

FARM DEBT MEDIATION ACT 1994 No. 91

NEW SOUTH WALES



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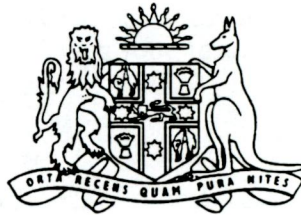
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FARM DEBT MEDIATION ACT 1994 No. 91

NEW SOUTH WALES



Act No. 91, 1994

An Act to make provision for mediation concerning farm debts, and for other purposes. [Assented to 12 December 1994]

The Legislature of New South Wales enacts:**PART 1—PRELIMINARY****Short title**

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

Commencement

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

Object

3. The object of this Act is to provide for mediation concerning farm debts before a creditor can take possession of property or other enforcement action under a farm mortgage.

Definitions

4. (1) In this Act:

“**Authority**” means the New South Wales Rural Assistance Authority constituted by the Rural Assistance Act 1989;

“**creditor**” means a person who provides financial accommodation to a farmer that creates or increases a farm debt and includes a bank, or a credit provider within the meaning of the Credit Act 1984;

“**enforcement action**”, in relation to a farm mortgage, means taking possession of property under a farm mortgage, the sale of property under a farm mortgage, or any other action to enforce a farm mortgage including the continuing of action already commenced to enforce a farm mortgage but does not include:

- (a) the completion of the sale of property held under a farm mortgage in respect of which contracts were exchanged before the commencement of section 6; or
- (b) the enforcement of a judgment that was obtained before the commencement of that section;

“**farm**” means land on which a farmer engages in a farming operation;

“**farm debt**” means a debt incurred by a farmer for the purposes of the conduct of a farming operation that is secured wholly or partly by a farm mortgage;

“**farm machinery**” means:

- (a) a harvester, binder, tractor, plough or other agricultural implement; or

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- (b) any other goods of a class commonly used for the purposes of a farming operation that are prescribed by the regulations as being farm machinery for the purposes of this Act,

if the goods are acquired for the purposes of a farming operation;

“farm mortgage” includes any interest in, or power over, property (comprising a farm or part of a farm or farm machinery used by a farmer in connection with a farming operation, or both) securing obligations of the farmer (whether as a debtor or guarantor);

“farmer” means a person (whether an individual person or a corporation) who is solely or principally engaged in a farming operation and includes a person who owns land cultivated under a share-farming agreement and the personal representatives of a deceased farmer;

“farming operation” means:

- (a) a farming (including dairy farming, poultry farming and bee farming), pastoral, horticultural or grazing operation; or
 (b) any other operation prescribed by the regulations for the purposes of this definition;

“function” includes a power, authority or duty;

“mediator” means a mediator for the time being accredited by the Authority pursuant to arrangements instituted by the Authority under this Act, and **“mediation”** means mediation by such an accredited mediator.

(2) This Act extends to:

- (a) a farm mortgage that was entered into before the commencement of section 6; and
 (b) a liability or obligation that arose under a farm mortgage before the commencement of section 6.

Application of Act

5. (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 the farmer or the creditor; or
 (c) a farmer, being a corporation, that is an externally administered corporation within the meaning of the Corporations Law.

Enforcement action in contravention of Act void

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

Relationship with other Acts

7. (1) Nothing in this Act affects the operation of the Contracts Review Act 1980 or any other Act or law that deals with the granting of relief in respect of harsh, oppressive, unconscionable or unjust contracts or on the grounds of hardship.

(2) Nothing in this Act is to be construed as affecting the operation of the Banking Act 1959 of the Commonwealth and, in particular, the duty of the Reserve Bank under Division 2 of Part II of that Act.

(3) The requirements of this Act, in so far as they apply to the provision of consumer credit, are in addition to, and do not affect, the requirements of the Credit Act 1984 or any Act or law amending or replacing that Act.

(4) Other than as provided in this section, this Act has effect despite any other Act.

PART 2—MEDIATION**No enforcement action until notice of availability of mediation given**

8. (1) A creditor to whom money under a farm mortgage is owed by a farmer must not take enforcement action against the farmer in respect of the farm mortgage until at least 21 days have elapsed after the creditor has given a notice to the farmer under this section.

(2) Notice to the farmer is to be in writing in a form approved by the Authority (informing the farmer of the creditor's intention to take enforcement action in respect of the farm mortgage and of the availability of mediation under this Act in respect of farm debts).

(3) This section does not apply if the Authority has given a certificate under section 11 in respect of the farm mortgage concerned.

Farmer may request mediation

9. (1) A farmer to whom notice has been given under section 8 may, within 21 days after the notice was given, notify the creditor in writing that the farmer requests mediation concerning the farm debt involved.

(2) The Authority may approve a form for the purposes of a notification under this section and a notification given to a creditor in that form is sufficient notification for the purposes of this section. Failure to use the approved form does not of itself invalidate a notification given by a farmer.

Enforcement action postponed to allow for mediation

10. Once a farmer has given a creditor a notification in accordance with section 9 requesting mediation, the creditor must not take enforcement action in respect of the farm mortgage concerned unless and until the Authority has given a certificate under section 11 in respect of the farm mortgage.

Certificate that Act does not apply to farm mortgage

11. (1) The Authority must, on the application of a creditor under a farm mortgage, issue a certificate that this Act does not apply to the farm mortgage if the Authority is satisfied that:

- (a) satisfactory mediation in respect of the farm debt concerned has taken place; or
- (b) the farmer has declined to mediate in respect of the farm debt; or
- (c) 3 months have elapsed after a notice was given by the creditor under section 8 and the creditor has throughout that period attempted to mediate in good faith (whether or not satisfactory mediation has taken place during that period).

(2) A farmer is presumed to have declined to mediate if any of the following circumstances is established:

- (a) the farmer has failed to take part in mediation in good faith or has unreasonably delayed entering into or proceeding with mediation;
- (b) the farmer has indicated in writing to the Authority or to the creditor that the farmer does not wish to enter into or proceed with mediation in respect of the debt concerned;
- (c) the farmer has failed to respond within 28 days to an invitation in writing given to the farmer by the creditor to commence mediation in respect of the farm debt.

(3) The regulations may make provision for or with respect to what constitutes satisfactory mediation.

(4) A certificate may be given under this section (except under subsection (1) (c)) whether or not any notice has been given under section 8.

PART 3—GENERAL PROVISIONS CONCERNING MEDIATION

Arrangements for mediation

12. (1) The Authority is to institute arrangements for the accreditation of suitably qualified and experienced persons as mediators for the purposes of this Act and is to consult with the Australian Bankers Association and the NSW Farmers' Association on those arrangements.

(2) The Authority is to make arrangements for the referral of parties to mediation for the purposes of this Act. The Authority is not liable for any of the costs of or associated with mediation for the purposes of this Act.

Functions of mediators

13. (1) The functions of a mediator are as follows:

- (a) to listen to the farmer and creditor; and
- (b) to attempt to mediate between the farmer and creditor; and
- (c) to advise the farmer and creditor of programs that are available to assist them; and
- (d) to advise, counsel and assist the farmer and the creditor in attempting to arrive at an agreement for the present arrangements and future conduct of financial relations among them.

(2) It is not a function of a mediator:

- (a) to advise a farmer or creditor about the law; or
- (b) to encourage or assist a farmer or creditor in reserving or establishing legal rights; or
- (c) to act as an adjudicator or arbitrator.

Conduct of mediation sessions

14. (1) The procedure for commencing and conducting a mediation session is to be as determined by the Authority.

(2) Mediation sessions are to be conducted with as little formality and technicality, and with as much expedition, as possible.

(3) The rules of evidence do not apply to mediation sessions.

(4) A mediation session is to be conducted in the absence of the public, but persons who are not parties to a mediation session may be present at or participate in a mediation session with the permission of the mediator.

Confidentiality of mediation sessions

15. (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.

Disclosure of information

16. A person must not disclose any information obtained in a mediation session or in connection with the administration or execution of this Act unless the disclosure is made:

- (a) with the consent of the person from whom the information was obtained; or
- (b) in connection with the administration or execution of this Act; or
- (c) as reasonably required for the purpose of referring any party or parties to mediation to any person, agency, organisation or other body and, with the consent of the parties to the mediation, for the purpose of aiding in the resolution of an issue between those parties; or
- (d) in accordance with a requirement imposed by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth; or
- (e) with other lawful excuse.

Maximum penalty: 20 penalty units or imprisonment for 6 months, or both.

Representation

17. (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 Law that is a party to a mediation from being represented at the mediation by an officer of the corporation.

(3) If the mediator approves of the representation of a party by an agent, the approval of the mediator may be given subject to such conditions as the mediator considers reasonable to ensure that the other party to the mediation is not substantially disadvantaged by the agent appearing at the mediation and, if the mediator does so approve, the entitlement of the agent to represent the party is subject to compliance by the agent with the conditions.

(4) A contravention of this section does not invalidate a mediation.

Exclusion of personal liability of mediators and certain other persons

18. 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

Act binds the Crown

19. 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.

Contracting out prohibited

20. (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.

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(3) A creditor who is a party to any such agreement or other instrument is guilty of an offence.

Maximum penalty: 100 penalty units.

Waiver of rights void

21. A waiver of mediation rights under this Act is void.

Notices by mortgagee

22. 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.

Manner of giving notice or other document

23. (1) If this Act requires or permits a notice or other document to be given, whether personally or by post, to the Authority or a mediator (whether the expression “deliver”, “serve”, “notify”, “send” or “give” or another expression is used), the notice or other document may be given by leaving it at, or by sending it by post to:

- (a) the office of the Authority; or
- (b) if it has more than one office—any one of its offices.

(2) If this Act requires or permits a notice or other document to be given to a person (other than the Authority or a mediator) (whether the expression “deliver”, “serve”, “notify”, “send” or “give” or another expression is used), the notice or other document may be given:

- (a) to a natural person:
 - (i) by delivering it to the person personally; or
 - (ii) by leaving it at, or by sending it by post, telex, facsimile or similar electronic facility to, the address of the place of residence or business of the person last known to the person giving the notice or other document; or

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(b) to a body corporate:

- (i) by leaving it at the registered office of the body corporate with an officer of the body corporate; or
- (ii) by sending it by post, telex, facsimile or similar electronic facility to its registered office.

(3) Nothing in subsection (1) or (2):

- (a) affects the operation of another law that authorises the service of a notice or other document otherwise than as provided in subsection (1) or (2); or
- (b) affects the power of a court or tribunal to authorise service of a notice or other document otherwise than as provided in subsection (1) or (2).

Date notice or other document is given

24. For the purposes of this Act, a notice or other document is taken to be given:

- (a) in the case of a notice or other document given personally—on the date it bears or the date it is received by the addressee, whichever is the later; or
- (b) in the case of a notice or other document sent by post—on the date it bears or the date when it would have been delivered in the ordinary course of post, whichever is the later; or
- (c) in the case of a notice or other document sent by facsimile transmission or some other form of electronic transmission—on the date it bears or the date on which the machine from which the transmission was sent produces a report indicating that the notice or other document was sent to the facsimile or other number of the addressee, whichever is the later.

