11AA, 11A (Repealed)**

**11B, 11C** (Renumbered as sections 18M, 18N)

### **12 Duration of prohibition certificate**

A prohibition certificate takes effect when it is issued and remains in force for a period of 6 months.

**12A** (Renumbered as section 18C)

## **Division 3 Exemption certificates**

### **13 Application for exemption certificate**

- (1) A creditor under a farm mortgage may apply to the Authority for a certificate that this Act does not apply to the farm mortgage (an **exemption certificate**).
- (2) An application is to be in the approved form.

### **14 Grant or refusal of exemption certificate**

- (1) The Authority may, on application, grant or refuse an exemption certificate.
- (2) The Authority must grant an exemption certificate if:
  - (a) the farmer is in default under the farm mortgage, and
  - (b) no prohibition certificate is in force in relation to the farm mortgage, and
  - (c) the Authority is satisfied that there is at least one additional ground for granting the exemption certificate.
- (3) Each of the following is an **additional ground** for granting an exemption certificate:
  - (a) the farmer has, when in default, given a mediation request to the creditor and satisfactory mediation has taken place following the request,
  - (b) the farm debt is secured by a farm mortgage over farm property in another State

or Territory and in New South Wales and mediation (equivalent to satisfactory mediation) has taken place under a corresponding law of that State or Territory in respect of that part of the farm debt that is secured by a farm mortgage over farm property in New South Wales,

- (c) the creditor has given the farmer a notice inviting mediation and has attempted to mediate in good faith throughout the period of 3 months (or such longer period as has been agreed by the creditor for the purposes of this section by notice in writing given to the farmer) commencing on the day on which the notice was given,
  - (d) the farmer has failed to respond to a notice inviting mediation within the period required by Part 2 (or within such longer period as the Authority considers is reasonable in the circumstances),
  - (e) the farmer has failed to take part in mediation in good faith or has unreasonably delayed entering into or proceeding with mediation in respect of the farm debt,
  - (f) 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 farm debt,
  - (g) the farmer has, in any other manner, declined to mediate (whether under this Act or under a corresponding law of another State or Territory).
- (4) However, the Authority may refuse to grant an exemption certificate if satisfied that:
- (a) in the circumstances, the farmer is justified in declining to mediate, and
  - (b) the farmer intends to mediate within a period that is reasonable in the circumstances.
- (5) 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.

#### **15 Duration of exemption certificate**

- (1) An exemption certificate takes effect when it is issued and remains in force until the date on which the effective period ends.
- (2) The **effective period** for an exemption certificate is:
  - (a) if satisfactory mediation in respect of the farm debt concerned has taken place, or the farmer has failed to take part in mediation in good faith—the period of 3 years commencing on the last date of the mediation, or
  - (b) if the farmer has indicated in writing that the farmer does not wish to enter into or proceed with mediation—the period of 3 years commencing on the date the

indication was given to the Authority or creditor, or

- (c) if the farmer has failed to respond to a notice inviting mediation within the period of 20 business days (or any longer period allowed by the Authority for the purposes of determining the application for the exemption certificate)—the period of 3 years commencing immediately after the end of the period required or allowed for the response, or
- (d) in any other case—the period of 3 years commencing on the date the certificate was issued.

- (3) An exemption certificate may not be issued after the date on which it would, if issued, expire under subsection (2).
- (4) An exemption certificate is to specify the date on which it expires.
- (5) The expiry of an exemption certificate 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.
- (6) The reference in subsection (5) 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.

## **Part 2 Mediation**

### **Division 1 Mediators**

#### **16 Accreditation of mediators**

- (1) The Authority may accredit or reaccredit persons as mediators for the purposes of this Act.
- (2) The regulations may make provision for or with respect to the accreditation of mediators (including, without limitation, for or with respect to applications for, and conditions of, accreditation and the suspension and cancellation of accreditation).

#### **17 Functions of mediators**

- (1) A mediator has the following functions:
  - (a) to mediate, or attempt to mediate, between the participants in the mediation for the purpose of arriving at an agreement for the present arrangements and future conduct of financial relations among them,
  - (b) such other functions as are conferred or imposed on the mediator by or under this

or any other Act.

(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.

