



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.

## 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.



New South Wales

# Farm Debt Mediation Amendment Bill 2002

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New South Wales

# Farm Debt Mediation Amendment Bill 2002

No , 2002

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## A Bill for

An Act to amend the *Farm Debt Mediation Act 1994* so as to provide for farmer-initiated mediation in respect of farm debts, for certificates of exemption from enforcement action and for review of certain decisions of the New South Wales Rural Assistance Authority; and for other purposes.

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**The Legislature of New South Wales enacts:**

**1 Name of Act**

This Act is the *Farm Debt Mediation Amendment Act 2002*.

**2 Commencement**

This Act commences on a day or days to be appointed by proclamation.

**3 Amendment of Farm Debt Mediation Act 1994 No 91**

The *Farm Debt Mediation Act 1994* is amended as set out in Schedule 1.

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## Schedule 1 Amendments

(Section 3)

**[1] Section 3 Object**

Omit the section. Insert instead:

**3 Object**

The object of this Act is to provide for the efficient and equitable resolution of farm debt disputes. Mediation is required before a creditor can take possession of property or other enforcement action under a farm mortgage.

**[2] Section 4 Definitions**

Insert in alphabetical order in section 4 (1):

**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.

**exemption certificate** means a certificate of exemption from enforcement action that is issued under section 9B.

**Heads of Agreement**, in relation to a mediation, means heads of agreement referred to in section 11AA.

**[3] Section 4 (1A)**

Insert after section 4 (1):

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

- (a) a mediation that has achieved a resolution of a farm debt dispute, or
- (b) a mediation that has proceeded as far as it reasonably can in an attempt to achieve a resolution of a farm debt dispute but has nevertheless failed to resolve the dispute, or

	(c) a mediation specified or of a class described in regulations made for the purposes of this subsection to be a satisfactory mediation.	1 2 3
<b>[4] Section 4A</b>		4
	Insert after section 4:	5
<b>4A Notes</b>		6
	Notes included in this Act do not form part of this Act.	7
<b>[5] Section 9 Farmer may request mediation</b>		8
	Insert after section 9 (1):	9
	(1A) A farmer who has not been given notice under section 8 but who owes money to a creditor in relation to a farm debt may notify the creditor in writing that the farmer requests mediation concerning the farm debt involved. A farmer may request mediation under this subsection whether or not the farmer is in default.	10 11 12 13 14 15
<b>[6] Section 9 (3)</b>		16
	Insert after section 9 (2):	17
	(3) If a farmer requests mediation but subsequently refuses to mediate, this Act ceases to apply to the farm mortgage concerned.	18 19 20
<b>[7] Sections 9A and 9B</b>		21
	Insert after section 9:	22
<b>9A Creditor may agree to or decline mediation</b>		23
	(1) A creditor who has received a request from a farmer to mediate may, by notice in writing given to the farmer, agree or decline to mediate in respect of the farm debt involved.	24 25 26
	(2) A refusal by a creditor to mediate does not, of itself, give rise to any claim or other consequence under this Act if the farmer is not in default.	27 28 29
	(3) If a farmer is in default, a refusal by a creditor to mediate may result in the issuance of an exemption certificate.	30 31

**9B Exemption certificates**

- (1) A farmer who is in default and who has requested a creditor to mediate in respect of the farm debt involved (whether or not the farmer has been given a notice under section 8) may apply to the Authority for a certificate of exemption from enforcement action (*exemption certificate*) if the creditor does not mediate.
- (2) The Authority must issue an exemption certificate if:
  - (a) the farmer is in default under a farm mortgage, and
  - (b) the farmer has requested the creditor to mediate in respect of the farm debt involved, and
  - (c) no certificate under section 11 is in force in relation to the farm mortgage, and
  - (d) the Authority is satisfied that:
    - (i) the creditor does not wish to enter into or proceed with mediation, or
    - (ii) the creditor has failed to respond in writing to the request to mediate, within 21 days after the receipt of the request, or
    - (iii) 3 months have elapsed after a request was made by the farmer under section 9 and the farmer has throughout that period attempted to mediate in good faith but no satisfactory mediation has taken place between the farmer and the creditor.
- (3) While an exemption certificate is in force in relation to a farm mortgage:
  - (a) no certificate can be issued by the Authority under section 11, and
  - (b) no enforcement action can be taken by the creditor.
- (4) An exemption certificate ceases to be in force on the earlier of the following:
  - (a) 6 months after the day on which the creditor declined to mediate,
  - (b) the day on which the farmer and creditor enter into mediation in respect of the farm debt.

