



Rural
Assistance
Authority

Farm Debt Mediation Act 1994 (NSW)
Review

Consultation Paper

23 March 2017

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Have your say

Your feedback will play a vital role in ensuring that the NSW Government continues to provide best practice civil dispute resolution and access to justice, whilst also driving economic growth in regional NSW and mitigating the risks to the community and industry that impede that growth.

Written submissions are invited **by 5 May 2017**.

Please email your submission in Word or Pdf format to

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Quick comments can also be provided online.

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Abbreviations and acronyms

AAT	Administrative Appeals Tribunal (federal)
ACCC	Australian Consumer and Credit Commission
ADT	Administrative Decisions Tribunal of New South Wales
AGSOC	Agriculture Senior Officials' Committee
AGMIN	Agriculture Ministers' Forum
ABA	Australian Bankers' Association
ADR	Alternative dispute resolution
DEDJTR	Government of Victoria, Department of Economic Development, Jobs, Transport and Resources
FDM	Farm debt mediation
FDMA	<i>Farm Debt Mediation Act 1994 (NSW)</i>
FLA	<i>Family Law Act 1975 (Cth)</i>
NFA	New South Wales Farmers Association
NMAS	National Mediator Accreditation System
NSWLRC	NSW Law Reform Commission
QFBDMA	<i>Farm Business Debt Mediation Act 2016 (Qld)</i>
QRAA	Queensland Rural Assistance Authority
QRIDA	proposed Queensland Rural Industry Development Authority
RAA	New South Wales Rural Assistance Authority
RAAA	<i>Rural Assistance Act 1989 (NSW)</i>
RAA Board	New South Wales Rural Assistance Authority Board constituted under the <i>Rural Assistance Act 1989 (NSW)</i>
RFCS	Rural Financial Counselling Service
VSBC	Victorian Small Business Commissioner

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Introduction

1. Two priority actions in the NSW Rural Assistance Authority's ("RAA's") *Business Plan 2016–2020* under the Department's *Strategic Plan 2015–2019* are to:
 - review the *Farm Debt Mediation Act 1994* (NSW) ("FDMA") to ensure it continues to deliver on its original intent, and
 - work with the Australian Government on a national approach to farm debt mediation ("FDM").
2. These actions respond to the RAA's key focus area of helping "to drive economic growth in regional NSW and mitigate the risks that impede this growth" and to the Department of Industry's broader aim of mitigating and managing risks to the community and industry.
3. The FDMA has worked well for 22 years. Creditors support mediation as a flexible mechanism for negotiating about business matters, and FDM provides equitable access to justice for farmers.
4. The FDMA is being reviewed to ensure it continues to deliver on its original intent and contributes to the development of a nationally consistent approach to FDM. National consistency is on the agendas of the Agriculture Senior Officials' Committee (AGSOC) and the Agriculture Ministers' Forum (AGMIN).¹ Interim findings from this review will be reported to AGSOC and AGMIN and any outcomes will inform the Review. This consultation paper does not further discuss possible future national developments in relation to FDM,² the proposed national banking tribunal,³ or the national review of the external dispute resolution framework for the financial system that is due to report at the end of March 2017.⁴

Object of the Act

5. The FDMA enables debtors in default of a farm mortgage to mediate with their creditors, facilitated by an independent mediator, before the creditor (mortgagee) can take enforcement action to recover a farm debt.
6. The object of the remedial FDMA is "to provide for the efficient and equitable resolution of farm debt disputes. Mediation is required before a creditor can take possession of property or other enforcement action under a farm mortgage."⁵ Justice Young (as his Honour then was) said in *Varga v Commonwealth Bank of Australia*:

One must construe the Act to fulfil its purpose. The purpose was to prevent persons being driven off their farms because of inability to pay debt where it was possible for the debt to be rearranged after a bona fide mediation process. To fulfil the purposes of the Act, one must construe it, to my mind, favourably to the farmer, and unless

¹ In 2014–15 an inter-governmental [working group](#) that reports to AGSOC discussed options for a [nationally consistent approach](#) to FDM. The National Farmers' Federation, the Rural Financial Counselling Service, the Australian Bankers' Association, the banking and finance sectors, state government agriculture departments and other rural stakeholders are represented on the working group.

² Australian Parliament, Joint Committee on Corporations and Financial Services, [Impairment of Customer Loans: Report](#), May 2016, Rec 6 [4.80]–[4.81], 82. The Australian Small Business and Family Enterprise Ombudsman (ASFBEO) recommended again in February 2017 that nationally consistent FDM be established: Australian Government, ASFBEO, [Inquiry into Small Business Loans](#), 2016, rec 14.

³ Australian Parliament, House of Representative Standing Committee on Economics, [Review of the Four Major Banks](#), October 2016.

⁴ Australian Government, the Treasury, [Review into Dispute Resolution and Complaints Framework](#), Review Chair: Professor Ian Ramsay.

⁵ FDMA [s 3](#).

*compelled by the language, not permit the overriding purposes of the Act to be defeated by technicalities.*⁶

7. A farm debt is defined as a debt incurred by a farmer for the purposes of conducting a farming operation, which is secured wholly or partly by farm land, a water licence or farm machinery. Unlike other business loans, farm debts often include security over the farm homestead and that can be affected by enforcement action.
8. Mediation is an inexpensive and confidential dispute resolution mechanism that can avoid the need for, or delay the initiation of enforcement action, including sometimes complex and expensive litigation. The Act enables constructive negotiations to occur, including with multiple creditors and joint farm owners. Mediation allows options to be developed and negotiated, and agreement to be reached, which can become a binding and enforceable contract if the parties agree. If no agreement is reached, each party retains their rights to litigate.
9. Mediation is a process that can be empowering for farmers who may or may not be assisted or represented by legal or financial representatives during the mediation. A meeting of farm debt mediators in Sydney in October 2016 agreed that of the range of alternative dispute resolution (“ADR”) mechanisms available (including conciliation, neutral evaluation, arbitration, and hybrid model), mediation is the most suitable and effective for farmers, provided imbalance of power issues are managed, and farmers access advice and representation when needed.
10. The FDMA, which is administered by the NSW Rural Assistance Authority, has been operating since February 1995. Stakeholders have generally been satisfied with how the Act has operated to date, with the FDMA viewed as suitable for national implementation.⁷

History of the FDMA

11. Farm debt mediation was pioneered in the United States in the mid-1980s during a rural crisis. It was introduced first in Iowa and Minnesota and in numerous states shortly thereafter.⁸ The FDMA followed the United States’ approach. The Farm Debt Mediation Bill was introduced to the NSW Parliament in October 1994, after two or three years of high interest rates (up to 23% per annum), low wool prices and severe drought, and an escalation in the rate of farmer suicide.⁹ Adjustment pressures also arose from the deregulation of the banking sector in the late 1980s, and changing lending practices and relationships between farmers and banks, partly due to increased competition and the introduction of e-banking.¹⁰ Banks’ interest in farm lending also contracted in the early 1990s.¹¹
12. The private member’s Bill was part of an Opposition drought relief package. With the support of the Fahey Government (provided amendments and a review within two years were agreed), the passage of the Bill was expedited.¹² The Bill included

⁶ [1996] NSWSC 86.

⁷ Australian Bankers Association Inc, [Submission to the Review of External Dispute Resolution and Complaints Schemes](#), October 2016, 5–6.

⁸ D Ginnivan, *Farm Debt Mediation: A Review of the Possibilities: Discussion Paper*, Rural Development Centre University of New England Armidale, 1993, 5–9.

⁹ Richard Amery (Mount Druitt), NSW Parliament, “Matter of public importance”, [Legislative Assembly Hansard](#) 16 November 1994; NSW Parliament, Standing Committee on Social Issues, *Report No 7: Suicide in Rural New South Wales*, 1994.

¹⁰ Ginnivan, above n 8, 19. Anecdotal evidence suggests some rural credit interest rates were as high as 27%.

¹¹ Australian Parliament, Standing Committee on Finance and Public Administration, *A Pocket Full of Change: Banks and Deregulation: Inquiry Report*, 1991.

¹² NSW Parliament, Legislative Assembly Hansard – 16 November 1994, Motion by Richard Amery (Mt Druitt) to re-order general business to prioritise debate on the private member’s Farm Debt Mediation Bill.

elements similar to the Credit Rural Finance Contract legislation that was enacted in 1987 but never proclaimed.¹³ The FDMA commenced in February 1995.

13. In the mid-1990s the NSW and Australian Governments also enacted a number of broader innovative reforms to require the use of ADR to resolve civil disputes, including mediation.¹⁴ The private sector supported mediation as a support for farmers. In 1987 the National Farmers' Federation ("NFF") and the Australian Bankers' Association ("ABA") established the Farm Assessment Scheme and Mediation Service. Consultants provided assessment reports and options to farmers and creditors, with the costs of the assessment shared on terms agreed before the assessment began.¹⁵ In 1986 the Australian Government funded a Rural Counselling Program to support stressed farm families and strengthen advocacy on behalf of farmers.
14. In 2014 the advantages of using ADR mechanisms nationally were affirmed in the Productivity Commission's report on *Access to Justice Arrangements*.¹⁶ In 2016 the Australian Government's response to that report confirmed the Government's support for the model litigant obligation that the Australian Government and its agencies "always consider alternatives to litigation" and "consider the use of alternative dispute resolution processes where appropriate".¹⁷

Previous reviews of the FDMA

15. The operation of the FDMA has been reviewed several times, and it has been the subject of commissioned and other research reports.¹⁸ The first review in 1995–6 resulted in 28 of the 35 recommendations being implemented.¹⁹
16. In 2000, the *Review of the Farm Debt Mediation Act 1994: Final Report* discussed amongst other matters the imbalance of power between farmers and creditors under the FDMA. The terms of reference for the review required the NSW Government Review Group ("Review Group") to identify any issues of market failure, and their nature and extent. The Review made about 30 recommendations, many of which the

¹³ The Hon JP Hannaford, Credit (Rural Contracts Act): response to question without notice, Legislative Assembly Hansard, 24 November 1992.

¹⁴ Discussed in *Idoport Pty Ltd & Anor v National Australia Bank Ltd & 8 Ors; Idoport Pty Ltd & Market Holdings Pty Ltd v Donald Robert Argus; Idoport Pty Ltd "JMG" v National Australia Bank Ltd [21] [2001] NSWSC 427*. The *Courts Legislation (Mediation and Evaluation) Amendment Act 1994* (NSW) introduced court-annexed mediation into the *Supreme Court Act 1970* (NSW). Similar provisions were introduced in other courts legislation. The *Civil Procedure Act 2005* now provides for mediation in all civil proceedings in the Supreme, District and Local Courts and the Dust Diseases Tribunal. See also: Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System (ALRC Report 89)*, 2000. The Australian Government established the National Alternative Dispute Resolution Advisory Council (NADRAC) in 1995 to advise the federal Attorney-General about ADR processes and procedures including their regulation and evaluation. Brendan French, 'Dispute resolution in Australia – the movement from litigation to mediation' (2007) 18 *ADRJ* 213–221; A Ardagh and G Cumes, 'The legal profession post-ADR: from mediation to collaborative law' (2007) 18 *ADRJ* 205–212.

¹⁴ The Hon JP Hannaford, Credit (Rural Contracts Act): response to question without notice, Legislative Assembly Hansard, 24 November 1992.

¹⁵ Ginnivan, above n 8, 1–2.

¹⁶ Australian Government, Productivity Commission, [Access to Justice Arrangements: Inquiry Report](#), 2014, Chapter 8.

¹⁷ Australian Government, [Government response to the Productivity Commission's Report into Access to Justice Arrangements](#), 29 April 2016. See *Civil Dispute Resolution Act 2011 (Cth)* and the *Australian Government's obligation to act as a model litigant, Appendix B to the Legal Services Directions 2005*.

¹⁸ See for example: T Altobelli and K Francis, *Research into Farm Debt Mediation Act 1994 for the Rural Assistance Authority: Report*, Faculty of Law University of Western Sydney Macarthur, 1999.

¹⁹ The Hon RJ Clough, *Farm Debt Mediation Act Review Report 1996*, Report to the NSW Minister for Agriculture by the Farm Debt Mediation Review Committee, discussed in NSW Government Review Group, *Review of the Farm Debt Mediation Act 1994: Final Report*, 7 and Appendix 3.

RAA implemented administratively, with others implemented in the [Farm Debt Mediation Amendment Bill 2002](#). Later amendments included farmers' rights to initiate mediation, and for a mediating party's representative to have written authority to enter into a heads of agreement.

17. The FDMA was subject to internal audits in 1998, 2004, 2008 and 2014 that assessed, amongst other matters: resources, statutory compliance, internal procedures, mediator accreditations and re-accreditations, internal controls and risk management. Each audit found well documented procedures that correctly implemented the FDMA, sound record-keeping procedures and an effective system of internal controls. The recommendations of these audits concerning the separation of the functions of the NSW Rural Assistance Authority as an administrator of the FDMA and a loan provider; and the development of two minor policy guidelines to assist with the implementation of the FDMA's provisions were subsequently implemented.

Previous amendments

18. The FDMA has been amended ten times since its commencement; most recently in 2010.
- The Farm Debt Mediation Amendment Acts of 1996 and 1998 implemented the recommendations of the 1996 review. New definitions were included, a three-year term for section 11 certificates ("s 11 certificate")²⁰ was introduced, a 14-day cooling off period was introduced, and the FDMA provided that mediation sessions were private but that farmers were entitled to have advisors present to provide "advice and counsel".
 - The *Corporations (Consequential Amendments) Act 2001* (NSW) excluded from the operation of the Act externally administered corporations within the meaning of the *Corporations Act 2001* (Cth), and permitted corporations involved in FDM to be represented by an officer of the corporation.²¹
 - The *Justices Legislation Repeal and Amendment Act 2001* (NSW) provided that offences under the FDMA would be dealt summarily before the Local Court.²²
 - The *Farm Debt Mediation Amendment Act 2002* (NSW) implemented many of the 30 recommendations made by the 2000 Review Panel aimed at redressing concerns that farmers had relatively weak power under the FDMA. The Act introduced exemption certificates for farmers where creditors had declined requested mediation. The Act also introduced the current object provision and farmer-initiated mediation, and clarified the issue of authority to settle. Mediators, farmers and creditors were given the right of appeal to the then Administrative Decisions Tribunal of New South Wales ("ADT") in relation to certain decisions made by the RAA.²³

The 2002 Act introduced a requirement that a farmer had to be in default under the farm mortgage before creditors could issue a mediation notice; and it strengthened the neutrality and effectiveness of the provisions concerning accredited mediators. A fairer process for nominating mediators was introduced, and the role of mediators was clarified.

²⁰ These certificates provide the Act does not apply to a farm mortgage.

²¹ FDMA ss 5 and 17.

²² Justices Legislation Repeal and Amendment Act 2001 No 121 Schedule 2 cl 2.110, amending s 25 *Farm Debt Mediation Act 1994*.

²³ Farm Debt Mediation Amendment Act 2002 [Schedule 1](#), including decisions to issue a certificate under ss 9B and 11, and concerning the refuse or withdraw a mediator's accreditation.

- The *National Competition Policy Health and Other Amendments (Commonwealth Financial Penalties) Act 2004* (NSW) removed the requirement that a creditor must wait 12 months before enforcing its security if the RAA found that it had not attempted to mediate in good faith, and removed access to the then ADT for the review of certain RAA decisions.²⁴
- The *Farm Debt Mediation Amendment (Water Access Licences) Act 2005* (NSW) enabled the FDMA to apply to farm debts secured by an interest in a water access licence issued under the *Water Management Act 2000* (NSW).
- Amendments in 2005,²⁵ 2007²⁶ and 2010²⁷ were minor and technical.

