

Farm Debt Mediation

Obligation to mediate in good faith

An essential aspect of a fair and equitable mediation is that parties act honestly and in good faith throughout the process.

The *Farm Debt Mediation Act 1994 (NSW)* includes various references to “good faith”:

- the Rural Assistance Authority can grant a s 9 prohibition certificate to an applicant farmer in default if three months have elapsed 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 10B(3)(a);¹
- the Rural Assistance Authority can grant a s 14 exemption certificate that the Act does not apply to an creditor:
 - if three months have elapsed after a creditor gave notice and the creditor attempted to mediate in **good faith** throughout that period or such other longer period as has been agreed by the creditor (s 14(3)(f));
 - the farmer has failed to take part in mediation in good faith or has unreasonably delayed entering into or proceeding with mediation in respect of the farm debt (s 14(3)(h));
- a creditor’s failure to forgive or reduce a farmer’s debt does not demonstrate a lack of **good faith** in attempting to mediate: s 14(5);
- 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 Act: s 18.

Unlike some other legislation,² the Act does not define “good faith”, but judicial guidance is available.³ 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 subject oneself to the process of negotiation or mediation;
- to have 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; and
 - a willingness to give consideration to putting forward options for the resolution of the dispute.

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;
- 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.⁴

“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.⁵

- ¹ The exemption certificate ceases to be in force either six months after the day it was issued: s 12.
- ² e.g. *Fair Work Act 2009* (Cth) s 228.
- ³ 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. See also: *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd* [2010] WASCA 222 and *United Group Rail Services Ltd v Rail Corporation New South Wales* (2009) NSWLR 618.
- ⁴ *Aiton v Transfield* [1999] NSWSC 996 per Einstein J.
- ⁵ *United Group Rail Services Ltd v Rail Corporation New South Wales* (2009) NSWLR 618.