

WHAT IS MEDIATION?



MEDIATION IS DEFINED AS

"The process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives and reach a consensual agreement that will accommodate their needs."

(Folberg and Taylor)

Under the Farm Debt Mediation Act 1994 "mediation" means mediation by a mediator who has been accredited by the NSW Rural Assistance Authority.

MEDIATION IN COMMERCIAL SETTINGS

Mediation is a co-operative problem-solving process, designed to help the parties to a dispute find constructive solutions to problems. Those solutions may or may not involve enforcement of the legal rights of the parties. From a commercial perspective, mediation is an extension of the usual commercial process of negotiating an agreement. If business can negotiate the entry into commercial arrangements, there is no logical reason why they cannot negotiate to end or modify those arrangements. By taking responsibility for difficulties that arise in their commercial arrangements, businesses are much more likely to end up with a satisfactory solution in which not only one but all parties benefit.

THE MEDIATOR

During mediation an independent third party, chosen by the disputing parties from a list of accredited mediators, facilitates the negotiation by the parties of their own solution to the dispute. A mediator who is respected and trusted by all parties and, if necessary, has expertise in the area of the dispute, can be of great benefit in helping the parties reach a solution satisfactory to all of them.

The NSW Rural Assistance Authority has accredited a number of experienced mediators as part of its Panel of Mediators. All the accredited mediators have received special training in the Act.

SELECTING A MEDIATOR

A farmer has the initial right to nominate a mediator from the list of accredited mediators provided by the NSW Rural Assistance Authority. If the creditor rejects that nomination, the farmer is then required to nominate a panel of at least three mediators, from which the creditor must then select one.

ROLE OF THE MEDIATOR

The mediator assists the parties:

- systematically isolate the issues in dispute (which, if the mediation is unsuccessful, may prove of assistance to the parties in any other form of dispute resolution, such as arbitration or litigation, which they may later pursue);
- develop and explore options for the resolution of the issues in dispute, enabling the parties to play an active role in the decision-making process and to exercise control over the terms of settlement;
- reach a consensual agreement, which accommodates their needs and interests.

REMEDIES AVAILABLE AT MEDIATION

The range of remedies available in mediation is unlimited. Consensual agreements tend to provide greater satisfaction procedurally and psychologically and are consequently more readily and

comfortably adhered to than those, which have been imposed by a judge or an arbitrator. Agreements reached are usually final and binding contractual agreements. The mediator will not impose a solution on the parties but may assist in the generation of options for settlement. The mediator will not coerce the parties into agreement nor make decisions for them. The mediator will not give legal advice nor direct the parties' decisions based on the mediator's interpretation of the law. One of the fundamental principles of mediation is that, parties properly informed of their rights and fully prepared for negotiation, can reach agreements which satisfy their needs. Those needs may involve a consideration of the legal rights of each of the parties but any solution is determined by reference to criteria including, but not limited to, those legal rights.

FEATURES OF MEDIATION

Mediation is a voluntary and confidential process. It will not be binding on any party unless and until agreement is reached. Mediation is conducted without prejudice to any legal rights which the parties may have. If mediation is unsuccessful, other means of dispute resolution may be used or continued.

WHAT HAPPENS BEFORE MEDIATION?

Before mediation the parties will have:

- decided to use mediation as an appropriate method of endeavouring to resolve the dispute;
- selected a suitable mediator, from the panel of mediators supplied by the NSW Rural Assistance Authority;
- reached agreement on how the costs of mediation are to be shared and where and when the mediation will be held.

It is usual for the costs of the mediator and venue hire to be shared equally between the parties. The venue for the mediation, to be agreed upon by the parties, can be either in the nearest large provincial city, or in Sydney.

Once the parties have reached agreement on their mediator, when and where they will hold their mediation and the sharing of costs, the mediator will assume control of the process. The mediator will convene a preliminary conference between the parties. This may take the form of a face to face meeting but will usually be by way of a telephone conference. Farmers should ensure that any adviser engaged by them also participates in the conference.

During the conference the mediator will cover a fixed agenda of topics. These include, an explanation of the mediation process, the agreement to mediate document, timings for the mediation session, mediators' fees, mediators' reporting obligations, preparation required by the parties prior to mediation as well as who will attend the mediation. The mediator will also give an explanation of the confidentiality provisions of the Act, the requirement for the parties to have the authority to settle the matter on the day, what constitutes satisfactory mediation, the need for both parties to act in 'good faith' and the farmers' rights under section 11A - the cooling off period.