Conduct of the review

19. This review is overseen by the Board of the NSW Rural Assistance Authority (“RAA Board”) and conducted within the RAA as a desktop study with consultation.
20. In November 2016 the RAA Board resolved that the review of the FDMA should focus on the opportunities and weaknesses in the current Act, and be consistent with the general level of satisfaction with how the FDMA has been operating. The Board asked that recent court decisions inform the review recommendations.
21. The Board approved the following stages for the review:
 - consideration of preliminary comments on the Act from RAA staff, interstate counterparts and farm debt mediators;
 - preparation and distribution of a Consultation Paper for comment by stakeholders and the broader community. The paper is accessible on the NSW Government’s [“Have your Say” website](#) and the [RAA’s website](#);
 - analysis of feedback;
 - further consultation with selected stakeholders;
 - preparation of final report;
 - recommendations to government; and
 - parliamentary processes.

Structure

22. This paper invites feedback on issues that the RAA is aware may need to be reviewed. These have arisen through the implementation of the legislation, judicial decisions, or have been identified by stakeholders.
23. The paper proceeds in a sequential fashion through the legislation, identifying issues under the four Parts of the Act that have been raised with the RAA, or which the RAA considers may need to be amended to improve the FDMA’s effectiveness.

²⁴ *National Competition Policy Health and Other Amendments (Commonwealth Financial Penalties) Act 2004*. See also discussion in *Hurworth Nominees Pty Limited v ANZ Banking Group Limited* [2006] NSWSC 1278.

²⁵ *Statute Law (Miscellaneous Provisions) Act (No 2) 2005* (NSW).

²⁶ *Miscellaneous Acts (Local Court) Amendment Act 2007* (NSW).

²⁷ *Credit (Commonwealth Powers) Act 2010* (NSW).

How the FDMA operates in summary

24. As noted above, the purpose of the FDMA is to prevent a creditor from enforcing a farm mortgage until the farmer in debt has been advised in writing,²⁸ on an RAA-approved form, of the availability of mediation under the Act, and has been given 21 days to advise whether they wish to participate in mediation.²⁹ The farmer may agree or decline to participate. If the farmer agrees, the creditor must notify the RAA that mediation is required and a mediation kit will be issued to both parties. Once mediation has been requested by a farmer, a creditor cannot take enforcement action until the RAA has issued a s 11 certificate to the applicant creditor.³⁰
25. Farmers may also initiate mediation whether or not they are in default on a debt, and invite their creditor to participate in mediation.³¹ If the creditor agrees to mediate, the farmer may notify the RAA and mediation kits will be issued to the parties. If the creditor declines to mediate either after it has invited a mortgagor to mediate, or in response to an invitation from a farmer and the farmer is in default on a debt, and other statutory requirements have been satisfied, an exemption certificate may be issued preventing enforcement action for 6 months or until mediation begins, whichever occurs first.³² The effect of a farmer agreeing to, or requesting mediation is that enforcement action is postponed to allow for that mediation to occur³³ provided the statutory timeframes are complied with.
26. Creditors are at liberty to take enforcement action on farm debts if the FDMA does not apply. The RAA can issue a s 11 certificate attesting that the Act does not apply in the circumstances. The RAA must, at a creditor's request, issue a certificate that the FDMA does not apply to a farm mortgage³⁴ if the RAA is satisfied that:
- satisfactory mediation in respect of the farm debt has taken place, or
 - the farmer has declined to mediate in respect of farm debt, or
 - a 3 month period (or longer if agreed by the creditor) has elapsed after a notice was given by the creditor under s 8 and the creditor has throughout that period attempted to mediate in good faith.
27. Creditors can enforce securities after s 11 certificates have been issued.³⁵
28. The FDMA is not intended to affect the operation of any other Act or law dealing with matters such as the granting of relief in respect of harsh, oppressive, unconscionable or unjust contracts, or on the grounds of hardship.³⁶

²⁸ "writing" is defined in the *Interpretation Act 1987* (Qld) s 21(1) as including "printing, photography, photocopying, lithography, typewriting and any other mode of representing or reproducing words in visible form" which is sufficiently broad to cover electronic communications. "Document" is defined to mean any record of information, including various types of document that are also sufficiently broad to include e-documents.

²⁹ FDMA ss 8, 23, 24. See *First Mortgage Managed Investments Ltd v Skyfarm Holdings Pty Ltd* [2010] NSWSC 58 [19]–[21].

³⁰ *Myross (NSW) Pty Limited v Kahlefeldt Securities Pty Limited* [2003] NSWSC 138 [22] and *Cassegrain v Commonwealth Development Bank of Australia Ltd* [2003] NSWCA 260, [28] cited in *National Australia Bank Limited v Landy Chen-Conway & Anor* [2008] NSWSC 448, a case that held that service of the certificate on the farmer is not a precondition for its validity at [47].

³¹ FDMA s 9(1A).

³² FDMA s 9A and s 9B.

³³ FDMA s 10.

³⁴ FDMA s 11.

³⁵ *Rural Bank Limited v Merriba Pty Limited & Ors* [2012] NSWSC 498; *National Australia Bank Ltd v Kamboj* [2014] NSWSC 865.

³⁶ Such as the *Contracts Review Act 1980* (NSW) and the *Banking Act 1959* (Cth): s 7.

29. Some decisions made under the FDMA are subject to judicial review subject to restrictions on admissible evidence under the Act's confidentiality provisions.³⁷ Decisions under the FDMA are not subject to administrative review,³⁸ but complaints may be made to the New South Wales Ombudsman and other accountability mechanisms.³⁹ The evidential constraints with reviewing mediated outcomes is discussed below, as is mediators' immunity.

Statistics: farm debt and decisions under the FDMA

30. The value of NSW's primary industries sector reached a record \$13.9 billion in 2016.⁴⁰ Beef and wheat had the highest gross values of production, while beef, cotton and wool were the highest-value export products. The NSW pulse industry, led by chickpeas, surged 91% in value to \$348 million. Average farm cash incomes and farm profits are estimated to have increased in all regions in New South Wales in 2015–16. This upturn was driven by increased receipts from beef cattle, crops, lambs and wool resulting from increased prices and higher crop production following improved seasonal conditions (refer to [table below](#)). Dairy farms were less profitable, but equity levels across all farms were relatively stable.
31. There is little reliable data available about the current level of farm debt in NSW⁴¹ or other states. Farm survey data suggests that farm debt in NSW has been trending upwards in recent years, but not steeply.
32. Relatively low farm cash incomes were recorded in the Far West and the North West Slopes and Plains in 2014–15, with most farms subject to dry seasonal conditions (refer to [ABARES Australian broadacre zones and regions](#) map below).⁴²

Table 1

33. Table 1 below shows the level of farm debt in various farm types surveyed during the period 2012–16.⁴³

Farm type	2013–14	2014–15 (preliminary estimate)	2015–16 (provisional estimate)
Broadacre	\$456,040	\$474,400	\$504,000
Dairy	\$807,920	\$890,500	\$947,000

Table 2

34. Table 2 below provides cumulative statistics concerning the operation of the FDMA between its commencement on 12 February 1995 and 30 December 2016.

³⁷ *Hurworth Nominees Pty Limited v ANZ Banking Group Limited* [2006] NSWSC 1278; *Waller v Hargraves Secured Investments Ltd* [2012] HCA 4; (2012) 245 CLR 311; *Heywood v Sharpe (No 2)* [2015] FCCA 355.

³⁸ The former s 29A(1) of the Act that provided access to the then administrative review was inserted in 2002 and repealed in 2004 (Act No 82 2002, Sch 1 [33] and Act No 52 2004, Sch 5 [2]).

³⁹ Such as the [Independent Commission Against Corruption](#), members of parliament, the media etc.

⁴⁰ NSW Department of Primary Industries, [NSW Primary Industries, Performance Data and Insights 2016 – Primed for Growth](#), 2016.

⁴¹ Rural Debt and Drought Taskforce Chairman's Report, *Addressing Debt and Drought Problems In Rural Queensland*, April 2016, viii. See Reserve Bank statistics: <www.rba.gov.au/statistics/tables/xls/d09hist.xls>.

⁴² Australian Government, Department of Agriculture and Water Resources, Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES), [About my Region](#), 2016.

⁴³ *ibid.*

Mediation kits issued by the RAA to farmers and creditors	<u>2947</u>
Section 11 certificates issued:	
s 11(1)(c)(i) Satisfactory mediation in respect of the farm debt concerned has taken place.	1659
s 11(1)(c)(iii) 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).	131
s 11(2) (a) The farmer has failed to take part in mediation in good faith or has unreasonably delayed entering into or proceeding with mediation.	82
s 11 (2) (b) The farmer has indicated in writing to the RAA or to the creditor that the farmer does not wish to enter into or proceed with mediation in respect to the debt concerned.	458
s 11 (2) (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.	194
TOTAL	<u>2522</u>

35. According to RAA statistics, the mediating parties reached agreement in 1487 mediations, and failed to reach agreements in only 172 of the 1659 “satisfactory mediations”. This represents an agreement rate of 90%. Under the FDMA a satisfactory mediation occurs when a farm debt dispute has been resolved; a mediation has proceeded as far as it reasonably can in an attempt to achieve a resolution of a farm debt dispute but has nevertheless failed to resolve the dispute; or a mediation that is specified or of a class described in regulations made for the purposes of this subsection to be a satisfactory mediation has occurred.⁴⁴
36. The RAA, in order to satisfy itself that a “satisfactory mediation” has occurred, considers the summary of mediation provided by the mediator, whether the current creditors participated in the FDM and that the mediator was appropriately qualified.⁴⁵

⁴⁴ See FDMA s 4(1A). As at December 2016 no regulations had been made under the Act.

⁴⁵ *Kirkham Estate Wines Pty Ltd v General Manager, New South Wales Rural Assistance Authority & Anor* [2004] NSWADTAP 24 having been noted.

Consultation issues

Part 1 of the FDMA: Preliminary

Definitions

37. Comments are invited on several definitions in the FDMA that may not be as linear, clear or broad as some stakeholders may wish.⁴⁶
38. The FDMA applies to "farm 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](#)".
39. "Farming operation" includes dairy [farming](#), poultry [farming](#) and bee [farming](#), pastoral, horticultural or grazing operations, or any other operation prescribed by the regulations. "Farm mortgage" includes any interest in, or power over, any [farm property](#) securing obligations of the [farmer](#) whether as a debtor or guarantor, including any interest in, or power arising from, a [hire purchase agreement](#) relating to [farm machinery](#), but does not include (a) any stock mortgage or any crop or wool lien, or (b) the interest of the lessor of any [farm machinery](#) that is leased. "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 if the goods are acquired for the purposes of a [farming operation](#).⁴⁷ "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](#), or (c) an access licence (within the meaning of the [Water Management Act 2000](#)) held by a [farmer](#) in connection with a [farming operation](#).

"Farmer"

40. In the FDMA "[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.⁴⁸ A court has suggested that whether a person is "solely or principally" engaged in a farming operation is not resolved by a mathematical calculation of the percentage of time spent on farming but involves a question whether "in all the circumstances is farming that person's principal activity".⁴⁹ A farmer can earn income from off-farm employment for farm-related investment purposes and still be a farmer under the FDMA.⁵⁰ The definition of "farming operation" and the case-law under it is also relevant, discussed below.
41. Guarantors who are not farmers and farm debtors do not currently have express rights to notice that a creditor has requested an FDMA mediation or s 11 certificate, or that a farmer has requested a mediation or exemption certificate. Depending on the circumstances, guarantors may not fall within the definition of "farmer" under the Act, although in practice they often do. Guarantors have interests in secured property and fall within the definition of "farm mortgage" because their interest secures the debtors'

⁴⁶ B. Kennedy, "Debt and distress", *Law Institute Journal Flipbook*, [December 2016](#), 30; *Lawloan Mortgages Pty Ltd v Young* [2008] NSWSC 1180 [42].

⁴⁷ No regulations have been made to date under the Act.

⁴⁸ And pluralities of individual and corporate structures: *Interpretation Act 1987* (NSW) s 8(b). The definitions for farmer and farming operation are the same as in the *Rural Assistance Act 1989* (NSW).

⁴⁹ *Roxo v Normandie Farm (Dairy) Pty Ltd* [2012] NSWSC 765 [30] applying the approach taken in *Varga v Commonwealth Bank of Australia* [1996] NSWSC 86.

⁵⁰ *Liberty Funding Pty Ltd v Jovan Ivosevich* [2002] NSWSC 140 (income from an off farm spray painting business supplemented an on-farm market garden and retail nursery found to be a horticultural operation).

obligations.⁵¹ Section 4(1) of the FDMA defines "farm mortgage" as including "any interest in, or power over, any farm property securing obligations of the farmer whether as a debtor or guarantor". As guarantors' interests can be affected by the mediation, feedback is invited on whether non-farmer guarantors ought to be provided with notice of an FDMA mediation and to participate in the mediation.

Consultation question

42. Should non-farmer guarantors be provided with notice of an FDMA mediation and be invited to participate in the mediation because they have interests in the affected farm mortgage?

43. The FDMA does not apply to a farmer whose property is subject to a bankruptcy petition or is being managed under the *Bankruptcy Act 1966* (Cth),⁵² or who is an externally administered corporation within the meaning of the *Corporations Act 2001* (Cth).⁵³ A corporate farmer that has been de-registered is also not a "farmer".⁵⁴
44. The FDMA definitions of "farmer" and "farming operation" are sufficiently broad to cover the main types of farm business structures in Australia, the most common of which are sole-traders and partnerships. A minority of farms have more complex corporate structures.⁵⁵ Collaborative farms and joint ventures are still relatively uncommon.⁵⁶
45. If debtors and creditors cannot agree whether the FDMA applies in their circumstances, the onus is on the farmer claiming the protection of the FDMA to establish that the Act applies.⁵⁷ The farmer whose property is secured by a farm mortgage must be engaged in a farming operation when questions about the application of the FDMA arise, and the farm debt must have been created for farming purposes, even if at the time the mortgage was created the borrower was not a farmer. As the nature of farming operations can change, both present and past circumstances are examined.⁵⁸ An oft-quoted approach is:

*a person who is today a farmer and whose farm property stands today as security for a debt will be protected if the purpose of the original incurring of the debt was a relevant farming purpose (and whether or not the person was then a farmer), but not if the original incurring was for some non-farming purpose; while, if the original incurring was for a relevant farming purpose but either the person by whom the debt is owed is not today a farmer or the security property is not today a farming property, the protection will not be attracted.*⁵⁹

⁵¹ *Waller v Hargraves Secured Investments Ltd* [2010] NSWCA 300 [110].

⁵² *Hargraves Secured Investments Limited v Michael Slaven as Trustee of Bankrupt Estate of Roslyn Edwina Waller* [2013] NSWSC 673; *Secure Funding Pty Limited v Coughlin* [2009] NSWSC 384; *Sharpe v W.H. Bailey & Sons (No 3)* [2013] NSWSC 1887.

⁵³ *In the matter of Maria's Farm Veggies Pty Ltd (admins apptd)* [2016] NSWSC 1770.

⁵⁴ *NAB re Trim Perfect Australia Pty Ltd* [2005] NSWSC 972.