## **Division 2 Preliminary procedure**

### **18A Creditor-initiated mediation**

- (1) A creditor under a farm mortgage may give a farmer who is in default under the mortgage a notice of invitation to participate in mediation (a ***notice inviting mediation***) in respect of the farm debt concerned.
- (2) The notice must specify that a failure of the farmer to respond to the notice within the period required by this section may constitute a ground for the grant of an exemption certificate.
- (3) The farmer must respond to the notice within 20 business days after receiving the notice.
- (4) A notice inviting mediation, or a farmer's response, is to be in writing in the approved form.

### **18B Farmer-initiated mediation**

- (1) A farmer who owes money to a creditor under a farm mortgage may, by notice given to the creditor, request mediation in relation to the farm debt concerned (a ***mediation request***).
- (2) The mediation request must specify that a failure of the creditor to respond to the request within the period required by this section may constitute a ground for the grant of a prohibition certificate.
- (3) A mediation request may be made whether or not the farmer is in default. However, a mediation request may not be made if the creditor has given the farmer a notice inviting mediation in respect of the farm debt.
- (4) The creditor must respond to the mediation request within 20 business days after receiving the request.

#### **Note—**

See section 10 for provisions relating to the grant of a prohibition certificate where a creditor declines to mediate with a farmer who is in default.

- (5) A mediation request, and a creditor's response, is to be in writing in the approved form.

### **Division 3 Mediation procedure**

#### **18C Farmer to nominate mediator**

- (1) If a farmer and creditor agree to enter into mediation in respect of a farm debt, the farmer must nominate a mediator.
- (2) A creditor cannot nominate a mediator but must accept or reject the mediator nominated by a farmer.
- (3) If a creditor rejects the mediator nominated by a farmer, the farmer must nominate a panel of at least 3 other mediators. The creditor must choose from the panel one mediator to mediate between the farmer and the creditor.

#### **18D Requests for information**

- (1) A mediator may facilitate the exchange of information between the parties to the mediation for the purpose of assisting the parties to resolve the issues between them.
- (2) For that purpose, a party to a mediation must give the mediator a copy of any request for information before giving the request to the other party.
- (3) In preparing a summary of the mediation under this Part, the mediator is to have regard to whether any request for information made by a party was reasonable, and whether information was provided in response to a request within a reasonable period.
- (4) Subsection (3) does not limit the matters to which the mediator is to have regard in preparing a summary of the mediation.

#### **18E Conduct of mediation sessions**

- (1) The procedure for commencing and conducting a mediation session is to be as determined by the Authority.
- (1A) Without limiting subsection (1), a mediator may:
  - (a) call a pre-mediation conference, and
  - (b) adjourn a mediation session if it appears that a party would be significantly disadvantaged because of the length of the session, and
  - (c) adjourn or terminate a mediation session if it appears that continuing the session would not be appropriate.
- (1B) In determining whether it would be appropriate to continue a mediation session, the mediator is to consider the following matters:

- (a) the duration of the mediation session,
  - (b) whether the parties are able and willing to participate in the mediation session,
  - (c) whether the parties are engaging in the mediation in good faith,
  - (d) any risk to the health or safety of the parties resulting from the conduct of the mediation session,
  - (e) any other matters that, in the opinion of the mediator, are relevant in the circumstances.
- (1C) Mediation sessions are to be held at a place and time, and in a manner, that is reasonably convenient for the parties.
- (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 18H, or
  - (b) may otherwise be present at or participate in the session with the permission of the mediator.

### **18F 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.
- (3) This section does not apply to the following documents:
- (a) a mediation agreement,
  - (b) a contract, deed, mortgage or other instrument entered into as a result of, or pursuant to, a mediation agreement,
  - (c) a summary of mediation under section 18O.



- (4) This section does not apply to proceedings commenced with respect to any act or omission in connection with which the information has been disclosed on the basis of preventing or minimising the danger of injury to any person or damage to any property.

**18G 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
- (c1) to prevent or minimise the danger of injury to any person or damage to any property, 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: 100 penalty units.

**18H 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.

- (3A) Any person representing a party to a mediation (whether or not the person is himself or herself a party to the mediation) must not attend a mediation session unless the person has been given written authority by the party the person represents to enter into a mediation agreement.
- (3B) (Repealed)
- (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 18E (1)-(3).
- (6) A contravention of this section does not invalidate a mediation.

