

Farm Debt Mediation Bill (No 2)

Government Bill

As reported from the Primary Production Committee

Commentary

Recommendation

The Primary Production Committee has examined the Farm Debt Mediation Bill (No 2) and recommends that it be passed with the amendments shown.

Introduction

The bill would establish a statutory farm debt mediation scheme to provide a structured and consistent process for resolving problems with farm debt.

It would require lenders to offer mediation if a farmer was in default, before the lender took enforcement action in relation to debt secured over farm property. Farmers would also be able to initiate mediation.

The intent of the bill is to provide for fair, equitable, and timely resolution of farm debt problems. It aims to have farmers and lenders explore solutions constructively. Where options are limited, it aims to allow arrangements to be concluded in a timely and dignified way.

Proposals for a statutory farm debt mediation scheme have been raised in various forms over the years. The number “2” in this bill’s title is because an earlier bill with the same name was introduced as a Member’s bill in 2018. It was subsequently withdrawn so that a Government bill could be introduced in its place.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Interpretation of various terms

We recommend several amendments in clause 6 to clarify the meaning of some key terms used in the bill.

Meaning of “enforcement action”

If a farmer declined to mediate, the bill would allow a creditor to seek authorisation to take enforcement action. This action includes moving to sell property and could include appointing a receiver, and appointing a person to assume control of the farm property.

We considered carefully whether the definition of “enforcement action” in clause 6(1) was appropriate.

We note that the bill aims to encourage the parties to engage in mediation before any enforcement action is taken. The definition should be sufficiently broad to cover the range of actions a creditor might take regarding farm debt, but not so wide as to prevent them from taking any action. We spent considerable time discussing whether mediation should be triggered by events earlier in the process, rather than waiting for an event of default. As we discuss later in relation to new clause 16A, we propose adding a requirement that creditors must accept an earlier request for mediation unless they have good reason to decline. A failure to do so would have implications for future certificate applications in relation to that debt.

We recommend that an application by the creditor to have the farmer declared bankrupt under the Insolvency Act 2006 should be included in the definition of enforcement action. This is because a bankruptcy situation would be similar to others covered by the bill, and its omission could lead to distortions. For clarity, we propose moving the revised definition to become new clause 9A(1).

Also for clarity, we propose moving to new clause 9A(2) and (3) most of the provisions from clause 58 of the bill as introduced. These relate to the appointment of an administrator or receiver under the Companies Act 1993. However, we recommend deleting clause 58(2)(c) of the bill as introduced, which relates to the appointment of a liquidator under section 241 of the Companies Act. This provision is unnecessary as a creditor is unable to make such an appointment. An application for an order to appoint a liquidator would, however, be covered by clause 9A(3)(c).

Definitions of “farmer” and “primary production business”

The policy intent of the bill is that anyone with a direct interest in farm debt mediation should be able to access the process. However, the intent is to exclude:

- hobby or lifestyle farms that are not considered a business activity
- secondary processing operations
- contractors, since they have a different connection to their debt than the farming sector.

To meet this intent, the bill as introduced defines a farmer as “a person who is solely and principally engaged in a primary production operation”. We consider that this

might be too limiting in cases of complex ownership, such as a farm held in a trust or corporate structure. We therefore recommend deleting the words “solely and principally” from the definition of farmer.

We also recommend adding a new limb to the definition so that it would cover any person who is a principal debtor of the farm debt, even if they did not contribute labour directly. We consider that a spouse, partner, or trustee who is employed elsewhere, but is a party to the farm debt, is “engaged” in the business. They should therefore be considered a farmer for the purposes of this legislation. Our proposed paragraph (b) would make it clear that any party to the farm debt would be considered a “farmer” and could initiate mediation.

We note that removal of the words “solely and principally” could allow some operations that are on the boundary between lifestyle farming and business operations to access the scheme. On balance, we consider this preferable to excluding some operations that could genuinely benefit from mediation. Moreover, we believe a lifestyle farmer is less likely to have a substantial loan that made mediation worthwhile.