⁵⁵ See for example *In the matter of Maria's Farm Veggies Pty Ltd (admins apptd)* [2016] NSWSC 1770.

⁵⁶ Business types include sole ownership/sole trader, partnership, joint venture, unit trust, discretionary trust, company: Crowe Horwath (Aust) Pty Ltd, [Business structures for a successful farm](#), GRDC 2014; R Heath, A Tomlinson, *A Review of Farm Funding Models and Business Structures in Australia*, Australian Farm Institute, 2016.

⁵⁷ *Secure Funding Pty Ltd v Bee* [2016] NSWSC 521; *Commonwealth Bank of Australia v Bird* [2011] NSWSC 586 at [16].

⁵⁸ *Constantinidis v Equititrust Ltd* [2010] NSWSC 299 at [13]–[14], per Barrett J; *Australian Cherry Exports Ltd v Commonwealth Bank of Australia* (1996) 39 NSWLR 337 and *Varga v Commonwealth Bank of Australia* [1996] NSWSC 86; (1996) 7 BPR 15,052.

⁵⁹ *Constantinidis v Equititrust* [2010] NSWSC 299 [14], *Bendigo & Adelaide Bank Ltd v McMahon* [2013] NSWSC 628 [13].

46. The purpose of the FDMA is that “farmers” who own farm land are protected by the Act’s procedures that provide a buffer against enforcement action. The FDMA is not intended to apply to farm employees and independent contractors who provide services that support production activities. These might include for example contractors providing aerial seeding, crop harvesting, fertiliser spreading, livestock dipping or wool classing.⁶⁰

“Farm machinery”

47. “Farm machinery” is defined in the FDMA as (a) a harvester, binder, tractor, plough or other agricultural implement, or (b) any other goods of class commonly used for the purposes of a farming operation that are prescribed by the regulations as being farm machinery for the purposes of the FDMA, if the goods are acquired for the purposes of a farming operation.”

48. In 2012 the Federal Court held that a quad bike is not a tractor for the purposes of the FDMA because while there is “a very significant overlap between all of the functions which may be performed by a small tractor and some of the functions which may be performed by a quad bike ... the converse is not true.”⁶¹

49. Stakeholders may prefer that some common types of machinery used on farms, such as vehicles including motorbikes, utilities, trucks and other vehicles are included in the definition of farm machinery by regulation, or excluded because they are commonly used by a wide range of stakeholders and to include them in FDM might be regarded as inequitable. The *Farm Business Debt Mediation Act 2016* (Qld) (“QFBDMA”)⁶² refers to “a vehicle, machine, tool or other thing that is usually used to carry on a farming business. Examples – tractor, milking machine, harvester, beehive.”⁶³

Consultation question

50. Should regulations be made under the FDMA to exclude from the definition of “farm machinery” certain types of machinery that are commonly used on farms such as motorbike, quadbike, car, utility, truck and other vehicles?
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“Farming operation”

51. “Farming operation” is defined in the FDMA as:

(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.*⁶⁴

⁶⁰ Class 0529 Other Agriculture and Fishing Support Services in the Australian Bureau of Statistics, 1292.0 – Australian and New Zealand Standard Industrial Classification (ANZSIC), 2006 (Revision 2.0), 2013.

⁶¹ *Waller v Yamaha Motor Finance Australia Pty Ltd* [2012] FCA 934 [6].

⁶² The [Farm Business Debt Mediation Bill 2016](#) was passed by the Legislative Assembly on 21 March 2017 with government and opposition amendments. See: Queensland Parliament, Finance and Administration Committee, Farm Business Debt Mediation Bill 2016 and Rural and Regional Adjustment (Development Assistance) Amendment Bill 2016, *Report No 34*, 55th Parliament, November 2016; Queensland Parliament, Finance and Administration Committee: Report No. 34, 55th Parliament – Farm Business Debt Mediation Bill 2016 and Rural and Regional Adjustment (Development Assistance) Amendment Bill 2016, Government Response; Queensland Parliament, Record of Proceedings (Proof), First session of the 55th Parliament, 21 March 2017.

⁶³ FDMA Schedule 1 (Dictionary).

⁶⁴ FDMA s 4(1).

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52. In 2014–15 in New South Wales about 80.92% of land was agricultural land, with grazing the most common land use. About 42% of NSW’s agricultural production was generated from cattle and calves (\$2.3 billion), wheat (\$2 billion) and wool (\$0.9 billion). In 2014–15, the gross value of agricultural production in NSW was \$12.1 billion, which was 23% of the total gross value of agricultural production in Australia (\$53.6 billion).⁶⁵ As noted above, in 2016 NSW’s primary industries sector reached a new record value of \$13.9 billion.⁶⁶
53. Courts have taken a traditional view as to what agricultural activities are “farming operations” and have focused on horticultural activities in several decisions.⁶⁷ The FDMA has been interpreted as *excluding* forestry (logging) operations,⁶⁸ commercial fish farming,⁶⁹ informal acquiescence in cattle agistment in the absence of other farming activities,⁷⁰ and a “holiday ranch” tourism business offering a function centre, accommodation, and recreational farming activities including horse riding.⁷¹ The FDMA was found not to apply where a debt was incurred for the purpose of acquiring and conducting a substantial cellar door, restaurant and wine sale operation and a small vineyard.⁷²
54. A farming operation under the FDMA need not be profitable and its activities may involve building up a farming operation.⁷³ Prima facie, a two-hectare property where a farmer lives and from which administrative and ancillary aspects of farming operations are conducted might be shown to be a “farm” subject to a “farm mortgage”.⁷⁴ In *Gill v General Manager, NSW Rural Assistance Authority & Anor* a loan taken out by hobby farmers to purchase a fruit and vegetable business elsewhere was held to fall outside the FDMA as only 40% of the loan was used for farm purposes.⁷⁵
55. A small and unprofitable peripatetic bee farming operation may be within the FDMA. Wilson J in *Secure Funding Pty Ltd v Bee* noted:

*The Act does not require any particular level of economic activity, or profitability of a farming activity before it is a farming operation within the meaning of the legislation. Nor does it require that all aspects of the farming operation must be conducted exclusively on the farm property.*⁷⁶

Comparative definitions

56. What constitutes a farming operation varies across state FDM legislation as interpreted by the courts.

⁶⁵ See section “Value of Agricultural Production” in Australian Government, Department of Agriculture and Water Resources, Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES), [About my Region](#), 2016.

⁶⁶ NSW Department of Primary Industries, above n 40, 2016.

⁶⁷ *Craigie v Champion Mortgage Services Pty Ltd* [2007] NSWCA 15 [6]; *Champion Mortgage Services Pty Limited v Charles Menzies Craigie and Anor* [2006] NSWSC 869.

⁶⁸ *Miles v Ficuga Pty Ltd* (1996) ACSR 156.

⁶⁹ *Champion Mortgage Services Pty Limited v Charles Menzies Craigie and Anor* [2006] NSWSC 869.

⁷⁰ *Lawloan Mortgages Pty Ltd v Young* [2008] NSWSC 1180 [48]–[50].

⁷¹ *Lawloan Mortgages Pty Ltd v Hancock & Ors* [2001] NSWSC 607.

⁷² *In the matter of Sundara Pty Limited & Ors* [2015] NSWSC 1694 [107].

⁷³ *Roxo v Normandie Farm (Dairy) Pty Limited* [2012] NSWSC 765. A photo of a few cattle on a property is insufficient evidence of a farming operation. Evidence of farming income and expenditure is preferred: *Commonwealth Bank of Australia v Bird* [2011] NSWSC 586.

⁷⁴ *Bendigo & Adelaide Bank Ltd v McMahon* [2013] NSWSC 628.

⁷⁵ [2004] NSWADT 114.

⁷⁶ *Secure Funding Pty Ltd v Bee* [2016] NSWSC 521 [56]; *Constantinidis v Equititrust Ltd* [2010] NSWSC 299 at [13]–[14], per Barrett J; *Australian Cherry Exports Ltd v Commonwealth Bank of Australia* (1996) 39 NSWLR 337 and *Varga v Commonwealth Bank of Australia* [1996] NSWSC 86; (1996) 7 BPR 15,052.

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57. The NSW and Victorian FDM farming business/operation definitions are similar in scope. NSW refers to farming (including dairy, poultry and bee farming), pastoral, horticultural and grazing operations. Victoria refers to agricultural, pastoral, horticultural and apicultural activities, poultry and dairy farming and any business that includes cultivation of soils, gathering of crops or rearing of livestock.
58. The South Australian *Farming Industry Dispute Resolution Code 2013* has the simplest and broadest scope because it applies to many farm business disputes and not just those about farm debt, involving:
- persons engaged in the business of primary production,
 - businesses having a connection with primary production businesses, and
 - businesses involving the supply of goods or services to persons engaged if the supply occurs in connection with the business of primary production.
- A private member's Farm Debt Mediation Bill 2015 was refused a second reading debate in November 2016 because statutory FDM was already available, but underutilised.⁷⁷
59. FDM legislation in Victoria, NSW and as proposed in Queensland, does not apply to suppliers, or businesses with a connection to primary production, but these types of businesses may be able to access these jurisdictions' small business ADR schemes.⁷⁸
60. The South Australian Code also applies to forestry and the harvesting of fish or other aquatic organisms, in addition to the types of farming businesses referred to in NSW and Victorian legislation.
61. The definition of "farming business" in the QFBDMA includes land-based aquacultural and viticultural businesses and tree harvesting. The QRAA relies on the definition for "primary producer" in the Primary Industry Productivity Enhancement Scheme (PIPES) guidelines for determining who is a farmer.⁷⁹
62. Stock mortgages, crop and wool liens and lessors' interests in leased farm machinery are excluded under the NSW and Victorian Acts.⁸⁰
63. Farm debt mediation legislation in NSW, Victoria and Queensland permits the definition of "farming operation" to be expanded in regulations. This provides an opportunity for a relatively simple harmonisation in those jurisdictions if a clearer definition can be agreed.
64. The Australian and New Zealand Standard Industrial Classification⁸¹ usefully distinguishes between production, and support services to production.
- "production" includes agriculture, forestry and fishing; "growing crops, raising animals, growing and harvesting timber, and harvesting fish and other animals from farms or their natural habitats". Production activities are horticulture, livestock production and aquaculture, forestry and logging, and fishing, hunting and trapping. "Agriculture" refers to both the growing and cultivation of horticultural and other crops (excluding forestry), and the controlled breeding, raising or farming of animals (excluding aquaculture). Aquaculture activities include the controlled breeding, raising or farming of fish, molluscs and

⁷⁷ The [Farm Debt Mediation Bill 2015](#) introduced by the Hon David Ridgway MLC, Shadow Minister for Primary Industries, Regional Development, and Tourism, [was refused a 2nd reading](#) in the House of Assembly on 17 November 2016. On 7 July 2016 the South Australian Minister for Small Business, the Hon MLJ Hamilton-Smith, explained to the House why the Government would not support the Bill. See: Parliament of South Australia, House of Assembly Hansard, 7 July 2016, 6366.

⁷⁸ E.g. [Small Business Business Commissioner Act 2013](#) (NSW).

⁷⁹ For Scheme purposes loans may be made to wild catch commercial fishers.

⁸⁰ FDMA [s 4\(1\)](#) and *Farm Debt Mediation Act 2011* (Vic) [s 3](#) definitions of "farm mortgage".

⁸¹ Australian Bureau of Statistics, [1292.0 – Australian and New Zealand Standard Industrial Classification \(ANZSIC\), 2006 \(Revision 2.0\), 2013](#).

crustaceans. Forestry and logging activities include growing, maintaining and harvesting forests, as well as gathering forest products. Fishing, hunting and trapping include gathering or catching marine life such as fish or shellfish, or other animals, from their uncontrolled natural environments in water or on land;

- “support services” are diverse, including for example: cotton ginning, shearing services, aerial crop spraying, fruit or vegetable picking, livestock dipping, seed grading or cleaning and wool classing.

65. The application of the FDMA would be clearer and more equitable across the farming sector if there was an agreed definition of “primary producer” and “primary production operation” that is straightforward to administer. The RAA administers natural disaster relief and recovery arrangements on behalf of the Australian and New South Wales Governments.⁸² “Eligible primary production enterprises” under these arrangements can be primary producers that are individuals, partnerships, trusts or companies (but not publicly listed companies) if they are operating commercially. Primary producers are defined as those that are listed under Australian New Zealand Standard Industrial Classification 2006 (ANZSIC) 1292.0 Codes 01 (Agriculture), 02 (Aquaculture), 03 (Forestry and Logging), and 04 (Fishing, Hunting and Trapping). If this classification were adopted, fishing, hunting and trapping could be excluded.

66. The Natural Disaster Relief and Recovery Grants program that the RAA administers on behalf of the Australian Government and New South Wales includes mandatory eligibility criteria that applicants need to meet to establish that they are an “eligible primary production enterprise”. Eligibility criteria include that the applicant:

- has a right or interest in the land used for the purpose of primary production;
- has a primary production enterprise in specified locations;
- contributes a significant part of their labour and capital to the primary production enterprise;
- under normal circumstances, derives more than 50 per cent of their total gross income from the primary production enterprise;
- was conducting business in the specified area prior to the specified event; and
- is registered with the Australian Taxation Office as a primary producer, and has an Australian Business Number (ABN). If the business has applied to the Australian Taxation Office, but not yet received the ABN, then they may be considered eligible.⁸³

67. The RAA does not consider it necessary that the element that “under normal circumstances” the farmer “derives more than 50 per cent of their total gross income from the primary production enterprise” warrants inclusion in the FDMA because often when farmers are under financial pressure they seek to increase their off-farm income to alleviate that stress. To require farmers to provide evidence to establish the income

⁸² See for example: NSW Government, Rural Assistance Authority, *Natural Disaster Relief Assistance Recovery Grants for Primary Producers August 2016 Inland Floods Scheme Information and Guidelines* [www.raa.nsw.gov.au/ data/assets/pdf file/0010/691381/Scheme-Information-and-Guidelines.pdf](http://www.raa.nsw.gov.au/data/assets/pdf_file/0010/691381/Scheme-Information-and-Guidelines.pdf), 1–2 for eligibility criteria.

⁸³ NSW Government, Rural Assistance Authority, *Natural Disaster Relief Assistance Recovery Grants for Primary Producers August 2016 Inland Floods Scheme Information and Guidelines* www.raa.nsw.gov.au/ data/assets/pdf file/0010/691381/Scheme-Information-and-Guidelines.pdf, 1–2.

benchmark is likely to be administratively burdensome and create unnecessary red-tape.

68. Feedback is invited on how best to define eligible primary production enterprises and primary producers in the FDMA, or in regulations under the FDMA, or in guidelines.

Consultation questions

69. Should the FDMA definition of “farm” or “primary production enterprise” extend the protection of the Act to a broader range of farmers using the ANZSIC code, but exclude wild-harvest such as fishing, hunting and trapping?
70. Should the FDMA, regulations or guidelines require a farmer or creditor to establish that the Act applies to a “farmer” or “primary producer” because they are “solely or principally engaged in primary production”?
71. Should the FDMA be amended to enable the RAA to require farmers and creditors to provide information to the RAA and/or the other party to establish that applicable definitions in the Act have been met?

