



New South Wales

# Farm Debt Mediation Amendment Bill 2018

## 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* (*the principal Act*) to make further provision with respect to mediation required in relation to a farm debt before enforcement action may be taken to enforce the mortgage securing the debt.

In particular, the Bill:

- (a) clarifies the object of the principal Act in relation to farm debt matters that are not disputes, and
- (b) clarifies and extends the definitions of *mediation*, *farm machinery* and *farming operation* for the purposes of the principal Act, and
- (c) clarifies the operation of the principal Act with respect to restructured farm mortgages, and
- (d) clarifies that the principal Act does not, without express provision, affect or limit any civil right or remedy available apart from the principal Act, and
- (e) creates new offences relating to unauthorised enforcement action, and
- (f) makes further provision in relation to certificates prohibiting or permitting enforcement action without further mediation, and
- (g) makes further provision in relation to the accreditation of mediators and the conduct of mediation sessions (including costs of mediation), and
- (h) replaces the requirement to enter into Heads of Agreement following a successful mediation with a requirement to enter into a binding mediation agreement, and enables the cooling off period for the agreement to be waived or varied by agreement between the parties, and

- (i) provides for an internal review process for certain decisions of the Rural Assistance Authority (*the Authority*) relating to certificates and accreditations under the principal Act, and
- (j) enhances the powers of the Authority to request information in connection with an application or a mediation under the principal Act, and
- (k) updates provisions relating to the service of documents, including by permitting service by email, and
- (l) clarifies that the requirement to grant an exemption certificate is not affected by a provision of the principal Act that declares a waiver of mediation rights to be void, and
- (m) makes other minor and consequential amendments, and
- (n) enacts consequential savings and transitional provisions.

## 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.

## Schedule 1      **Amendment of Farm Debt Mediation Act 1994** **No 91**

### Preliminary

**Schedule 1 [1]** makes it clear that the object of the principal Act extends to the resolution of any matter involving a farm debt, whether or not the matter is in the nature of a dispute. **Schedule 1 [3]** makes a consequential amendment.

**Schedule 1 [5]** inserts a definition of *mediation* to make it clear that mediation is a structured negotiation process that is facilitated by a neutral and independent mediator. The proposed amendment also extends the definition of *farming operation* to include aquaculture, timber and native vegetation cultivation or harvesting and activities involving primary production carried out in connection with those farming operations. The definition excludes wild harvest fishing and the hunting or trapping of animals, birds and reptiles in the wild.

**Schedule 1 [2]** inserts and substitutes various definitions for the purposes of the principal Act. The definition of *farm machinery* is extended to all vehicles, machines and implements used for the purposes of a farming operation, whether or not they have been acquired for the purposes of a farming operation.

**Schedule 1 [6]** makes it clear that the principal Act does not operate to require mediation in relation to a farm debt for a restructured farm mortgage if the farm debt for the earlier farm mortgage is subject to a mediation agreement and the farmer is in default under the restructured mortgage.

**Schedule 1 [8]** makes it clear that the principal Act does not, without express provision, affect or limit any civil right or remedy available apart from the principal Act.

### Enforcement action

**Schedule 1 [9]** inserts proposed Part 1A into the principal Act, containing provisions relating to the prohibition on enforcement action without mediation, and the process for prohibiting or authorising enforcement action. The Part simplifies and consolidates existing provisions relating to the general prohibition on taking enforcement action, certificates prohibiting a creditor from taking enforcement action (currently defined in the principal Act as *exemption certificates*) and certificates providing that the principal Act does not apply to a farm mortgage (given under existing section 11). **Schedule 1 [4] and [7]** make consequential amendments.

**Division 1** creates an offence prohibiting a creditor from taking enforcement action unless an exemption certificate is in force. The maximum penalty that a court may impose for the offence is 2,500 penalty units for a corporation or 500 penalty units for an individual.

**Division 2** provides for the following changes to existing provisions dealing with exemption certificates:

- (a) Exemption certificates are redefined as *prohibition certificates*.
- (b) An application for a prohibition certificate is to be made in the form approved by the Authority.
- (c) The failure of a creditor to respond to a farmer-initiated request for mediation within the period of 20 business days, or such longer period as the Authority allows, is included as a ground for the grant of a prohibition certificate.
- (d) 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 the failure to respond is justified in the circumstances.
- (e) A prohibition certificate remains in force for a period of 6 months.

**Schedule 1 [2]** makes a consequential amendment to insert a definition of *prohibition certificate*.

**Division 3** provides for the following changes to existing provisions dealing with certificates under section 11 of the principal Act:

- (a) Certificates are defined as *exemption certificates*.
- (b) An application for an exemption certificate is to be made in the form approved by the Authority.
- (c) It is not mandatory for the Authority to grant an exemption certificate where mediation has been requested by a farmer who is not in default.
- (d) The conduct of satisfactory mediation, and the conduct of the farmer in declining to mediate, under corresponding laws of other States and Territories are included as grounds for issuing an exemption certificate.
- (e) The Authority may refuse to grant an exemption certificate where the farmer has declined to mediate if satisfied that the farmer was, in the circumstances, justified in doing so, and the farmer intends to mediate within a reasonable period.
- (f) If the farmer fails to respond within the specified period (generally 20 business days) to a notice of invitation to participate in mediation given by the creditor, the exemption certificate expires 3 years after the period for responding to the invitation ends. (The existing provision dealing with expiry provides that, where a farmer has been given a notice by the creditor concerning the availability of mediation under the principal Act, the certificate expires 3 years and 3 months after the date on which the notice was given.)