We also note that removing the requirement for a farmer to be “solely and principally” engaged in farming could mean that some agricultural contractors fell within the definition of “primary production operation”. The bill’s intent is not to include contracted service providers such as harvesters or shearers. To clarify this point, we recommend amending the term from “primary production operation” to “primary production business”, and amending the definition to more specifically exclude contractor-type services. Our definition would also help to make clear the types of primary production activities that we believe should be covered by the mediation scheme.

We also recommend amending the definitions of “farm debt” and “farm property” to reflect our proposed use of the term “primary production business”, and including a new term, “related activities”.

Meaning of “security interest”

Finally, we recommend amending the definition of “security interest” in clause 6.

We considered whether the obligation to offer mediation should apply in relation to debts of property rates or various statutory charges. We concluded that the following charges should be excluded from the scheme as their inclusion would not fit within the scheme’s purpose. We propose that the definition of “security interest” exclude:

- statutory property charges (such as local authority rates, or penalties under the Resource Management Act)
- statutory charges relating to failure to deduct PAYE or child support payments.

We note that the use of the Personal Property Securities Act definition encompasses a wide range of security interests. It would include those that secure low levels of debt (for example, hire purchase agreements for low-value goods). We considered including a *de minimis* provision, to limit the bill’s application to debt over a certain amount, but ultimately rejected this on the basis that mediation could be useful in all instances of debt. However, National members of the committee are concerned that

this may inadvertently capture low-level credit arrangements such as hire purchase contracts which would not normally be considered farm debt.

Initiation of mediation before a farmer is in default

Given that one of the bill's aims is to encourage farmers and creditors to explore solutions constructively, we considered whether earlier mediation could better assist the policy intent. Clauses 14 and 15 of the bill as introduced only allow a creditor to offer mediation once a farmer is in default (although a farmer could initiate mediation under the scheme at an earlier stage).

We consider that if mediation is to be effective, it should be initiated at an early stage when financial pressures first become apparent. We note that the bill does not prevent mediation being initiated at an earlier stage, either by a creditor or a farmer, outside the scheme proposed in the bill. However, we are concerned that, if the bill is to achieve its intent, farmers should have more power to call for the banks to begin early mediation to give them the best chance of effective outcomes being found.

We recommend inserting clause 16A to require creditors to agree to a farmer's request for mediation unless there is good reason for them to decline. If the creditor refused to mediate without good reason or failed to give a reason for declining, this could be considered in an assessment of "good faith" grounds for any future enforcement or prohibition certificate application made in relation to the same debt.

We also recommend consequential amendments in clauses 16(2A), 20(5)(b), 32, and 33.

Position of guarantors

Some submitters expressed concern about the position of guarantors. They suggested that creditors might be able to take action to recover debt from a guarantor without first offering mediation.

We acknowledge this concern. We note that a guarantor of farm debt may not be a farmer, and so would not be able to initiate mediation under the bill. A guarantor would also not be a direct party to the farm debt contract. However, they would have a material interest in the outcome of mediation.

We believe clause 20 of the bill is relevant here, as it provides for the parties and the mediator to enter into an agreement about the procedure for the mediation. Clause 20(3) specifically provides for them to include guarantors and other interested parties in the mediation. We do not consider that changes are needed to the bill. However, we recommend that the guidance to be prepared for parties and mediators should advise them to consider including guarantors in the mediation process.¹

¹ If the bill is enacted, the Ministry for Primary Industries would be responsible for administering it and preparing guidance material.

We also note that our proposed new clause 22(1A) regarding the conduct of mediation would require a mediator to discuss having a multi-party mediation, if appropriate. This requirement should also help to ensure that the interests of guarantors in participating are taken into account.

We recommend amending clause 57 to make it clear that any enforcement actions against any property owned by a guarantor, whether or not that property is “farm property”, would be limited until the farmer and creditor have gone through the mediation scheme. We also recommend an amendment in clause 10(3) to make this clear.

Multi-party mediation

Several submitters pointed out that multiple parties might need to participate in a mediation process. This reflects the realities that debt and property may be shared in marriages and partnerships; that debt may be held with several secured creditors and across multiple properties; and that a farmer may control multiple entities.

