

First print



New South Wales

Farm Debt Mediation Amendment Bill 1996

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Farm Debt Mediation Act 1994*:

- (a) to extend the operation of that Act beyond 12 February 1997 by repealing the “sunset” provision (section 31), and
 - (b) to clarify the meanings of *farm mortgage* and other essential terms, and
 - (c) to make further provision with respect to mediation between farmers and their creditors.
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Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the repeal of section 31 of the *Farm Debt Mediation Act 1994* on the date of assent to the proposed Act. The remainder of the Act will commence on a day or days to be appointed by proclamation.

Clause 3 is a formal provision giving effect to the amendments to the *Farm Debt Mediation Act 1994* set out in Schedule 1.

Schedule 1 Amendments

Definitions

Schedule 1 [1] amends section 3 of the Act to clarify the meanings of three defined terms. At present the definition of *creditor* refers to the provider of financial accommodation to a farmer. The definition is amended to include a reference to the holder of the debt for the time being (for example, the assignee of a mortgage).

The definition of *enforcement action* is amended to include a reference to the giving of a prescribed statutory notice under the *Real Property Act 1900*, the *Conveyancing Act 1919* or other prescribed legislation.

The definition of *farm mortgage* is amended to make it clear that it does not include a reference to stock mortgages, crop and wool liens or other interests in the nature of a chattel mortgage (other than such an interest in farm machinery) and does not include the interest of the lessor of leased farm machinery or the interest of the owner of machinery on hire-purchase. Separate definitions of the expressions *farm property* (that is, the kind of property that can be the subject of a *farm mortgage*) and *statutory enforcement notice* are included, for ease of reading.

Time period for attempted mediation before issue of section 11 certificate

Section 11 of the Act provides for the issue of certificates that the Act does not apply to a particular farm mortgage. The section at present provides for a time period of 3 months after which a creditor who satisfies the Rural Assistance Authority that bona fide but unsuccessful attempts at mediation have been tried within that period is entitled to a certificate under the section.

Schedule 1 [5] amends section 11 by inserting a new subsection (1A) that provides that, where the farmer and creditor have agreed in writing that the finalisation of mediation between them will require a longer period, the period relevant to obtaining the certificate is correspondingly extended.

Good faith of creditor

A creditor wishing to obtain a section 11 certificate must show that efforts at mediation were attempted in good faith. **Schedule 1 [5]** amends section 11 by inserting a new subsection (1B) that provides that a failure on the part of the creditor to agree to reduce or forgive the debt concerned does not, of itself, demonstrate a lack of good faith on the part of the creditor in attempting to mediate.

What counts as “declining to mediate”

Section 11 (2) of the Act creates presumptions as to when a farmer may be said to have declined to engage in mediation under the Act. One of these presumptions depends on a farmer’s failure to respond to an invitation by the creditor to “commence mediation”. **Schedule 1 [6]** re-enacts section 11 (2) (c) to provide that the invitation must be specific as to a particular time and place of meeting proposed for a mediation session, and that the invitation is distinct from a notice given as required by section 8 of the Act, and that it must contain certain statements and indications. If the invitation is properly made out and issued, the farmer is obliged to respond in writing.

Expiry of section 11 certificates

At present a certificate issued under section 11 of this Act is valid for an unlimited time. The certificate is issued following any instance of successful mediation between the parties or of bona fide attempted mediation by the creditor, and effectively excludes the debt concerned from the operation of the Act from that time onward. **Schedule 1 [7]** amends section 11 so that the validity of the certificate is limited to the period of three years after its issue. On the expiry of the three-year period, the protection of the Act is again extended to the farmer, except to the extent that litigation has already commenced before expiry of the certificate. **Schedule 1 [2], [3] and [4]** make consequential amendments.

Advice to farmer at mediation sessions

Schedule 1 [9] amends section 17 of the Act to confer on a farmer the right to have an advisor present at mediation sessions. The advisor can be a lawyer or other professional advisor or an unqualified person. **Schedule 1 [8]** makes a consequential amendment.

Farm Debt Mediation Amendment Bill 1996

Explanatory note

Relieve of Act from sunset

Schedule 1 [10] repeals section 31 of the Act, which effectively provides for the cessation of the operation of the Act on 12 February 1997. In place of the repealed section, provision is made for savings and transitional provisions consequent on the enactment of the proposed Act.