**Schedule 1 [2]** makes a consequential amendment to insert a definition of *exemption certificate*.

### **Mediation**

**Schedule 1 [10]** inserts Divisions 1–5 into Part 2 of the principal Act, which contain provisions relating to the accreditation of mediators, preliminary steps to mediation, mediation procedure and internal review of decisions made by the Authority. **Schedule 1 [11]–[19], [22], [23], [25] and [28]–[33]** make consequential amendments.

**Division 1** provides for the following changes to existing provisions dealing with accreditation of mediators:

- (a) The Authority is no longer required to consult with representative bodies in the banking and farming industries before instituting arrangements for accreditation.
- (b) Instead, a regulation-making power is included to enable regulations to provide for matters relating to the accreditation of mediators.

**Division 2** provides for the following changes to existing provisions dealing with preliminary steps to mediation:

- (a) A notice given by a creditor concerning the availability of mediation under the principal Act is defined as a *notice inviting mediation*. The notice is no longer required to inform the farmer of the creditor's intention to take enforcement action.
- (b) A farmer's response to a notice inviting mediation must be given to the creditor within 20 business days (instead of 21 ordinary days) after receiving the notice.
- (c) A farmer may initiate a request for mediation (whether or not in default) by giving the creditor a *mediation request*. A creditor must respond to a mediation request within 20 business days after receiving the request.

**Division 3** provides for the following changes to existing provisions dealing with mediation procedure:

- (a) The proposed Division makes it clear that a mediator may facilitate the exchange of information for the purposes of the mediation.
- (b) **Schedule 1 [20] and [21]** amend existing section 14, which is transferred to Division 3 and renumbered as section 18E by **Schedule 1 [30]**. The proposed amendments enable a mediator to adjourn or terminate a mediation session if it would be inappropriate to continue the session, having regard to such matters as the duration of the session, the willingness of the parties to participate, whether the parties are engaging in the mediation in good faith and any risk to the health or safety of the parties. **Schedule 1 [21]** also provides that mediation sessions are to be held at a place and time that is reasonably convenient for the parties.
- (c) **Schedule 1 [23]–[25]** amend existing section 15, which is transferred to Division 3 and renumbered as section 18F by **Schedule 1 [30]**. **Schedule 1 [24]** provides for an exception to the general rule against admissibility in court proceedings of information obtained from a mediation session so that the information may be admitted in proceedings in connection with which the information is disclosed to prevent danger of personal injury or property damage.
- (d) **Schedule 1 [26]** amends existing section 16, which is transferred to Division 3 and renumbered as section 18G by **Schedule 1 [30]**. The proposed amendment creates an exception to an offence relating to unauthorised disclosure of information to allow information to be disclosed for the purpose of preventing personal injury or property damage.
- (e) **Schedule 1 [27]** also amends existing section 16 by removing the penalty of imprisonment from that offence so that the maximum penalty a court may impose for the offence is 100 penalty units.
- (f) Proposed **section 18I** makes further provision for the costs of mediation. The parties to a mediation are to pay their own costs of attendance at a mediation and are generally to pay equal shares of the mediator's fees.

**Division 4** provides for the following changes to existing provisions dealing with Heads of Agreement.

- (a) *Heads of Agreement* are redefined as *mediation agreements*.
- (b) A mediation agreement is binding on the parties, and may be varied or replaced by a further written agreement.
- (c) The cooling off period for a mediation agreement may be waived or varied by agreement in writing between the parties. The existing provision for cooling off periods limits variations to an extension (rather than a reduction) of the duration of the period.

**Division 5** provides for an internal review process for decisions of the Authority relating to the grant or refusal of prohibition certificates and exemption certificates and the accreditation or reaccreditation of mediators. The Division contains the following provisions:

- (a) **Section 18P** establishes a right of review for farmers, creditors and guarantors (for decisions about prohibition certificates and exemption certificates) and mediators (for decisions about accreditation and reaccreditation). The proposed section also deals with the process of review and provides that the review must be determined within 30 business days after the application for review is made.
- (b) **Section 18Q** provides that an application for internal review of a decision to grant an exemption certificate operates to stay the decision being reviewed until the applicant is notified of the decision on the review. The creditor must not take enforcement action while an application for review of a decision to refuse a prohibition certificate is pending. An application for the review of any other decision does not operate to stay the decision.

#### **Miscellaneous**

**Schedule 1 [34]** inserts **section 19A** into Part 4 of the principal Act, to enable the Authority to require a farmer or a creditor to provide information that is relevant to an application under the principal Act or the rights or obligations of a party to a mediation. The Authority may refuse to consider an application made by a farmer or creditor if that party fails to comply with the requirement.

**Schedule 1 [35]** makes it clear that an existing provision declaring a waiver of mediation rights under the principal Act to be void does not affect the requirement for the Authority to grant an exemption certificate where the farmer indicates an unwillingness to enter into or proceed with mediation.

**Schedule 1 [36]** repeals a provision specifying when a document is taken to be given to a person for the purposes of the principal Act. The proposed amendment also extends a provision specifying the optional methods for service of documents to include service by email and to enable the recipient to specify an address for the service of all documents of a particular kind. The extended provision enables regulations under the principal Act to prescribe alternative or additional methods of service.

**Schedule 1 [37]** repeals an obsolete provision.

**Schedule 1 [40] and [46]** insert provisions dealing with savings and transitional matters consequent on the proposed Act. **Schedule 1 [38], [39] and [41]–[45]** make consequential amendments.