Proceedings for offences

25. Proceedings for an offence against this Act or the regulations are to be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

Double jeopardy

26. 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.

Aiding, abetting and attempts

27. (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.

Offences by corporations

28. (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.

Limitation

29. 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.

Regulations

30. (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.

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

Expiry of Act

31. This Act expires on the second anniversary of the commencement of section 6.

*[Member's second reading speech made in—
Legislative Assembly on 27 October 1994
Legislative Council on 30 November 1994]*

SECOND PRINT

FARM DEBT MEDIATION BILL 1994

NEW SOUTH WALES



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This PUBLIC BILL, originated in the LEGISLATIVE ASSEMBLY and, having this day passed, is now ready for presentation to the LEGISLATIVE COUNCIL for its concurrence.

Legislative Assembly

Clerk of the Legislative Assembly.

NEW SOUTH WALES



Act No. , 1994

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

Farm Debt Mediation 1994

The Legislature of New South Wales enacts:

PART 1—PRELIMINARY**Short title**

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

5 **Commencement**

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

Object

10 3. The object of this Act is to provide for mediation concerning farm debts before a creditor can take possession of property or other enforcement action under a farm mortgage.

Definitions

4. (1) In this Act:

15 “**Authority**” means the New South Wales Rural Assistance Authority constituted by the Rural Assistance Act 1989;

“**creditor**” means a person who provides financial accommodation to a farmer that creates or increases a farm debt and includes a bank, or a credit provider within the meaning of the Credit Act 1984;

20 “**enforcement action**”, in relation to a farm mortgage, means taking possession of property under a farm mortgage, the sale of property under a farm mortgage, or any other action to enforce a farm mortgage including the continuing of action already commenced to enforce a farm mortgage but does not include:

25 (a) the completion of the sale of property held under a farm mortgage in respect of which contracts were exchanged before the commencement of section 6; or

(b) the enforcement of a judgment that was obtained before the commencement of that section;

“**farm**” means land on which a farmer engages in a farming operation;

30 “**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;

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“farm machinery” means:

(a) a harvester, binder, tractor, plough or other agricultural implement; or

(b) any other goods of a class commonly used for the purposes of a farming operation that are prescribed by the regulations as being farm machinery for the purposes of this Act, 5

if the goods are acquired for the purposes of a farming operation;

“farm mortgage” includes any interest in, or power over, property (comprising a farm or part of a farm or farm machinery used by a farmer in connection with a farming operation, or both) securing obligations of the farmer (whether as a debtor or guarantor); 10

“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; 15

“farming operation” means:

(a) a farming (including dairy farming, poultry farming and bee-farming), pastoral, horticultural or grazing operation; or

(b) any other operation prescribed by the regulations for the purposes of this definition; 20

“function” includes power, authority or duty;

“mediator” means a mediator for the time being accredited by the Authority pursuant to arrangements instituted by the Authority under this Act, and “mediation” means mediation by such an accredited mediator. 25

(2) Act extends to:

(a) a farm mortgage that was entered into before the commencement of section 6; and

(b) a liability or obligation that arose under a farm mortgage before the commencement of section 6. 30

Application of Act

5. (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: 35

(a) a farmer whose property is subject to control under Division 2 of Part X of the Bankruptcy Act 1966 of the Commonwealth; or

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- (b) a farmer whose property is the subject of a bankruptcy petition presented by the farmer or the creditor; or
- (c) a farmer, being a corporation, that is an externally administered corporation within the meaning of the Corporations Law.

5 **Enforcement action in contravention of Act void**

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

Relationship with other Acts

10 7. (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.

15 (2) The requirements of this Act, in so far as they apply to the provision of consumer credit, are in addition to, and do not affect, the requirements of the Credit Act 1984 or any Act or law amending or replacing that Act.

(3) Other than as provided in this section, this Act has effect despite any other Act.

PART 2—MEDIATION

20 **No enforcement action until notice of availability of mediation given**

8. (1) A creditor to whom money under a farm mortgage is owed by a farmer must not take enforcement action against the farmer until at least 21 days have elapsed after the creditor has given a notice to the farmer under this section.

25 (2) Notice to the farmer is to be in writing in a form approved by the Authority (for the purpose of informing the farmer of the availability of mediation under this Act in respect of farm debts).

Farmer may request mediation

30 9. (1) A farmer to whom notice has been given under section 8 may, within 21 days after the notice was given, notify the creditor in writing that the farmer requests mediation concerning the farm debt involved.

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(2) The Authority may approve a form for the purposes of a notification under this section and a notification given to a creditor in that form is sufficient notification for the purposes of this section. Failure to use the approved form does not of itself invalidate a notification given by a farmer. 5

Enforcement action postponed to allow for mediation

10. Once a farmer has given a creditor a notification in accordance with section 9 requesting mediation, the creditor must not take enforcement action in respect of the farm mortgage concerned unless and until the Authority has certified in writing to the creditor that the Authority is satisfied that the mediation requested has been completed or has not been successful. 10

What constitutes unsuccessful mediation

11. (1) Without limiting section 10, the Authority is required to certify that mediation has not been successful if it is satisfied that the farmer concerned has refused or failed to take part in mediation in good faith. 15

(2) If on the other hand the Authority is satisfied that the creditor has refused or failed to take part in mediation in good faith, the Authority may refuse to certify that mediation has not been successful and may continue to refuse to so certify for as long as the creditor's refusal or failure continues, up to a maximum of 12 months after the creditor requests the Authority to certify that mediation has not been successful. 20

**PART 3—GENERAL PROVISIONS CONCERNING
MEDIATION**

Arrangements for mediation 25

12. (1) The Authority is to institute arrangements for the accreditation of suitably qualified and experienced persons as mediators for the purposes of this Act and is to consult with the Australian Bankers Association and the NSW Farmers' Association on those arrangements.

(2) The Authority is to make arrangements for the referral of parties to mediation for the purposes of this Act. The costs of and associated with mediation are payable by the parties to the mediation in such proportions as they may agree among themselves or, failing agreement, in equal shares. 30

Functions of mediators

13. (1) The functions of a mediator are as follows:

- (a) to listen to the farmer and creditors who wish to be heard; and
- (b) to attempt to mediate between the farmer and creditors; and
- 5 (c) to advise the farmer and creditors of programs that are available to assist them; and
- (d) to attempt to arrive at an agreement to fairly restructure, refinance or pay the farm debts; and
- 10 (e) to advise, counsel and assist the farmer and creditors in attempting to arrive at an agreement for the future conduct of financial relations among them.

(2) It is not a function of a mediator:

- (a) to advise a farmer or creditor about the law; or
- 15 (b) to encourage or assist a farmer or creditor in reserving or establishing legal rights; or
- (c) to act as an adjudicator or arbitrator.

Conduct of mediation sessions

14. (1) The procedure for commencing and conducting a mediation session is to be as determined by the Authority.

20 (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.

25 (4) A mediation session is to be conducted in the absence of the public, but persons who are not parties to a mediation session may be present at or participate in a mediation session with the permission of the mediator.

Confidentiality of mediation sessions

30 15. (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.

Disclosure of information

16. 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 5
- (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 10
- (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 15
- (e) with other lawful excuse.

Maximum penalty: 20 penalty units or imprisonment for 6 months, or both.

Representation

17. (1) A party to mediation is not entitled to be represented by an agent unless it appears to the mediator that: 20

- (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, 25

and the mediator so approves.

(2) Subsection (1) does not prevent a corporation within the meaning of the Corporations Law 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 any 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. 30 35

(4) A contravention of this section does not invalidate a mediation.

Exclusion of personal liability of mediators and certain other persons

5 **18.** 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**Act binds the Crown**

10 **19.** 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.

Contracting out prohibited

15 **20. (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.

20 **(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.

25 Waiver of rights void

21. A waiver of mediation rights under this Act is void.

Notices by mortgagee

30 **22.** 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

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- (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.

Manner of giving notice or other document

5

23. (1) If this Act requires or permits a notice or other document to be given, whether personally or by post, to the Authority or a mediator (whether the expression “deliver”, “serve”, “notify”, “send” or “give” or another expression is used), the notice or other document may be given by leaving it at, or by sending it by post to:

10

- (a) the office of the Authority; or
 (b) if it has more than one office—any one of its offices.

(2) If this Act requires or permits a notice or other document to be given to a person (other than the Authority or a mediator) (whether the expression “deliver”, “serve”, “notify”, “send” or “give” or another expression is used), the notice or other document may be given:

15

(a) to a natural person:

- (i) by delivering it to the person personally; or
 (ii) by leaving it at, or by sending it by post, telex, facsimile or similar electronic facility to, the address of the place of residence or business of the person last known to the person giving the notice or other document; or

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(b) to a body corporate:

- (i) by leaving it at the registered office of the body corporate with an officer of the body corporate; or
 (ii) by sending it by post, telex, facsimile or similar electronic facility to its registered office.

25

(3) Nothing in subsection (1) or (2):

- (a) affects the operation of another law that authorises the service of a notice or other document otherwise than as provided in subsection (1) or (2); or
 (b) affects the power of a court or tribunal to authorise service of a notice or other document otherwise than as provided in subsection (1) or (2).

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Date notice or other document is given

24. For the purposes of this Act, a notice or other document is taken to be given:

- 5 (a) in the case of a notice or other document given personally—on the date it bears or the date it is received by the addressee, whichever is the later; or
- (b) in the case of a notice or other document sent by post—on the date it bears or the date when it would have been delivered in the ordinary course of post, whichever is the later; or
- 10 (c) in the case of a notice or other document sent by facsimile transmission or some other form of electronic transmission—on the date it bears or the date on which the machine from which the transmission was sent produces a report indicating that the notice or other document was sent to the facsimile or other number of
- 15 the addressee, whichever is the later.

Proceedings for offences

25. Proceedings for an offence against this Act or the regulations are to be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

20 Double jeopardy

26. 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,

25 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.

Aiding, abetting and attempts

30 27. (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.

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(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.

Offences by corporations

28. (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. 5

(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. 10

(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. 15

Limitation

29. 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. 20

Regulations

30. (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. 25

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

Review of Act

31. (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. 30

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(2) The review is to be undertaken as soon as possible after the period of 2 years from the date of assent to this Act.

(3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 2 years.

FIRST PRINT

FARM DEBT MEDIATION BILL 1994

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The objects of this Bill are:

- (a) to enable a farmer or a farmer's creditor to apply for voluntary mediation concerning farm debts; and
- (b) to make provision for mandatory mediation concerning farm debts before a farmer's creditor can take possession of property or other enforcement action under a farm mortgage.

PART 1—PRELIMINARY

This Part (clauses 1–7) contains provisions that assist an understanding of the proposed Act as a whole, as well as certain machinery provisions.

The Part sets out the short title of the proposed Act (clause 1) and provides for its commencement 2 months after the date of assent, unless commenced sooner by proclamation (clause 2). The objects of the proposed Act, which are as stated above, are set out (clause 3). Certain terms used in the proposed Act are defined (clause 4). Among the terms defined are “creditor”, “enforcement action”, “farm”, “farm debt”, “farm mortgage”, “farmer” and “farming operation”. A “farm debt” is a debt incurred by a farmer, for the purposes of the conduct of a farming operation, that is secured by a farm mortgage.