“Farming operation” in more than one jurisdiction

72. The FDMA does not state expressly that its operation is confined to NSW but this is assumed in the absence of countervailing considerations.⁸⁴ It applies to enforcement action commenced in NSW and it may apply where a security instrument nominates the law of NSW as the proper law of the contract if farm machinery is located in another jurisdiction, depending on the facts of a dispute, and courts’ interpretation of the FDMA.
73. Where a creditor or farmer has secured property in another jurisdiction other than NSW and they wish to mediate or the security has become enforceable, applications should be made in each jurisdiction. This situation arises only occasionally, because South Australia and Victoria are currently the only other jurisdictions with statutory FDM, with Queensland likely to follow in 2017.
74. The *Farm Debt Mediation Act 2011* (Vic) provides that a creditor can apply for a Victorian exemption certificate on the basis that satisfactory mediation has taken place in respect of the farm debt under another scheme,⁸⁵ and the QFDMA has an equivalent provision.⁸⁶ If FDM schemes were harmonised nationally, extra-territorial provisions could codify and simplify procedures⁸⁷ and inter-state mediations could be recognised in each jurisdiction.

Consultation question

75. Should the FDMA be amended to clarify its operation where a farming operation is conducted in more than one jurisdiction and the FDMA applies?

“Default”

76. The FDMA defines "default" in relation to a [farm mortgage](#) as failure to perform an

⁸⁴ *Interpretation Act 1987* (NSW) s 5(2), 12.

⁸⁵ *Farm Debt Mediation Act 2011* (Vic) s 15(1)(c).

⁸⁶ QFDMA s 49(1)(d).

⁸⁷ The *Competition and Consumer Act 2010* (Cth) provides for the extra-territorial operation of the Act that applies in State and Territory parties to the scheme: [s 44AD](#), e.g. Division 2 and s 5A *Fair Trading Act 1987* (NSW).

obligation that is a ground for [enforcement action](#)⁸⁸ under the mortgage. A statutory note provides examples, including failure to pay amounts of the principal, interest or other money owing; failure to maintain insurance over the mortgaged property, and failure to submit financial statements required by the creditor.⁸⁹

77. In 2016 the Queensland Finance and Administration Committee heard evidence from a number of submitters and witnesses that creditors sometimes take enforcement action where there is no default on the part of the farmer but the loan to value ratio of the mortgaged property has changed. The Committee recommended that the definition of “default” in the Queensland bill, which is substantially the same as the NSW definition, be amended to provide that a creditor must offer mediation to a farmer under the scheme where the creditor seeks to commence enforcement action because the loan to value ratio is altered.⁹⁰ The RAA considers that if changes in the loan to value ratio of a mortgage constitutes ground for enforcement action under the mortgage, having an opportunity to mediate would already be required under the FDMA.

"Enforcement action"

78. The FDMA is intended to protect farmers from enforcement action unless mediation has been offered. This does not prevent negotiations between farmers and their mortgagees about debt restructuring or refinancing prior to the service of a Form 1 s 8 notice notifying a mortgagee’s intention to take enforcement action. For example, a bank may offer to renew finance or provide new finance conditional on a farmer agreeing to sell specific assets. Farmers would be wise to seek legal advice in such circumstances to ensure that the mortgagee is not seeking to avoid the application of the FDMA.

79. Enforcement action in the FDMA includes the issuance of a writ of possession resulting in delivery by the Sheriff of physical possession of a farm or farm machinery, and the appointment, either by the court or by a creditor, of a receiver and manager to take possession of and manage a farming enterprise, or the appointment of a receiver to receive proceeds coming due from the sale of produce to the farming enterprise.⁹¹

80. Action by a secured creditor to wind up a corporate farmer mortgagor has been held not to be an “*action to enforce a farm mortgage*” within the definition of “*enforcement action*” because the action is not dependent upon the existence of the mortgage.⁹² A creditor’s application to have a company reinstated so that they could more easily enforce their security was also not “enforcement action” for the same reason.⁹³ The appointment of an administrator under the *Corporations Act 2001* (Cth) is also not enforcement action and the exclusion in s 5(2)(c) of the FDMA applies, or can be construed to apply.⁹⁴

⁸⁸ Defined as taking possession of property under a farm 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 before the Act commenced.

⁸⁹ FDMA s 4(1).

⁹⁰ Queensland Parliament, Finance and Administration Committee, above n 62, 26–27 and [5.7] and rec 9.

⁹¹ *Constantinidis v Equititrust Ltd* [2010] NSWSC 299; *Westpac Banking Corporation v Hodgson Pastoral Co. (Torry Plains)* and Ors [1996] NSWSC 11.

⁹² *Commonwealth Bank of Australia v Trelis Holdings* (1996) 19 ACSR 319, *Australian Cherry Exports Ltd v Commonwealth Bank of Australia* (1996) 39 NSWLR 337.

⁹³ *NAB re Trim Perfect Australia Pty Ltd* [2005] NSWSC 972.

⁹⁴ *In the matter of Maria’s Farm Veggies Pty Ltd (admins apptd)* [2016] NSWSC 1770.

“Farm debt” and application of the Act

81. A “farm debt” in the FDMA 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.”⁹⁵ “Purposes” in this definition includes “a debt incurred for the purpose of acquiring the land or an interest in the land on which the farming operation is conducted”.⁹⁶
82. A farm mortgage may secure debts other than a farm debt, but for the FDMA to apply, there must be a farm debt secured by a farm mortgage.⁹⁷ The NSW Supreme Court has held that provided all farm debts have been the subject of a mediation, an FDMA s 11 certificate will not be invalidated because other non-farm debts were also negotiated during the mediation.⁹⁸
83. Some farm debts may be secured primarily or solely by a guarantor who is a farmer. The FDMA does not currently exclude farmers whose farm mortgage is primarily or solely secured by a guarantor who is subject to a bankruptcy petition or who is being managed under the *Bankruptcy Act 1966* (Cth). To extend the exclusion of the FDMA in such circumstances may be consistent with its object and other provisions that ensure the FDMA does not intrude into matters of federal law.

Consultation question

84. Should FDMA s 5(2) be amended so that the Act does not apply to farmers whose farm mortgage is secured by a guarantor if the guarantor is subject to a bankruptcy petition or who is being managed under the *Bankruptcy Act 1966* (Cth)?

Procedural fairness and s 11 certificates

85. The RAA respects its obligations under administrative law when considering creditors’ application for FDMA s 11 certificates and farmers’ applications for s 9B exemption certificates. The RAA affords procedural fairness to the farmer and creditor by providing an opportunity to comment on representations made; takes into account relevant considerations; does not take into account irrelevant considerations; does not act unreasonably, and does not make decisions which have no evidence to support them.
86. When the RAA’s FDM Unit receives an application from a creditor for a s 11 certificate it writes to the farmer notifying them of the application; their right to make a submission in response to the allegations made by the creditor within 28 days; provides a copy of the mediator’s summary of the mediation if mediation occurred; the date by which the submission needs to be received in the RAA, and the date the decision will be made; the subject matter of the decision (the issue of the certificate that the FDMA does not apply to the farm mortgage) and the potential consequences for the farmer of the issuance of the certificate, such as that a creditor may proceed to take enforcement action in respect of the farm mortgage.
87. The same steps are taken to provide creditors with an opportunity to comment when farmers apply for s 9B exemption certificates that stay enforcement actions for six months. The RAA ensures that the farmer receives the notification and a copy of the served documents is provided to the creditor and vice versa. These steps that accord procedural fairness are non-statutory, and flexibility in timeframes has assisted the

⁹⁵ The QFBDMB uses the term “farm business debt”.

⁹⁶ *Varga v Commonwealth Bank of Australia* [1996] NSWSC 86; *Roxo v Normandie Farm (Dairy) Pty Ltd* [2012] NSWSC 765 [28].

⁹⁷ *Waller v Hargraves Secured Investments Limited* [2012] HCA 4.

⁹⁸ *Rural Bank Limited v Merriba Pty Limited & Ors* [2012] NSWSC 498 [30].

RAA to ensure that it has the necessary information upon which to base its decision to issue or not issue each type of certificate, provided the parties respond cooperatively. After a decision has been made the party adversely affected is notified and both parties are provided with a copy of the certificate issued.

88. The Victorian Small Business Commissioner undertakes similar procedural fairness steps when considering applications for Victorian Exemption Certificates and Prohibition Certificates. Like NSW, these processes are not in the Victorian FDMA.
89. The QFBDMA follows similar due process steps but the process is statutory and includes “show cause” notices and “show cause periods”, with a 20 business day timeframe.⁹⁹

Consultation question

90. Should the FDMA be amended to include statutory “show cause” notices and “show cause” periods?

When s 11 certificates are issued

Should default be required?

91. Feedback is invited on whether creditors should be required to wait to apply for a s 11 certificate until default has occurred under a heads of agreement, contract, mortgage or other document that gives effect to the mediated agreement. The FDMA currently enables creditors to apply for a s 11 certificate once satisfactory mediation has occurred (including where no agreement is reached). Having a s 11 certificate means that enforcement action can commence in accordance with the law at the creditor’s discretion. Farmers who have concluded negotiations in good faith and who have complied with their heads of agreement (or subsequent deed or contract that implements the heads of agreement) may feel offended that creditors can nonetheless apply for a s 11 certificate.
92. In 2013 the Supreme Court of NSW held that a heads of agreement that provided for a period of time within which the farmers could sell their farm properties or refinance them did not affect the underlying default on the farm mortgage. The agreement provided an opportunity for the default to be rectified through an agreed method.¹⁰⁰

Should successive mediations be required?

93. In *Waller v Hargraves Secured Investments Ltd*¹⁰¹ the High Court held that a certificate issued under s 11 of the FDMA authorised the creditor to take enforcement action only in relation to a farm debt that had been the subject of mediation under the FDMA. It did not authorise enforcement action in relation to a new secured farm debt that had not been the subject of mediation.
94. The High Court noted that each farm mortgage subject to the FDMA is linked with a farm debt, and that a s 11 certificate is needed to lift the statutory bar on the enforcement of each new mortgage. In that case the original farm debt had been released in a mediated heads of agreement. The parties agreed to several amended loan arrangements after the farmer had defaulted on repayments several times due to

⁹⁹ QFBDMA ss 41, 42, 50, 51, 71, 72, 73. A copy of the relevant application must also be provided with the show cause notice: ss 41(4) and 50(4).

¹⁰⁰ *Permanent Custodians v McMahon* [2013] NSWSC 769. Leave to appeal was refused in *McMahon v Permanent Custodians Ltd* [2013] NSWCA 275.

¹⁰¹ [2012] HCA 4; (2012) 245 CLR 311.

drought. The Court held that the third loan agreement had extinguished the debts under the first and second loan agreements and created new obligations which gave rise to a new "interest" or "power" over the farm property within the meaning of the definition of "farm mortgage" in the FDMA. These debts were unenforceable in the absence of new s 11 certificates.

95. The practical effect of the High Court's judgment is that if a heads of agreement is negotiated during a mediation under the FDMA that discharges the farm debt, and the farmer subsequently defaults on the new mortgage arrangements, a further mediation is required before the creditor can take enforcement action, unless the heads of agreement creates obligations concerning refinancing, surrendering or selling the mortgaged property.¹⁰²
96. The High Court's interpretation could have the effect of unreasonably delaying a creditors' ability to realise their securities because any mediated amendments to a mortgage could create a new debt. This could occur for example, if the new mortgage arrangements provide that the creditor will pay further advances, amend the interest payable, consolidate loans, increase the overdraft limit, convert a foreign currency debt to an Australian dollar debt, or extend the payment date. In order to ensure that the FDMA provides for "the efficient and equitable resolution of farm debt disputes" amendments may be necessary to clarify its operation so as to avoid the practical implications of the *Waller* judgment.
97. The QFBDMA may have affirmed the *Waller* approach, as amended during passage, because it provides that "*this Act does not apply in relation to a farmer for a particular farm business debt if – (a) the farmer previously defaulted under the farm mortgage for the debt and, because of the farmer's default, the farmer and the mortgagee took part in mediation for the debt under this Act*".¹⁰³ As in the *Waller* case, the effect of the mediation could be to create new debt subject to the mediation requirements of the Act.
98. The RAA invites views on whether the definition of "farm debt" in the FDMA should be amended to exclude a new farm debt arising from a mediation or from post-mediation negotiations that result in amended credit arrangements. This amendment would respond to the outcome of the High Court's decision in *Waller v Hargraves Secured Investments Ltd* [\[2012\] HCA 4](#); [\(2012\) 245 CLR 311](#).

Consultation questions

99. Should the FDMA be clarified so that subsequent mediations are not required for a farmer's default under a heads of agreement, contract, mortgage or other document that gives effect to the mediated agreement?
100. Should the FDMA be amended to require that if a heads of agreement has been agreed, default under that agreement must occur before an application can be made for a s 11 certificate?

Enforcement action in contravention of FDMA void

101. The FDMA has been working effectively to prevent enforcement action taken by a creditor to whom the Act applies otherwise than in compliance with the Act.¹⁰⁴

¹⁰² See also *Myross (NSW) v Kahlefeldt Securities* [\[2003\] NSWSC 138](#) where a binding heads of agreement was found to alter the terms of a farm mortgage to permit early redemption and discharge of the mortgage.

¹⁰³ QFBDMA s 11.

¹⁰⁴ *Roxo v Normandie Farm (Dairy) Pty Limited* [\[2012\] NSWSC 765](#); *Sharpe v W H Bailey & Sons Pty Ltd* [\[2013\] NSWSC 913](#).

Relationship with other Acts

102. Section 7 of the FDMA provides that the Act does not affect the operation of the *Contracts Review Act 1980*¹⁰⁵ or similar legislation designed to relieve the operation of unjust contracts. The FDMA also does not affect the operation of the *Banking Act 1959* (Cth), the *Corporations Act 2001* (Cth) or the *Bankruptcy Act 1966* (Cth).¹⁰⁶ Section 7(4) provides “Other than as provided in this section, this Act has effect despite any other Act.”
103. The relationship between the FDMA and indefeasibility (paramountcy) provisions of the *Real Property Act 1900* (NSW) has been raised in some cases, but did not then have to be resolved.¹⁰⁷ Under the Torrens Title system, a registered proprietor holds the registered land estate or interest subject only to the encumbrances, estates or interests that are recorded in the folio of the Torrens Title Register, except in the case of fraud and various other exceptions, notwithstanding the existence of any other person or any estate or interest in the land. The RAA invites views on whether the FDMA should be amended to confirm the paramountcy of the Real Property Act.
104. The FDMA is currently silent about its application when farm property law matters are subject to family law proceedings; an Australian Government jurisdiction that provides for the division of property after consideration of the legal and equitable interests of the parties. The Act does not currently include special procedures for mediations where joint debtors are estranged.
105. Unless the FDMA excludes disputes that are in proceedings under the *Family Law Act 1975* (Cth) (“FLA”), there could be adverse impacts upon a farmer’s spouse or partner, and potentially later difficulties in property settlement proceedings under the FLA. Even though litigants in FLA proceedings are obliged to make full and frank disclosures of all relevant financial information, some litigants do not comply with their disclosure obligations. For example, it is foreseeable that a farmer could enter into an agreement with a creditor pursuant to the processes provided in the FDMA which could adversely impact upon the rights and entitlements of the spouse/partner, who has not participated in the FDMA process and who may not even know anything about the process or their spouse/partner’s financial position. It is foreseeable that a farmer could agree with a creditor, without reference to his/her spouse/partner to:
- fix an amount said to be owing to a creditor (either a capital amount and/or arrears); and/or
 - agree upon a repayment plan; and/or
 - agree a different rate of interest than reflected in the security documents; and/or
 - offer alternative security; and/or
 - agree to meet some or all of the creditor’s costs.
106. Third party creditors often intervene in, or are joined as respondents, to FLA property proceedings. Under [s 79\(10\)](#) of the FLA, a third party creditor is entitled to

¹⁰⁵ See for example: *Suncorp-Metway Ltd v Bellairs* [2009] NSWSC 135; *Teresa Starceavich & 1 Or v Swart & Associates Pty Ltd* [2006] NSWSC 960; *Hurworth Nominees Pty Ltd v ANZ Banking Group Ltd* [2006] NSWSC 1278.

