

Questions & answers

Q1. How has the Farm Debt Mediation Act 1994 (NSW) been amended?

The Act has been amended by:

- clarifying definitions and extending the application of the Act to more types of farm businesses and mortgaged farm property.
 - the definition of 'farming operation' has been broadened to include contemporary farming such as aquaculture and forestry, and
 - a definition of 'mediation' has been provided consistent with definitions used in other NSW Acts;
- clarifying the functions of farm debt mediators and the requirements for notifying, arranging, conducting and concluding mediations;
- affirming the principle that creditors are required to make one mandatory mediation offer to a farmer in default before enforcement action can be taken;
- encouraging early farmer-initiated mediation when the farmer is not in default;
- providing for prompt internal appeals against certain administrative decisions;
- enabling mutual recognition of mediations that take place under the corresponding law of other states or territories, and after regulations have been made, enabling mediators that are accredited under similar, interstate laws to be accredited to mediate under the Act;
- introducing an appropriate penalty for creditors who take enforcement action contrary to the Act; and
- updating confidentiality requirements.

Q2. Why has the Act been amended?

The 2018 amendments respond to the feedback stakeholders provided during a routine review of the Act in 2017.

The amendments strengthen an already effective Act.

The Act has worked well for 23 years and has been improved by the minor amendments in the Act.

The amendments harmonise some provisions with farm debt mediation legislation in other States.

NSW supports the Commonwealth's policy of harmonising farm debt mediation legislation across Australia.

Q3. What consultation with industry occurred before the Act was amended?

Mediators and mediation firms, financial counsellors, lawyers, farmers, industry bodies and accountants provided comment in response to a routine review of the Act in 2017. The NSW Rural Assistance Authority ('the Authority') released an Issues Paper for public comment March-May 2017.

40 written submissions were received: 15 submissions and 25 completed responses to an online survey that provided the review consultation questions.

Meetings were held with other jurisdictions, accredited farm debt mediators and industry bodies.

Q4. How do the 2018 amendments help farmers?

The amendments help farmers because:

- new and amended definitions and section headings clarify the scope and object of the Act
- they require farm debt mediation to be offered to a broader range of farmers before enforcement action can be taken in relation to secured farm debts in default. Farmers engaged in farm forestry and aquaculture for example, are protected by the Act;

- a new deterrent is provided to discourage unlawful enforcement action; Creditors face a fine of up to 500 penalty units for an individual and 2,500 penalty units for a corporation if they take enforcement action without offering to mediate. A penalty unit = \$110 in 2018;
- an incentive has been provided to encourage mediation before default occurs. If a farmer asks their creditor to mediate before they default, the farmer still retains their right to be offered one mediation after they default;
- how the costs of farm debt mediations are shared fairly by the creditor and the farmer is clarified;
- clarifying that the Act does not affect or limit a civil right or remedy that exists apart from the Act, whether at common law or otherwise;
- clarifying time periods in the Act so that those using it are less likely to be confused, and harmonisation is progressed with other jurisdictions' legislation;
- clarifying the role of accredited farm debt mediators under the Act; and
- providing for the internal review of certain administrative decisions that the Authority can make under the Act.

Q5. How successfully has the Act been working?

The Act has worked well for 23 years. It was introduced in part to reduce the number of farmer suicides in NSW after a rural crisis in the 1980s and early 1990s when pressure for bank accountability was mounting, and when NSW led the nation innovating with alternative dispute resolution (ADR). ADR has since become an integral part of civil dispute resolution processes.

The Act is a proven and effective access to justice mechanism for farmers and creditors. Either can initiate mediation under the Act. Creditors must offer mediation before they can take possession of property or other enforcement action under a farm mortgage.

Mediation as a way of resolving financial disputes is inexpensive, efficient and equitable.

Mediation is a structured negotiation process in which an accredited mediator – a neutral and independent person – assists farmers and their creditors to reach agreement on their present and future financial arrangements.

The parties share the mediator's fees and the costs of the mediation, and cover their own preparation and participation costs.

In farm debt mediation farmers can communicate openly and confidentially with creditors to explore options like refinancing or restructuring loans, or changing the nature of the farm business.

Farmers, creditors, lawyers, mediators and Rural Financial Counsellors like the Act. Creditors appreciate that farmers wish to resolve their financial difficulties with dignity. Farmers like being able to retain their dignity.

Parties aim to reach agreement during mediation. This can become a binding and enforceable contract. Farmers can rescind the agreement within a 10 business day statutory cooling off period.

Once a satisfactory mediation has occurred, a creditor can apply under the Act for a certificate that states that the Act no longer applies to the particular farm mortgage. Enforcement action can be taken once a certificate has been issued if default continues. Certificates remain current for 3 years.