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New South Wales

Farm Debt Mediation Amendment Bill 1996

No. , 1996

A Bill for

An Act to amend the *Farm Debt Mediation Act 1994* to extend the period of operation of that Act and to make further provision with respect to mediation between farm debtors and their creditors.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Farm Debt Mediation Amendment Act 1996*.

2 Commencement

- (1) This Act commences on a day or days to be appointed by proclamation, except as provided by subsection (2). 5
- (2) Schedule 1 [10] commences on the date of assent to this Act.

3 Amendment of Farm Debt Mediation Act 1994 No 91

The *Farm Debt Mediation Act 1994* is amended as set out in Schedule 1. 10

Schedule 1 Amendments

(Section 3)

[1] Section 4 Definitions

Omit the definitions of *creditor*, *enforcement action* and *farm mortgage* from section 4 (1). 5

Insert in alphabetical order:

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

enforcement action, in relation to a farm mortgage, means taking possession of property under the mortgage or any other action to enforce the mortgage, including the giving of any statutory enforcement notice, or the continuation of any action to that end already commenced, but does not include: 10

(a) the completion of the sale of property held under the mortgage in respect of which contracts were exchanged before the commencement of this Act, or 15

(b) the enforcement of a judgment that was obtained before the commencement of this Act. 20

farm mortgage includes any interest in, or power over, any farm property securing obligations of the farmer (whether as a debtor or guarantor), but does not include:

(a) any stock mortgage or any crop or wool lien, or

(b) the interest of: 25

(i) the lessor of any farm machinery that is leased, or

(ii) the owner of any farm machinery that is subject to a hire-purchase agreement.

farm property means: 30

(a) a farm or part of a farm, or

(b) farm machinery used by a farmer in connection with a farming operation.

statutory enforcement notice means:

- (a) a notice under section 57 (2) (b) of the *Real Property Act 1900*, or
- (b) a notice under section 111 (2) (b) of the *Conveyancing Act 1919*, or 5
- (c) a notice, given under any Act or statutory instrument, that is prescribed by the regulations as being within the scope of this definition.

[2] Section 8 No enforcement action until notice of availability of mediation given 10

Omit "the Authority has given a certificate" from section 8 (3).
Insert instead "a certificate is in force".

[3] Section 10 Enforcement action postponed to allow for mediation

Omit "and until the Authority has given a certificate". 15
Insert instead "a certificate is in force".

[4] Section 10 (2)

Insert at the end of section 10:

- (2) This section does not invalidate any statutory enforcement notice or other process given, served or executed in order to fulfil a condition precedent to the taking of any enforcement action, but operates to prohibit the taking of the action concerned, or the enforcement by a court or tribunal of any such process, except as provided by section 11 (6). 20 25

[5] Section 11 Certificate that Act does not apply to farm mortgage

Insert after section 11 (1):

- (1A) If the creditor has (in whatever terms employed) agreed in writing to extend the period that will be available to the farmer for the conclusion of mediation between the parties to beyond 3 months, the reference in subsection (1) (c) to a period of 3 months is taken to be a reference to the extended period. 5
- (1B) For the purposes of subsection (1) (c), a failure by a creditor to agree to reduce or forgive any debt does not, of itself, demonstrate a lack of good faith on the part of a creditor in attempting to mediate. 10

[6] Section 11 (2) (c)

Omit the paragraph. Insert instead:

- (c) the farmer has failed to respond in writing, within 28 days, to an invitation that: 15
- (i) is made in writing by the creditor and is identified as an invitation under this paragraph, and
- (ii) invites the farmer to attend a mediation session at a specific time and place, and 20
- (iii) indicates that a failure of the farmer to respond in writing to the invitation might be taken to be an indication that the farmer declines to mediate in respect of the farm debt. 25

[7] Section 11 (5)–(7)

Insert after section 11 (4):

- (5) A certificate under this section remains in force for a period of 3 years from the date of its issue, and expires at the end of that period. 30