The proposed Act applies only to creditors so far as farm debts are concerned. Circumstances in which the proposed Act does not apply are also stipulated (clause 5). For example, the proposed Act does not apply to farm debts that have been mediated previously in accordance with its provisions.

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Enforcement action taken by a creditor to whom the proposed Act applies is void unless it is taken in conformity with the requirements of the proposed Act (clause 6).

The proposed Act does not affect the Contracts Review Act 1980 or any other law that provides for the grant of relief in respect of harsh, oppressive, unconscionable or unjust contracts or on the grounds of hardship. Further, in so far as the requirements of the proposed Act may impact on the provision of consumer credit, they are in addition to, and do not affect, the requirements of any other law that applies to the provision of such credit. Other than this, the proposed Act is to have effect despite any other Acts (clause 7).

PART 2—VOLUNTARY MEDIATION

This Part (clauses 8–10) enables a farmer or creditor to apply to the New South Wales Rural Assistance Authority (“the Authority”) for voluntary mediation concerning a farm debt (clause 8), and makes provision as to the form of application for voluntary mediation (clause 9). The Authority may, after evaluating an application, direct a mediator to mediate between the farmer and creditor concerning the farm debt (clause 10). The provisions of Part 5 (General Provisions Concerning Mediation) apply to voluntary, as well as, mandatory mediation under the proposed Act.

PART 3—MANDATORY MEDIATION—PROCEDURE

This Part deals with the circumstances in which mandatory mediation is required and with the procedural steps that must be taken by the parties to mandatory mediation under the proposed Act.

Division 1—Mandatory mediation and mediation notices

This Division (clauses 11–14) sets out requirements for mandatory mediation and commencement of the mandatory mediation process.

The Division prohibits the taking of enforcement action relating to a farm mortgage by a creditor unless the creditor complies with the requirements of the proposed Act as to mandatory mediation, or enforcement action is otherwise authorised by the proposed Act (clause 11). The Division requires a creditor who wishes to take enforcement action to serve a mediation notice on the farmer and the Authority (clause 12). Within 7 business days after being served with a mediation notice, the Authority must provide the farmer concerned with a list of persons or agencies that are available to provide the farmer with free advice and assistance for the purposes of preparation of a mediation request and in subsequent discussions with a financial counsellor nominated by the Authority (clause 13). All mediation notices relating to the same farmer that are served on the Authority before the initial mediation session for that farmer are to be dealt with together (clause 14).

Division 2—Mediation requests

This Division (clauses 15–22) deals with action to be taken following service of a mediation notice or if enforcement action is taken by a creditor who has not served a mediation notice on a farmer as required by the proposed Act.

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A farmer served with a mediation notice who wishes to have the farm debt mediated in accordance with the proposed Act must lodge a mediation request with the Authority within 21 days after service of the mediation notice (clause 15). Provision is made as to the form and content of the mediation request (clause 16).

A farmer who fails to lodge a mediation request in the 21-day period is taken to have waived the right to mandatory mediation with respect to the farm debt concerned and the creditor, on being provided with a certificate to this effect by the Authority, is free to commence or proceed with enforcement action concerning the farm debt (clause 17).

If a creditor who is not otherwise authorised to take enforcement action under the proposed Act does so without first serving a mediation notice, the farmer may nevertheless lodge a mediation request with the Authority. On receiving the mediation request and on satisfying itself that the circumstances are such that service of a mediation notice by the creditor was required, the Authority must serve a notice on the creditor, calling on the creditor to cease taking enforcement action until the requirements of the proposed Act as to mandatory mediation have been met (clause 18). A creditor who does not comply with such a notice is liable to the imposition of a civil penalty by the Commercial Tribunal on the application of the farmer. The maximum civil penalty that the Commercial Tribunal may impose is the amount of all interest charges payable under the farm mortgage from the date on which the creditor commenced enforcement action until a date specified by the Commercial Tribunal (being a date not earlier than the date on which the Commercial Tribunal determines the enforcement action ceased). However, if the farmer satisfies the Commercial Tribunal that the farmer has suffered a loss as a result of the taking of the enforcement action, the civil penalty imposed must be not less than the amount of that loss (clause 19). Provision is made as to the manner in which a civil penalty ordered to be paid by a creditor may be recouped by a farmer (clause 20) and as to the finality of orders made under the Division by the Commercial Tribunal (clause 21).

Within 7 business days after the farmer lodges a mediation request, the Authority must nominate a financial counsellor to meet with the farmer to assist with the preparation of the farmer's financial records for the initial mediation session. The qualifications of financial counsellors are specified (clause 22).

Division 3—Mediation period

This Division (clauses 23 and 24) makes provision for a mediation period of 60 days after the Authority issues a mediation proceeding notice concerning a farmer. The mediation period may be extended by agreement of the parties (clause 23). During the mediation period, an orientation session and an initial mediation session must be held. The mediator may also arrange for the holding of additional mediation sessions (clause 24).

Division 4—Mediation proceeding notice

This Division (clauses 25–30) sets out the steps to be taken after the Authority receives a mediation request. Within 14 days after that event, the Authority must serve a mediation proceeding notice on the farmer and all creditors listed by the farmer in the

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mediation request, and a claim form on those creditors (clause 25). Provision is made as to the matters that must be included in the mediation proceeding notice (clause 26). These matters include:

- the time and place appointed for the orientation and initial mediation sessions;
- a description of the procedure for selection of the mediator;
- a notification to the effect that creditors are prohibited from taking enforcement action for 60 days after the issue of the mediation proceeding notice (unless otherwise authorised by the proposed Act);
- details of information to be provided by the creditors to the farmer before the initial mediation session.

This Division requires the creditor who served the mediation notice and the farmer, within 7 days after service of the mediation proceeding notice, to take certain steps connected with the selection of a mediator from a panel of 3 mediators nominated by the Authority in the mediation proceeding notice. Alternatively, the farmer and creditor or creditors concerned may jointly select, and pay for, a professional mediator of their own choosing (clause 27).

Creditors served with a mediation proceeding notice cannot take enforcement action for 60 days after the despatch of the mediation proceeding notice unless:

- the creditor and farmer have come to an agreement, under clause 44 of the proposed Act, that permits the creditor to take such action and neither party has rescinded the agreement during the prescribed cooling off period; or
- the creditor is served with a copy of a certificate, under Division 2 of Part 4 of the proposed Act, certifying that the mediator believes that the farmer has failed to mediate in good faith; or
- mediation has ended within the 60-day mediation period without the making of a mediation agreement precluding the taking of enforcement action and the mediator has served a termination statement on the creditor (clause 28).

The Division contains requirements concerning the provision of information relating to farm debts by creditors to the farmer before the initial mediation session (clause 29).

The Division is also expressed to apply subject to Division 2 (Mediation in good faith required) of Part 4 (Mandatory Mediation—Other Matters) of the proposed Act (clause 30).

Division 5—Orientation session and mediation sessions

This Division (clauses 31-34) makes provision as to arrangements for orientation and mediation sessions.

Provision is made for the holding of an orientation session at a time and place appointed by the Authority in the mediation proceeding notice. The farmer and a financial counsellor and mediator nominated by the Authority (who need not be the same mediator who is to handle the mediation sessions) are to attend the orientation session. Creditors who have been served with the mediation proceeding notice and who wish to participate in mediation may also attend the orientation session (clause 31).

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The purposes of the orientation session are to ensure that the farmer's documentation is in order for mediation and that the farmer understands the procedures involved (clause 32).

The initial mediation session is to be held at a time and place appointed by the Authority in the mediation proceeding notice (clause 33) and additional mediation sessions are to be held, during the mediation period or any extension of it, in accordance with arrangements made by the mediator (clause 34).

Division 6—Lodgment of claim forms by creditors

This Division (clauses 35–41) deals with the lodgment of claim forms by creditors.

The claim form is to be that served with the mediation proceeding notice (clause 35). Creditors who lodge a claim form but who do not choose to participate in mediation are bound by any mediation agreement reached. However, they have the opportunity to lodge an objection to the mediation agreement. Creditors who are served with a mediation proceeding notice but who do not lodge a claim form are bound by the mediation agreement and may not object to it (clause 36).

Claim forms are to be lodged within 10 days after service of the mediation proceeding notice or within any extension of that period allowed by the Authority (clause 37). A creditor served with a mediation proceeding notice may dispute that the debt owed to the creditor is covered by the requirements of the proposed Act. The Authority must decide whether or not the debt is covered and advise the creditor accordingly. The creditor may appeal to the Commercial Tribunal against a determination that a debt is covered by the requirements of the proposed Act (clause 38).

Once a mediation agreement is concluded, the mediator must notify the creditors who did not participate in mediation of the terms of the mediation agreement (clause 39). A creditor who lodged a claim form may then make a written objection to the terms of the mediation agreement if the creditor wishes to do so (clause 40). If this occurs, the mediation proceeding must be re-opened for a period of 10 days during which the parties, including the objecting creditor, are to endeavour to mediate a fresh mediation agreement. Enforcement action may not be taken by the creditors during this period even if the mediation period has expired (clause 41).

Division 7—Mediation agreement

This Division (clauses 42 and 43) deals with the manner of preparation, signing and service of mediation agreements (clause 42) and their legal effect (clause 43). A concluded mediation agreement binds the following persons:

- the farmer
- the creditors who are parties to the mediation agreement
- creditors who were served with the mediation proceeding notice.

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Division 8—End of mediation

This Division (clauses 44 and 45) deals with termination of mediation.

A farmer may, by agreement with a creditor, consent to the taking of enforcement action before the end of the mediation period. Such an agreement may be rescinded by either the farmer or the creditor during a 5-day cooling off period (clause 44).

A mediator is required, before the mediation period ends (or at the end of any extension of the mediation period), to prepare a termination statement that certifies that mediation has ended and describes the agreements (if any) that the parties have reached. Copies of the termination statement are to be served on the farmer, the creditors who participated in mediation, the creditors who were served with the mediation proceeding notice but who did not participate in mediation and the Authority. Once the termination statement has been served, a creditor may proceed with enforcement action if a mediation agreement was not concluded or any mediation agreement reached does not prevent the taking of such action (clause 45).

PART 4—MANDATORY MEDIATION—OTHER MATTERS

This Part makes provision as to the following:

- inspection and valuation of property covered by a farm mortgage
- the requirement for the farmer and principal creditor to mediate in good faith and steps to be taken if this does not occur
- concealment, removal or transfer of property covered by a farm mortgage by a farmer.

Division 1—Inspection and valuation of property

This Division (clauses 46–48) deals with procedures to be adopted for inspection and valuation of property that is the subject of a farm mortgage.

After a farmer lodges a mediation request, a creditor may inspect property that is covered by the creditor's farm mortgage during business hours (clause 46). A farmer who, without reasonable excuse, refuses to permit the inspection or who destroys or damages the property is presumed (in the absence of proof to the contrary) not to have mediated in good faith for the purposes of the proposed Act (clause 47). A procedure is specified for the purposes of the valuation of property covered by a farm mortgage in the event of a dispute as to its value, including the method of selecting a valuer (clause 48).