If a creditor refuses a farmer's request for mediation when the farmer is in default, the farmer can apply for a certificate of exemption from enforcement

Q6. How many farmers are involved with farm debt mediation each year?

The Farm Debt Mediation Act has contributed to cultural change in the agribusiness lending sector. It is good law, based on good policy.

The number of farm debt mediations is steadily declining each year, which is a very welcome trend.

During the first few years that the Act operated there were several hundred mediations a year. In 2016–17, the number of mediations fell to 39 new cases (34 creditor initiated and 6 farmer initiated), down from 62 cases in 2015–16.

After more than 20 years of successful operation, the Authority believes that the Act, and other Government policy mechanisms, and revisions to the banking sector's Code of Banking Practice, have improved communication between creditors and farmers.

Reasonable weather, steady commodity prices and banks' relatively low interest rates for agribusiness facilities also contribute to declining numbers of impaired loans.

Other policy mechanisms that are helping to build farmer resilience include:

- Farm Management Deposits, a scheme that enables farmers to ride out uneven incomes by providing a tax incentive for pre-tax income to be set aside in good years, to build up cash reserves for use in low-income years.
- farm business skills and professional training programs are upskilling farmers in business skills and reducing the need for farm debt mediation.
- Government-funded concessional farm finance including Drought Recovery, Dairy Recovery and other Drought Assistance Loans and grants reduce the need for farm debt mediation.

Q7: Why is the definition of farming in the Act being expanded?

The definitions in the Farm Debt Mediation Act have been expanded so that a wider range of farms are protected by the Act.

The Act now applies to emerging agricultural businesses such as on-farm and offshore aquaculture and farm forestry.

The NSW Government recognises the benefits of the negotiated resolution of farm debt matters, mindful that the Act has worked well for about 23 years.

Q8: Now that forestry is included under the Act, does this mean Managed Investment Scheme plantations are covered by the Act?

The Act now applies to farming operations run on a commercial basis by farmers who are “solely and principally engaged in a farming operation”, including those who own land under a share farming agreement.

Provided a plantation is run as a commercial primary production activity that is run by one or more farmers, the Act should apply.

A farmer seeking to use the Act would need to work on the plantation as a commercial primary production activity.

Persons who own land under a share farming agreement are regarded as farmers if they are solely and principally engaged in a farming operation.

The Act does not apply to farmers who derive most of their income from other employment, trades or professions, who are not solely and principally working the land, as individuals, corporations or share-farmers.

The Act does not apply to people who are not farmers who engage in secondary-market trading of interests in managed investment schemes.

Q9: Why are farmers being encouraged to initiate mediation when they have not defaulted?

Early mediation means farmers have more bargaining power to negotiate about possible longer-term strategies to address poor farm business performance. Such strategies may include:

- restructuring the nature of the farm business or the farm's financial arrangements
- completing resilience-building activities such as training in farm business skills, or developing a farm business plan that incorporates innovation and agri-tech improvements.

Early mediation is more likely to lead to successful financial outcomes than late-stage mediation.

Q10: How does the Rural Assistance Authority choose mediators?

The Authority maintains a panel of mediators who are accredited under the National Mediator Accreditation System.

The Authority plans to open up the panel to mediators who are nationally accredited and who practice farm debt mediation in other jurisdictions, by regulation.

The Authority receives expressions of interest from mediators in being appointed to the panel from time to time and fills vacancies as needs arise.

Q11: How does the Authority ensure that mediators are effective and impartial?

The Authority accredits mediators to a NSW panel of farm debt mediators. Each mediator is required to hold accreditation under the National Mediator Accreditation System (NMAS) and to perform their mediations in a way that is consistent with the NMAS Practice Standards. Those standards require that mediators be effective and impartial. In addition, the Authority has for many years required mediators to attend a training session that the Authority delivers annually, at least once every two years.

Parties who are dissatisfied with a mediator's performance can:

- advise the Authority in their exit questionnaire after the mediation
- lodge a complaint with the mediators' Recognised Mediator Accreditation Body under the NMAS
- apply for internal review of a decision by the Rural Assistance Authority to issue an exemption certificate after a satisfactory mediation.
- The Farm Debt Mediation Act provides that the Authority must withdraw the accreditation of any mediator who:
 - fails to draft the mediation agreement reached after a satisfactory mediation for the parties to settle, or
 - fails to provide to the Authority after a mediation a summary of the mediation in the form approved by the Authority.