Although we believe it is implicit in the bill as introduced that a mediation could encompass multiple parties or multiple debt arrangements, we propose making this explicit. We recommend amending clause 25 and inserting clauses 5(5), 22(1A), and 57A to make this point clear. As discussed below, the cap on mediation costs would be the total collectively payable by the farmer and any other non-creditor parties.

Costs of mediation

In considering this bill, we have been very aware that the situations it covers are extremely stressful for farmers and their families. Farmers must not only deal with the challenges of a struggling business, but also navigate the power imbalance of the relationship with lenders.

We therefore explored ways of ensuring that the costs of mediation would not be a barrier against farmers accessing and benefitting from the farm debt mediation scheme.

As introduced, clause 21 provides for the parties to meet their own costs and expenses in the mediation, with the proviso that a farmer must not be required to pay more than half of the fees and expenses of the mediator. We were advised that the mediator’s total costs are likely to be less than \$6,000 for most two-party mediations.

We propose capping the farmer’s contribution towards the mediator’s costs at \$2,000. To do this, we recommend amending clause 21, with a consequential change in clause 5(3). We believe this would help address concern that cost could be a barrier for those experiencing extreme financial hardship.

Several submitters queried how costs would be shared in multi-party mediations. Our proposed new clause 57A would provide for mediator costs to be shared equally between parties where there are more than two parties to the mediation. The \$2,000 cap would be the total that the farmer and any other party who is not a creditor would collectively be required to pay.

Confidentiality of matters covered in mediation

Clause 26 as introduced stipulates that matters covered in mediation are confidential and must not be disclosed except for specified purposes. Nevertheless, several submitters raised concerns about confidentiality, particularly about details of the mediation agreement being part of the mediation report given to the chief executive, as required under clause 25(2)(b).

We understand the concerns, and recommend removing clause 25(2)(b). We also recommend making clause 26 more specific so that parties' individual agreement information is not at risk of being shared. Our amendments would emphasise that disclosure should only be to the extent necessary.

Regarding the Official Information Act 1982 (the OIA), clause 25(5) specifies that nothing in the OIA would apply to a mediation report. We consider this clause unnecessary as the provisions of the OIA should be sufficient to ensure that parties' confidential information is not released. We recommend that clause 25(5) be deleted.

Situations of urgency

Several submitters pointed out that a creditor should be allowed to take action in situations of urgency to maintain the value of the assets, despite a restriction on enforcement action. This could involve maintaining animal welfare or avoiding crop wastage, environmental non-compliance, or the misappropriation of assets.

We agree, and recommend inserting clause 57B. This would allow a secured creditor to apply to the High Court for an order allowing them to appoint a receiver to maintain the value of the assets. The court would have to be satisfied that there was a need for urgency.

Duration of mediation process

One of the bill's aims is to provide for timely resolution of farm debt problems, rather than the drawn-out process it has often been. For this reason, clause 23 allows a maximum of 60 working days in which mediation should be completed, unless the parties agree to extend the timeframe.

However, clause 17(3) of the bill as introduced would allow a farmer, within 5 days of receiving a request for mediation from a creditor, to seek a 20 working day extension of time to reply to the request. We agree with certain submitters that a total of 25 working days for replying to the request represents too high a proportion of the 60 day total timeframe envisaged for mediation.

We recommend amending clause 17(3) so that an extension of time for a farmer's reply could be no longer than 10 working days.

Appendix

Committee process

The Farm Debt Mediation Bill (No 2) was referred to the committee on 27 June 2019. The closing date for submissions was 7 August 2019. We received and considered 30 submissions from interested groups and individuals. We heard oral evidence from 18 submitters.

We received advice from the Ministry for Primary Industries.

Committee membership

Hon David Bennett (Chairperson)

Kiritapu Allan

Hon Amy Adams

Kieran McAnulty

Todd Muller

Mark Patterson

Rino Tirikatene

Hamish Walker

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Damien O'Connor

Farm Debt Mediation Bill (No 2)

Government Bill

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Farm Debt Mediation Act **(No 2) 2019**.

2 Commencement

- (1) This Act comes into force on a date or dates set by Order in Council, and 1 or more orders may be made bringing different provisions into force on different dates. 5
- (2) Any provision of this Act that is not already in force 12 months after Royal assent comes into force then.