Division 2—Mediation in good faith required

This Division (clauses 49–59) deals with the requirement for parties to mediate in good faith, the consequences of a failure by a creditor or farmer to mediate in good faith and the review of a finding (or failure to make a finding) as to lack of good faith by a mediator.

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Subdivision 1—General

This Subdivision (clauses 49 and 50) specifies that parties to mandatory mediation are required to mediate in good faith and gives certain examples of behaviour that, if undertaken without reasonable excuse, demonstrates a failure by a party to mediate in good faith. This behaviour includes a failure to attend scheduled mediation sessions or to provide full financial information as required by the proposed Act (clause 49). Provision is made for the issue of a certificate by a mediator stating that a farmer or principal creditor has not mediated in good faith (clause 50).

Subdivision 2—Lack of good faith by creditor

This Subdivision (clauses 51–54) sets out the procedure to be followed if a mediator certifies that the principal creditor is not mediating in good faith. If this occurs, the farmer may request the Local Court sitting in the area in which the farm concerned is located to arrange for court supervised mediation (clause 51). The Local Court is to require the farmer and principal creditor to mediate, under its supervision, for not more than 60 days. The Court may issue such orders as it considers necessary to enable mediation in good faith to take place (clause 52). The creditor must not take enforcement action during court supervised mediation (clause 53). If the Local Court is satisfied at the end of the period of court supervised mediation that the creditor has failed to mediate in good faith, the Court may order that the creditor is not to take enforcement action for such additional period, not exceeding 60 days, that the Court considers appropriate and specifies in its order (clause 54).

Subdivision 3—Lack of good faith by farmer

This Subdivision (clauses 55 and 56) deals with the failure by a farmer to mediate in good faith.

A mediator is to issue a certificate that a farmer has not mediated in good faith if the farmer conceals, removes or transfers property covered by a farm mortgage with the intention of defrauding, defeating or delaying the interests of a creditor (clause 55). (This behaviour constitutes one example of a failure by a farmer to mediate in good faith. Other examples of such behaviour are set out in clauses 47 and 49.) A creditor served with a mediator's certificate as to a lack of good faith by a farmer may take enforcement action under the farm mortgage concerned (clause 56).

Subdivision 4—Review of good faith findings

This Subdivision (clauses 57–59) deals with the procedure to be followed if a party disputes a mediator's finding (or a failure to make a finding) concerning good faith in mediation. In this event, either party may, in a specified time, request the Local Court sitting in the area in which the farm concerned is located to review the position. The request is to be dealt with within 10 days after its lodgment and, if the request relates to a finding that a farmer has failed to mediate in good faith, operates as a stay of enforcement action by the creditor until the Court determines the matter (clause 57). The powers of a Local Court in relation to the conduct of the review are specified (clause 58) and provision is made that the mediator concerned is competent, but not compellable, to give evidence for the purposes of the review (clause 59).

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Division 3—Concealment, removal or transfer of property by farmer

This Division (clauses 60–62) deals with the concealment, removal or transfer of property covered by a farm mortgage by a farmer.

Provision is made that a farmer who conceals, removes or transfers property covered by a farm mortgage is ineligible, or ceases to be eligible, for mandatory mediation in specified circumstances (clause 60). A creditor who holds a farm mortgage over property that has been concealed, removed or transferred by a farmer may, within a specified time, request the Local Court sitting in the area in which the farm concerned is located to order that the creditor be permitted to take enforcement action despite the fact that the requirements of the proposed Act as to mandatory mediation have not been satisfied. The farmer is to be summoned to appear at the hearing of the request (clause 61). If the Local Court finds that the farmer has acted in the manner alleged, the Court may permit the taking of enforcement action by the creditor immediately (clause 62).

PART 5—GENERAL PROVISIONS CONCERNING MEDIATION

This Part (clauses 63–70) deals with general issues, such as the eligibility and functions of mediators and the disclosure of information obtained during mediation, that relate to both voluntary and mandatory mediation under the proposed Act.

Mediators are required to be impartial (clause 63) and their functions are specified (clause 64). Provision is made as to the manner in which mediation sessions are to be conducted (clause 65). The disclosure of financial information to various persons, including other creditors, who are authorised or required to attend orientation and mediation sessions is specifically sanctioned (clause 66) and provision is made as to the confidentiality of mediation sessions (clause 67) and the disclosure, outside the mediation arena, of information obtained during mediation (clause 68). Representation of parties to mediation is covered (clause 69). Mediators and persons acting under the direction of mediators are excused from personal liability for acts or omissions done or omitted to be done in good faith for the purposes of the proposed Act (clause 70).

PART 6—MISCELLANEOUS

This Part (clauses 71–83) makes provision as to a number of matters relating to the operation of the proposed Act.

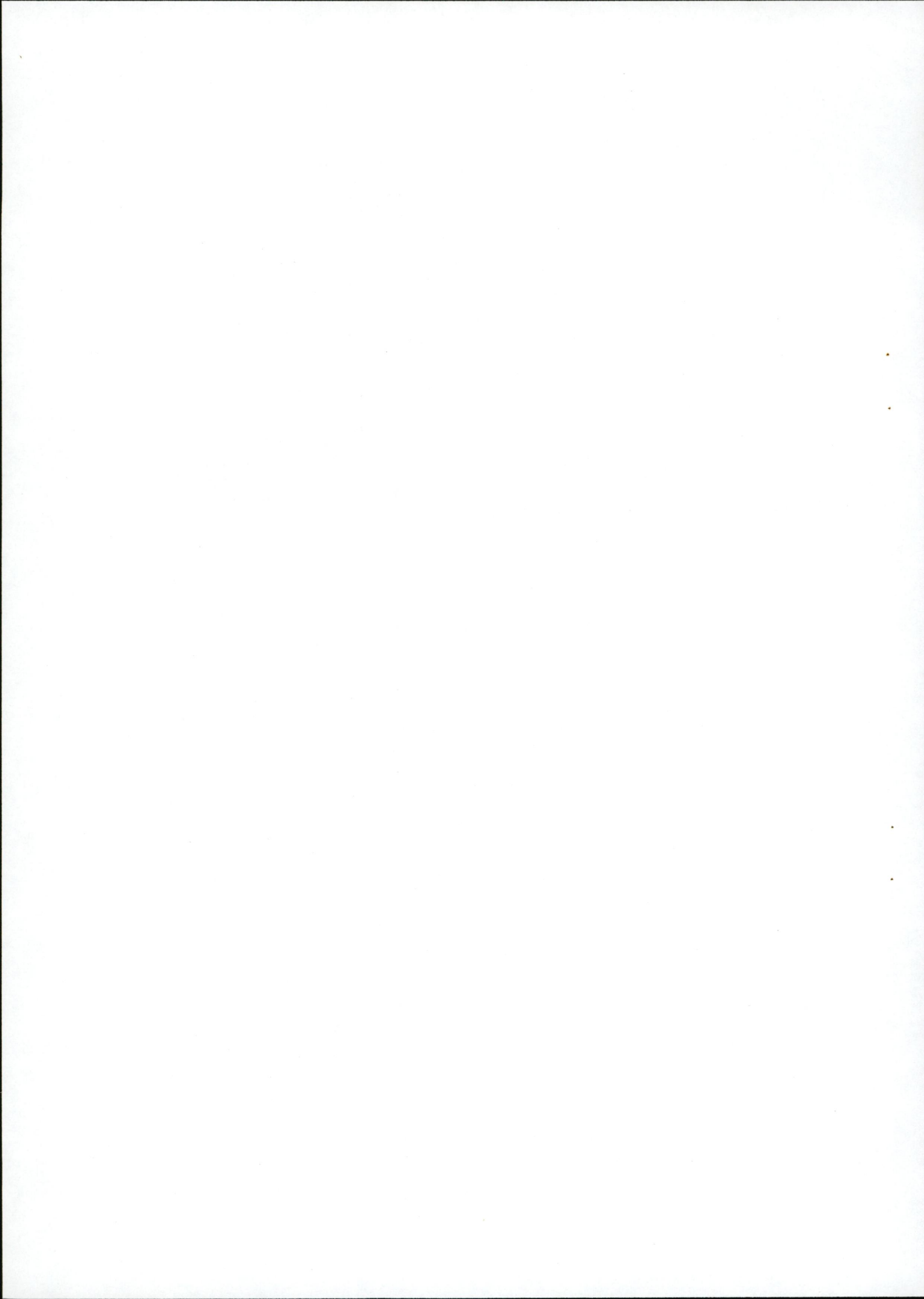
The Part provides that the proposed Act binds the Crown (clause 71). Persons are prohibited from contracting out of the operation of the proposed Act and, in the case of a creditor, such action attracts a maximum penalty of 100 penalty units (presently equivalent to \$10,000) (clause 72). A waiver of rights under the proposed Act has no effect unless expressly provided for by the proposed Act (clause 73). Provision is made as to the giving of notice by a mortgagee to a mortgagor of land before an exercise of rights in the event of a default under a mortgage (clause 74). Provision is also made as to service, and the date of giving, of notices and other documents under the proposed Act (clauses 75 and 76).

The Part provides that proceedings for offences against the proposed Act and the regulations are to be dealt with summarily before a Local Court (clause 77). Persons punished for an act or omission that is an offence against another law are not to be punished for the same act or omission if it also constitutes an offence against the

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proposed Act or the regulations (clause 78). Provision is made as to the position of persons who aid or abet or are concerned in the commission of, or who attempt to commit, offences against the proposed Act or the regulations (clause 79). The Part deals with the position of officers of corporations that offend against the proposed Act or the regulations (clause 80), and requires that proceedings for offences against the proposed Act or the regulations be commenced within 3 years after the commission of the offence unless the Attorney General agrees to the extension of that period (clause 81).

Provision is made for the Governor-in-Council to make regulations for the purposes of the proposed Act (clause 82) and for the Chairman and any 2 members of the Commercial Tribunal and the Rule Committee established under the Local Courts (Civil Claims) Act 1970 to make rules for the purposes of the exercise of jurisdiction by the Commercial Tribunal and Local Courts under the proposed Act (clause 83).