<b>[8] Section 11 Certificate that Act does not apply to farm mortgage</b>	1
Omit section 11 (1). Insert instead:	2
(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:	3
(a) the farmer is in default under the farm mortgage, and	4
(b) no exemption certificate is in force in relation to the farm mortgage, and	5
(c) the Authority is satisfied that:	6
(i) satisfactory mediation has taken place in respect of the farm debt involved, or	7
(ii) the farmer has declined to mediate, or	8
(iii) 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 a mediation session or satisfactory mediation took place during that period).	9
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<b>[9] Section 11 (1A)</b>	19
Omit “subsection (1) (c)”.	20
Insert instead “subsection (1) (c) (iii)”.	21
<b>[10] Section 11 (1B)</b>	22
Omit “For the purposes of subsection (1) (c), a failure”.	23
Insert instead “A failure”.	24
<b>[11] Section 11 (1B)</b>	25
Insert at the end of the subsection:	26
<b>Note.</b> Satisfactory mediation may nevertheless have taken place between the farmer and the creditor despite such failure to agree (see section 4 (1A)).	27
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<b>[12] Section 11 (3)</b>	1
Omit the subsection. Insert instead:	2
(3) If the Authority does not issue a certificate because the Authority is not satisfied that the creditor had attempted to mediate in good faith throughout the 3 months referred to in subsection (1) (c) (iii), the creditor must not:	3
(a) give notice to the farmer under section 8, or	4
(b) make an invitation referred to in section 11 (2) (c),	5
in respect of the farm debt involved for a period of 12 months from the date on which the creditor receives notice of the Authority's decision to refuse to issue the certificate, unless the farmer agrees to a shorter period.	6
<b>Note.</b> Under subsection (1) (c) (iii), attempting to mediate on the part of the creditor includes making preparations for mediation even if no mediation session ever took place.	7
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<b>[13] Section 11 (4)</b>	16
Omit "under subsection (1) (c))".	17
Insert instead "where subsection (1) (c) (iii) applies)".	18
<b>[14] Section 11AA</b>	19
Insert after section 11:	20
<b>11AA Heads of Agreement</b>	21
(1) If it appears to a mediator 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 document setting out the main points of agreement on the issue.	22
<b>Note.</b> Failure to comply with this section may result in the withdrawal of the accreditation of a mediator (see section 12 (3)).	23
(2) If the parties are satisfied that the document sets out the main points agreed on by them during, or within 24 hours of the end of, a mediation, the parties may enter into Heads of Agreement by signing the document.	24
<b>Note.</b> Under section 17 (3A), a person representing a party to a mediation must have written authority to enter into Heads of Agreement.	25
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<b>[15] Section 11A Cooling off period for Heads of Agreement</b>	1
Omit “written agreement entered into by a farmer during, or at the conclusion of, a mediation session between the farmer and a creditor” from section 11A (1).	2 3 4
Insert instead “Heads of Agreement”.	5
<b>[16] Section 11A (2)</b>	6
Omit “agreement is” wherever occurring.	7
Insert instead “Heads of Agreement are”.	8
<b>[17] Section 11A (3)</b>	9
Omit “written agreement entered into by a farmer during, or at the conclusion of, a mediation session”.	10 11
Insert instead “Heads of Agreement”.	12
<b>[18] Section 11A (4)</b>	13
Omit “an agreement does not”.	14
Insert instead “Heads of Agreement do not”.	15
<b>[19] Section 11A (5) (a)</b>	16
Omit the paragraph. Insert instead:	17
(a) Heads of Agreement are in force in relation to the farm debt, and	18 19
<b>[20] Section 11A (6)</b>	20
Omit the subsection.	21
<b>[21] Section 11B Rights during cooling off period</b>	22
Omit “agreement is” from section 11B (3).	23
Insert instead “Heads of Agreement are”.	24
<b>[22] Section 11B (1), (4) and (6)</b>	25
Omit “agreement” wherever occurring.	26
Insert instead “Heads of Agreement”.	27