Part 1

Preliminary provisions

3 Purpose of Act

The purpose of this Act is to provide parties to farm debt with the opportunity to use mediation to reach an agreement on the present arrangements and future conduct of financial relations between them before an enforcement action is taken in relation to farm property. 5

4 Outline of Act

- (1) This Act requires parties to a farm debt to engage in mediation before the creditor can take an enforcement action in relation to farm property. 10

Example

A farmer borrows money from a bank to purchase additional land and stock. As part of that loan, the farmer gives a mortgage over the farm land to the bank.

The farmer stops repaying the loan.

The mortgage allows the bank to sell the farm land and use the sale money to repay the outstanding amount of the loan. 15

However, the bank must invite the farmer to mediate, and engage in that mediation process in good faith, before the bank can use that power of sale.

- (2) Under **Part 2**,—
- (a) a creditor cannot take an enforcement action in relation to farm property unless the creditor has an enforcement certificate (*see section 10*); and 20
- (b) an enforcement certificate will not be issued unless the creditor has participated in the mediation process in good faith (*see sections 32 and 36*). An enforcement certificate lasts for 3 years (*see section 40*). An enforcement certificate could also be issued if the farmer has declined to mediate (*see section 18*). 25
- (3) **Part 2** also allows a farmer to initiate mediation in relation to a farm debt, and allows a farmer to obtain a prohibition certificate if the relevant grounds are established (*see sections 33 and 37*). A prohibition certificate stops a creditor from taking an enforcement action for 6 months (*see sections 10 and 40*). 30
- (4) In addition, **Part 2** sets out requirements relating to—
- (a) ~~how mediation requests are made~~ ~~is commenced~~ and the mediation process. A guide to mediation requests and the mediation process is set out in **section 5**: 35
- (b) how mediation agreements may be entered into and when they may be enforced (*see subpart 3 of Part 2*):
- (c) the application for, and issue of, certificates (*see subpart 4 of Part 2*). If the parties do not enter into a mediation agreement, or if the farmer

cancels the agreement under **section 30**, the farmer or the creditor may have grounds for applying for a certificate (*see sections 32 and 33*).

- (5) The restriction on enforcement actions under **section 10** does not apply if the parties enter into a mediation agreement (*see section 11*). However, the terms of the mediation agreement are binding on the parties and can be enforced (*see section 29*). If a mediation agreement is more than 3 years old, the restriction on enforcement actions applies again (*see section 11*). 5
- (6) In addition, the restriction on enforcement actions does not apply if the farmer is subject to an insolvency proceeding or process, such as liquidation or bankruptcy (*see section 12*). 10
- (7) **Part 3** allows mediation organisations to be approved. Once approved, those mediation organisations can authorise a person to be a mediator. *See subpart 1 of Part 3*. Mediation must be carried out by an authorised mediator.
- (8) **Part 3** also contains a process for reviewing decisions to issue a certificate or to approve an organisation, and other miscellaneous matters. 15
- (8A) Guarantors of farm debt are also protected by the restriction on enforcement actions under **section 10** (*see section 57*).
- (9) This section and **section 5** are a guide only to the general scheme and effect of this Act.
- 5 Outline of mediation requests and mediation process—mediation initiation and process** 20
- (1) A farmer or a creditor may ~~request~~ initiate mediation using the procedure set out in **sections 14 to 17**. ~~At any point during this process, a party may decline to mediate. Declining to mediate includes failing to reply to a request (*see section 18*).~~ 25
- (1A) A request to mediate may be accepted or declined (*see section 16*). However, a creditor may only decline if they have a good reason to do so (*see section 16A*). Declining to mediate (which includes failing to reply to a request—*see section 18*) can result in a certificate being issued.
- (2) ~~Once~~If the farmer and creditor ~~agree~~ have agreed to mediate, the mediation process begins. The parties have 60 working days to complete the mediation process. However, this period can be extended if both parties agree (*see section 23*). 30
- (3) The mediation process contains the following steps:
- (a) the parties appoint a mediator (*see section 19*): 35
- (b) the parties enter into a procedure agreement (*see section 20*). This agreement sets out the arrangements between the parties about how the mediation will be conducted. The agreement must include an agreement about the costs of mediation, ~~but the~~ However, the farmer cannot be