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FARM DEBT MEDIATION BILL 1994

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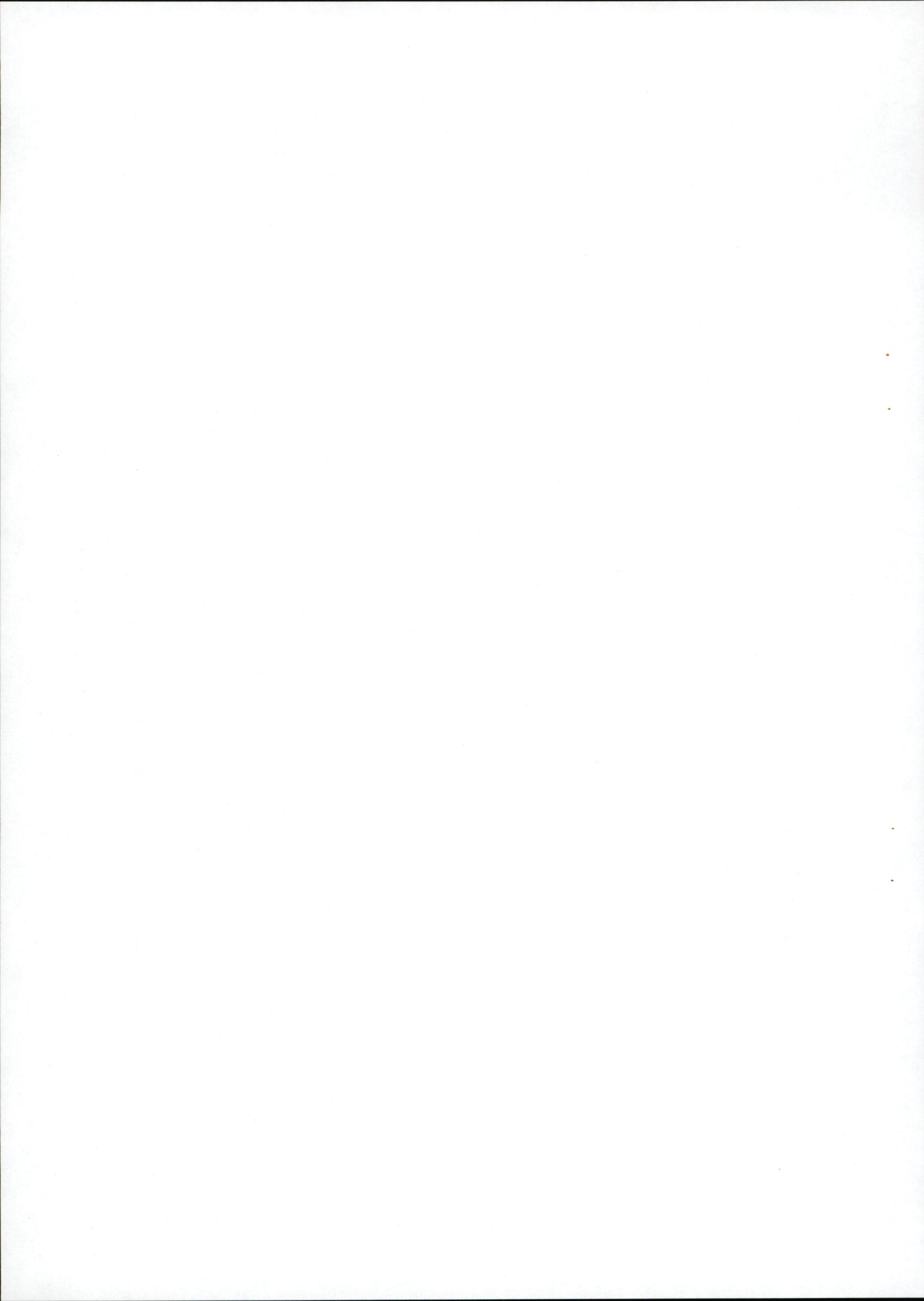
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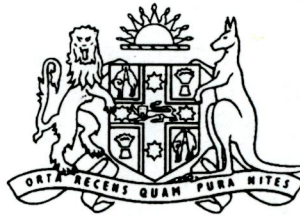
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FARM DEBT MEDIATION BILL 1994

NEW SOUTH WALES



No. , 1994

A BILL FOR

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

The Legislature of New South Wales enacts:**PART 1—PRELIMINARY****Short title**

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

5 Commencement

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

Objects of Act

3. The objects of this Act are:
 - 10 (a) to enable voluntary mediation concerning farm debts; and
 - (b) to make provision for mandatory mediation concerning farm debts in accordance with this Act before a creditor can take possession of property or other enforcement action under a farm mortgage.

Definitions

- 15 4. (1) In this Act:
 - “**Authority**” means the New South Wales Rural Assistance Authority constituted by the Rural Assistance Act 1989;
 - 20 “**bank**” means a bank within the meaning of the Banking Act 1959 of the Commonwealth or a bank constituted by a law of a State or of the Commonwealth, but does not include the Reserve Bank of Australia;
 - “**claim form**” means a form referred to in section 35;
 - “**Commercial Tribunal**” means the Commercial Tribunal of New South Wales constituted by the Commercial Tribunal Act 1984;
 - 25 “**creditor**” means a person who provides financial accommodation to a farmer that creates or increases a farm debt and includes a bank, or a credit provider within the meaning of the Credit Act 1984;
 - 30 “**enforcement action**”, in relation to a farm mortgage, means taking possession of property under a farm mortgage, the sale of property under a farm mortgage, or any other action to enforce a farm mortgage including the continuing of action already commenced to enforce a farm mortgage but does not include:

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- (a) the completion of the sale of property held under a farm mortgage in respect of which contracts were exchanged before the commencement of section 6; or
- (b) the enforcement of a judgment that was obtained before the commencement of that section; 5
- “exercise”** a function includes perform a duty;
- “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 by a farm mortgage;
- “farm machinery”** means: 10
- (a) a harvester, binder, tractor, plough or other agricultural implement; or
- (b) any other goods of a class commonly used for the purposes of a farming operation that are prescribed by the regulations as being farm machinery for the purposes of this Act, 15
- if the goods are acquired for the purposes of a farming operation;
- “farm mortgage”** includes any interest in, or power over, property (comprising a farm or part of a farm or farm machinery used by a farmer in connection with a farming operation, or both) securing obligations of the farmer (whether as a debtor or guarantor); 20
- “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; 25
- “farming operation”** means:
- (a) a farming (including dairy farming, poultry farming and bee farming), pastoral, horticultural or grazing operation; or
- (b) any other operation prescribed by the regulations for the purposes of this definition; 30
- “function”** includes a power, authority or duty;
- “initial mediation session”** means a mediation session referred to in section 33;
- “mandatory mediation”** means mediation under Part 3;
- “mediation agreement”** means an agreement referred to in section 42; 35
- “mediation notice”** means a notice served by a creditor on a farmer under section 12;

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“**mediation period**” means the period of 60 days referred to in section 23 (1);

5 “**mediation proceeding**” means an initial mediation session and any additional mediation sessions held during a mediation period or any extension of a mediation period and includes any steps taken for or in respect of mediation of a farmer’s debts;

“**mediation proceeding notice**” means a notice served by the Authority on a farmer and creditors under section 25;

10 “**mediation request**” means a request lodged by a farmer with the Authority under section 15 or 18;

“**mediation session**” means a session referred to in section 34 and includes a mediation session referred to in Part 5;

“**orientation session**” means a session referred to in section 31;

15 “**principal creditor**” means a creditor who serves a mediation notice or a creditor in respect of whom a farmer lodges a mediation request under section 18;

“**termination statement**” means a statement issued by a mediator under section 45;

“**voluntary mediation**” means mediation requested under section 8.

20 (2) This Act extends to:

(a) a farm mortgage that was entered into before the commencement of section 6; and

(b) a liability or obligation that arose under a farm mortgage before the commencement of section 6.

25 **Application of Act**

5. (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:

30 (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 the farmer or the creditor; or

(c) a farmer, being a corporation, that is an externally administered corporation within the meaning of the Corporations Law.

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(3) This Act does not apply in respect of a farm debt owed by a farmer to a creditor that:

(a) was the subject of a mediation notice in respect of which:

(i) the farmer failed to lodge a mediation request within the time specified by this Act; and

(ii) the creditor commenced enforcement action within 60 days after being notified by the Authority of the farmer's failure to lodge the mediation request; or

(b) was the subject of a mediation proceeding notice and in respect of which a termination statement has issued.

(4) Nothing in this Act prevents the taking of enforcement action in respect of a farm debt referred to in subsection (3).

Enforcement action in contravention of Act void

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

Relationship with other Acts

7. (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) The requirements of this Act, in so far as they apply to the provision of consumer credit, are in addition to, and do not affect, the requirements of the Credit Act 1984 or any Act or law amending or replacing that Act.

(3) Other than as provided in this section, this Act has effect despite any other Act.

PART 2—VOLUNTARY MEDIATION

Farmers or creditors may apply for voluntary mediation

8. A farmer who owes money under a farm mortgage to a creditor or a creditor to whom money under a farm mortgage is owed by a farmer may request the Authority to arrange for mediation concerning the farm debt.

Form of application for voluntary mediation

9. An application for voluntary mediation must:

(a) be in a form approved by the Authority; and

- (b) be accompanied by the information and documents required by the Authority; and
- (c) be accompanied by a fee of \$20; and
- (d) include any particulars prescribed by the regulations.

5 **Authority to evaluate applications and may direct mediation assistance**

10 **10. (1)** The Authority must evaluate each application that it receives for voluntary mediation.

(2) If the Authority considers it appropriate, the Authority may direct a mediator to mediate between the farmer and the creditor concerning the farm debt.

PART 3—MANDATORY MEDIATION—PROCEDURE

Division 1—Mandatory mediation and mediation notices

Enforcement action not permitted unless requirements of Act are met

15 **11.** A creditor to whom money under a farm mortgage is owed by a farmer may not take enforcement action against the farmer unless:

- (a) the creditor complies with the requirements of this Act; or
- (b) enforcement action by the creditor is expressly permitted by this Act.

20 **Service of mediation notice by creditor on farmer**

12. (1) A creditor who wishes to take enforcement action must serve a mediation notice, in a form approved by the Authority, on the farmer and the Authority.

25 (2) After the mediation notice has been served on the farmer, the creditor must inform the Authority in writing of the date on which the notice was served on the farmer.

Provision of services of farm advisor

30 **13.** Within 7 business days after the Authority has been served with a mediation notice, the Authority is to provide the farmer concerned with a list of persons or agencies involved in the provision of advice and assistance to farmers who may be available, without charge, to assist the farmer with the preparation of a mediation request and in subsequent discussions with a financial counsellor nominated by the Authority under section 22.

All mediation notices concerning same farmer to be mediated together

14. All mediation notices served on the Authority in respect of the same farmer before the initial mediation session involving the farmer are to be dealt with together in the same mediation proceeding.

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Division 2—Mediation requests**Farmer served with mediation notice may lodge mediation request with Authority**

15. If a farmer who has been served with a mediation notice wishes to exercise the right to have the farm debt to which the notice relates mediated in accordance with this Act, the farmer must lodge a mediation request with the Authority within 21 days after service of the mediation notice on the farmer.

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Form of mediation request

16. (1) A mediation request must:

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- (a) be in a form approved by the Authority; and
- (b) state the date on which the mediation notice was served on the farmer; and
- (c) identify all known creditors of the farmer and all other persons to whom the farmer owes money for any purpose; and
- (d) be accompanied by the other information and documents required by the Authority; and
- (e) state that the farmer has no objection to financial information concerning the farmer being disclosed by the farmer's creditors to one another and to other persons who are required to attend the orientation session, the initial mediation session and any additional mediation sessions concerning the farmer for the purposes of mediation under this Act; and
- (f) include any particulars prescribed by the regulations; and
- (g) be verified by the farmer by statutory declaration.

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(2) A farmer may, with the consent of the Authority, amend a mediation request.