- (6) The expiry of a certificate under this section does not affect any proceedings for recovery of a farm debt, or for the exercise or enforcement of any right of the creditor, already taken or commenced by a creditor while the certificate was in force, and any such proceedings may be continued and concluded as if the certificate were still in force. 5
- (7) The reference in subsection (6) to the commencement of proceedings does not include a reference to the giving of any statutory enforcement notice or other action taken in order to fulfil a condition precedent to the enforcement of a right otherwise than through proceedings in a court or tribunal. 10

[8] Section 14 Conduct of mediation sessions

Omit section 14 (4). Insert instead: 15

- (4) A mediation session is not open to the public.
- (5) Persons who are not parties to a mediation session:
- (a) may be present at or participate in the session in an advisory or representative capacity if authorised to do so under section 17, or 20
- (b) may otherwise be present at or participate in the session with the permission of the mediator.

[9] Section 17 Representation and assistance during mediation

Omit section 17 (4). Insert instead:

- (4) A farmer who is a party to mediation is entitled to have present at any mediation session an advisor, who may but need not be legally or otherwise professionally qualified, and is entitled to call upon that advisor for advice and counsel during the session. 25
- (5) Nothing in subsection (4) affects the operation of section 14 (1)–(3). 30
- (6) A contravention of this section does not invalidate a mediation.

[10] Section 31 and Schedule 1

Omit the section. Insert instead:

31 Savings and transitional provisions

Schedule 1 has effect.

Schedule 1 Savings and transitional provisions 5
(Section 31)

1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of:
the Farm Debt Mediation Amendment Act 1996. 10
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later day.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as: 15
- (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or 20
- (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

2 Certificates under section 11 25

- (1) A certificate under section 11 that was issued earlier than 3 years before the amendments made to that section by the *Farm Debt Mediation Amendment Act 1996* took effect is of no force or effect, and any other certificate under that section expires as provided by section 11 (5). 30

Farm Debt Mediation Amendment Bill 1996

Schedule 1 Amendments

- (2) Section 11 (1A) and (1B) apply to the issue of a certificate under section 11 regardless of whether application was made for the certificate before or after the commencement of those subsections. Those subsections do not, however, operate to invalidate a certificate that was issued before their commencement. 5

3 Conduct of mediation sessions

The amendment made to section 17 by the *Farm Debt Mediation Amendment Act 1996* has no effect in relation to mediation sessions that commenced before that amendment took effect. 10