- required to pay more than \$2,000 towards the mediator's costs ~~half of those costs~~ (*see* **section 21**):
- (c) mediation is conducted using that procedure agreement (*see* **section 22**):
- (d) the mediator gives a report to the chief executive (*see* **section 25**). That report includes a summary of the ~~conduct of the mediation process, and a copy of any relevant mediation agreement.~~ 5
- (4) The farmer and creditor must participate in each step of the mediation process in good faith (*see* **section 24**). Failure to participate in good faith can result in a certificate being issued. 10
- (5) The mediator may discuss the possibility of a multi-party mediation (for example, by inviting the farmer's other creditors to participate in the mediation). **Section 57A** applies if there is a multi-party mediation.
- 6 Interpretation**
- (1) In this Act, unless the context otherwise requires,— 15
- approved mediation organisation** means a mediation organisation that is approved under **section 42**
- authorised mediator** means a mediator who is authorised under **section 44**
- certificate** means an enforcement certificate or a prohibition certificate
- chief executive** means the chief executive of the Ministry 20
- creditor** means a person to whom a farm debt is owed by a farmer
- default**, in relation to a farm debt, means a failure to perform an obligation or the occurrence of an event that, under the terms of the farm debt or the security interest, gives the creditor a right to take an enforcement action
- enforcement action** ~~has the meaning set out in **section 9A**, in relation to a security interest in farm property,—~~ 25
- (a) ~~means an action that is taken to enforce a security interest in farm property following a default; and~~
- (b) includes—
- (i) ~~appointing a receiver of the farm property under a power contained in an instrument relating to the security interest; or~~ 30
- (ii) ~~applying for an order for the appointment of a receiver of the farm property for the purpose of enforcing the security interest; or~~
- (iii) ~~serving a notice under section 119 or 128 of the Property Law Act 2007; or~~ 35
- (iv) ~~entering into possession, or assuming control, of the farm property for the purpose of enforcing the security interest; or~~

- (v) ~~appointing a person to enter into possession or assume control of the farm property (whether as agent for the creditor or for the farmer) for the purpose of enforcing the security interest; or~~
- (vi) ~~exercising, as creditor or as a receiver or person so appointed, a right, power, or remedy existing because of the security interest, whether arising under an instrument relating to the security interest, under a written or unwritten law, or otherwise~~ 5

Example

~~A farmer misses a payment that is due under a farm debt that is secured by a mortgage over crops.~~ 10

~~The creditor sends a letter reminding the farmer to make the payment. That letter is not an enforcement action.~~

~~Payment is still not made. The creditor sends another letter, which includes a notice under section 128 of the Property Law Act 2007 for the purposes of accelerating the debt. That letter is an enforcement action.~~ 15

enforcement certificate means an enforcement certificate issued under **section 36**

event of urgency has the meaning set out in **section 57B**

farm debt means a debt incurred by a farmer (whether as principal debtor or guarantor) that,— 20

- (a) ~~at the time it is incurred, is incurred solely or principally for the purpose of conducting a primary production business or any related activities operation; and~~
- (b) ~~is secured wholly or partly by a security interest in farm property (whether granted by the farmer or a guarantor)~~ 25

farm property means any property that is used for or in connection with the primary production ~~business or related activities operation~~ of the farmer

Example 1

~~A farmer is engaged in aquaculture. The farmed fish are farm property.~~

Example 2

~~A farmer is engaged in apiculture. The apiary, bees, and smoker are farm property. agriculture. The tractor and hay baler used on the farm are farm property.~~ 30

Example 3

~~A sharemilker farmer owns a utility vehicle and a car—2 vehicles. One The utility vehicle is used on the farm, and is farm property. The other car is used for personal purposes, and is not farm property.~~ 35

farmer—

- (a) ~~means a person who is engaged in a primary production operation; and~~

- (b) includes a principal debtor under a debt that was incurred solely or principally for the purpose of conducting a primary production business (whether or not that person is engaged in the business)