¹⁰⁶ FDMA s 5.

¹⁰⁷ *In the matter of Sundara Pty Limited & Ors* [2015] NSWSC 1694; *In the matter of Sundara Pty Ltd (recs & mgrs apptd) (in liq)*; *In the matter of Wine National Pty Ltd (recs & mgrs apptd) (in liq)*; *In the matter of Killara 10 Pty Ltd (recs & mgrs apptd) (in liq)*; *James Estate Wines Pty Ltd (recs & mgrs apptd) v Rabobank Australia Ltd & Anor* [2015] NSWSC 1443 [35].

become a party to property alteration proceedings under the FLA if the making of a property settlement order would mean that they may not be able to recover a debt they are owed. Similarly, a third party creditor can apply to set aside an order made under the FLA after it is made (FLA ss [79A\(1\)](#) and [\(4\)](#)) on the same basis. Analogous provisions apply to creditors of parties to de facto relationships.

107. A party to proceedings under the FLA may be entitled to seek orders against a third party pursuant to [FLA Part VIII A A](#). For example, a party could seek to restrain a creditor from enforcing an alleged debt or could seek an order that a creditor substitute one party for both parties in relation to the debt owed to the creditor. Strict criteria exist to be met (s [90AE\(3\)](#)) and matters to be taken into account ([s 90AE\(4\)](#)) before any such order is made effecting the rights of a third party.
108. If proceedings under the FLA were to be excluded from the operation of the FDMA, an exception could be included to enable spouses/partners engaged in property settlement proceedings under the FLA, who also have a farm debt, to jointly invoke the FDMA process against a creditor.
109. Feedback is invited on whether the *Family Law Act 1975* (Cth) should be excluded in FDMA s 5(2) and whether amendments are needed to ensure that the needs of separated joint debtors can be accommodated effectively in mediation.

Consultation question

110. Should ss 42 and 43A of the [Real Property Act](#) 1900 (NSW) prevail over FDMA s 6 and should that be noted in FDMA s 7?
111. Should FDMA s 5(2) be amended so that the Act does not apply to a farmer whose property is subject to proceedings under the *Family Law Act 1975* (Cth)?
112. Should the FDMA be amended to ensure that the needs of separated joint debtors can be accommodated effectively in mediation, and if so, how?

Part 2 of the FDMA: Mediation

Farmer-initiated mediation

113. The FDMA enables a s 11 certificate to be issued where a farmer not in default has entered into mediation with a creditor of their own initiative provided other requirements of s 11 have been met.¹⁰⁸ In 2016 the Queensland Finance and Administration Committee recommended that the QFDBMB be amended to ensure that mediation could be entered into without default and could not amount to a ground for the issuance of the equivalent of a s 11 certificate benefiting creditors, where the earlier mediation occurred within 3 years of the default.¹⁰⁹ The RAA regards this as a sensible recommendation as it would ensure that another mediation would be required after a default, and the farmer would not be disadvantaged by initiating a mediation with their creditor, consistent with the intended aims of the FDMA which include to promote constructive negotiations amongst farmers and creditors to improve farm businesses.

Consultation question

114. Should the Act be amended so that if a farmer not in default initiates a mediation, a creditor is prevented from applying for a s 11 certificate within three years of a

¹⁰⁸ FDMA s [11\(1\)\(c\)\(i\)](#).

¹⁰⁹ Queensland Parliament, Finance and Administration Committee, above n 62, rec 10, 34–35.

default after the mediation, unless another mediation is held?

Communications among the parties and the RAA

115. Various sections of the FDMA refer to communications by farmers and creditors with each other but the RAA is not included. Sometimes parties direct their correspondence to the other party through the RAA for convenience, or because relations between the parties are strained, or the Act does not require communication back to the RAA. The effective administration of the FDMA could be improved, if for example, ss 8, 9A, 9B(2)(d), 12A, 18A expressly required communications to be with the other party with a contemporaneous copy to be given to the RAA. An equivalent provision in the Victorian Act is s 10 for example.

Consultation questions

116. Should the FDMA be amended to require that the RAA be provided with copies of communications effected under ss 8, 9A, 9B(2)(d), 12A, 18A?

117. Should FDMA s 9A and s 9B(2)(d) be amended to provide that creditors can advise the RAA that they agree to mediate and a creditor can be taken to decline to mediate if they have failed to respond to the farmer or RAA within 21 days (or 20 business days if amended) of receipt of a notice to mediate?

Timeframes in the FDMA

118. The FDMA enables a farmer to request mediation either on their own initiative and whether or not they are in default, or after a creditor has notified them that they intend to take enforcement action. Farmers must respond to invitations to mediate within 21 days.¹¹⁰ Creditors may apply for a s 11 certificate if a farmer has not responded within 28 days to a creditor's written invitation to attend a mediation session that refers to s 11(2). A farmer may apply for an exemption certificate under s 9B if they are in default; they have requested mediation that the creditor has declined or has failed to respond in writing to within 21 days; or 3 months have elapsed after a farmer's written request to the creditor, and the farmer has throughout that period attempted to mediate in good faith but no satisfactory mediation has taken place.¹¹¹

119. The end of the cooling off period in the FDMA is expressed as the "14th day".¹¹² References to 14 days could become 10 business days.

120. The FDMA's references to "days" rather than "business days" may create unintended consequences for the parties when disputes arise during periods of extended public holidays and business closures. The references in the FDMA to 21 and 28 days may confuse new users of the Act. Equivalent time periods in the Queensland QFBDMA are expressed as "20 business days".¹¹³ Time periods of 21 and 28 calendar days are also shorter than 20 business days, with the latter more likely to be regarded by both farmers and creditors as a preferable time period within which to obtain legal and financial advice, and to respond to the other party. An extended time period also protects farmers experiencing a natural disaster. National consistency in timeframes is also desirable.

¹¹⁰ FDMA ss [8\(1\)](#), [9\(1\)](#), [9B\(2\)\(d\)\(ii\)](#), [11\(2\)\(c\)](#), [11\(5\)\(d\)](#).

¹¹¹ FDMA s [9B\(2\)](#).

¹¹² FDMA s [11A\(2\)](#) and [11A\(4\)](#).

¹¹³ QFBDMA s 14, 41, 45, 50, 53, 54, 56, 59, 62, 65, 67, 71, 80.

Consultation question

121. Should FDMA provisions that refer to 14 days be amended to “10 business days”?
122. Should FDMA provisions that refer to 21 or 28 days be amended to “20 business days” to minimise the risk of confusion and to ensure the Act operates as intended during extended public holiday periods?

Timeframe for farmer response

123. The FDMA provides in s 11(1)(c)(ii) and s 11(2) various circumstances that the RAA may regard as indicating that the farmer has declined to mediate in response to a creditor’s application. The RAA regards these provisions as working well except that there is no reference to the circumstance that a farmer has failed to respond to a s 8 notice from a creditor and the creditor has provided the RAA with evidence that the notice has been received by the farmer or their agent.

Consultation question

124. Is a new FDMA s 11(2)(d) needed that provides if a farmer has failed to respond to a s 8 notice from a creditor and the creditor has provided the RAA with evidence that the notice was sent to the farmer or their agent, the farmer is presumed to have declined to mediate?

Good faith

125. An essential aspect of a fair and equitable mediation is that parties’ have acted honestly and in good faith throughout the process, but in NSW this is not an express element of the definition of “satisfactory mediation”, unlike in Queensland.¹¹⁴ The FDMA includes various references to “good faith”:
- the RAA must issue a s 9B exemption certificate to an applicant farmer in default three months after the farmer asked the creditor to mediate but no satisfactory mediation has taken place and the farmer attempted to mediate in good faith throughout that period: s 9B(2)(d)(iii);¹¹⁵
 - the RAA must issue a s 11 certificate that the FDMA does not apply to an applicant creditor three months after a creditor gave notice where the creditor attempted to mediate in good faith throughout that period, whether or not a mediation session or satisfactory mediation took place during that period;¹¹⁶
 - a creditor’s failure to forgive or reduce a farmer’s debt does not demonstrate a lack of good faith in attempting to mediate: s11(1B);
 - a farmer is presumed to have declined to mediate where a farmer has failed to take part in mediation on good faith: s11(2)(a);
 - a s 11 certificate expires on the third anniversary of the last date of a mediation where the farmer failed to mediate in good faith: s 11(5)(b); and

¹¹⁴ QFBDMA ss 7, 33.

¹¹⁵ The exemption certificate ceases to be in force either six months after the day on which the creditor declined to mediate or the day on which the farmer and creditor enter into mediation, whichever occurs first: FDMA s 9B(4).

¹¹⁶ FDMA s 11(1)(c)(iii).

- personal liability is excluded where a mediator or someone acting under their direction does or omits to do something in good faith for the purpose of executing the FDMA: s 18.
126. Unlike some other legislation,¹¹⁷ the FDMA does not define “good faith”, but judicial guidance is available.¹¹⁸ An obligation to negotiate or mediate in good faith connotes more than mere attendance in the process. Whether good faith has been observed is a question of fact determined on a case-by-case basis. It involves honest conduct and the absence of unconscionable conduct such as dishonesty or fraud, and to undertake to subject oneself to the process of negotiation or mediation (which must be sufficiently precisely defined by the agreement to be certain and hence enforceable). It also involves having an open mind in the sense of:
- a willingness to consider such options for the resolution of the dispute as may be propounded by the opposing party or by the mediator, as appropriate;
 - a willingness to give consideration to putting forward options for the resolution of the dispute.
127. The obligations of a party who contracts to negotiate or mediate in good faith, do not oblige nor require the party to act for or on behalf or in the interests of the other party, or to act otherwise than by having regard to self-interest. To negotiate in good faith does not mean that the parties have to reach agreement and resolve the dispute.¹¹⁹ “Good faith” also involves a willingness to exercise a degree of co-operation to isolate the issues that are genuinely in dispute and to resolve them as speedily and efficiently as possible.¹²⁰
128. The Court of Appeal of the Supreme Court of Singapore has defined good faith as involving “the threshold subjective requirement of acting honestly, as well as the objective requirement of observing accepted commercial standards of fair dealing in the performance of the identified obligations. This encompasses a duty to act fairly, having regard to the legitimate interests of the other party.”¹²¹
129. In 2013 the federal Administrative Appeals Tribunal (AAT) published guidelines on the duty to act in good faith in alternative dispute resolution processes at the AAT.¹²² The AAT notes that people have a responsibility to take steps to resolve or clarify disputes in the simplest and most cost-effective way and that people who attend a dispute resolution process should show their commitment to that process by listening to other views and by putting forward and considering options for resolution
130. The AAT regards the following conduct as consistent with the duty to act in good faith:

¹¹⁷ e.g *Fair Work Act 2009* (Cth) [s 228](#), *Dispute Resolution Act 2011* (Cth) [s 4](#). See Harry Orr Hobbs, ‘The Dispute Resolution Act 2011 (Cth) and the meaning of ‘genuine steps’: formalising the common law requirement of ‘good faith’ (2012) 23 *ADRJ* 249.

¹¹⁸ See the discussion of relevant case law in Tania Sourdin, *Alternative Dispute Resolution* (5th ed) (Lawbook Co 2016)[11.30] including *Aiton v Transfield* [\[1999\] NSWSC 996](#).

¹¹⁹ *Aiton v Transfield* [\[1999\] NSWSC 996](#) per Einstein J. See also: *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd* [\[2010\] WASCA 222](#).

¹²⁰ *United Group Rail Services Ltd v Rail Corporation New South Wales* (2009) NSWLR 618.

¹²¹ *HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd* [2012] SGCA 48 (27 August 2012) [45] citing similar tests in § 1-201(b)(20) of the *Uniform Commercial Code of the United States* and *In the United Kingdom, Lord Bingham of Cornhill held in Director General of Fair Trading v First National Bank plc* [\[2001\] UKHL 52](#); [2002] 1 AC 481.

¹²² These include conferencing, conciliation, mediation, neutral evaluation and case appraisal. See: Australian Government, Administrative Appeals Tribunal, *The Duty to Act in Good Faith in ADR Processes at the AAT* (2013).

- not failing to attend an ADR process without sufficient notice or reason
- acting reasonably and fairly having regard to the interests of all the parties disclosing information relevant to the dispute in a timely fashion¹²³
- adopting an honest and genuine approach to resolving a dispute by discussion
- ensuring that the person attending an ADR process (other than conferencing) on behalf of a party has the necessary authority to settle the matter
- not behaving unethically (parties are not obliged to act against their own interests)
- maintaining the confidentiality of the ADR process
- treating other parties to the ADR process and AAT staff respectfully
- being prepared to make concessions for the purposes of the ADR process, though not necessarily for the purposes of any subsequent AAT hearing
- endeavouring to limit the scope of proceedings by making partial concessions where appropriate
- having an open mind and a willingness to consider the interests of the other side, understand their position and consider options generated by the other side, or the AAT member or Conference Registrar
- having a willingness to propose options for the resolution of the dispute and discuss their position in detail
- explaining the rationale behind an offer of settlement or the refusal of the other party's offer of settlement
- being faithful to any agreement reached in the ADR process
- legal representatives fulfilling their obligations under the Australian Solicitors' Conduct Rules and the Barristers' Rules applicable in the practitioner's jurisdiction.

131. The duty to act in good faith does not prevent a party from withdrawing from the ADR process if appropriate or require that agreement is reached or that any particular outcome is achieved.

132. The Queensland Parliament's Finance and Administration Committee recommended that the Minister inform the House how the Government Bill would ensure that farmers are clearly informed, prior to any mediation taking place, about what acting in good faith means under the legislation; examples of acting in good faith and not acting in good faith for the purposes of the legislation, and possible consequences of not acting in good faith for the purposes of the legislation.¹²⁴ In Queensland the farmer and the mortgagee must have participated in the mediation "in good faith" for it to have been a "satisfactory mediation".¹²⁵

Consultation question

133. Should "good faith" be defined in the FDMA, in regulations, in the RAA's template checklist for the mediator's summary of each mediation, or in a policy document similar to that issued by the Administrative Appeals Tribunal?

134. Should "good faith" be part of the definition of a satisfactory mediation under the FDMA?

¹²³ In mediations there is no obligation on banks to discuss alleged breaches of the Code of Banking Practice: Legal Aid Queensland, Submission to the consultation on the expansion of the Financial Ombudsman's Small Business Jurisdiction, 1 December 2014, 4.

¹²⁴ Queensland Parliament, above n 62, rec 20, 45.

¹²⁵ QFBDMA s 7.

