

Farm Debt Mediation

This document provides an overview of farm debt mediation in NSW.

The object of the *Farm Debt Mediation Act 1994 (NSW)* is to provide for the efficient and equitable resolution of matters concerning farm debts.

Under the Act, a creditor must invite a farmer in writing to mediate before taking enforcement action in relation to a farm mortgage. Heavy penalties apply if correct procedures are not followed.

The farmer has 20 business days to respond to a creditor's invitation.

Farmers may also initiate mediation under the Act, whether or not they are in default in relation to a secured farm debt. Farming families and businesses may find mediation useful for resolving business or succession planning disputes.

Financial problems will be more effectively addressed if identified early. Seeking advice from a Rural Financial Counsellor, accountant or solicitor can assist.

Please contact the NSW Rural Assistance Authority (the Authority) if you are considering mediating under the Act to discuss whether the Act applies in the circumstances, and for information about the mediation process. Information is also accessible on the Authority's website:

www.raa.nsw.gov.au or by calling 1800 678 593.

What is Farm Debt Mediation?

Mediation is a structured negotiation process in which the mediator, as a neutral and independent person, assists the parties to communicate effectively with each other and reach agreement on issues. It may help to achieve a way forward in a financial relationship, or agreement on how to end that relationship in a way that best meet all parties' needs.

Parties should participate in the mediation with a preparedness to consider all reasonable options proposed, respond promptly to reasonable requests for information, and demonstrate respect for all the participants and the mediation process.

Remedies available at mediation

One of the fundamental principles of mediation is that parties properly informed of their rights and fully prepared for negotiation, can reach agreements which satisfy their needs. The range of remedies available in mediation is unlimited as they are consensual agreements and become binding contracts. The mediator will not make decisions for the parties or impose a solution but may assist in the generation of options for settlement.

Types of mediation

There are two types of mediation under the Act. The first is creditor-initiated mediation, which results from a farmer agreeing to an invitation to mediate issued by a creditor. The second is farmer-initiated mediation, where a farmer takes the initiative and requests mediation.

The same timeframes apply to arranging each type of mediation.

Arranging the mediation

It is the responsibility of both the farmer and the creditor to reach agreement on:

- how costs of mediation will be shared
- where and when mediation will take place
- who the mediator will be
- who will make contact with the mediator.

Who are the mediators?

The Authority has accredited and experienced mediators on its panel of mediators. The farmer must nominate a mediator from the Authority's panel when they agree to mediate. If the creditor rejects their nomination, the farmer must nominate at least three other mediators from the accredited panel, from which the creditor must select one.

The mediators are strictly neutral – they do not take sides or represent either the farmer or the creditor. Mediators must not provide legal advice, or act as an adjudicator or arbitrator.

What are the advantages of mediating?

Mediation:

- is a simple, voluntary and confidential process that is more accessible and affordable than litigation
- helps parties understand how the others see and feel about the problem
- may help a business relationship to be maintained as it focuses on ways forward
- enables identification and exploration of all issues, including those which may not be revealed in arbitration or litigation because of the application of the rules of evidence or the adversarial nature of the process
- is strictly confidential, so privacy and commercially or personally sensitive information is not publicly disclosed.

Where should mediation take place?

Mediation works best when the parties are in a neutral place. Even if the farmer and creditor are used to meeting in one party's office, mediation should not take place there.

Pre-mediation preparation

The parties are encouraged to thoroughly prepare their case before mediation. This will help the mediation to proceed smoothly. Please contact the Authority if you have difficulty accessing the farm debt videos or other mediation resources provided on its website.

Who can be at the mediation?

The farmer may bring a solicitor, accountant, rural financial counsellor or other adviser to the mediation. The farmer may bring family members, with the approval of the mediator. An agent may represent a farmer if the mediator agrees, and the mediator may attach conditions, to prevent the farmer being disadvantaged. The creditor may be represented by an officer of the corporation who may be a lawyer and may bring other advisers if the mediator agrees.

Any agent or representative who attends a mediation on behalf of a party must provide the mediator with a written authority to settle at the mediation that has been signed by the party they represent.

If another mediation session is required as a result of a party's failure to give the required authority, the party is liable for all costs associated with the attendance by the other party at that additional session.

What will mediation cost?

The cost usually includes the mediator's fees, mediator's out of pocket expenses such as travel, accommodation, and phone costs, together with any hire fee for the venue.

The fees charged by the Authority's accredited mediators are accessible on the Authority's website. Some fees may be negotiable.