Example

A married couple own a farm. Both spouses are parties to the farm debt. One spouse works on the farm. The other is a librarian. Both spouses are farmers. 5

~~farmer~~ means a person who is solely or principally engaged in a primary production operation

guarantee means a guarantee, an indemnity, or a liability given, assumed, or undertaken by a guarantor 10

guarantor—

- (a) means a person who—
- (i) guarantees the performance of a debtor's obligations under a debt; or
 - (ii) indemnifies a creditor against any loss that the creditor may incur in connection with the debt; or 15
 - (iii) assumes liability for performing the obligations of a debtor under the debt; but
- (b) does not include such a person to the extent that the person indemnifies a creditor against any loss that the creditor may incur in connection with the debt under a contract of insurance 20

insolvency proceeding or process has the meaning set out in **subsection (2)**

linked has the meaning set out in **subsection (3)**

mediation agreement means an agreement between the parties to the mediation entered into in accordance with **sections 27 and 28** ~~section 27~~ 25

mediation process means the process set out in **sections 19 to 25**

mediation report—

- (a) means a report given by the mediator to the chief executive under **section 25(1)**; and
- (b) includes any further information given by the mediator to the chief executive under **section 25(3)** 30

mediation request means a request under **section 14 or 15**

mediator means an impartial third person appointed by the parties to the mediation to assist the parties to reach an agreement for the present arrangements and future conduct of financial relations between the parties 35

Ministry means the department of State that, with the authority of the Prime Minister, is responsible for the administration of this Act

primary production business—

- (a) means a business undertaking that primarily produces unprocessed materials (including, without limitation, agriculture, horticulture, and aquaculture); and
- (b) includes— 5
- (i) sharemilking; and
- (ii) any business or class of business specified in regulations; but
- (c) does not include—
- (i) a business undertaking that primarily provides materials or labour to perform a service for a business undertaking of a kind set out in **paragraph (a)**; or 10
- (ii) a business undertaking that primarily involves mining; or
- (iii) any business or class of business specified in regulations

Example 1

An architect owns a lifestyle farm and has some chickens and a sheep on that farm. The produce is for personal use. The architect is not raising the chickens and sheep as a business undertaking. There is no primary production business. 15

Example 2

A company provides shearers to farmers on a contract basis. The company is providing labour to perform a service. There is no primary production business. 20

primary production operation—

- (a) ~~means a business undertaking that primarily involves 1 or more of the following activities:~~
- ~~(i) agriculture (including sharemilking):~~
- ~~(ii) horticulture:~~ 25
- ~~(iii) aquaculture:~~
- ~~(iv) an activity involving primary production that is carried out in connection with 1 or more of the activities set out in **subparagraph (i), (ii), or (iii)**; and~~
- (b) ~~includes a business undertaking of a kind specified in regulations; but~~ 30
- (e) ~~does not include a business undertaking that primarily involves 1 or more of the following activities:~~
- ~~(i) wild harvest fishing:~~
- ~~(ii) the hunting and trapping of animals or birds~~

procedure agreement means an agreement relating to procedure for the mediation agreed between the parties in accordance with **section 20** 35

prohibition certificate means a prohibition certificate issued under **section 37**

property—

- (a) means any real or personal property in New Zealand; and
- (b) includes any consent or permit granted under the Resource Management Act 1991 5

related activities means business activities that involve primary production and are carried out in connection with a primary production business

Example

A company produces buffalo milk and is a primary production business. In addition to producing milk, the company also makes and sells a limited range of cheeses. The company is primarily producing milk, and the cheese-making is a related activity. 10

security interest—

- (a) means— 15
 - (i) a security interest as defined in section 17 of the Personal Property Securities Act 1999; and
 - (ii) a mortgage as defined in section 4 of the Property Law Act 2007; but
- (b) does not include— 20
 - (i) a charge created by section 169 of the Tax Administration Act 1994 or sections 169 and 184 of the Child Support Act 1991; or
 - (ii) a charge or other interest in property created by or under any other enactment.