Failure to lodge mediation request

17. (1) A farmer who fails to lodge a mediation request with the Authority within 21 days after being served with a mediation notice is

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taken to have waived the right to mediation of the farm debt concerned under this Act.

5 (2) If a farmer fails to lodge a mediation request within 21 days after being served with a mediation notice, the Authority must forthwith give the creditor who served the mediation notice a certificate stating that the farmer has failed to lodge a mediation request concerning the farm debt with the Authority.

10 (3) A creditor who has been given a certificate under subsection (2) may take enforcement action against the farmer in respect of the farm debt.

Farmer may lodge mediation request if enforcement action is taken and no mediation notice has been served

15 18. (1) If enforcement action is taken by a creditor otherwise than as authorised by this Act and the creditor has not served a mediation notice, the farmer may, within 21 days after the enforcement action is commenced or such longer period as the Authority may allow, lodge a mediation request with the Authority.

20 (2) A mediation request lodged under this section is to comply with section 16 (1) but, instead of stating the date of service of the mediation notice, is to include details of the enforcement action taken against the farmer and a statement that a mediation notice has not been served on the farmer.

25 (3) On lodgment of a mediation request under this section, the Authority must, after satisfying itself that the matter is one in which service of a mediation notice was required, serve on the creditor concerned a notice requiring the creditor immediately to cease taking enforcement action until the requirements of this Act have been met.

Penalty for failure by creditor to comply with notice from Authority

30 19. (1) If a creditor refuses or fails to comply with a notice served by the Authority under section 18 (3), the farmer may apply to the Commercial Tribunal for an order for a civil penalty under this section.

35 (2) The maximum penalty that the Commercial Tribunal may impose for refusal or failure to comply with such a notice is the amount of all interest charges payable under the farm mortgage, calculated in accordance with subsection (4), for the period from the date on which the creditor commenced enforcement action until a date specified by the Commercial Tribunal in its order, being a date that is not earlier than the date the Commercial Tribunal determines is the date on which the creditor ceased taking, or ceases to take, enforcement action.

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(3) However, the Commercial Tribunal may impose a greater civil penalty if the farmer satisfies the Commercial Tribunal that the farmer has suffered a loss as a result of the taking of enforcement action by the creditor. In that event, the amount of the penalty is to be not less than the amount of the loss. 5

(4) For the purposes of this section, the amount of all interest charges payable under the farm mortgage:

(a) is to be calculated:

(i) if the mortgage provides for a fixed rate of interest—at that rate; or 10

(ii) if the mortgage provides that interest accruing at a fixed rate will accrue at a reduced rate in certain circumstances—at the original rate; or

(iii) if the mortgage provides for a variable rate of interest—at the rate applicable on the date that the creditor commenced enforcement action; and 15

(b) is to be calculated on a daily basis and on the actual balance of the farm debt each day during the period referred to in subsection (2).

Payment of penalty to farmer

20. (1) An amount of a civil penalty ordered by the Commercial Tribunal to be paid on an application for an order made by a farmer may be set off by the farmer against any amount that is due or becomes due to the creditor under the farm mortgage. If there is no such amount, the amount of the civil penalty is a debt due by the creditor to the farmer. 20

(2) An order made on an application by a farmer may include such directions as the Commercial Tribunal considers appropriate relating to the payment of the amount owed by the creditor as a result of the order. 25

Order of Commercial Tribunal to be final

21. (1) An order of the Commercial Tribunal under this Division is final and binding on the farmer and creditor and no appeal lies in respect of such an order. 30

(2) The proceedings of the Commercial Tribunal and an order or finding of the Commercial Tribunal under this Division are not to be questioned in any proceedings except proceedings based solely on one or both of the following grounds: 35

(a) that the Commercial Tribunal had or has no jurisdiction or has exceeded its jurisdiction in the proceedings in question or in making the finding or order in question;

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(b) that there has occurred a denial of natural justice in the course of the proceedings in question.

5 (3) This section does not limit or otherwise affect the operation of section 20 (Questions of procedure and law) of the Commercial Tribunal Act 1984.

Nomination of financial counsellor

10 22. (1) Within 7 business days after a farmer has lodged a mediation request, the Authority must nominate a financial counsellor to meet with the farmer and to review and, if necessary, prepare, or assist with the preparation of, the farmer's financial records before the initial mediation session.

(2) Persons nominated by the Authority as financial counsellors must have:

- 15 (a) knowledge of rural and financial affairs and experience in the preparation of financial analyses of farming operations; and
- (b) the capacity and willingness to assist farmers with the preparation of statements concerning financial information for the purposes of mediation under this Act.

Division 3—Mediation period

20 **Mediation period**

23. (1) The mediation period is the period of 60 days after the date on which the Authority issues the mediation proceeding notice concerning a farmer in accordance with Division 4.

25 (2) The mediation period may be extended for any period if the farmer and creditors served with mediation proceeding notices agree. During any such period, enforcement action must not be taken against the farmer by the creditors.

Steps to be taken in mediation period

30 24. (1) An orientation session and an initial mediation session must be held in the mediation period.

(2) The mediator may also arrange for the holding of additional mediation sessions during the mediation period.

Division 4—Mediation proceeding notice**Service of mediation proceeding notice by Authority**

25. Within 14 days after receiving a mediation request, the Authority must serve:

- (a) a mediation proceeding notice on the farmer; and 5
- (b) a mediation proceeding notice and claim form on all creditors listed by the farmer in the mediation request.

Form of mediation proceeding notice

26. (1) A mediation proceeding notice must state:

- (a) the name and address of the farmer; and 10
- (b) the fact that the farmer has requested mediation under this Act; and
- (c) the date on which the farmer lodged the mediation request with the Authority; and
- (d) the time and place appointed by the Authority for the orientation session; and 15
- (e) the time and place appointed by the Authority for the initial mediation session.

(2) The mediation proceeding notice must include the names of 3 mediators who have been assigned to the mediation proceeding by the Authority together with background information, including biographical information, relating to the mediators, a summary of their previous mediation experience and a note of the number of mediation agreements signed by parties to previous mediation proceedings in which the mediators have been involved. 20

(3) The mediation proceeding notice must state that:

- (a) the farmer and the principal creditor may each request the Authority, by notification made within 7 days after receiving the notice, to exclude one of the 3 mediators named in the notice; and
- (b) that, as an alternative to having a mediator nominated by the Authority, the farmer and any one or more of the creditors may jointly select, and pay for, a professional mediator. 30

(4) The mediation proceeding notice must also state that:

- (a) this Act prohibits the creditor from taking enforcement action for 60 days after the date on which the Authority issues the mediation proceeding notice unless otherwise permitted in accordance with this Act; and 35

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(b) the creditor must provide the farmer, before the initial mediation session, with such of the following as are within the creditor's possession or control:

(i) a copy of the following:

- 5 • any loan agreement or letter of offer and terms and conditions relating to the farm debt;
- statements of account relating to the farm debt;
- the farm mortgage;
- 10 • any memorandum of the terms and conditions of the farm mortgage;
- any other documents relating to the farm debt or farm mortgage that are prescribed by the regulations;

15 (ii) a statement as to interest rates currently applicable to the farm debt, arrears in payments and unpaid principal and interest balances;

 (iii) the creditor's valuation of the property over which the farm mortgage is held;

 (iv) proposals for variation of the farmer's obligations under the farm mortgage that the creditor wishes to advance.

20 (5) The Authority must insert, in the mediation proceeding notice, the date of its issue before the mediation proceeding notice is served.

Selection of mediator

25 27. (1) The principal creditor and the farmer may each, by written notification sent to the Authority within 7 days after each receives the mediation proceeding notice, request the Authority to exclude one mediator from the list of mediators contained in the notice.

30 (2) If the farmer and any one or more of the creditors do not wish the Authority to assign a mediator for the mediation proceeding from the list of mediators included in the mediation proceeding notice, the farmer and the creditor or creditors concerned may agree to jointly select, and pay for, a professional mediator.

 (3) The Authority may not assign a professional mediator to the mediation proceeding unless the mediator provides the Authority with a statutory declaration that, in the opinion of the Authority, establishes that:

35 (a) the mediator does not have, and has not had, any relationship or association with the farmer or the creditor or creditors involved in the mediation proceeding that would prevent the mediator dealing with the mediation proceeding in an unbiased and impartial manner; and

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- (b) the mediator is, by reason of the mediator's qualifications, training and experience, qualified to act as a professional mediator for the purpose of the mediation proceedings; and
 - (c) the fees, or rate or scale of fees, proposed to be charged by the mediator for the mediation proceeding is fair, reasonable and in keeping with the current practice (if any) of professional mediators; and 5
 - (d) the mediator will, if assigned to the mediation proceeding, uphold the requirements of this Act and will faithfully discharge the duties of a mediator. 10
- (4) If a professional mediator is not selected for the mediation proceeding, the Authority must assign a mediator for the mediation proceeding from any mediator or mediators not excluded from the list contained in the mediation proceeding notice.
- Service of mediation proceeding notice stays enforcement action for 60 days** 15
28. (1) A creditor who is served with a mediation proceeding notice may not take enforcement action until 60 days after the date on which the Authority issued the mediation proceeding notice, except as provided in this section. 20
- (2) A creditor who has been served with a mediation proceeding notice may take enforcement action:
- (a) 5 business days after the farmer and creditor sign an agreement under section 44 that allows the creditor to take enforcement action in relation to the farm mortgage if neither party has rescinded the agreement within that period; or 25
 - (b) after being served with a copy of a certificate, under Division 2 of Part 4, as to a lack of good faith on the part of a farmer; or
 - (c) immediately after the creditor has been served with a termination statement in respect of mediation that did not result in the signing of a mediation agreement precluding the taking of such action. 30
- Creditor served with mediation proceeding notice to provide information before initial mediation session**
29. A creditor served with a mediation proceeding notice must provide the farmer, before the initial mediation session, with the material referred to in section 26 (4) (b). 35

Application of Division subject to Division 2 of Part 4

5 **30.** The application of this Division is subject to the provisions of Division 2 of Part 4 relating to the extension or reduction of the period before which a creditor may take enforcement action and to court supervised mediation.

Division 5—Orientation session and mediation sessions**Arrangements for orientation session**

31. (1) The orientation session is to take place at the time and place appointed by the Authority in the mediation proceeding notice.

10 **(2)** The farmer is to attend the orientation session together with a financial counsellor and mediator nominated by the Authority.

(3) The mediator attending the orientation session need not be the mediator who is assigned to attend the mediation proceeding.

15 **(4)** Creditors served with the mediation proceeding notice who wish to participate in the mediation proceeding may also participate in the orientation session.

Matters to be dealt with at orientation session

32. At the orientation session, the financial counsellor must:

20 (a) review the farmer's financial records and inventory of property to ensure that they are adequate for the purposes of mediation; and

(b) inform the farmer of any matters that require attention before the initial mediation session; and

(c) inform the farmer of the requirements of the mediation proceeding.

25 **Initial mediation session**

33. The initial mediation session is to take place at the time and place appointed by the Authority in the mediation proceeding notice.

Additional mediation sessions

30 **34.** Such additional mediation sessions as the mediator arranges are to be held during the mediation period or any extension of the mediation period.