HOW LONG WILL MEDIATION TAKE

To allow for all options to be thoroughly discussed at mediation, parties must allow a minimum of six (6) hours for the process. If necessary, the time can be extended, or the parties may agree to reconvene at a later date.

HOW DOES MEDIATION WORK?

For the mediation itself, a neutral venue including a main room large enough to accommodate all participants and separate rooms for each group, will need to be arranged. Once the participants have been introduced, the mediator will open the mediation by making a short statement explaining the mediation process, its essential features and objectives and the mediator's role in the process.

After opening, the mediator will ask each party, in turn, to explain what it is that has brought them to mediation. From the parties' statements, the mediator will identify the issues, which are in dispute and the common ground between the parties. Then, after checking with the parties, the mediator usually

will write those issues, and the common ground, on a whiteboard and will set an agenda for the discussion of those issues.

PRIVATE SESSIONS

During the mediation, the mediator may meet with each of the parties separately. The aim of such private sessions is to enable the mediator to explore any underlying issues and to ensure that the parties are content with the process. It is during the private session that proposed settlement options are often fully explored and tested. The mediator will not, unless specifically authorised to do so, disclose anything said in a private session to the other parties.

HEADS of AGREEMENT

If it appears to the mediator that the parties have agreed, or are about to agree, on an issue between them, the mediator will personally prepare for the consideration of the parties a document setting out the main points of agreement on the issue.

If the parties are satisfied that the document sets out the main points agreed by them during, or within 24 hours of the end of a mediation, the parties may enter into Heads of Agreement by signing the document.

A contract, deed, mortgage or other instrument entered into as a result of, or pursuant to, Heads of Agreement between a farmer and a creditor must reflect the relevant Heads of Agreement.

If a mediator wishes to enter the mediation session with any part of the final agreement already drafted, the parties must be given ample notification and opportunity to consider the contents before the mediation. Ideally, this should happen at the time of the preliminary conference.

WHAT HAPPENS IF THE PARTIES DON'T REACH AGREEMENT?

Under the Act, the parties are required to make reasonable attempts to negotiate a settlement to their dispute at mediation.

If, after reasonable attempts, an agreement cannot be reached by mediation, the creditor/bank may apply to the NSW Rural Assistance Authority for a Section 11 certificate. Once in possession of a Section 11 certificate a creditor/bank may commence enforcement action under their mortgage.

Settlement by mediation is voluntary and neither party can be forced to agree to anything at mediation.

WHAT IS A SECTION 11 CERTIFICATE?

This is a certificate, issued, in terms of section 11 of the Act, to a creditor upon application, stating that the Farm Debt Mediation Act no longer applies to the particular farm mortgage. Before a creditor/bank can be issued with a certificate, the creditor/bank must satisfy the NSW Rural Assistance Authority that the creditor/bank has complied with the Act. Once in possession of a Section 11 certificate, a creditor/bank may commence enforcement action under the particular farm mortgage.

ADVISER'S ROLE IN MEDIATION

It is recommended that farmers employ a professional adviser. The adviser can be your local Rural Financial Counsellor, your Solicitor, your Accountant or some other appropriately qualified person.

The role of the parties' adviser in mediation will be to, fully prepare their clients for, and then to assist and advise, rather than represent them, during the process and on any settlement options raised, and perhaps, assist the mediator with drafting the terms of any settlement reached. It is essential that any adviser employed have a clear understanding of the mediation process and sound financial skills.

AUTHORITY TO SETTLE

All parties to the mediation must have the authority to sign off on any Heads of Agreement developed at the mediation. Any person representing a party to a mediation (whether or not the person is himself or herself a party to the mediation) must not attend a mediation session unless the person has been given written authority by the party the person represents to enter into Heads of Agreement. If another mediation session is required as a result of a party's failure to give the required authority, the party is liable for all costs associated with the attendance by the other party at that additional session.