security interest means— 25

- (a) ~~a security interest as defined in section 17 of the Personal Property Securities Act 1999; or~~
- (b) ~~a mortgage as defined in section 4 of the Property Law Act 2007.~~
- (2) In this Act, a farmer is subject to an **insolvency proceeding or process** if any of the following apply: 30
 - (a) the farmer is in liquidation under the Companies Act 1993 or under any other enactment:
 - (b) the farmer is in voluntary administration or subject to a deed of company arrangement under Part 15A of the Companies Act 1993:
 - (c) a receiver has been appointed and is acting in relation to the whole, or substantially the whole, of the assets and the undertaking of the farmer: 35
 - (d) the farmer is subject to a compromise with its creditors that has been approved under Part 14 of the Companies Act 1993:

- (e) an order that an arrangement or a compromise is binding on the farmer has been made under Part 15 of the Companies Act 1993:
- (f) the farmer is in statutory management under the Corporations (Investigation and Management) Act 1989 or any other enactment:
- (g) the farmer is an undischarged bankrupt: 5
- (h) a person is appointed in respect of, or another event occurs that indicates the start of, a process in New Zealand or in any other country ~~in which the farmer was incorporated, created, or established~~ that is similar to any of those set out in **paragraphs (a) to (g)**.
- (3) In this Act, an enforcement action (the **action**) is **linked** to another enforcement action if the action and the other enforcement action relate to— 10
- (a) the same default; and
- (b) the same security interest; and
- (c) the same farm property.
- 7 Transitional, savings, and related provisions** 15
- The transitional, savings, and related provisions set out in **Schedule 1** have effect according to their terms.
- 8 Act binds the Crown**
- This Act binds the Crown.
- 9 Status of examples** 20
- (1) An example used in this Act is only illustrative of the provisions to which it relates. It does not limit those provisions.
- (2) If an example and a provision to which it relates are inconsistent, the provision prevails.

Part 2 25

Restrictions on enforcement of farm debt

Subpart 1—Restrictions on enforcement of farm debt

9A Meaning of enforcement action

- (1) An enforcement action, in relation to a security interest in farm property,— 30
- (a) means an action that is taken to enforce a security interest in farm property following a default; and
- (b) includes—
- (i) appointing a receiver of the farm property under a power contained in an instrument relating to the security interest; or

-
- (ii) applying for an order for the appointment of a receiver of the farm property for the purpose of enforcing the security interest; or
- (iii) -serving a notice under section 119 or 128 of the Property Law Act 2007; or
- (iv) entering into possession, or assuming control, of the farm property for the purpose of enforcing the security interest; or 5
- (v) appointing a person to enter into possession or assume control of the farm property (whether as agent for the creditor or for the farmer) for the purpose of enforcing the security interest; or
- (vi) exercising, as a creditor or as a receiver or person so appointed, a right, power, or remedy existing because of the security interest, whether arising under an instrument relating to the security interest, under a written or unwritten law, or otherwise. 10
-
- Example**
- A hazelnut grower misses a payment that is due under a farm debt that is secured by a charge over the grower's vacuum harvester. 15
- The creditor sends a letter reminding the grower to make the payment. That letter is not an enforcement action.
- Payment is still not made. The creditor sends another letter, which includes a notice under section 128 of the Property Law Act 2007 for the purposes of accelerating the debt. That letter is an enforcement action. 20
-
- (2) An action of a creditor specified in **subsection (3)** is to be treated as if it were an enforcement action in relation to a security interest in farm property (and, accordingly, the restriction in **section 10** applies to those actions).
- (3) The actions are— 25
- (a) appointing an administrator of a farmer under section 239K of the Companies Act 1993; or
- (b) applying for an order for the appointment of an administrator of a farmer under section 239L of the Companies Act 1993; or
- (c) applying for an order for the appointment of a liquidator of a farmer under section 241 or 342 of the Companies Act 1993; or 30
- (d) appointing a receiver of the whole, or substantially the whole, of the assets and undertaking of a farmer; or
- (e) applying for a farmer to be adjudicated bankrupt under section 13 of the Insolvency Act 2006; or 35
- (f) another action that is similar to any of those set out in **paragraphs (a) to (e)**.
- (4) See also **section 57** (which provides that enforcement actions in relation to a security interest in any property of a guarantor, or actions of a kind set out in

subsection (3) taken in relation to the guarantor, are treated as actions in relation to a security interest in farm property).