Division 6—Lodgment of claim forms by creditors**Claim form**

35. (1) A creditor who wishes to lodge a claim form with the Authority must use the form served on the creditor by the Authority with the mediation proceeding notice. 5

(2) The claim form is to include a proof of claim to be verified by the creditor by statutory declaration.

Effect of lodgment, or failure to lodge, claim form

36. (1) A creditor served with a mediation proceeding notice and claim form who: 10

(a) completes and lodges the claim form with the Authority within the time for lodgment of a claim form; and

(b) does not otherwise participate in the mediation proceeding,

is subject to and bound by any mediation agreement reached in the mediation proceeding unless the creditor serves an objection to the mediation agreement in accordance with this Division. 15

(2) A creditor served with a mediation proceeding notice and claim form who does not complete and lodge the claim form with the Authority within the time for lodgment of a claim form is subject to and bound by any mediation agreement reached in the mediation proceeding. 20

Time for lodgment of claim form

37. (1) In this Division, “**time for lodgment of a claim form**” means within 10 days after the mediation proceeding notice and claim form are served by the Authority on the creditor concerned or within such further time as the Authority may allow. 25

(2) In considering whether to grant an extension of time, the Authority is to consider whether a delay in the lodgment of the completed claim form by the creditor is likely to prejudice other parties to the mediation proceeding and, in particular, the farmer.

Creditor may dispute that debt is covered by Act 30

38. (1) If a creditor served with a mediation proceeding notice and claim form does not consider that the debt owed by the farmer to the creditor is covered by this Act, the creditor must:

(a) complete and return the claim form to the Authority within the time for lodgment of a claim form; and 35

(b) specify in the claim form the reason why the creditor considers that the debt is not covered by this Act.

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(2) The Authority must, within 7 days after receiving the material referred to in subsection (1) (a) and (b):

- (a) decide whether the debt is covered by this Act; and
- (b) notify the creditor of its decision.

5 (3) If the Authority decides that the debt is not covered by this Act, the Authority must provide the creditor with a certificate to that effect. The certificate is, for all purposes, conclusive evidence that this Act does not apply to the debt.

10 (4) If the Authority decides that the debt is covered by this Act, the creditor may appeal against the decision to the Commercial Tribunal within 14 days after being notified by the Authority of its decision.

(5) An appeal under this section is to be dealt with by the Commercial Tribunal within 28 days after it is lodged.

15 (6) Until the appeal is determined, the debt is taken to be a debt to which this Act applies and the requirements of this Act are taken to bind the creditor accordingly.

(7) Section 21 applies to an order of the Commercial Tribunal made under this section in the same way it applies to an order made by the Commercial Tribunal under Division 2.

20 **Mediator to notify creditor who lodges claim form of mediation agreement**

25 **39.** The mediator must immediately notify a creditor who was served with a mediation proceeding notice but who did not participate in the mediation proceeding of the terms of any mediation agreement reached in the mediation proceeding.

Objection by creditor to mediation agreement

30 **40. (1)** A creditor who was served with a mediation proceeding notice and who did not participate in the mediation proceeding but who lodged a claim form may make a written objection to the terms of a mediation agreement.

(2) The objection must be made, and served on the mediator, the farmer and the other creditors who were served with the mediation proceeding notice, within 10 days after the notice of the terms of the mediation agreement is served on the creditor.

35 **Mediator to arrange new meeting if objection is served**

41. (1) If a creditor serves an objection to a mediation agreement in accordance with this Division, the mediator must, within 10 days after the

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objection is served, arrange and hold a further mediation session or sessions with the farmer and creditors (including the creditor who has made the objection) in an endeavour to mediate a new mediation agreement.

(2) Mediation sessions may be held during the period of 10 days after the objection has been served despite the fact that the mediation period may have expired. During that period, enforcement action must not be taken against the farmer by the creditors. 5

Division 7—Mediation agreement**Procedure if agreement is reached 10**

42. If an agreement is reached by the farmer and a creditor or creditors at the end of a mediation period or any extension of the mediation period, the mediator must:

- (a) arrange for the agreement to be written down and signed by the parties; and 15
- (b) certify on the agreement that it has been made after mediation in accordance with this Act; and
- (c) serve a copy of the agreement on all creditors who were served with the mediation proceeding notice.

Effect of execution of mediation agreement 20

43. (1) The farmer and the creditor or creditors who are parties to a mediation agreement and the creditors who were served with the mediation proceeding notices:

- (a) are bound by the terms of the mediation agreement; and
- (b) may enforce the mediation agreement as a legal contract; and 25
- (c) may use the mediation agreement as a defence to any action that does not accord with the terms of the agreement.

(2) This section does not apply to a mediation agreement that is the subject of an objection under section 40.

Division 8—End of mediation 30**Farmer may agree to creditor taking enforcement action**

44. (1) During the mediation proceeding, a farmer may, by agreement in writing with a creditor, consent to the taking of enforcement action by the creditor before it is otherwise allowed under this Part.

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(2) The agreement does not take effect until 5 business days after it is signed and, during that period, either the farmer or the creditor may rescind the agreement.

Termination statement to be prepared at end of mediation period

5 **45. (1)** The mediator must, before the end of the mediation period, prepare a termination statement.

(2) The termination statement:

- (a) is to certify that mediation has ended; and
 10 (b) is to describe agreements (if any) reached between the farmer and the creditor or creditors (including any agreement reached under section 44) and agreements (if any) reached between the creditors; and
 (c) may have copies of any concluded agreements annexed to it.

15 **(3)** The mediator must sign the termination statement and serve copies of it on the farmer, the creditors who participated in the mediation proceeding, the creditors who were served with mediation proceeding notices but did not participate in the mediation proceeding and the Authority.

20 **(4)** Despite subsections (1)–(3), if a creditor lodges an objection to the terms of a mediation agreement under Division 6, the mediator must not prepare, sign and serve the termination statement until after the expiration of the period of 10 days referred to in section 41.

(5) A creditor who is served with a termination statement may immediately take enforcement action against the farmer:

- 25 (a) if the mediation proceeding did not result in the signing of a mediation agreement; or
 (b) if the taking of enforcement action is not precluded by the terms of any mediation agreement so signed.

PART 4—MANDATORY MEDIATION—OTHER MATTERS30 **Division 1—Inspection and valuation of property****Inspection of property by creditors**

46. (1) After a farmer has lodged a mediation request, a creditor may inspect the property over which the creditor holds a farm mortgage.

(2) The inspection may be carried out during normal business hours after giving 24 hours' notice to the farmer.

(3) In this section, a reference to:

- (a) "a creditor" extends to an agent, valuer, consultant or assessor appointed by the creditor for the purposes of making the inspection; and 5
- (b) "normal business hours" means 8 am to 6 pm each day other than a Saturday, Sunday or public holiday.

Refusal by farmer to permit inspection may be evidence of lack of good faith 10

47. (1) A farmer who, without reasonable cause, refuses to permit a creditor, in accordance with this Division, to inspect property over which the creditor holds a farm mortgage or who destroys, or commits waste in relation to, the property is presumed not to have mediated in good faith for the purposes of Division 2. 15

(2) A presumption under subsection (1) is rebuttable in proceedings under Division 2 by proof on the balance of probabilities.

Valuation of property in event of dispute as to value

48. (1) In the case of a dispute between a farmer and a creditor or creditors concerning the market value of property over which a creditor or creditors hold farm mortgages, the market value of the property is to be determined by a valuer selected in accordance with this section. 20

(2) The valuer is to be selected in the following manner:

- (a) the mediator conducting the mediation proceeding is to submit to the farmer and the principal creditor a list of the names of 3 valuers who are registered under the Valuers Registration Act 1975 and who are experienced in the valuation of farms in the area in which the farm concerned is situated; and 25
- (b) the farmer and the creditor may then each, within a time nominated by the mediator, strike the name of one of the 3 valuers from the list or leave the list unamended and return it to the mediator; and 30
- (c) from the name or names remaining on the list, the mediator is to select one valuer to make the valuation.

(3) The valuation made by the valuer selected in accordance with this section is to be accepted by the farmer and the creditors as the market value of the property concerned as at the date on which the valuation is 35

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made unless the farmer or a creditor or creditors demonstrate, to the satisfaction of the mediator, that:

- (a) the valuation is manifestly incorrect; or
- (b) the valuation was not made in good faith.

5 (4) The valuation must be made within 45 days after the dispute concerning the value of the property arises and within the mediation period.

10 (5) The costs of the valuation are to be borne equally by the farmer and the principal creditor or, if a creditor or creditors other than the principal creditor have disputed the valuation, by the farmer and the creditor or creditors who disputed the valuation.

15 (6) If the mediator considers that a valuation prepared in accordance with this section is manifestly incorrect or was not made in good faith, the mediator may select another valuer to make a valuation of the property concerned and may make directions as to the manner in which the costs of the valuation are to be met.

(7) In this section, “**market value**” of land at any time means the amount that would have been paid for the land if it had been sold at that time by a willing but not anxious seller to a willing but not anxious buyer.

20 **Division 2—Mediation in good faith required**

Subdivision 1—General

Parties must mediate in good faith

25 **49. (1)** The parties to mediation under Part 3 must participate in mediation in good faith.

(2) The following are examples of failures by parties to participate in mediation in good faith:

- 30 (a) a failure without reasonable excuse on a regular or continuing basis to attend and to participate in mediation sessions;
- (b) a failure to provide full information regarding the financial obligations of parties, including a failure by a creditor to provide information under section 29, without reasonable excuse;
- 35 (c) a failure by a creditor, without reasonable excuse, to assign a representative to participate in the mediation proceeding who has authority, within one business day after the need for the making of a decision by the creditor has arisen, to make binding commitments on behalf of the creditor to fully settle, compromise or otherwise mediate the farm debt concerned;

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- (d) a failure, without reasonable excuse, to provide proposals for variation of a farmer's obligations under the farm mortgage or a written statement of reasons why proposals for variation of a farmer's obligations under the farm mortgage are unacceptable to the party; 5
- (e) other similar behaviour, without reasonable excuse, that demonstrates a lack of good faith by a party.

(3) A failure to agree to reduce, restructure, refinance or forgive debt does not, of itself, demonstrate a lack of good faith on the part of a creditor. 10

Mediator's certificate to issue if party does not mediate in good faith

50. (1) A mediator who believes that a farmer or principal creditor is not participating in the mediation in good faith must issue a certificate:

- (a) certifying that the mediator finds that the party has not mediated in good faith; and 15
- (b) setting out the reasons for this finding.

(2) The certificate is to be lodged with the Authority and copies of it are to be served by the Authority on the farmer and the principal creditor.

Subdivision 2—Lack of good faith by creditor

Court supervised mediation may be requested if creditor does not mediate in good faith 20

51. (1) If a mediator issues a certificate stating that a principal creditor has not mediated in good faith, the farmer may, by filing a copy of the certificate in the Local Court sitting in the area in which the farm concerned is located, request court supervised mediation. 25

(2) The farmer must serve a copy of the request on the creditor.