<b>[23] Section 11C</b>	1
Insert after section 11B:	2
<b>11C Implementing Heads of Agreement</b>	3
(1) A contract, deed, mortgage or other instrument entered into as a result of, or pursuant to, Heads of Agreement between a farmer and a creditor must reflect the relevant Heads of Agreement.	4 5 6 7
(2) A creditor who is a party to any contract, deed, mortgage or other instrument which purportedly results from, or is pursuant to, Heads of Agreement between the creditor and a farmer but which fails to reflect the relevant Heads of Agreement is guilty of an offence.	8 9 10 11 12
Maximum penalty (subsection (2)): 100 penalty units.	13
<b>[24] Section 12 Role of Authority</b>	14
Omit “The Authority is to make arrangements for the referral of parties to mediation for the purposes of this Act.” from section 12 (2).	15 16
<b>[25] Section 12 (2)</b>	17
Insert “, except in its capacity as a creditor” after “Act”.	18
<b>[26] Section 12 (3)</b>	19
Insert after section 12 (2):	20
(3) The Authority must withdraw the accreditation of a mediator if the mediator fails, without reasonable excuse, to comply with section 11AA (1) or 18A.	21 22 23
<b>[27] Section 12A</b>	24
Insert after section 12:	25
<b>12A Farmer to nominate mediator</b>	26
(1) If a farmer and creditor agree to enter into mediation in respect of a farm debt, the farmer must nominate a mediator.	27 28
(2) A creditor cannot nominate a mediator but must accept or reject the mediator nominated by a farmer.	29 30

(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.	1 2 3 4
<b>[28]</b>	<b>Section 13 Functions of mediators</b>	5
	Insert at the end of section 13 (1):	6
	A mediator has such other functions as are conferred or imposed on the mediator by or under this or any other Act.	7 8
<b>[29]</b>	<b>Section 14 Conduct of mediation sessions</b>	9
	Insert after section 14 (1):	10
(1A)	Without limiting subsection (1), a mediator may:	11
(a)	call a pre-mediation conference, and	12
(b)	adjourn a mediation session if it appears that a party would be significantly disadvantaged because of the length of the session.	13 14 15
<b>[30]</b>	<b>Section 15 Confidentiality of mediation sessions</b>	16
	Insert after section 15 (2):	17
(3)	This section does not apply to the following documents:	18
(a)	Heads of Agreement,	19
(b)	a contract, deed, mortgage or other instrument entered into as a result of, or pursuant to, Heads of Agreement,	20 21
(c)	a summary of mediation under section 18A.	22
<b>[31]</b>	<b>Section 17 Representation and assistance during mediation</b>	23
	Insert after section 17 (3):	24
(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 Heads of Agreement.	25 26 27 28 29
(3B)	If another mediation session is required as a result of a party's failure to give the required authority, the party is liable for all costs associated with the attendance by the other party at that additional session.	30 31 32 33

<b>[32] Section 18A</b>	1
Insert after section 18:	2
<b>18A Summary of mediation</b>	3
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 Heads of Agreement entered into by the parties).	4
<b>Note.</b> Failure to comply with this section may result in the withdrawal of the accreditation of a mediator (see section 12 (3)).	5
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<b>[33] Section 29A</b>	10
Insert after section 29:	11
<b>29A Reviews by Administrative Decisions Tribunal</b>	12
(1) A farmer or creditor who is aggrieved by a decision of the Authority to issue or to refuse to issue an exemption certificate or a certificate under section 11 may apply to the Administrative Decisions Tribunal for a review of the decision.	13
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(2) An applicant for accreditation as a mediator who is aggrieved by a decision of the Authority to refuse accreditation under arrangements referred to in section 12 (1) may apply to the Administrative Decisions Tribunal for a review of the decision.	18
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(3) A mediator who is aggrieved by a decision of the Authority under section 12 (3) to withdraw his or her accreditation may apply to the Administrative Decisions Tribunal for a review of the decision.	23
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<b>Note.</b> Section 38 (1) of the <i>Administrative Decisions Tribunal Act 1997</i> provides that the Tribunal has jurisdiction to review a decision (or a class of decisions) if an Act or statutory rule provides that applications may be made to it for a review of any such decision (or class of decisions).	27
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(4) The Administrative Decisions Tribunal may award costs under section 88 of the <i>Administrative Decisions Tribunal Act 1997</i> in respect of proceedings commenced by an application made under this section.	31
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<b>[34] Schedule 1 Savings and transitional provisions</b>	1
Insert at the end of clause 1 (1):	2
the <i>Farm Debt Mediation Amendment Act 2002</i>	3
<b>[35] Schedule 1, clause 7</b>	4
Insert after clause 6:	5
<b>7 Application of amendments</b>	6
(1) The amendments made by the <i>Farm Debt Mediation Amendment Act 2002</i> extend to a default by a farmer before commencement of this clause if:	7
(a) no notice under section 8 of this Act has been given to the farmer before that date in relation to the default, and	8
(b) the default is under a farm mortgage in relation to which no certificate under section 11 is in force.	9
(2) The amendments made by the <i>Farm Debt Mediation Amendment Act 2002</i> do not extend to a mediation that commenced before the commencement of this clause.	10
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