Under the Act the parties to the mediation must share the mediator's costs unless they agree otherwise. Parties must pay their own costs.

If the farmer engages an adviser to assist at mediation, a written cost-estimate should be obtained from the adviser beforehand.

What is a Mediation Agreement?

It is the mediator's responsibility to write up the parties' Mediation Agreement under the Act. The document will state their main points of agreement. It should be signed by each party within 24 hours of the mediation.

Any contract, deed, mortgage or other instrument entered into as a result of the Mediation Agreement must reflect the terms of that Agreement. A penalty applies to breach of this requirement.

What if the parties don't reach agreement?

Settlement by mediation is voluntary, and neither party can be forced into an agreement. Under the Act, the parties are required to make reasonable attempts to negotiate a settlement at mediation.

If an agreement cannot be reached despite a mediation proceeding as far as it reasonably can in an attempt to reach agreement, the creditor can apply to the Authority for an Exemption Certificate. Once that certificate has been issued, enforcement action can commence.

How long does mediation take?

To allow for satisfactory mediation to take place, both parties should allow at least six hours, unless the matter is very simple. The time can be extended, and the mediation may be adjourned for another day or days if necessary and if the mediator and the parties agree.

Mediation takes time as during the mediation the mediator will meet with each party separately in a confidential private session to explore underlying issues and discuss how the mediation is progressing. Proposed settlement options are usually explored during private sessions. The mediator will not, unless specifically authorised to do so, disclose anything said in a private session during the joint session. The mediation is confidential to those participating.

Farmer's rights and obligations under the Act

Once the farmer has received an invitation to mediate from the creditor, the farmer has 20 business days to respond to the creditor, either agreeing or declining to mediate. In rare and exceptional circumstances, the Authority may agree to extend this period. If the farmer elects to mediate, the farmer must advise the creditor in writing.

If the farmer fails to respond in writing within 20 business day, the creditor may apply for an Exemption Certificate which has the effect that the Act does not apply for three years. The Authority will invite the farmer to comment on the creditor's application before the Exemption Certificate is issued.

Cooling off period

There is a mandatory 10 business day cooling off period for any Mediation Agreement entered into by a farmer. The cooling off period may be amended by agreement between the farmer and the creditor, but legal advice is best sought before the cooling off period is changed.

Rights during cooling off period

The farmer may, during the cooling off period, serve a written notice on the creditor to the effect that the farmer rescinds the Mediation Agreement subject to the cooling off period. The farmer or the farmer's solicitor must sign the notice of rescission.

Time limits for farmers

As noted above, the farmer must give written notice, within 20 business days of receipt of a notice under the Act, to the creditor, indicating that the farmer agrees to mediate.

The Authority considers it reasonable to expect that the mediation process will be completed within three months from the date the farmer receives an invitation to mediate.

This period can be extended by agreement between the parties.

Record keeping

Both the farmer and the creditor should keep accurate records and evidence of service of notices, together with copies of all notices served on each other. Please ensure that any forms and other documents sent to a party have been received by that party, preferably with an acknowledgement in writing, or by email.

Types of certificates issued under the Act

An **Exemption Certificate** states that the Act does not apply to a specified farm mortgage for three years. Once in possession of an Exemption Certificate, a creditor may commence enforcement action in relation to a secured farm debt if that debt is in default or a Mediation Agreement has been breached.

A **Prohibition Certificate** prohibits a creditor from taking enforcement action. It may be issued if the farmer is in default under a farm mortgage, the creditor has declined the farmer's request to mediate, and other requirements of the Act have been satisfied. A Prohibition Certificate remains in force for six months.

Internal review

The Act provides that a farmer or guarantor whose obligations are secured by a farm mortgage, or the creditor may apply to the Authority for an internal review of a decision to:

- grant, or refuse to grant a Prohibition Certificate
- grant, or refuse to grant an Exemption Certificate.

An application for review must be lodged on the Authority's approved form within 20 business days of the Authority's decision, or such longer period as the Authority allows.

It is highly recommended that farmers contact their local Rural Financial Counsellor, accountant and/or solicitor for advice or further information if you wish to appeal against a decision of the Authority under the Act.

The Authority should make a decision within 30 business days of receiving an application. The Authority may confirm, amend or substitute another decision.

Further Information

For further information about the Act please visit the Authority's website www.raa.nsw.gov.au or contact:

Free call: 1800 678 593

Email: rural.assist@raa.nsw.gov.au

Farm Debt Mediation Unit

NSW Rural Assistance Authority Locked Bag 23

ORANGE NSW 2800