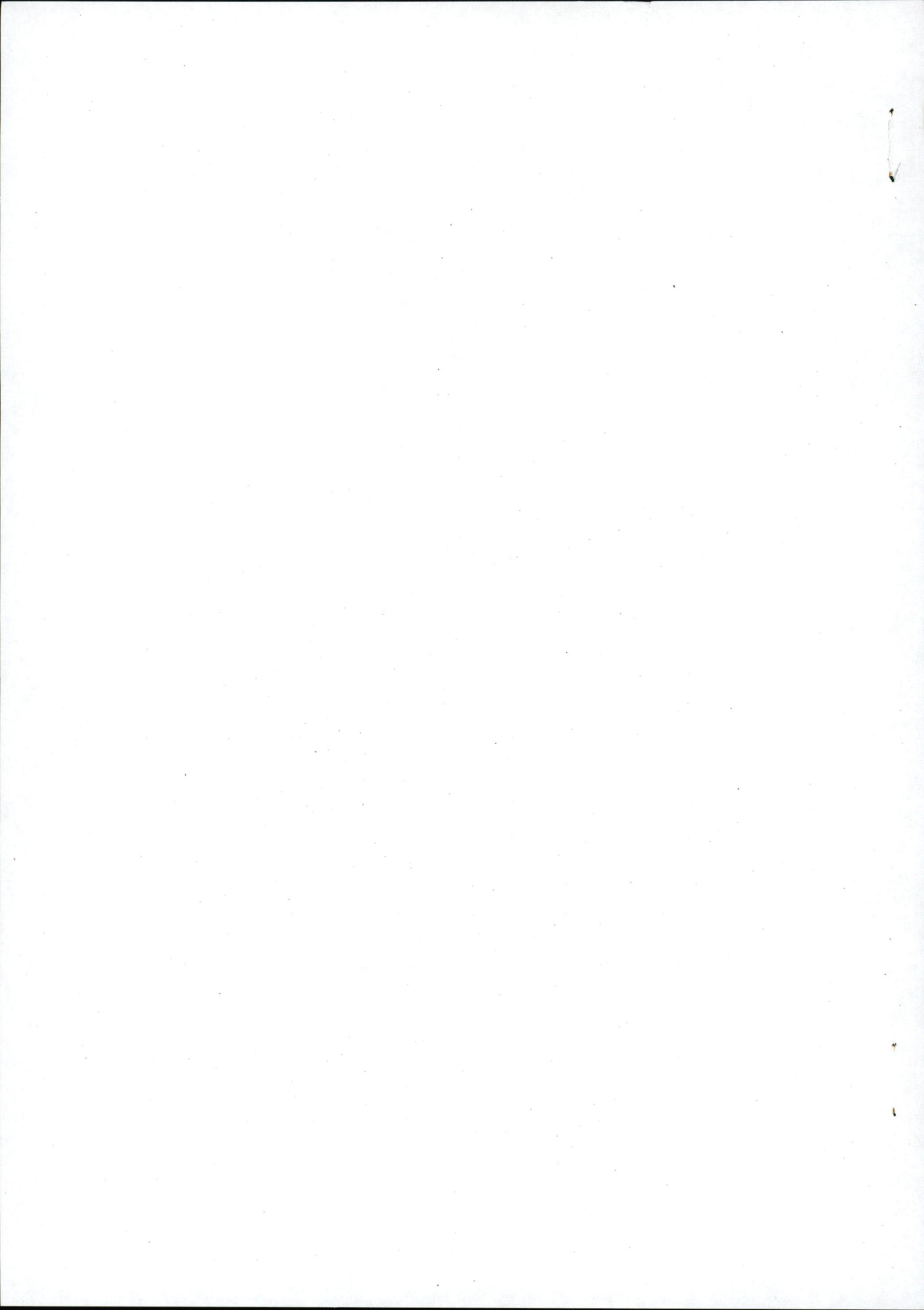


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Farm Debt Mediation Amendment Act 1996 No 106

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New South Wales

Farm Debt Mediation Amendment Act 1996 No 106

Act No 106, 1996

An Act to amend the *Farm Debt Mediation Act 1994* to extend the period of operation of that Act and to make further provision with respect to mediation between farm debtors and their creditors. [Assented to 2 December 1996]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Farm Debt Mediation Amendment Act 1996*.

2 Commencement

- (1) This Act commences on a day or days to be appointed by proclamation, except as provided by subsection (2).
- (2) Schedule 1 [10] commences on the date of assent to this Act.

3 Amendment of Farm Debt Mediation Act 1994 No 91

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

Schedule 1 Amendments

(Section 3)

[1] Section 4 Definitions

Omit the definitions of *creditor*, *enforcement action* and *farm mortgage* from section 4 (1).

Insert in alphabetical order:

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

enforcement action, in relation to a farm mortgage, means taking possession of property under the mortgage or any other action to enforce the mortgage, including the giving of any statutory enforcement notice, or the continuation of any action to that end already commenced, but does not include:

- (a) the completion of the sale of property held under the mortgage in respect of which contracts were exchanged before the commencement of this Act, or
- (b) the enforcement of a judgment that was obtained before the commencement of this Act.

farm mortgage includes any interest in, or power over, any farm property securing obligations of the farmer (whether as a debtor or guarantor), but does not include:

- (a) any stock mortgage or any crop or wool lien, or
- (b) the interest of:
 - (i) the lessor of any farm machinery that is leased, or
 - (ii) the owner of any farm machinery that is subject to a hire-purchase agreement.

farm property means:

- (a) a farm or part of a farm, or
- (b) farm machinery used by a farmer in connection with a farming operation.

statutory enforcement notice means:

- (a) a notice under section 57 (2) (b) of the *Real Property Act 1900*, or
- (b) a notice under section 111 (2) (b) of the *Conveyancing Act 1919*, or
- (c) a notice, given under any Act or statutory instrument, that is prescribed by the regulations as being within the scope of this definition.