BENEFITS OF MEDIATION

Mediation:

- puts control of the resolution of the dispute into the hands of those best equipped to find the most appropriate solution in view of the parties' individual needs and interests;
- helps negotiations without fear of showing weakness;
- provides an opportunity for parties to have their say, to tell others exactly how they see the problem in a confidential, non-threatening atmosphere without prejudice to any rights;
- helps disputing parties understand how the others see and feel about the problem;
- enables business relationships to be maintained and even enhanced by encouraging co-operative problem solving;
- enables identification and exploration of all issues, including those which may not be revealed in arbitration or litigation because of the application of the rules of evidence;
- helps disputing parties to regain the perspective that can so easily be lost in arbitration and litigation;
- provides the opportunity for an unlimited range of creative and final solutions unlike the limited remedies which can be awarded by an arbitrator or a judge;
- can provide procedural and psychological as well as substantive satisfaction;
- is confidential thereby avoiding adverse publicity or media attention and the need for any confidential or commercially sensitive information or trade secrets to be publicly disclosed;
- is usually significantly cheaper and quicker than arbitration or litigation and can be arranged to suit the convenience of the parties;
- focuses on the future rather than on the rights and wrongs of the past.

FARMER-INITIATED MEDIATION

Farmer-initiated mediation is mediation where a farmer, rather than the creditor, takes the initiative to request mediation. A farmer, who has not been given a notice under section 8, but who owes money to a creditor in relation to a farm debt, may notify the creditor, in writing, that the farmer requests mediation. A farmer may request mediation whether or not the farmer is in default.

The same time frames apply to farmer-initiated mediation as apply to mediation initiated by a creditor in terms of section 8 of the Act. Failure by a creditor to agree to a farmer initiated mediation where the farmer's loans are in default may result in the issue of a Section 9B certificate of Exemption from Enforcement Action. The forms required to initiate farmer-initiated mediation are available from the Authority or the Authority's web site: www.raa.nsw.gov.au

WHAT SHOULD A FARMER DO IF SERVED WITH NOTICES UNDER THE ACT?

1. On receipt of a **Form 1 Section 8 Notice** from a creditor/bank you should seek professional advice by contacting your rural financial counsellor, solicitor or other adviser.
2. If you wish to enter into mediation with the creditor you must return a written notice, **within 21 days**, indicating that you wish to mediate. A **Form 2 Section 9 Notice** should have been included with the notices issued by the creditor/bank, to enable you to do so. Shortly after you return the **Form 2 Section 9 Notice**, you will receive a '**mediation kit**' from the NSW Rural Assistance Authority. Upon receipt of the 'kit', you will **need to reach agreement with the creditor/bank** on the following: (a) **how you will share the costs of mediation**, (b) **who your mediator will be**, (c) **where you will hold the mediation** and (d) **the date the mediation will take place**. Once appointed, the mediator will take control of the process.
3. Even though you have returned a notice indicating that you wish to enter into mediation, you can still attempt to reach an agreement with the creditor/bank outside of mediation. As a condition of any agreement reached outside of mediation, the creditor may request that you to sign a **Form 6 Section 11(2)(b) Notice** indicating that you do not wish to enter into or proceed with mediation.
4. During the course of attempting to arrange for mediation, or attempting to reach an agreement with the creditor/bank outside of mediation, you may receive an **invitation to attend a mediation session**. This invitation will indicate that it has been issued in terms of **section 11(2)(c)** of the Act and, that if you **fail to respond to it, in writing, within 28 days**, such failure might be taken to be **an indication that you decline to mediate** in respect of the farm debt. To ensure that you maintain your rights under the Act, **you must respond, in writing, within 28 days, to such an invitation**.
5. **Ensure that you participate in the preliminary conference** arranged by the mediator prior to your mediation. The preliminary conference is held to ensure that you are fully aware of what to expect on the day of mediation.

NOTE: Parties subject to the Act will lose their rights under the Act if they do not comply with the time frames as set out in Sections 8(1), 9(1), 11(1)(c)(iii) and 11(2)(c). Farmer-initiated mediation Sections 9B(2)(d)(ii) and 9B(2)(d)(iii).