### **18I Costs of mediation**

- (1) The parties to a mediation are to pay:
- (a) an equal share of any fee charged by the mediator for the mediation, and
  - (b) their own costs associated with attendance at the mediation.
- (2) If more than one mediation session is required as a result of a party's failure to give a person representing the party authority to enter into a mediation agreement, the party is to pay the whole of the mediator's fee for the session and all costs associated with the attendance by the other party at the additional session.
- (3) The parties may agree to apportion costs otherwise than as provided by this section.
- (4) The Authority is not liable for any of the costs of or associated with mediation for the purposes of this Act, except in its capacity as a creditor.

## **Division 4 Mediation agreements**

### **18J Draft mediation agreements**

- (1) If a mediator is satisfied that a farmer and a creditor who are parties to a mediation have agreed, or are about to agree, on an issue between them, the mediator must personally prepare for the consideration of the parties a draft agreement setting out the main points of agreement on the issue (***draft mediation agreement***).
- (2) The draft mediation agreement must include a statement, in the approved form, relating to the cooling off period for the proposed mediation agreement.

### **18K Mediation agreements**

- (1) If the parties are satisfied that a draft mediation agreement sets out the main points agreed on by them during, or within 24 hours after the end of, the mediation, the parties may enter into a mediation agreement by signing the draft agreement.
- (2) A mediation agreement is binding on the parties to the agreement.
- (3) A mediation agreement may be varied or replaced by a further agreement in writing between the parties.
- (4) If the mediation agreement does not include the statement relating to the cooling off period for the agreement as required by this Part, the creditor who is a party to the agreement is to give to the farmer a statement relating to the cooling off period.
- (5) The statement given by the creditor is to be in the approved form.

### **18L Cooling off period for mediation agreement**

- (1) There is to be a cooling off period for each mediation agreement between a farmer and a creditor.
- (2) The cooling off period expires:
  - (a) at 5 pm on the 10th business day after the day on which the mediation agreement is entered into, or
  - (b) if a statement relating to the cooling off period was not included in the draft mediation agreement—at 5 pm on the 10th business day after the day on which a statement relating to the cooling off period is given to the farmer by the creditor as required by this Part.
- (3) The cooling off period may be waived or varied by agreement in writing between the farmer and the creditor.
- (4) The Authority may not issue an exemption certificate to a creditor on the ground that satisfactory mediation in respect of a farm debt has taken place if:
  - (a) a mediation agreement is in force in relation to the farm debt, and
  - (b) the cooling off period has not expired.

### **18M Rights during cooling off period**

- (1) The farmer may, during a cooling off period arising under section 18L, serve a written notice on the creditor or the creditor's Australian legal practitioner to the effect that the farmer rescinds the mediation agreement subject to the cooling off period.
- (2) The notice of rescission must be signed by the farmer or the farmer's Australian legal

practitioner.

- (3) On service of a notice of rescission signed in accordance with this section, the mediation 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 mediation agreement.
- (5) This section and section 18L do not affect any right or remedy available otherwise than under this section or section 18L.
- (6) A creditor may not make a claim under subsection (4) if the only basis of the claim is the rescission of the mediation agreement under this section.

### **18N Implementing mediation agreement**

- (1) (Repealed)
- (2) A creditor who is a party to any contract, deed, mortgage or other instrument which purportedly results from, or is pursuant to, a mediation agreement between the creditor and a farmer but which fails to reflect the relevant mediation agreement is guilty of an offence.

Maximum penalty (subsection (2)): 100 penalty units.

### **18O Summary of mediation**

At the end of a mediation, a mediator must fill in the form approved by the Authority for setting out a summary of the conduct and results of the mediation (including any mediation agreement entered into by the parties).

## **Division 5 Internal review**

### **18P Internal review of decisions of Authority**

- (1) An aggrieved person may apply to the Authority for a review (***internal review***) of any of the following decisions:
  - (a) a decision to grant, or to refuse, a prohibition certificate,
  - (b) a decision to grant, or to refuse, an exemption certificate,
  - (c) a decision to accredit or reaccredit, or to refuse to accredit or reaccredit, a person as a mediator,
  - (d) a decision to suspend or cancel the accreditation of a mediator.
- (2) An ***aggrieved person*** is:

- (a) in relation to a decision about the grant or refusal of a prohibition certificate or an exemption certificate—the farmer or guarantor whose obligations are secured by the farm mortgage concerned, or the creditor, or
  - (b) in relation to a decision about accreditation or reaccreditation of a mediator—the mediator.
- (3) An application for internal review must:
- (a) be in the approved form, and
  - (b) be lodged with the Authority within 20 business days (or such longer period as the Authority may allow) after the person was notified of the making of the decision concerned, and
  - (c) comply with such other requirements as may be prescribed by the regulations.
- (4) The application is to be dealt with by the Chief Executive of the Authority or an employee of the Authority who is directed by the Chief Executive to deal with the application. The reviewer must be a person who was not substantially involved in making the decision the subject of the application.
- (5) The reviewer may invite any person who, in the opinion of the reviewer, may be affected by the outcome of the review to submit material for consideration on the review.
- (6) The reviewer is to consider any relevant material submitted by the applicant or any person invited under this section to submit material.
- (7) In determining an application for internal review, the reviewer may:
- (a) affirm the decision, or
  - (b) vary the decision, or
  - (c) set aside the decision and make a decision in substitution for the decision that is set aside.
- (8) In determining an application for internal review, the reviewer may exercise the same functions under this Act or any other law that the Authority had in making the decision subject to review.
- (9) The reviewer is to give notification of the reviewer's decision to:
- (a) the applicant, and
  - (b) if the review relates to a decision about the grant or refusal of a prohibition certificate or an exemption certificate—the farmer or creditor, or any guarantor, under the farm mortgage concerned who is not the applicant for the review, and

(c) the Authority.

(10) The notification is to include a statement of reasons for the decision.

(11) An application for internal review is to be determined within 30 business days after it is made. However, a determination is not invalid because it is made after the expiration of that period.

(12) The regulations may make provision for or with respect to the conduct of internal reviews.

### **18Q Stay of reviewable decisions**

- (1) An application under this Division for internal review of a decision to grant an exemption certificate operates to stay the decision until the applicant is notified of the reviewer's decision.
- (2) If an application is made for internal review of a decision to refuse a prohibition certificate, the creditor must not take enforcement action in respect of the farm mortgage concerned until the creditor is notified of the reviewer's decision.
- (3) An application under this Part for internal review of any of the following decisions does not operate to stay the decision:
  - (a) a decision to grant a prohibition certificate,
  - (b) a decision to refuse an exemption certificate,
  - (c) a decision to accredit or reaccredit, or to refuse to accredit or reaccredit, a person as a mediator,
  - (d) a decision to suspend or cancel the accreditation of a mediator.

## **Part 3 General provisions concerning 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.

### **19A Authority may require information**

- (1) The Authority may, by notice given to a farmer or a creditor, require the farmer or creditor to provide to the Authority such information as the Authority considers to be relevant to:
  - (a) an application under this Act made by the farmer or creditor, or
  - (b) the rights or obligations of the farmer or creditor in relation to a mediation under this Act (including any mediation that has not yet taken place).
- (2) The Authority may refuse to consider an application made by the farmer or the creditor under Part 1A if the farmer or the creditor fails to comply with a requirement made under this section.

### **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**

- (1) A waiver of mediation rights under this Act is void.
- (2) This section does not affect the requirement for the Authority to grant an exemption certificate in respect of a farm mortgage in circumstances where the farmer has indicated that the farmer does not wish to enter into or proceed with mediation in respect of the debt concerned.

### **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 Service of documents**

- (1) A document that is authorised or required by this Act or the regulations to be served on any person (other than a mediator) may be served by any of the following methods:
  - (a) in the case of an individual—by personal delivery to the person,
  - (b) by post to the address specified by the person for the service of documents of that kind,
  - (c) in the case of an individual who has not specified such an address—by post to the residential or business address of the person last known to the person serving the document,
  - (d) in the case of a corporation—by post to the registered office or any other office of the corporation or by leaving it at any such office with a person apparently over the age of 16 years,
  - (e) by email to an email address specified by the person for the service of documents of that kind,
  - (f) by any other method authorised by the regulations for the service of documents of that kind.
- (2) A document that is authorised or required by this Act or the regulations to be served on a mediator may be served by post to any office of the Authority.
- (3) Nothing in this section affects the operation of any provision of a law or of the rules of a court authorising a document to be served on a person by any other method.
- (4) In this section, **serve** includes give or send.

### **24 (Repealed)**

### **25 Proceedings for offences**

Proceedings for an offence against this Act or the regulations are to be dealt with summarily before the Local Court.