Cooling off period

135. [Section 11A \(3\)](#) of the FDMA provides a 14-day cooling off period within which farmers may rescind *ab initio* if the heads of agreement is concluded at or within 24-hours of the mediation. The rescission must be signed by the farmer or the farmer's solicitor.¹²⁶ If rescission occurs and a party has received a benefit under the heads of agreement, the farmer or creditor may claim for compensation, adjustment or accounting as is just and equitable. The FDMA does not currently provide that heads of agreement can be amended from time to time, unlike in the QFBDMA.¹²⁷
136. In some circumstances, farmers may wish to avoid the cooling off period so that benefits negotiated at mediation can be accessed before the expiry of the 14-day period. This is likely to be a very rare occurrence. To accommodate this possibility the legislation could include an exception to the cooling off period that provides that it can be waived by the farmer upon the production of a letter from a lawyer representing the farmer to the effect that the farmer is aware of and understands the nature and effect of the waiver. The QFBDMA permits the duration of the 10 business day cooling off period to be amended or waived as agreed by the parties in writing, provided the farmer has had a reasonable opportunity to seek legal advice. The mediator has to ensure that each party has a copy of the amended heads of agreement that includes the agreement to amend the cooling off period and the day on which it ends.¹²⁸
137. The Victorian legislation does not provide for a cooling off period. This is consistent with the other legislative schemes that are administrated by the Victorian Small Business Commissioner. That approach has been adopted to highlight the importance of parties preparing and coming to mediations with the attitude that the decisions will be final. It also removes a potential further delay in a process that can be lengthy. Victorian officials have advised that no substantial issues have arisen as the result of Victoria not having a cooling off provision.

Consultation question

138. Should the FDMA be amended to enable farmers to amend their heads of agreement from time to time and to waive the cooling off period upon the production of a letter from a lawyer representing the farmer to the effect that the farmer is aware of and understands the nature and effect of the amendment or waiver?

Part 3 of the FDMA: General provisions concerning mediation

Nomination of mediator

139. Under the FDMA if a farmer and creditor agree to enter into mediation the farmer must nominate the mediator. If the creditor rejects the nominee, the farmer must nominate a panel of at least 3 other mediators from which the creditor must agree one.¹²⁹ In Queensland the way in which mediators are chosen will be prescribed by regulation.¹³⁰ In Victoria, the Small Business Commissioner contracts the mediator for each farm debt mediation from the panel of accredited mediators.¹³¹

¹²⁶ FDMA [s 11AA](#).

¹²⁷ QFBDMA s 30A.

¹²⁸ QFBDMA ss 27, 28.

¹²⁹ FDMA s 12A.

¹³⁰ QFBDMA s 18.

¹³¹ FDMA s 20(3).

Consultation question

140. Are the current provisions for the contracting of a mediator to conduct a mediation satisfactory or should the FDMA provide that mediators must be chosen in the way prescribed by regulation?

Mediation sessions and pre-mediation conferencing by electronic means

141. [Section 14](#) of the FDMA deals with the conduct of mediation sessions, the procedure for which the RAA may determine. The RAA currently provides to mediating parties and mediators a template agreement to mediate, a list of possible venues, information about the obligation to mediate in good faith, a cooling off period statement and information about what constitutes a satisfactory mediation. The RAA does not require expressly that mediations, including the preliminary conference or intake, be conducted in a manner consistent with the Practice Standards under the National Mediator Accreditation System (“NMAS”).¹³² However mediators can only be accredited under the Act if they have NMAS accreditation, and compliance with the standards is expected.
142. The FDMA does not require that farmers notify all secured creditors that a mediation is occurring under the Act, and nor does the RAA require the mediator to ensure this. The NMAS Practice Standards refer to this as a matter to be addressed at the mediation intake or preliminary conference. Under the FDMA, mediations with second and other mortgagees can be held separately from the first mortgagee’s mediation, if held at all, and information flow is necessarily constrained by confidentiality provisions.
143. The FDMA does not currently provide for intake conferences, mediations, or part-mediations, to be conducted by electronic means, such as by telephone, video-link, web-based communication, website or portal. Nor does it require that mediations be held at a place reasonably convenient for the farmer, or if at a place more convenient for the creditor, that the creditor contribute to the travel and accommodation costs of the farmer, and not add those to the mortgage debt.
144. Mediations in Victoria are not held electronically, but are held in person or by telephone. The VSBC arranges the location, timing and mediator. This assists in determining reasonable places for the mediation to be held for both parties.
145. In 2016 the Queensland Finance and Administration Committee agreed with a Resolution Institute recommendation that mediations conducted by electronic means can be convenient for the parties provided it is feasible, and the farmer has sufficient access to the services required. The QFDMA was amended to provide for mediation “by any technology allowing reasonably contemporaneous and continuous communication between the parties” if both parties agree, such as teleconferencing and videoconferencing.¹³³ The Committee also recommended that the QFDMA be amended to require that the mediation must be reasonably convenient for the farmer. The Bill was amended accordingly.¹³⁴

¹³² See 3.2 for example in the NMAS Practice Standards:

<www.msb.org.au/sites/default/files/documents/NMAS%201%20July%202015.pdf>.

¹³³ QFDMA s 25. Queensland Parliament, Finance and Administration Committee, above n 62, [5.7] and rec 7.

¹³⁴ QFDMA s 25.

Consultation questions

146. Should the RAA require its mediators to conduct their mediations consistent with the NMAS Practice Standards, including intake requirements to identify all the parties who should participate in the mediation?
147. Should the FDMA, FDM regulations or guidelines, permit mediations to be conducted by electronic means provided all parties agree?
148. Should the FDMA require that the mediation be held at a place reasonably convenient for the farmer?

Adjournment and termination of mediation sessions

149. The FDMA provides that a mediator may adjourn a mediation session “if it appears that a party would be significantly disadvantaged because of the *length* of the session.”¹³⁵ This is a narrower ground for adjournment than is provided for in the NMAS Practice Standards. NMAS-accredited mediators are expected to suspend or terminate a mediation process if a party appears to be unable or unwilling to participate or continue in the mediation session, if a participant is not mediating in good faith or is misusing the mediation, or the safety of one or more participants may be at risk.¹³⁶ Parties must also be able to understand the information being presented, to appreciate the significance of that information for their lives and be able to weigh options in view of their needs and interests.¹³⁷ Mediators and creditors also have obligations under the *Disability Discrimination Act 1992 (Cth)* not to discriminate against a person because of their disability in the provision of services.
150. In both NSW and Victoria, mediators are required to be accredited under the NMAS. There is an expectation that mediators will conduct the mediations consistent with the NMAS Practice Standards.
151. The NSW Law Reform Commission (“NSWLRC”) has suggested that it is necessary to know when mediation has been terminated so that, for example, parties know when communications are no longer confidential or privileged. Some NSW legislation confers a general discretion on mediators to terminate a mediation session. The NSWLRC’s model provision suggests that courts and tribunals must presume a mediation to have been terminated if the mediator or a party purports to terminate it, the timeframes agreed by the parties have expired, or litigation commences or recommences.¹³⁸

Consultation question

152. Should the FDMA or FDM regulations provide that mediators may adjourn or terminate a mediation if they form the view that mediation is no longer fair or productive as interpreted in the NMAS Practice Standards?

Access to information

153. The FDMA does not include an express power enabling the RAA to require the

¹³⁵ FDMA [s 14\(1A\)\(b\)](#)

¹³⁶ Australian National Mediator Standards: Practice Standard 5-6, 1 July 2015.

¹³⁷ Rebekah M Doley, ‘Accommodating common mental health issues in mediation’ (2016) 27 *ADRJ* 84–93; Lise Barry, ‘Elder mediation’ (2013) 24 *ADRJ* 251–258.

¹³⁸ NSW Government, NSW Law Reform Commission (NSWLRC), “Dispute Resolution: Model Provisions”, [Consultation Paper 18](#), 2016, 12. The paper recommend amendments to the FDMA generally (see list of legislation recommended for amendment in Consultation Paper Appendix A).

production of persons or papers to the RAA or a mediator. There may be benefit in aiming to ensure greater sharing of information between the farmer and creditor which can result in better more informed outcomes at the mediation. In terms of providing information to RAA (or DEDJTR or VSBC) information would only be requested for a sound administrative reason. For example, to determine that the definitions of the Act have been met or the farmer is in default at the time of issuing an exemption certificate.

154. The QFBDMA provides that a mortgagee and farmer in mediation can require the provision of copies of certain documents from the other relating to the farm debt within 30 business days or longer as agreed in consultation with the mediator, subject to limited exceptions. This is intended to facilitate trust-building and informed negotiations.¹³⁹ Documents that can be requested concern:

- the farmer's application for the farm business debt and farm mortgage, and any variation of the debt or mortgage
- the contractual relationship between the farmer and the creditor, including any loan or mortgage documents
- correspondence between the farmer and the creditor about changes to the farm business debt or the farm mortgage
- the farmer's default under the farm mortgage and any action taken by the creditor in relation to the default
- any other matter prescribed by regulation.

155. The Queensland Finance and Administration Committee had suggested that the Queensland Government should consult with relevant stakeholders about whether the QFBDMA should be amended to require third parties to provide relevant documents and information that is necessary for a mediation, subject to exclusion if not relevant. This was not agreed following a consideration of stakeholders' views.¹⁴⁰

Consultation question

156. Should the FDMA be amended to require farmers, creditors or third parties to provide information to the RAA, the mediator or the parties to a mediation, such as information about the mortgage, correspondence between the farmer and the creditor, the farmer's default and any other matter prescribed by regulation?

Template heads of agreement

157. The FDMA does not currently have regulations that prescribe matters that may arise in the implementation of the Act. As noted above, the FDMA is regarded as successful legislation that has served stakeholders well for more than 20 years. The RAA has been asked on occasion whether it could provide a template or skeleton heads of agreement to assist farm debt mediators and the parties conclude their mediation. This may facilitate the conclusion of a heads of agreement and discourage creditors from offering farmers a very long document drafted in technical language after the mediation that purports to represent the outcome of the mediation. The

¹³⁹ FBDMA ss 21–22; the Hon Ms Le Donaldson, Farm Debt Mediation Bill, Queensland Hansard 30 August 2016.

¹⁴⁰ Queensland Parliament, Finance and Administration Committee, above n 62, 47–48. Queensland Parliament, Record of Proceedings (Proof), above n 62.

content of the template would have to be populated by the mediator to ensure consistency with [s 11AA](#) of the FDMA.

158. Section 11AA (1) provides:

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

159. Such a template agreement would include matters such as the parties' names, recitals detailing the circumstances giving rise to the mediation and the securities involved, parties' acknowledgements, rights and undertakings, next steps in the event of default or dispute, costs and the cooling off period, and a signatures section. The VSBC has a pro-forma Terms of Settlement (Heads of Agreement) that may be used by the parties, but parties are not required to use that template. The QFBDMA provides that the mediator "must prepare or supervise the preparation of, a document in the approved form" and the Act specifies some terms that must be included such as the cooling-off period.¹⁴¹

Consultation question

160. Should the FDMA or regulations provide that the RAA is to provide a blank skeleton heads of agreement to assist farm debt mediators under the Act?
161. Should the FDMA require farm debt mediators to use a template heads of agreement?

Costs of mediation

162. A significant advantage of mediation is its relatively accessible and shared cost. If farmers experiencing financial distress wish to seek redress for creditors' practices the option of litigation can be prohibitively expensive.¹⁴²

163. The FDMA does not currently regulate how mediation costs are to be shared by the parties. Section 12(2) of the FDMA provides that "[t]he Authority is not liable for any of the costs associated with mediation for the purposes of this Act, except in its capacity as a creditor". [Section 14](#) provides that "the procedure for commencing and conducting a mediation session is to be as determined by the Authority". The mediation agreement that the RAA provides to creditors and debtors in the mediation kit states that the parties are to be severally liable to the mediator for their agreed share of the costs of the mediation, and for all the other shared costs of the mediation. Travel and accommodation costs are regarded as parties' own costs. There is currently no requirement, as noted above, for creditors to contribute to the travel and accommodation costs of the farmer, and not add those to the mortgage debt, if a mediation has to be held for whatever reason at a place more convenient for the creditor than the farmer.

164. The RAA's template agreement also provides that if a person representing a party to a mediation lacks authority to settle, and another mediation session is required, the party lacking representative authority is liable for all costs associated with the other party's attendance at that additional mediation session. Mediations under the FDMA

¹⁴¹ QFBDMA s 26.

¹⁴² Legal Aid Queensland, Submission to the consultation on the expansion of the Financial Ombudsman's Small Business Jurisdiction, 1 December 2014, 6.

occur before, and are separate from “enforcement action” that has to be postponed until after mediation has occurred where a farmer has requested mediation.

165. In recent years, including in 2016, some stakeholders have expressed concern that legal costs arising from creditors’ preparation for mediation have been passed on to farmers’ loan accounts. The RAA wrote to creditors in 2010 expressing its view that this would be contrary to the spirit and intent of the FDMA. In Victoria the DEDJTR and VSBC are also aware of instances where creditors have been passing on legal costs to farmers by adding the cost to secured debts. Similarly, the VSBC has written to creditors advising that this practice should cease. The Victorian and NSW FDMAs prohibit creditors from seeking indemnity for a loss or liability arising under the Act from a farmer or guarantor.¹⁴³
166. Legal fees incurred by a creditor when preparing for or participating in FDM are incurred in the protection of the creditor’s interests during a statutorily established mechanism that regulates both farmers’ and creditors’ actions. Costs incurred in preparing for a mediation under the FDMA are not costs for the preparation, maintenance or enforcement costs of a security, as enforcement action cannot be taken until other steps have been taken under the Act, including the issuance of a s 11 certificate. The RAA is of the view that costs associated with the preparation for mediation, and the conduct of a mediation should be shared equitably and not passed on to the mortgagor who may be in financial distress if the Act has been invoked, and may be already be subject to penalty interest rates. If necessary, standard form security documents ought to be amended accordingly.
167. The QFBDMA provides that each party to a mediation must pay their own costs for the mediation and half of the mediator’s fee and costs for the mediation. A party’s costs include costs incurred in relation to the mediation such as travel and accommodation costs. The QFBDMA also includes a provision that is in the FDMA, that if another mediation meeting is required because a person representing a party at a mediation meeting does not have authority, the party must pay the other party’s costs for the other meeting and the mediator’s fee and costs for the other meeting.¹⁴⁴
168. In Victoria, FDM services are provided by the [Victorian Small Business Commissioner](#). Mediating parties are responsible for their own travel and preparation costs in attending mediation, but in 2016 the cost of the mediation for the parties was \$195 per session for each participant, with the Victorian Government covering any additional cost.

Consultation questions

169. Should the FDMA require parties to a mediation to be severally liable to the mediator for their agreed share of the costs of the mediation, and for all the other shared costs of the mediation, and that each party is responsible for other costs associated with preparation for and participation in the mediation?

Accreditation of farm debt mediators

170. [Section 12\(1\)](#) of the FDMA gives the RAA the power to accredit, re-accredit and withdraw accreditation from mediators. Section 4 defines “mediator as “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

¹⁴³ FDMA s 20(2) – an offence with a maximum penalty of 100 penalty units; Victorian FDMA s 29(2) – the provision is void.

