



Legislative Council

Farm Debt Mediation Amendment

Bill Hansard - Extract

23/10/2002

Second Reading

The Hon. IAN MACDONALD (Parliamentary Secretary) [5.14 p.m.]: I move:

That the bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

The *Farm Debt Mediation Act 1994* is an Act which provides for the efficient and equitable resolution of farm debt disputes.

The Act establishes a structure whereby a farmer is given the opportunity to mediate with the creditor prior to a creditor taking enforcement action on a farm debt.

Farm debts are different to other business loans. Farmers generally include the homestead as part of the security for the farm mortgage.

Enforcement action by a creditor involving foreclosure on the loan therefore means not just loss of the business but also automatic loss of the family home.

In December 2001 I released the NSW Government Review Group Report into the *Farm Debt Mediation Act 1994*.

As well as some representatives from Government Departments, the Review Group comprised representatives from the NSW Farmer's Association, The Australian Banker's Association and the Rural Counselling Service.

The Review Panel generally agreed with the approach of the Farm Debt Mediation Act providing negotiation-based resolutions to farm debt disputes as, unlike the inflexible, all-or-nothing resolution process of the Court system, mediation allowed the parties to retain a greater degree of control over the resolution process.

The Review made around 30 recommendations for improving the Farm Debt Mediation process some of which have already been implemented by the Rural Assistance Authority.

The other recommendations will be implemented by the amendments that are proposed to be made under the *Farm Debt Mediation Amendment Bill 2002*.

This Bill introduces the concept of Farmer-Initiated Mediation into the Act.

The Review Panel found that, 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 can be issued if a farmer declines a creditor's request for mediation.

This means there is little incentive for creditors to agree to participate in mediation which a farmer has initiated.

However it is arguable that it may also be to the benefit of the creditor if a farmer anticipates a problem and takes the initiative to contact them to discuss remedial strategies before the situation is such that few feasible options remain.

Ideally, at the end of the process, the creditor will have a performing loan and a new contract that can be enforced.

As recommended by the Review Panel, this Bill proposes to introduce a clause whereby a farmer 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.

If the farmer is in default of the loan to a creditor and the creditor declines mediation requested by the farmer this may result in the issue by the Authority of an exemption certificate.

An exemption certificate prevents the issue of a section 11 certificate and therefore prohibits the creditor from taking any enforcement action while the exemption certificate is in force.

Exemption certificates remain in force for a maximum of six months or earlier if the farmer and the

creditor enter into mediation in respect of the farm debt.

This proposed amendment is designed to give farmers the bargaining power which they currently lack with their creditors.

In addition, the Bill also proposes to introduce an incentive for creditors to mediate in good faith.

At present if a creditor does not mediate in good faith the Authority cannot issue a section 11 certificate until the creditor does mediate in good faith.

This Bill proposes that a creditor who fails to mediate in good faith is prohibited from giving a notice to the farmer under the Act inviting a debtor to mediate, for a period of 12 months, unless the farmer agrees to a shorter period.

This proposal should provide a strong incentive for creditors to attempt to mediate in good faith from the beginning.

The Bill also introduces the requirement that a farmer must be in default under the farm mortgage before mediation notices can be issued by the creditor.

Creditors will no longer be able to issue notices under the Act where a farmer is not in default under the farm mortgage.

The Review Group received a number of submissions regarding the selection of a mediator.

Currently the mediator is chosen by agreement between the farmer and the creditor.

In the past, the Authority has been called upon to resolve a stalemate in the selection of a mediator on five occasions.

By agreement between the parties, the Authority has nominated a mediator to mediate the particular dispute.

A concern was expressed to the Review Panel that some mediators tend to be undertaking a substantial proportion of all mediations.

It was felt that these mediators may have a good reputation with creditors, putting farmers at a disadvantage as creditors have far more experience with the mediation process than do farmers.

The Review Group found that there is a perception in some quarters that, through their more frequent involvement in debt mediation processes, creditors have an advantage over farmers in selecting mediators who favour their position.

Therefore with the intention of giving farmers more power over their own mediations, this Bill proposes to give farmers the initial right to nominate a mediator.

If the creditor rejects the nomination, the farmer must then nominate a panel of at least three mediators from whom the creditor must select one.

Mediators will also be given more of a role under the proposed legislation, including the function of calling pre-mediation conferences and adjourning mediation sessions.

Giving mediators the power to adjourn a mediation session, if it appears that a party would be significantly disadvantaged because of the length of the session, will ensure that mediation by attrition does not take place.

In the early days of the Act, a Heads of Agreement document drawn up at the end of a mediation session would run to one half to perhaps one page of written points agreed upon by the parties.

Over time the agreements developed into legalistic documents running to some twenty to twenty five pages.

Under the proposed Bill mediators will be given the role of preparing a Heads of Agreement document. This is a document that a mediator will develop as the parties to the mediation agree on certain points as the meditation continues.

The parties may sign the Heads of Agreement within 24 hours of the end of the mediation.

Under these proposals a person representing a party to a mediation will not be able to attend a mediation session unless the person has been given written authority by the party the person represents to enter into a Heads of Agreement.

Any contract deed, mortgage or other instrument, which purportedly results from, or is pursuant to, Heads of Agreement between the creditor and a farmer must reflect the relevant heads of Agreement.

A failure on the part of a creditor will constitute an offence under the Act.

The Bill also proposes to confer a right of review to the Administrative Decisions Tribunal of decisions by the Authority to:

- issue or refuse to issue an exemption certificate;
- issue or refuse to issue a section 11 certificate;
- refuse to accredit a person as a mediator; or
- withdraw the accreditation of a mediator.

I commend the bill to the House.