The Farm Debt Mediation Act also provides that it is not the function of mediators to:

- advise a farmer or creditor about the law
- encourage or assist a farmer or creditor in reserving or establishing legal rights, or
- act as an adjudicator or arbitrator.

The 2018 amendments enable the Authority to make regulations to extend accreditation to farm debt mediators who practice in other jurisdictions, consistent with Australia's mutual recognition policy.

Q12: Why is accreditation under the National Mediation Accreditation System (NMAS) required?

Applicants for NMAS accreditation need to satisfy their Recognised Mediator Accreditation Body (RMAB) that they meet threshold training, education and assessment requirements as described in the Practice Standards and Approval Standards which form part of the NMAS.

The Authority requires farm debt mediators to be accredited under the NMAS because its accreditation process is standard across Australia, and is effective.

Q13: What process is available to lodge a complaint about a mediator?

Parties who are dissatisfied with a mediator's performance can:

- advise the Authority in their exit questionnaire after the mediation
- lodge a complaint with the mediators' Recognised Mediator Accreditation Body under the National Mediator Accreditation System (NMAS)
- lodge an internal appeal against certain administrative decisions made by the Authority including that a certificate should be issued after a satisfactory mediation under the Act.

Q14: Can a mediator appeal a decision made by the Authority on their accreditation?

The 2018 amendments provide that the Authority may accredit and reaccredit persons as mediators for the purposes of the Act, and that the regulations may make provision for:

- applications for accreditation
- conditions of accreditation
- the suspension of accreditation
- the cancellation of accreditation.

The 2018 amendments provide that a person who is aggrieved by a decision of the Authority may apply to the Authority for a review of that decision (internal review).

Decisions subject to internal review include:

- A decision to accredit or reaccredit or to refuse to accredit or reaccredit a person as a mediator
- A decision to suspend or cancel the accreditation of a mediator.

Internal appeals will be determined by the Chief Executive of the Authority or an employee of the Authority who is directed by the Chief Executive to deal with the application. The reviewer must be a person who was not substantially involved in making the decision the subject of the application.

Q15: Why is online farm debt mediation not being implemented?

The Act as amended provides that mediation sessions are to be held at a place and time, and in a manner, that is reasonably convenient for the parties.

The Authority does not regard online farm debt mediation as a suitable mechanism for exploring, negotiating and resolving the various complex financial challenges that arise on farms.

Farm debt mediations often require frank and difficult conversations about deeply personal issues such as assets and liabilities, succession plans, personal and family health, family relationships, and tragedies and hardships of a diverse nature. These conversations are best conducted in a confidential, structured process of mediation that has proven to be most effective when done face to face.

When parties speak face to face they are more likely to respond to the feelings and aspirations expressed by other parties to the mediation.

Minor defaults on farm machinery loans may be able to be negotiated effectively in a teleconference or videoconference, if the mediating parties and the mediator agree.

Q16: What benefit is there to NSW from harmonisation of farm debt mediation legislation?

Harmonised farm debt mediation would deliver:

- better access to justice nationally
- equality under the law for Australian farmers
- cost and time efficiency for all parties
- shared expertise and learning by doing across jurisdictions
- an expected reduction in negative behaviours associated with financial stress such as domestic violence and self-harm.

Q17: How do these amendments impact farming operations spread across multiple states?

The 2018 amendments enable the Authority to recognise a satisfactory mediation conducted in another state under corresponding farm debt mediation legislation when the farm debt is secured by a farm mortgage over farm property in that other State, as well in NSW.

The amendments also enable the Authority to take account of a farmer's refusal to mediate under the corresponding law of another jurisdiction.

Victoria and Queensland can already recognise farm debt mediations conducted in NSW if secured farm property is in NSW and in Victoria or Queensland. The 2018 amendments extend this mutual recognition so that the Authority can recognise mediations and refusals to mediate in other jurisdictions under corresponding legislation.

Q18: What protections are available to protect against unscrupulous creditors?

Banks; building societies; credit unions; and other types of authorised deposit-taking institutions ("banking businesses") are licensed, and prudentially regulated by the Australian Prudential Regulation Authority ("APRA"). They are also regulated as companies by the Australian Securities and Investments Commission ("ASIC").

Farmers who wish to lodge complaints against unscrupulous creditors will be able to complain to the Australian Government's new one-stop shop – the Australian Financial Complaints Authority, or through other legal mechanisms.

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry established on 14 December 2017 may recommend other means of redress for farmers and other consumers who are aggrieved about unscrupulous creditors.

The amendments to the Farm Debt Mediation Act that significantly increase penalties under the Act should provide an effective deterrent to unscrupulous creditors who misuse their power in relation to farm debt.