¹⁴⁴ QFBDMA s 39.

mediator". This definition of mediation doesn't explain the process of mediation that accredited mediators are expected to follow. The NSWLRC suggested in 2016 that legislation that defines mediation and that refers to the NMAS could adopt a common definition of mediation, i.e.:

*"Mediation" means a process in which the parties to a dispute, with the assistance of a third party dispute resolution practitioner (the mediator), come together in an endeavour to resolve their dispute. It includes a process that fits this description even when such a process is described as "conciliation" or "neutral evaluation".*¹⁴⁵

171. Section 12 provides that the RAA 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." In 2000 the Review Group report recommended that accreditation be renewed every two years and that the criteria for re-accreditation be the same as the criteria applied on initial application for accreditation. However in lieu of the initial RAA training a training course of at least twelve hours duration must have been completed.¹⁴⁶ The Review also recommended that the RAA establish a procedure for mediators who have been refused accreditation to seek review of that RAA decision.¹⁴⁷
172. The RAA Board updated the criteria for the accreditation and re-accreditation of mediators in 2011.¹⁴⁸ The RAA requires the applicants for accreditation to have:
- current accreditation under the NMAS¹⁴⁹ from a Recognised Mediator Accreditation Body (evidence to be provided)
 - an affinity with rural industries and an understanding of finance and financial management
 - the ability to carry out the functions of a mediator as set out in s 13(1) of the FDMA, and
 - completed a training seminar conducted by the RAA.
173. The RAA reaccredits mediators every two years provided they have:
- maintained NMAS accreditation from a Recognised Mediator Accreditation Body (evidence to be provided), and
 - completed at least one training seminar conducted by the RAA during the twenty-four month period preceding the date of application for re-accreditation.
174. In Victoria, the VSBC requires mediators to join the VSBC External Mediator List and to have NMAS accreditation. The expectation is that mediations will be conducted in a manner that is consistent with the NMAS Practice Standards.
175. The NSWLRC suggests that a standard definition for the accreditation of mediators should be "*a person who is accredited by a Recognised Mediator Accreditation Body in accordance with the National Mediator Accreditation System*".¹⁵⁰

¹⁴⁵ NSWLRC, above n 138, viii.

¹⁴⁶ Government of NSW, *Review of the Farm Debt Mediation Act 1994: Final Report*, 2000, rec 4.

¹⁴⁷ *Ibid*, rec 28.

¹⁴⁸ Rural Assistance Authority, 'Farm Debt Mediation – Accreditation and Re-accreditation', *Policy no. RAA060Pol*, 23 April 2014.

¹⁴⁹ A voluntary industry system introduced in 2008 and revised in 2015 under which organisations that qualify as Recognised Mediator Accreditation bodies (RMABs) can accredit mediators for two years who have met minimum standards of training and assessment and comply with the NMAS Approval and Practice Standards. Mediators can be reaccredited if they meet the reaccreditation requirements.

176. The FDMA enables the RAA to withdraw the accreditation of a mediator in prescribed circumstances, such as if the mediator fails to prepare a heads of agreement or summary of mediation under s 11AA(1) or 18(A). The RAA can also decline to renew an accreditation. The QFBDMA specifies a wide range of grounds upon which mediators' accreditation can be suspended or cancelled, with merits review available.¹⁵¹

177. The RAA provides a profile of its accredited mediators on its website¹⁵² and provides a hard-copy to parties considering mediation under the Act. Feedback is invited on current accreditation requirements, the closed nature of the panel and mutual recognition issues. Currently the RAA requires that accredited mediators have an affinity with rural industries and an understanding of finance and financial management. The RAA does not currently require mediators to have experience with elder or small business mediations, or accreditation as a family dispute resolution practitioner.

Mutual recognition of mediators on panels interstate?

178. In 2000 the Review Group recommended that the requirement for a government-based accreditation scheme be reviewed with the next Competition Policy review in five years' time, or earlier if necessary. The Australian Constitution¹⁵³ and Australian governments have long supported the free movement of service providers across the national economy.¹⁵⁴ The Australian Government's Regulatory Reform Agenda supports the review of legislation to remove unnecessary barriers to competition. The Australian Government's response to the 2015 Competition Policy Review (the Harper Review)¹⁵⁵ supports the Review's recommendations that all Australian governments should review regulations in their jurisdictions and after applying a public interest test, ensure that unnecessary restrictions on competition are removed. The response also supports in principle the Review's recommendation that procurement policies should be reviewed and not restrict competition unless:

- the benefits of the restrictions to the community as a whole outweigh the costs; and
- the objectives of the policy can only be achieved by restricting competition.¹⁵⁶

179. The NSW Government supports the removal and prevention of regulatory impediments to competition in both public and private sectors so as to promote value for money, improving service quality, creating contestability and incentives to innovate, and increasing accountability and transparency.¹⁵⁷

180. The RAA receives enquiries from time to time from mediators who are nationally accredited under the NMAS, or who have attained specialist accreditation as a mediator,¹⁵⁸ who wish to offer their services under the Act but may not currently. The

¹⁵⁰ NSW Government, NSWLRD, above n 138, viii.

¹⁵¹ QFBDMA s 70.

¹⁵² <www.raa.nsw.gov.au/__data/assets/pdf_file/0007/275686/Mediator-Profiles.pdf>.

¹⁵³ Australian Constitution s 92. See also: Anthony Gray, 'State-based business licensing in Australia: the Constitution, economics and international perspectives' (2009) 14(2) *Deakin Law Review* 165–188. Gray argues that the High Court's decision in *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 may provide a basis for challenging state-based occupational licensing regimes that unreasonably impede interstate trade and commerce.

¹⁵⁴ *Mutual Recognition Act 1992 (Cth)*, *Trans-Tasman Mutual Recognition Act 1997 (Cth)*.

¹⁵⁵ Prof Ian Harper (chair), *Competition Policy Review: Final Report* (Commonwealth of Australia 2015).

¹⁵⁶ Australian Government, *Response to the Competition Policy Review*, 24 November 2015, recs 8 and 18.

¹⁵⁷ NSW Government, *Submission to the Competition Policy Review*, June 2014, 2.

¹⁵⁸ See for example the specialist accreditation in mediation offered by the NSW Law Society and the Resolution Institute: www.lawsociety.com.au/community/findingalawyer/SpecialistAccreditationScheme/.

RAA regards the panel as fully-subscribed for the time being. Once on the panel, mediators can continue on indefinitely, provided they continue to meet re-accreditation requirements. This might be regarded as a restriction on competition.

181. The benefits of maintaining a list of accredited mediators is that parties can compare the profiles of the 43 RAA-accredited mediators, each of whom has experience in FDM mediation, even though some may run more mediations than others by virtue of their marketing and reputational advantages. A disadvantage of opening up the panel to more members is that parties may feel overwhelmed by the number of mediators available, and there would be additional administrative costs in maintaining a larger register. Greater competition may lessen the opportunities to develop expertise that is currently available to the closed list, but the closed list can also effectively prevent non-accredited mediators from being able to practise in a field of interest, to the potential detriment of the parties if those mediators are particularly effective.

Consultation questions

182. Should the FDM Act include a definition of “mediation” as proposed by the NSW Law Reform Commission?
183. Should the RAA amend its accreditation and re-accreditation requirements for FDM mediators or should these be provided in the FDMA or regulations?
184. If the RAA’s mediator panel is maintained should it provide a maximum period of service?
185. Should any mediators who meet RAA requirements be permitted to join the panel of farm debt mediators?
186. Should the RAA recognise the accreditation of farm debt mediators who practise interstate under comparable legislation without further accreditation requirements?

Confidentiality of mediation sessions and disclosure of information

187. One of the benefits of mediation is confidentiality, with the parties generally able to exchange views orally and in writing, and to explore options without prejudice to possible later, more formal proceedings. Confidentiality for parties and others can be sourced in the agreement to mediate, in NMAS standards, in the common law and in legislation. Mediators may not disclose information in court or tribunal hearings, subject to exceptions. Due to the policy objectives underpinning this confidentiality, mediations are not amenable to merits or judicial review, and mediators are immune from liability.
188. Confidentiality under the FDMA extends to “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”. Such evidence is inadmissible in any proceedings in a court or before a person or body authorised to hear and receive evidence.¹⁵⁹

For Resolution Institute Advanced accreditation, mediators have to demonstrate 250 hours of practice (usually 35 or more mediations) with at least 10 involved parties providing written evaluations attesting to their proficiency. Two independent accredited mediators must also certify the mediator as having a high level of competence in mediation: <www.resolution.institute/accreditation/resolution-institute-advanced-accreditation>. Accredited specialists may also seek accreditation from the International Mediation Institute.

¹⁵⁹ FDMA s 15.

189. The FDMA includes an offence provision carrying a maximum penalty of 20 penalty units or six months' imprisonment, or both, where a person discloses any information obtained in a mediation session or in connection with the administration or execution of this Act, unless the disclosure is made:

- with the consent of the person from whom the information was obtained, or
- in connection with the administration or execution of this Act, or
- as reasonably required for the purpose of referring a party to a third party 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
- 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
- with other lawful excuse.¹⁶⁰

190. The penalty provision for the disclosure of information in the Victorian FDMA s 27 is 60 penalty units.

191. The FDMA provides that "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"¹⁶¹ is not admissible in any proceedings in a court or before a person or body authorised to hear and receive evidence".¹⁶² Section 15 of the FDMA is "in absolute terms" and does not include an exception for proceedings for costs.¹⁶³ The exceptions to inadmissibility in s 15(3) of the FDMA are:

- heads of agreement
- a contract, deed, mortgage or other instrument entered into as a result of, or pursuant to, heads of agreement
- a summary of mediation under section 18A.

192. Heads of agreement concluded at or after a mediation are admissible on the policy basis that they are concluded when negotiations have concluded, and are not created "pursuant to mediation".¹⁶⁴

193. The *Civil Procedure Act 2005* (NSW) provisions concerning the confidentiality of court-annexed mediation includes an additional exception "if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property".¹⁶⁵ The *Court Procedures Act 2004* (ACT) includes this exception, and an additional exception where "the disclosure is necessary to report to the appropriate authority the commission of an offence or prevent the likely commission of an offence." Offence is defined to mean "(a) violence, or the threat of violence to a person, or (b) intentional damage, or the threat of intentional damage, to property".¹⁶⁶ The QFBDMA provides exceptions to

¹⁶⁰ FDMA s 16. Schedule 1 [Dictionary](#). The FBDMA includes an equivalent cl 83.

¹⁶⁰ Queensland Parliament, Finance and Administration Committee, above n 40, s 56 of the *Rural Assistance Act 1989* (NSW) is in similar terms.

¹⁶¹ "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": FDMA [s 15](#). See also QFBDMA s 38.

¹⁶² FDMA s [15\(1\)](#).

¹⁶³ *Azzi & Ors v Volvo Car Australia Pty Ltd (Costs)* [\[2007\] NSWSC 375](#) [22].

¹⁶⁴ *Gain v Commonwealth Bank of Australia* [\(1997\) 42 NSWLR 252](#); *ANZ Bank v Ciavarella* [\[2002\] NSWSC 1186](#), *Bell v Mediate Today Pty Ltd* (unreported, SCNSW, 29 October 1998).

¹⁶⁵ Civil Procedure Act 2005 (NSW) [s 31](#).

¹⁶⁶ *Court Procedures Act 2004* s 52C.

confidentiality where the proceeding is not open to the public or concerns a violence or threat of violence, concealing ongoing criminal activity, or abuse of a child or another person.¹⁶⁷

194. Other legislation provides broader exceptions to confidentiality in the public interest. The *Evidence Act 1995* (Cth), for example, provides that the exclusion of evidence about settlement negotiations does not apply where:

- the substance of the evidence has been partly disclosed with the express or implied consent of the parties and full disclosure is reasonably necessary to enable a proper understanding of the other evidence that has already been provided, or to clarify other evidence that might otherwise be misleading
- the evidence contradicts or qualifies evidence that has already been admitted
- one of the persons in dispute, or their employee or agent, knew or ought reasonably to have known that the communication or document was prepared in furtherance of a deliberate abuse of power.¹⁶⁸

195. The NSWLRC has proposed a model provision for the confidentiality and admissibility of mediation communications in evidence that aims to limit the circumstances justifying disclosure, and to uphold the public interest in preventing disclosures made in mediation being used in subsequent proceedings. A model provision had been supported in a majority of submissions lodged in response to consultation. The model provision draws on statutory provisions in Singapore, Hong Kong and Ontario. It provides:

Model Provision 2: Confidentiality and admissibility of mediation communications in evidence

(1) Definitions

“Mediation communication” means

- (a) anything said or done*
- (b) any document prepared, or*
- (c) any information provided,*

for the purposes of mediation, in the course of mediation, or to follow up mediation including any invitation to mediate or any mediation agreement.

“Tribunal” means a tribunal established under statute and includes both administrative and arbitral tribunals.

(2) Confidentiality of mediation communications

- (a) A person must not disclose a mediation communication except as provided for by Model Provision 2(2)(b) or (2)(c).*
- (b) A person may disclose a mediation communication if:*
 - (i) all the parties to the mediation consent and, if the information relates to the mediator, the mediator agrees to the disclosure*
 - (ii) the disclosed information is publicly available, but is not information that is only in the public domain due to an unauthorised disclosure by that person*
 - (iii) the disclosure is made for the purpose of seeking legal advice*

¹⁶⁷ QFBDMA s 38; Queensland Parliament, above n 62, rec 18.43.

¹⁶⁸ *Evidence Act 1995* (Cth) s 131.

(iv) the disclosure is required for the purposes of carrying out or enforcing a settlement agreement

(v) the disclosure is required to bring a claim for mediator misconduct or to respond to such a claim

(vi) the disclosure is made for research, evaluation, or educational purposes and is made without revealing, or being likely to reveal, whether directly or indirectly, the identity of any party, mediator, or other person involved in the conduct of the mediation

(vii) the disclosure is required by law, or

(viii) the disclosure is required to protect the health or safety of any person.

(c) A person may disclose a mediation communication with leave of the court or tribunal under Model Provision 2(4).

(3) Admissibility of mediation communications in evidence

A court or tribunal may admit a mediation communication in evidence in any proceedings (including judicial, arbitral, administrative or disciplinary proceedings) only by leave under Model Provision 2(4).

(4) Leave for disclosure or admission of evidence

(a) A court or tribunal may, on application by any person, grant leave for a mediation communication to be disclosed under Model Provision 2(2)(c) or admitted in evidence under Model Provision 2(3).

(b) For the purposes of Model Provision 2(4)(a), the court or tribunal must take into account the following matters in deciding whether to grant leave:

(i) whether the mediation communication may be or has been disclosed under Model Provision 2(2)(b)

(ii) whether it is in the public interest or the interests of justice for the mediation communication to be disclosed or to be admitted in evidence, notwithstanding the general public interest in favour of preserving the confidentiality of mediation communications, and

(iii) any other circumstances or matters that the court or tribunal considers relevant.

(c) Where a person seeks disclosure or admission of the mediation communication in evidence:

(i) before a court, the application must be made to the court before which the proceedings are heard

(ii) before a tribunal, the application must be made to the tribunal before which proceedings are heard, and

(iii) in any other case, the application must be made to NSW Civil and Administrative Tribunal.¹⁶⁹

Consultation question

196. Should the scope of the exceptions in FDMA s 15(3) be broadened to include an exception aimed at preventing a serious and imminent risk to a person's life, health

¹⁶⁹ NSW Government, NSWLRC, above n 138, 7–10.

or property, violent or damaging offence, or deliberate abuse of power or adopt the NSW Law Reform Commission's model provisions concerned with confidentiality and admissibility of mediation communications in evidence?