**For further information contact the NSW Rural Assistance Authority on Toll Free 1800 678 593 and ask for the Farm Debt Mediation Unit or phone direct on (02) 6391 – 3013
Web site: www.raa.nsw.gov.au**

FARM DEBT MEDIATION ACT, 1994

RESPONSIBILITIES OF THE FARMER, THE CREDITOR AND THE MEDIATOR

THE FARMER	THE CREDITOR	THE MEDIATOR
<ul style="list-style-type: none"> ◆ s4 Definitions ◆ s5(2) Act does not apply to farmer whose property is: s5(2)(a) subject to control under Div 2 of Part X of Bankruptcy Act 1966 (Commonwealth) ◆ s5(2)(b) bankruptcy petition presented by any person, or ◆ s5(2)(c) is an externally administered farmer corporation ◆ s9(1) Farmer who receives s8 Notice may notify creditor in writing, within 21 days, requesting mediation. May use form (Section 9 Notice) approved by Authority. ◆ S11(1)(c)(iii) three months have elapsed after a S 8 notice was given by the creditor and the creditor has throughout that period attempted to mediate in good faith (whether or not a mediation session or satisfactory mediation took place during that period. ◆ s11(2) Presumed to have declined mediation if: <ul style="list-style-type: none"> 11(2)(a) fails to take part in mediation in good faith or unreasonably delays entering into or proceeding with mediation or 11(2)(b) gives written notice that do not wish to enter into or proceed with mediation or 11(2)(c) fails to respond in writing, within 28 days of receipt of an invitation in writing given by the creditor to the farmer to attend a mediation session ◆ 11B(1) Farmer may, during a cooling off period serve a written notice on the creditor or to the effect that the farmer rescinds the agreement. ◆ S12A Farmer to nominate mediator. ◆ S17(4) Farmer entitled to have adviser ◆ S21 Waiver of mediation rights under the Act is void. 	<ul style="list-style-type: none"> ◆ s4 Definitions ◆ s5(1) Act applies only in so far as they are creditors under a farm debt. ◆ s6 Enforcement action otherwise than in compliance with Act is void ◆ s8(1) Unless creditor has s. 11 certificate (s8(3)), creditor must not take enforcement action until at least 21 days after creditor gives notice under this section ◆ s8(2) S8 Notice must be in a format approved by Authority ◆ s9B(2)(d)(ii) & (iii) Response in relation to farmer-initiated mediation where farmer is in default. ◆ s10 No further enforcement action by creditor once receives Section 9 notice until S11 certificate issued by Authority ◆ s11(2)(c) Can issue invitation in writing to farmer to attend mediation session ◆ 11A(1) There is to be a cooling off period for any Heads of Agreement. ◆ 11A(4) If Heads of Agreement does not contain the statement required, the cooling off period is extended until such time as a statement, in the form approved by the Authority, is served on the farmer. ◆ 11C A contract, deed, mortgage or other instrument entered into as a result of, or pursuant to, Heads of Agreement must reflect the relevant Heads of Agreement. ◆ 12(2) A creditor cannot nominate a mediator but must accept or reject the mediator nominated by a farmer. ◆ s20 Contracting out prohibited 	<ul style="list-style-type: none"> ◆ s4 Definitions ◆ s11AA Drafting Heads of Agreement ◆ s13(1) Functions of a mediator are to mediate impartially or attempt to mediate impartiality between the farmer and the creditor for the purpose of arriving at an agreement for the present arrangements and future conduct of financial relations among the parties ◆ s13(2) It is not a function of a mediator to (a) advise a farmer or a creditor about the law; or (b) to encourage or assist a farmer or a creditor in reserving or establishing legal rights; or (c) to act as an adjudicator or arbitrator ◆ s14(1) Conduct mediation in accordance with procedures determined by the Authority ◆ s14(1A)(b) May adjourn mediation ◆ s14(2) Conduct mediation with as little formality and technicality and with as much expedition as possible ◆ s14(4) Conduct mediation in the absence of the public ◆ s14(5) Mediator can permit persons other than the parties to be present at or participate in a mediation session ◆ s17 Mediator can decide if an agent can represent a party (except a corporation) and impose conditions on representation ◆ s18 Mediator not subject to claims for acts or omissions if acting in good faith for the purposes of executing the Act ◆ s18A Mediator to complete Summary of mediation

Common Responsibilities

- S15(1) and (2) Confidentiality** – anything said or admitted or documents prepared for a mediation are not admissible in proceedings
- S16 Disclosure – Invoices criminal sanction** – cannot disclose unless with consent of person from whom information obtained or in connection with administration of Act; or as reasonably required for purposes of referral; in accordance with requirements of law; or with other lawful excuse
- S17 (3A) Representation** - any person representing a party to a mediation (whether or not the person is himself/herself a party to the mediation) must not attend a mediation session unless the person has been given written authority by the party the person represents to enter into Heads of Agreement.