[2] Section 8 No enforcement action until notice of availability of mediation given

Omit “the Authority has given a certificate” from section 8 (3).
Insert instead “a certificate is in force”.

[3] Section 10 Enforcement action postponed to allow for mediation

Omit “and until the Authority has given a certificate”.
Insert instead “a certificate is in force”.

[4] Section 10 (2)

Insert at the end of section 10:

- (2) This section does not invalidate any statutory enforcement notice or other process given, served or executed in order to fulfil a condition precedent to the taking of any enforcement action, but operates to prohibit the taking of the action concerned, or the enforcement by a court or tribunal of any such process, except as provided by section 11 (6).

[5] Section 11 Certificate that Act does not apply to farm mortgage

Insert after section 11 (1):

- (1A) If the creditor has (in whatever terms employed) agreed in writing to extend the period that will be available to the farmer for the conclusion of mediation between the parties to beyond 3 months, the reference in subsection (1) (c) to a period of 3 months is taken to be a reference to the extended period.
- (1B) For the purposes of subsection (1) (c), a failure by a creditor to agree to reduce or forgive any debt does not, of itself, demonstrate a lack of good faith on the part of a creditor in attempting to mediate.

[6] Section 11 (2) (c)

Omit the paragraph. Insert instead:

- (c) the farmer has failed to respond in writing, within 28 days, to an invitation that:
 - (i) is made in writing by the creditor and is identified as an invitation under this paragraph, and
 - (ii) invites the farmer to attend a mediation session at a specific time and place, and
 - (iii) indicates that a failure of the farmer to respond in writing to the invitation might be taken to be an indication that the farmer declines to mediate in respect of the farm debt.

[7] Section 11 (5)–(7)

Insert after section 11 (4):

- (5) A certificate under this section remains in force for a period of 3 years from the date of its issue, and expires at the end of that period.

- (6) The expiry of a certificate under this section does not affect any proceedings for recovery of a farm debt, or for the exercise or enforcement of any right of the creditor, already taken or commenced by a creditor while the certificate was in force, and any such proceedings may be continued and concluded as if the certificate were still in force.
- (7) The reference in subsection (6) to the commencement of proceedings does not include a reference to the giving of any statutory enforcement notice or other action taken in order to fulfil a condition precedent to the enforcement of a right otherwise than through proceedings in a court or tribunal.

[8] Section 14 Conduct of mediation sessions

Omit section 14 (4). Insert instead:

- (4) A mediation session is not open to the public.
- (5) Persons who are not parties to a mediation session:
 - (a) may be present at or participate in the session in an advisory or representative capacity if authorised to do so under section 17, or
 - (b) may otherwise be present at or participate in the session with the permission of the mediator.

[9] Section 17 Representation and assistance during mediation

Omit section 17 (4). Insert instead:

- (4) A farmer who is a party to mediation is entitled to have present at any mediation session an advisor, who may but need not be legally or otherwise professionally qualified, and is entitled to call upon that advisor for advice and counsel during the session.
- (5) Nothing in subsection (4) affects the operation of section 14 (1)–(3).
- (6) A contravention of this section does not invalidate a mediation.

[10] Section 31 and Schedule 1

Omit the section. Insert instead:

31 Savings and transitional provisions

Schedule 1 has effect.

Schedule 1 Savings and transitional provisions

(Section 31)

1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of:
the Farm Debt Mediation Amendment Act 1996.
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later day.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
 - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
 - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

2 Certificates under section 11

- (1) A certificate under section 11 that was issued earlier than 3 years before the amendments made to that section by the *Farm Debt Mediation Amendment Act 1996* took effect is of no force or effect, and any other certificate under that section expires as provided by section 11 (5).

- (2) Section 11 (1A) and (1B) apply to the issue of a certificate under section 11 regardless of whether application was made for the certificate before or after the commencement of those subsections. Those subsections do not, however, operate to invalidate a certificate that was issued before their commencement.

3 Conduct of mediation sessions

The amendment made to section 17 by the *Farm Debt Mediation Amendment Act 1996* has no effect in relation to mediation sessions that commenced before that amendment took effect.

[Minister's second reading speech made in—
Legislative Assembly on 30 October 1996
Legislative Council on 20 November 1996]

BY AUTHORITY