197. Should FDM penalty provisions be harmonised in NSW, Victoria and Queensland?

Enforceability of heads of agreement

198. Mediated settlement agreements, described as heads of agreement under s 11AA of the FDMA, can be binding and enforceable depending on the intention of the parties as expressed in the agreement.¹⁷⁰ The QFDBA has clarified this by providing that a signed heads of agreement is binding on each party while in effect.¹⁷¹ If a s 11 certificate is issued after a satisfactory mediation, farm debts become enforceable and litigation is often unnecessary when calling in a farm security. However if a party has to litigate in court to enforce the agreement, the formality and costs of that proceeding are likely to largely negate the advantages of the mediation such as informality and relative lack of expense. Other jurisdictions, such as native title and workers compensation, provide for access to courts and tribunals for parties to seek binding orders post-mediation.¹⁷²

199. The NSWLRC has recommended model provisions for enforcement, with the onus on the defendant to prove lack of enforceability. The model provision includes:

(2) If a party to a mediated settlement agreement fails to comply with its terms, another party wishing to enforce the agreement may, on notice to all other parties who signed the agreement, apply to the Court for orders to give effect to the agreement if:

(a) the agreement is reduced to writing and signed by the parties, and

(b) the mediation was conducted by an accredited mediator, and

(c) a party against whom the applicant seeks to enforce the settlement agreement has explicitly consented to such enforcement, whether by the terms of the agreement or other means.

(3) The mediator must draw the attention of the parties to the effect of Model Provision 5(2) before the mediated settlement agreement is signed.

(4) The Court may refuse to give orders under Model Provision 5(2) only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the Court proof that the agreement is void or voidable on grounds of incapacity, fraud, misrepresentation, duress, coercion, mistake or other invalidating cause, including that the agreement is void or voidable after a court has found it is unjust in the circumstances relating to the contract at the time it was made under the Contracts Review Act 1980 (NSW), or

(b) if the Court finds that:

¹⁷⁰ *Masters v Cameron* (1954) 91 CLR 353; *Hargraves Secured Investments Limited v Ciavarella* [2016] NSWSC 732; *Boardman v Boardman* [2013] NSWSC 1257 discussed in Herbert Smith Freehills Dispute Resolution: ADR Notes, [Australia: Enforceability of heads of agreement following mediation](#), 2013.

¹⁷¹ QFBDMA s 28A.

¹⁷² Discussed in L Boulle AM, *Mediation Principles, Process, Practice* (3rd ed), Lexis Nexis Butterworths 2011, 453.

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- (i) any of the terms of the agreement cannot be enforced as an order of the Court, or
- (ii) making the order would be contrary to public policy, or
- (iii) the mediator failed to draw the parties' attention to the binding nature of the agreement before it was signed.¹⁷³

Consultation question

200. Should the NSWLRC's model "enforcement" provision for heads of agreement be included in the FDMA?
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Penalty provisions

201. The FDMA includes various penalty provisions, including for aiding, abetting and attempts,¹⁷⁴ where:
- a creditor who fails to reflect a mediated heads of agreement in a contract, deed, mortgage or other instrument – maximum penalty 100 penalty units¹⁷⁵
 - a maximum criminal penalty of up to 6 months imprisonment or 20 penalty units or both for breaching the confidentiality requirements of the Act¹⁷⁶
 - a creditor purports to contract out of the Act or requires a farmer or guarantor to indemnify a creditor for any loss or liability arising under the Act: 100 penalty units – maximum penalty 100 penalty units¹⁷⁷
 - an offence in an FDMA regulation carrying a penalty of up to 10 penalty units has been breached.¹⁷⁸
202. Each penalty units in NSW is equivalent to \$110.¹⁷⁹
203. The Queensland Parliamentary Committee examining the QFBDMB recommended an equivalent range of penalties for similar breaches of the Act, but the QFBDMB has broader exceptions to the confidentiality requirements.
204. A meeting of NSW Farm Debt mediators in October 2016 requested that the criminal penalty in s 16 be replaced with civil penalty provisions and that the privilege attaching to mediations be clarified. The effect of such an amendment would be that the custodial sentences could not be imposed on an offender, and a civil "balance of probabilities" standard of proof would replace the higher "beyond reasonable doubt" evidential standard. The civil onus of proof would be on the party seeking to benefit from the provision rather than a prosecutor. The RAA agrees with the mediators that whilst a breach of the confidentiality provisions of the FDMA are a very serious matter, a custodial sentence is inappropriate as such punishments are usually reserved for the most serious offences and to protect the public.

¹⁷³ NSWLRC, above n 138, 14–16.

¹⁷⁴ FDMA s [27](#).

¹⁷⁵ FDMA s [11C](#).

¹⁷⁶ FDMA s [16](#).

¹⁷⁷ FDMA s [20](#).

¹⁷⁸ FDMA s [30](#). No regulations have been made under the Act to date.

¹⁷⁹ *Crimes (Sentencing Procedure) Act 1999* (NSW) [s 17](#).

Consultation question

205. Should the FDMA be amended to change the penalty for unauthorised disclosure from criminal to civil?

Exclusion of personal liability of mediators and certain other persons

206. The FDMA provides for immunity from liability for matters or things done or omitted to be done by the RAA, a member of the Board or a person acting under the direction of the RAA, or a member of the Board. 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 the FDMA, subject the mediator or a person so acting personally to any action, liability, claim or demand.¹⁸⁰ In Victoria *the Small Business Commissioner Act 2003* (Vic)¹⁸¹ provides immunity from liability for the Commissioner and others performing the Commissioner's ADR functions. The scope of mediators' immunity under the FDMA appears to be consistent with the immunity recommended by the NSWLRC except that absolute immunity for court-administered mediation is not provided for as it is rarely relevant to the FDMA.¹⁸²
207. A counter-consideration is that the trend appears for a narrowing of the immunity applicable to lawyers' work, for example if that work involves negligent advice that leads to the settlement of a case by agreement between the parties embodied in consent orders. Common law immunity continues to apply for however "for work done out of court which leads to a decision affecting the conduct of the case in court."¹⁸³

Consultation question

208. Does the scope of mediators' immunity from liability under the FDMA need to be broadened expressly?

Representation and assistance during mediation

209. A party involved in FDM in NSW may be represented by an agent and/or other advisors such as an accountant or other support person if the mediator considers that the agent has sufficient knowledge of the issues to represent the party effectively and so approves their attendance, but farmers may have an advisor present who may be legally qualified but need not be. The farmer is entitled to call upon an advisor for advice and counsel during the mediation.¹⁸⁴ The FDMA confers significant discretion on farm debt mediators in relation to the imposition of reasonable conditions on a party's representative so as to ensure that the other party is not substantially disadvantaged, and their attendance is subject to compliance with the mediator's conditions.¹⁸⁵ The RAA includes information about the availability of free financial counselling for farmers through the national Rural Financial Counselling Service (RFCS) Programme
210. The RFCS provides free rural financial counselling to farmers, fishing enterprises, forestry growers and harvesters, and small, related businesses across Australia who

¹⁸⁰ FDMA s 18.

¹⁸¹ Section 12A.

¹⁸² NSW Government, NSWLRC, above n 138, 10–11. In 2017 the District Court referred a matter to mediation as if the FDMA applied. This was a disputed issue: *AGCO Finance Pty Ltd v James Luxford Swann Matters* Case number 2015/233073.

¹⁸³ *Gregory Ian Attwells & Anor v Jackson Lalic Lawyers Pty Ltd* [2016] HCA 16.

¹⁸⁴ FDMA s 17.

¹⁸⁵ FDMA s 17(3)

are suffering financial hardship. The Programme is funded by the Australian, State and Northern Territory Governments.

211. The RFCS and the RAA work closely in the delivery of services to rural communities throughout NSW with the RFCS assisting eligible clients with the lodgement of applications for both Australian Government (i.e. concessional loans) and State (i.e. Farm Innovation Fund) funding, as well as jointly (i.e. Natural Disaster Relief) funded assistance measures. The RFCS also assists fishers, including helping to access the Commercial Fisheries Business Adjustment Program. Rural Financial Counsellors (RFCs) can help eligible clients to prepare for mediation, and may attend mediation as a support person, but during the mediation may not act as advisors or give counsel.
212. The RAA provides information about the RFCS to farmers when it provides mediation kits, but often by that time the financial options available to farmers have narrowed significantly compared with what might have been possible had they accessed professional financial advice and counselling earlier. The RFCS proposed to the Queensland Finance and Administration Committee that the QFBDMA be amended to include a requirement that creditors refer farmers to the RFCS once they have been transferred into the creditors' problem loan section.¹⁸⁶ Banking representatives suggest instead that their industry is changing, with expert advice now provided to small businesses to assist with the development of responses to financial pressures before major problems develop.¹⁸⁷
213. In Victoria, the RFCS has also raised with DEDJTR a desire to have creditors refer clients to the RFCS when they are referred to the creditor's problem loan section. The view is that this is the point at which farm business will have more options to resolve issues or take different business approaches to improve their financial position. Some of the Victorian services have reported improved relationships with creditors permitting earlier action.
214. Victoria also recognises the importance of the RFCS in providing support to farmers in the FDM process. Details of the RFCS are provided on the RAA's Farm Debt Mediation website, in material provided to creditors to send to farmers, in acknowledgment of requests for mediation, and the VSBC directly encourages farmers to seek support. DEDJTR and VSBC have also provided training and participated in panel sessions for the RFCS to ensure they are aware and understand the FDM process and application procedures.
215. In Queensland, Legal Aid has provided a free Farm and Rural Legal Service since the mid-1990s for rural producers and businesses with severe debt-related problems or who are in dispute with their creditors. No income or asset test is applied. The Service is currently staffed by one senior lawyer but the Queensland Parliament's Finance and Administration Committee has recommended that staffing be increased to two senior lawyers and that financial assistance be provided to farmers to assist with outlays related to their participation in FDM.¹⁸⁸ The QFBDMA provides for one or more advisors to be present at the mediation at the farmer's request.¹⁸⁹
216. Legal Aid NSW and community legal centres in NSW do not have dedicated farm and rural lawyers, but during 2015–16 Legal Aid NSW reviewed the way it provided

¹⁸⁶ Queensland Parliament, Finance and Administration Committee, *Public hearing – Inquiry into the Farm Business Debt Mediation Bill 2016 and Rural and Regional Adjustment (Development Assistance) Amendment Bill 2016*, 6 October 2016, 8,

¹⁸⁷ Australian Government, ASBFEO, Small Business Loans Inquiry Hearings, Transcripts of hearing with National Australia Bank and Westpac, 29 November 2016.

¹⁸⁸ Queensland Parliament, Finance and Administration Committee above n 62, 26–27 and rec 5.

¹⁸⁹ QFBDMA s 24.

legal services to disadvantaged people in a number of remote and rural locations. About 47% of Legal Aid's clients are based in rural areas.¹⁹⁰ The NSW Financial Rights Legal Centre has advised that farmers seek advice from that Centre from time to time concerning credit card debt, hire purchase and machinery loans.¹⁹¹

Review mechanisms for RAA decisions

217. As noted above, the FDMA does not currently include statutory requirements for the internal or external administrative review of decisions concerning the issuance of certificates or accreditation of mediators. The RAA does have an internal review and complaints handling policy that provides for the internal review of RAA decisions consistent with best practice decision-making standards and policies.¹⁹² Since 2004, this process has not been applied to FDM decisions as the decision of the s 11 Committee was considered final. Judicial review has been available.
218. In Queensland Part 6 of the QFBDMA provides for the internal and external merits review of "original decisions" made under the Act. These are decisions for which an "information notice" must be given under the Act,¹⁹³ and decisions about the end-date stated on the certificate authorising enforcement action.¹⁹⁴ The chief executive officer may extend relevant time periods for giving notice and making decisions.¹⁹⁵ The Queensland Civil and Administrative Tribunal (QCAT) can stay certain decisions under the QFBDMA and hear applications for the review of a decision. Internal reviews will to be conducted by an independent senior officer.¹⁹⁶ Decisions subject to review include decisions and failure to make decisions to approve or refuse within the required timeframe mediator accreditation, re-accreditation, suspension or cancellation of accreditation decisions.
219. The ASBFEO recommended in the report on small business loans that
- External dispute resolution schemes must be expanded to include disputes with third parties that have been appointed by the bank, such as valuers, investigative accountants and receivers, and to borrowers who have previously undertaken farm debt mediation.*¹⁹⁷

Consultation question

220. Should the FDMA specify which decisions made under the Act are subject to internal review?

Part 4 of the FDMA: Miscellaneous

Section 21: Waiver of rights void

221. The FDMA creates an offence for contracting out of the Act,¹⁹⁸ and s 21 provides

¹⁹⁰ Legal Aid NSW, *Annual Report 2015–2016*.

¹⁹¹ Oral comment, 29 November 2016.

¹⁹² e.g. NSW Ombudsman, *Effective Complaint Handling (2nd ed. 2010)*; NSW Ombudsman, *Complaint Management Framework and Model Policy (2015)*; NSW Ombudsman, *Complaint Handling - Research, Resources and Training (2013)*; AS/NZS 10002:2014 – Guidelines for complaint management in organisations (2014).

¹⁹³ i.e. a notice that states the decisions, reasons for the decision, rights of review, review timeframe and application procedures for stays of a decision: QFBDMA Schedule 1 Dictionary.

¹⁹⁴ FBDMA Schedule 1 [Dictionary](#).

¹⁹⁵ FDMA ss 81, 82.

¹⁹⁶ Queensland Parliament, Finance and Administration Committee, above n 62, 28.

¹⁹⁷ ASFBEO, above n 2, Rec 13, 53.

¹⁹⁸ FDMA s 20.

that “a waiver of mediation rights under this Act is void.”¹⁹⁹ As noted above, this would not prevent a farmer from restructuring their finances following negotiation with their mortgagee. Creditors risk infringing the Act however if they insist that a farmer changes their financial arrangements in response to a threat of enforcement action. Such avoidance of the Act is likely to be void under ss 6 and 20 of the FDMA. There is an apparent inconsistency between s 21 and s 11(2)(b) of the FDMA, with s 11(2)(b) providing that a farmer is presumed to have declined to mediate if:

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.

222. The difficulty with reconciling these provisions may be remedied with an amendment of s 21 that includes an exception or cross-reference excluding s 11(2)(b) from the prohibition on waiving rights under the Act.

223. The QFBDMA includes examples of farmers’ rights under the Act that cannot be waived. These include the right to ask for mediation for a farm business debt; the right to nominate a mediator to conduct mediation, or a panel of at least 3 mediators for a creditor to choose a mediator to conduct mediation; and the right to apply for an enforcement action suspension certificate.²⁰⁰

224. As noted above, there may be sound reasons, on rare occasions, for waiving a cooling off period with legal advice and informed consent.

Consultation question

225. Should FDMA s 21 be amended to include an exception or cross-reference to exclude s 11(2)(b) from the prohibition on waiving rights under the Act?

Savings and transitional provisions

226. FDMA schedule 1 includes the various savings and transitional provisions that became necessary as the Act was amended previously. Most, if not all of these, appear to have been expended and may perhaps be safely repealed. Consultation comments are invited.

Consultation question

227. Is it necessary to retain all or any of the saving and transitional provisions in FDMA schedule 1?

Any other matters?

228. The RAA welcomes any additional comment that you wish to make concerning the operation of the FDMA.

Consultation question

229. Are there any issues not mentioned in the Consultation Paper that you wish to raise with the RAA Board for consideration?
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¹⁹⁹ This prohibition on waiving rights under the Act was included in the Farm Debt Mediation Bill as introduced to Parliament. Section 11(2)(b) was included in the FDMA in the Farm Debt Mediation Act 1996 (NSW): Schedule 1 clause 6.

²⁰⁰ FBDMA s 86.