Local Court to supervise mediation

52. (1) On the filing of the request, the Local Court is to require both parties to mediate, under the Court's supervision, in good faith for a period of not more than 60 days. 30

(2) The Local Court may issue such orders as the Court considers necessary in an endeavour to ensure that the parties may mediate in good faith.

Enforcement action suspended for period of court supervised mediation

53. During the period of court supervised mediation, the creditor must not take enforcement action.

5 **Enforcement action may be suspended further if creditor does not mediate in good faith**

54. If, at the end of the period of court supervised mediation, the Local Court finds that the creditor has not mediated in good faith, the Court may order that the creditor must not take enforcement action for a further period, not exceeding 60 days, that the Court considers appropriate and specifies in its order.

Subdivision 3—Lack of good faith by farmer**Lack of good faith by farmer**

55. A mediator is to issue a certificate stating that a farmer has not mediated in good faith if, during the mediation period, the farmer:

- (a) in contravention of the terms of the farm mortgage concerned; and
- (b) without remitting to the creditor any money received as the result of the action taken by the farmer,

conceals, removes or transfers property that the farmer knows is the subject of the farm mortgage with the intention of defrauding, defeating or delaying the interests of the creditor.

Creditor may proceed with enforcement action when mediator's certificate issues

56. A creditor who is served with a mediator's certificate stating that a farmer has failed to mediate in good faith may, subject to section 57 (3), immediately take enforcement action under the farm mortgage concerned.

Subdivision 4—Review of good faith findings**Review of mediator's finding as to lack of good faith**

57. (1) A farmer or principal creditor may request the Local Court sitting in the area in which the farm is located to review:

- (a) a finding by a mediator that the farmer or creditor has not mediated in good faith; or

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- (b) a failure by a mediator to find that the farmer or creditor has not mediated in good faith.
- (2) The request must be made by the farmer or principal creditor:
- (a) within 7 days after service on the party of a copy of the mediator's certificate setting out the finding; or 5
- (b) within 7 days after the party believes the mediator had grounds for making a finding of a failure to mediate in good faith on the part of the other party.
- (3) A copy of the request must be served on the farmer or principal creditor, as the case requires. 10
- (4) A request must be dealt with by the Court within 10 days after its lodgment and, during that period, the principal creditor must not take enforcement action against the farmer.

Powers of the Local Court on review of mediator's finding

58. (1) A review under this Subdivision is limited to whether or not a mediator acted reasonably in making, or in failing to make, the finding. 15
- (2) If the Local Court finds that a mediator has acted unreasonably in finding, or failing to find, that a farmer or creditor has not mediated in good faith, the Court may, by order:
- (a) reinstate the mediation and direct that the creditor not take enforcement action under the farm mortgage concerned for a period set out in the order; or 20
- (b) direct that the farmer and creditor concerned participate in court supervised mediation; or
- (c) direct that the creditor may take enforcement action immediately. 25

Mediator may, but need not, give evidence

59. A mediator is competent, but not compellable, to give evidence on a review of the mediator's finding, or failure to make a finding, as to a lack of good faith of a party to mediation.

Division 3—Concealment, removal or transfer of property by farmer**Farmer who conceals, removes or transfers property loses right to mediation**

5 **60.** A farmer who conceals, removes or transfers property which the farmer knows is the subject of a farm mortgage is ineligible, or ceases to be eligible, for mandatory mediation if any one or more of the following apply:

10 (a) the concealing, removal or transfer is done with the intention of defrauding, defeating or delaying the interests of a creditor or creditors;

15 (b) the concealing, removal or transfer is done for the purpose of mortgaging or otherwise encumbering property that is the subject of the farm mortgage in contravention of its terms and without the consent of the creditor concerned;

 (c) the concealing, removal or transfer otherwise contravenes the terms of the farm mortgage concerned.

Creditor may request Local Court to allow enforcement action without mediation

20 **61. (1)** A creditor who holds a farm mortgage over property that has been concealed, removed or transferred by a farmer in contravention of this Division may request the Local Court sitting in the area in which the farm concerned is located to order that the creditor be permitted to take enforcement action despite the requirements of this Act.

25 **(2)** A request under this section may be made within one year after the concealment, removal or transfer occurs or within such further time as the Court may allow.

30 **(3)** Within 7 days after the filing of a request under this section, the Court is to issue a summons requiring the farmer concerned to appear before the Court on a day and at a place stated in the summons.

(4) The date fixed for the appearance must be not less than 7, and not more than 14, days after the date on which the summons is issued.

Hearing of request by the Local Court

35 **62. (1)** On the return of the summons, the Local Court is to determine whether the farmer has concealed, removed or transferred property in the manner referred to in section 60.

(2) If the Court finds that the farmer has concealed, removed or transferred property in that manner, the Court may, by order, direct that the creditor may take enforcement action immediately.

PART 5—GENERAL PROVISIONS CONCERNING MEDIATION

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Eligibility of mediators

63. (1) A person is not eligible to be a mediator if the person has a conflict of interest that does not allow the person to be impartial.

(2) For the purposes of this Act, a “**conflict of interest**” includes being a current officer, or a person currently involved in any way in the management, of a creditor.

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Functions of mediators

64. (1) The functions of a mediator are as follows:

- (a) to listen to the farmer and creditors who wish to be heard; and
- (b) to attempt to mediate between the farmer and creditors; and
- (c) to advise the farmer and creditors of programs that are available to assist them; and
- (d) to attempt to arrive at an agreement to fairly restructure, refinance or pay the farm debts; and
- (e) to advise, counsel and assist the farmer and creditors in attempting to arrive at an agreement for the future conduct of financial relations among them.

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(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.

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Conduct of mediation sessions

65. (1) The procedure for commencing and conducting a mediation session is to be as determined by the Authority.

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(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 to be conducted in the absence of the public, but persons who are not parties to a mediation session may be present at or participate in a mediation session with the permission of the mediator.

Disclosure of financial information authorised for purposes of Act

5 **66. (1)** The disclosure of information concerning a farmer's financial affairs that has been provided by one creditor in accordance with the requirements of this Act:

(a) to other creditors involved in the mediation proceeding; or

10 (b) to other persons, such as farm advisors, financial counsellors or mediators, who are required to attend the orientation session, the initial mediation session or any additional mediation sessions concerning the farmer,

is hereby authorised.

15 **(2)** Without limiting subsection (1), a disclosure of information referred to in subsection (1) for the purposes of this Act does not constitute an interference with the privacy of the farmer to whom the information relates.

Confidentiality of mediation sessions

20 **67. (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.

25 **(2)** Subsection (1) does not apply with respect to the admission of any evidence or document in proceedings under Division 2 of Part 4 to review a mediator's finding, or failure to make a finding, that a party to mediation has failed to mediate in good faith.

30 **(3)** 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.

Disclosure of information

35 **68. (1)** 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

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- (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 5
- (d) in accordance with a requirement imposed by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth; or
- (e) with other lawful excuse.
- Maximum penalty: 20 penalty units or imprisonment for 6 months, or both. 10
- (2) Nothing in this section prevents the disclosure of information obtained in an orientation session, an initial mediation session or any additional mediation session by a representative of a corporation to other officers of the corporation for the purposes of enabling the corporation to comply with the requirements of this Act. 15
- Representation**
- 69. (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 20
- (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 Law that is a party to a mediation from being represented at the mediation by an officer of the corporation. 25
- (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 any 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. 30
- (4) A contravention of this section does not invalidate a mediation. 35

Exclusion of personal liability of mediators and certain other persons

5 70. 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 6—MISCELLANEOUS**Act binds the Crown**

10 71. 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.

Contracting out prohibited

15 72. (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.

20 (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.

25 Waiver of rights void

 73. A waiver of mediation rights under this Act is void except as expressly allowed under this Act.

Notices by mortgagee

30 74. 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.

Manner of giving notice or other document

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75. (1) If this Act requires or permits a notice or other document to be given, whether personally or by post, to the Authority or a mediator (whether the expression “deliver”, “serve”, “notify”, “send” or “give” or another expression is used), the notice or other document may be given by leaving it at, or by sending it by post to:

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- (a) the office of the Authority; or
 (b) if it has more than one office—any one of its offices.

(2) If this Act requires or permits a notice or other document to be given to a person (other than the Authority or a mediator) (whether the expression “deliver”, “serve”, “notify”, “send” or “give” or another expression is used), the notice or other document may be given:

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- (a) to a natural person:
 (i) by delivering it to the person personally; or
 (ii) by leaving it at, or by sending it by post, telex, facsimile or similar electronic facility to, the address of the place of residence or business of the person last known to the person giving the notice or other document; or
 (b) to a body corporate:
 (i) by leaving it at the registered office of the body corporate with an officer of the body corporate; or
 (ii) by sending it by post, telex, facsimile or similar electronic facility to its registered office.

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(3) Nothing in subsection (1) or (2):

- (a) affects the operation of another law that authorises the service of a notice or other document otherwise than as provided in subsection (1) or (2); or
 (b) affects the power of a court or tribunal to authorise service of a notice or other document otherwise than as provided in subsection (1) or (2).

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Date notice or other document is given

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76. For the purposes of this Act, a notice or other document is taken to be given:

- (a) in the case of a notice or other document given personally—on the date it bears or the date it is received by the addressee, whichever is the later; or
- 5 (b) in the case of a notice or other document sent by post—on the date it bears or the date when it would have been delivered in the ordinary course of post, whichever is the later; or
- 10 (c) in the case of a notice or other document sent by facsimile transmission or some other form of electronic transmission—on the date it bears or the date on which the machine from which the transmission was sent produces a report indicating that the notice or other document was sent to the facsimile or other number of the addressee, whichever is the later.

Proceedings for offences

- 15 77. Proceedings for an offence against this Act or the regulations are to be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

Double jeopardy

78. If an act or omission constitutes an offence:

- 20 (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.

Aiding, abetting and attempts

25 79. (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.

- 30 (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.

Offences by corporations

80. (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. 5

(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. 10

(4) In this section, “**officer**” means a director of the corporation or a person who is otherwise concerned in its management.

Limitation

81. 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. 15

Regulations

82. (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. 20

(2) In particular, the regulations may make provision for or with respect to the following: 25

(a) prescribing the fees, or rates of fees, and travelling and other expenses payable to financial analysts and mediators engaged under the Act;

(b) proceedings in the Commercial Tribunal under Divisions 2 and 6 of Part 3; 30

(c) proceedings in a Local Court under Divisions 2 and 3 of Part 4.

(3) A provision of a regulation may:

(a) apply generally or be limited in its application by reference to specified exceptions or factors; or

(b) apply differently according to different factors of a specified kind; or 35

(c) authorise any matter or thing to be from time to time determined, applied or regulated by a specified person or body.

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

Rules

5 **83. (1)** The Chairman and any 2 members of the Commercial Tribunal may make rules for or with respect to regulating and prescribing the practice and procedure to be followed in proceedings in the Commercial Tribunal under Divisions 2 and 6 of Part 3.

10 **(2)** The Rule Committee established under the Local Courts (Civil Claims) Act 1970 may make rules for or with respect to regulating and prescribing the practice and procedure to be followed in proceedings in a Local Court under Divisions 2 and 3 of Part 4.