### **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.

## **29A (Repealed)**

## **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 (Repealed)**

## **Schedule 1 Savings and transitional provisions**

### **Part 1 Savings and transitional regulations**

#### **1 Regulations**

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends this Act.
- (1A) Any such provision has effect despite anything to the contrary in this Schedule. The regulations may make separate savings and transitional provisions or amend this Schedule to consolidate the savings and transitional provisions.
- (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.

### **Part 2 Provisions consequent on enactment of [Farm Debt Mediation Amendment Act 1996](#)**

#### **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.

### **Part 3 Provisions consequent on enactment of [Farm Debt Mediation Amendment Act 1998](#)**

#### **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.

### **Part 4 Provision consequent on enactment of [Farm Debt Mediation Amendment Act 2002](#)**

#### **7 Application of amendments**

- (1) The amendments made by the [Farm Debt Mediation Amendment Act 2002](#) extend to a default by a farmer before commencement of this clause if:
  - (a) no notice under section 8 of this Act has been given to the farmer before that date in relation to the default, and
  - (b) the default is under a farm mortgage in relation to which no certificate under section 11 is in force.
- (2) The amendments made by the [Farm Debt Mediation Amendment Act 2002](#) do not extend to a mediation that commenced before the commencement of this clause.

### **Part 5 Provision consequent on enactment of [National Competition Policy Health and Other Amendments \(Commonwealth Financial](#)**

## Penalties) Act 2004

### 8 Application of 2004 amending Act

- (1) In this clause, **the 2004 amending Act** means the *National Competition Policy Health and Other Amendments (Commonwealth Financial Penalties) Act 2004*.
- (2) Section 11 (3) continues to apply to the farmer and the creditor under a farm mortgage in respect of which the Authority had, before the repeal of that subsection by the 2004 amending Act, failed to issue a certificate under section 11 as if that subsection had not been repealed.
- (3) An application to the Administrative Decisions Tribunal that had been made under section 29A before the repeal of that section by the 2004 amending Act is to be heard and determined, and the decision of the Administrative Decisions Tribunal on the application is to be given effect to, as if that section had not been repealed.

## Part 6 Provision consequent on enactment of Farm Debt Mediation Amendment (Water Access Licences) Act 2005

### 9 Application of 2005 amending Act

- (1) In this clause, **the 2005 amending Act** means the *Farm Debt Mediation Amendment (Water Access Licences) Act 2005*.
- (2) The amendments made by the 2005 amending Act extend to a farm mortgage involving an interest in, or power over, an access licence (within the meaning of the *Water Management Act 2000*) that was entered into before the commencement of the 2005 amending Act, even if the farmer is in default under the farm mortgage before the commencement of the 2005 amending Act.
- (3) However, the amendments made by the 2005 amending Act do not affect any enforcement action commenced before the commencement of the 2005 amending Act.

## Part 7 Provisions consequent on enactment of Farm Debt Mediation Amendment Act 2018

### 10 Definitions

In this Part:

**amending Act** means the *Farm Debt Mediation Amendment Act 2018*.

**commencement date** means the date on which the amending Act commences.

**existing Heads of Agreement** means Heads of Agreement in force under this Act immediately before the commencement date.

## **11 Heads of Agreement**

- (1) Existing Heads of Agreement entered into between a farmer and a creditor are taken, on the commencement date, to be a mediation agreement under section 18K of this Act (as inserted by the amending Act).
- (2) The amendments made to this Act by the amending Act extend to the existing Heads of Agreement.
- (3) Without limiting subclause (2), section 18L (3) (as inserted by the amending Act) extends to the existing Heads of Agreement. However, the amendments do not otherwise affect the expiry of any cooling off period in force immediately before the insertion of section 18L.
- (4) A reference in section 5 (3) to a mediation agreement includes a reference to Heads of Agreement under this Act as in force before the commencement date.

## **12 Mediation concluded before commencement of amending Act**

The amendments made to this Act by the amending Act extend to the following:

- (a) any farm debt in respect of which mediation was concluded before the commencement date and an exemption certificate is in force, or an application for an exemption certificate is pending, on that date,
- (b) any mediation commenced, but not concluded, before the commencement date.

## **13 Mediators**

- (1) A person who, immediately before the commencement date, was a mediator within the meaning of this Act as then in force, is taken, on that date, to have been accredited as a mediator under section 16 of this Act, as substituted by the amending Act.
- (2) Accreditation is subject to any conditions or limitations that were in force before the substitution of section 16 by the amending Act.