

Overview of amendments

Amended 'object' – no 'dispute' needed

The Act provides for the efficient and equitable resolution of matters involving farm debts. The object of the Act has been clarified so that a dispute about a farm debt is not needed.

A notice given by a creditor to a farmer inviting mediation is no longer required to inform the farmer of the creditor's intention to take enforcement action, to encourage mediation earlier after default.

Amended definitions

The Act defines mediation as a structured negotiation process that is facilitated by a neutral and independent mediator.

'Heads of Agreement' are redefined as 'mediation agreements'. A mediation agreement is binding on the parties, and may be varied or replaced by a further written agreement.

The protection of the Act has been extended to a broader range of 'farming operations', including on-farm and offshore aquaculture, timber and native vegetation cultivation or harvesting, and activities involving primary production carried out in connection with those farming operations. The definition excludes wild harvest fishing and the hunting or trapping of animals, birds and reptiles in the wild.

Time periods in the Act have been simplified, and changed from calendar days to business days. For example:

- a farmer's response to a notice inviting mediation must be given to the creditor within 20 business days (instead of 21 ordinary days) after receiving the notice.
- A farmer may initiate a request for mediation (whether or not in default) by giving the creditor a mediation request. A creditor must respond to a mediation request within 20 business days after receiving the request.

'Exemption certificates' (formerly 'Section 9B Exemption Certificates') have been redefined as 'Prohibition Certificates'. A prohibition certificate remains in force for 6 months. The Authority may refuse to grant a prohibition certificate where the creditor has failed to respond to a mediation request if the Authority is satisfied that the failure to respond is justified in the circumstances.

The former 'Section 11 Certificates' are re-named 'Exemption certificates'. If a farmer fails to respond within the specified period (generally 20 business days) to a notice of invitation to participate in mediation given by the creditor, the exemption certificate expires 3 years after the period for responding to the invitation ends.

The Authority may refuse to grant an exemption certificate where the farmer has declined to mediate if the Authority is satisfied that the farmer was, in the circumstances, justified in doing so, and the farmer intends to mediate within a reasonable time.

The definition of farm machinery has been extended to all vehicles, machines and implements used for the purposes of a farming operation, whether or not they have been acquired for the purposes of a farming operation.

Role of mediators

The amendments make further provision in relation to the accreditation of mediators and the conduct of mediation sessions, including costs of mediation. The Authority is no longer required to consult with representative bodies in the banking and farming industries before instituting arrangements for accreditation. Instead, a regulation-making power enables regulations to provide for matters relating to the accreditation of mediators.

The amendments make it clear that a mediator may facilitate the exchange of information for the purposes of the mediation.

A mediator may adjourn or terminate a mediation session if it would be inappropriate to continue the session, having regard to such matters as the duration of the session, the willingness of the parties to participate,

whether the parties are engaging in the mediation in good faith and any risk to the health or safety of the parties.

Mediation sessions are to be held at a place and time that is reasonably convenient for the parties.

The amendments provide for an exception to the general rule against admissibility in court proceedings of information obtained from a mediation session, permitting information to be disclosed to prevent danger of personal injury or property damage.

The amendments confirm that parties to a mediation are to pay their own costs of attendance at a mediation and are generally to pay equal shares of the mediator's fees.

Incentive for farmers to mediate early

The amendments provide an incentive for early mediation by enabling farmers to ask their creditors to mediate before the farmer defaults on their loan. If a farmer later defaults, the creditor will still need to invite the farmer to mediate before they can take enforcement action. Further voluntary mediations may also occur.

Creditors' invitation to mediate is mandatory

It is mandatory for a creditor to invite a farmer to mediate before the creditor can take possession of property or other enforcement action under a farm mortgage.

The Act does not require mediation to be offered in relation to a farm debt for a restructured farm mortgage if:

- the farm debt for the earlier farm mortgage is subject to a mediation agreement under the Act, and
- the farmer is in default under the restructured mortgage.

Service of notices

Provisions relating to the service of documents have been updated, including permitting service by email or to a specified address. Regulations may be made prescribing alternative or additional methods of service.

The amendments also make timeframes for responding to notices clearer and more flexible. The Rural Assistance Authority will be authorised to allow a farmer extra time to respond to an invitation to mediate in certain circumstances, including if the farmer has experienced or is experiencing extreme events such as flood or bushfire; relationship and family breakdown or family violence; physical and mental health issues; or if the farmer is working off-farm or is in jail, meaning a notice may not have been received. Making the Act more flexible will deliver better access to justice for disadvantaged farmers.

Access to information

The amendments strengthen the power of the Authority to request information in connection with an application or a mediation under the Act. The Authority may refuse to consider an application made by a farmer or creditor if the applicant fails to comply with the requirement.

These amendments enable the Authority to better determine whether the Act applies in the circumstances, or whether mediation through the Office of the Small Business Commissioner, or privately, would be more appropriate.

Internal review of certain decisions

The amendments provide for an internal review process for decisions of the Authority relating to the grant or refusal of prohibition certificates and exemption certificates and the accreditation or reaccreditation of mediators, consistent with administrative law principles. The review will be concluded within 30 business days of a review application and conducted by a person not substantially involved in the original decision.

An application for internal review of a decision to grant an exemption certificate operates to stay the decision being reviewed until the applicant is notified of the decision on the review.

A creditor must not take enforcement action while an application for review of a decision to refuse a prohibition certificate is pending.

An application for the review of any other decision does not operate to stay the decision.

New offence provisions and higher penalties

The amendments create new offences relating to unauthorised enforcement action, in addition to the enforcement action being void. A creditor is prohibited from taking enforcement action unless an Exemption Certificate (formerly known as a 'Section 11 Certificate') is in force. The maximum penalty that a court may impose for the offence is 2,500 penalty units (\$275,000) for a corporation or 500 penalty units (\$55,000) for an individual.

The amendments also amend the penalty for unlawfully disclosing confidential information relating to a mediation. The penalty has been increased to a maximum of 100 penalty units, currently \$11,000.

The penalty of imprisonment for disclosing information obtained in or in relation to a mediation has been removed so that the maximum penalty a court may impose for the offence is 100 penalty units.

Civil rights and remedies not affected

The amendments clarify that the Act does not affect or limit any available civil right or remedy, unless it expressly so provides.

Certain interstate mediations recognised

The amendments enable mediations concluded under corresponding legislation in another jurisdiction to be recognised in New South Wales. The conduct of satisfactory mediation, and the conduct of the farmer in declining to mediate, under corresponding laws of other States and Territories are included as grounds for issuing an exemption certificate.

The amendments also enable regulations to be made that could enable the Rural Assistance Authority to appoint nationally accredited farm debt mediators who mediate under similar interstate laws.

Cooling off period may be varied or waived

The cooling off period for a mediation agreement may be waived or varied by agreement between the parties. The existing provision for cooling off periods limits variations to an extension (rather than a reduction) of the duration of the period.