10 When creditor cannot take enforcement action

- (1) A creditor must not take an enforcement action in relation to ~~under~~ a security interest in farm property unless an enforcement certificate is in force in respect of the relevant farm debt. 5
- (2) A creditor must not take an enforcement action in relation to ~~under~~ a security interest in farm property if there is a prohibition certificate in force in respect of the relevant farm debt.
- (3) This section does not affect an enforcement action ~~under a security interest in~~ relation to property that is not farm property (but see **section 57**, which extends the restriction in this section to enforcement actions in relation to non-farm property owned by a guarantor). 10
- (4) See **subpart 4** for when a certificate may be issued.
- (5) See also **section 54** (which provides that certain applications for administrative review act as a stay on enforcement action). 15
- (6) See also **section 57** (which provides that enforcement actions in relation to security interests granted by guarantors are also subject to this provision) ~~and **section 58** (which provides that actions to appoint an administrator, a liquidator, or a receiver of a farmer are also subject to this provision).~~ 20
- Compare: Farm Debt Mediation Act 1994 ss 5(3)(c), 8(1) (New South Wales)

11 Restriction does not apply if parties enter into mediation agreement

Section 10 does not apply if the parties have, at any time in the 3 years before the enforcement action, entered into a mediation agreement under this Act in relation to the farm debt. 25

Example 1

At the end of a mediation process, the parties enter into a mediation agreement. In the agreement, the creditor agrees that the farmer can do various things before the creditor will take an enforcement action.

Despite this, the creditor takes an enforcement action without waiting for the farmer to do those things. 30

Because there is a mediation agreement, the restriction in **section 10** does not apply. This means that the enforcement action is not void.

However, the mediation agreement is binding (see **section 29**) and the farmer can enforce that agreement against the creditor. 35

Example 2

A dairy farmer defaults 3 years after a mediation agreement is entered into. The creditor wants to take an enforcement action.

Because the mediation agreement was entered into more than 3 years before the enforcement action ~~default~~, the restriction in **section 10** applies. If the creditor 40

wants to take an enforcement action in respect of the default, the creditor must first obtain an enforcement certificate.

12 Restriction does not apply if farmer is subject to insolvency proceeding or process

- (1) **Section 10** does not apply if the farmer under the relevant farm debt is subject to an insolvency proceeding or process. 5
- (2) The end of an insolvency proceeding or process does not affect an enforcement action (the **action**), and the action may continue and be completed as if **subsection (1)** still applied, if— 10
- (a) the action was commenced or is in progress while the farmer is subject to an insolvency proceeding or process; or
- (b) the action is linked to another enforcement action, and that other enforcement action was commenced or was in progress while the farmer was subject to an insolvency proceeding or process.

Example 15

While ~~an avocado grower~~ a farmer is in bankruptcy, a creditor serves notice under section 128 of the Property Law Act 2007. That notice does not become void when the ~~farmer grower~~ is discharged from bankruptcy, and the creditor may continue to exercise its power to sell the mortgaged goods.

13 Enforcement action in contravention is void 20

- (1) An enforcement action taken in contravention of **section 10** is void.
- (2) However, nothing in **subsection (1)** affects—
- (a) section 184 of the Property Law Act 2007 (which provides protection to a person who purchases mortgaged property from a mortgagee or receiver); and 25
- (b) section 124 of the Personal Property Securities Act 1999 (which provides, in the case of transfer of collateral sold by a secured party, for a purchaser to acquire good title to goods); and
- (c) section 51 of the Land Transfer Act 2017 (which provides, in the case of a transfer of an estate or interest in land, for title by registration except as provided for by that section); and 30
- (d) the provisions of any other enactment or law that protects a purchaser who purchases ~~farm~~ property from or through a creditor in good faith, or any person claiming through such a purchaser.

Compare: Farm Debt Mediation Act 1994 s 8(2) (New South Wales) 35

Subpart 2—Mediation process

Mediation requests~~How mediation commenced~~**14 Farmer may request mediation at any time**

- (1) A farmer who owes a farm debt to a creditor may request mediation in accordance with this Act in relation to the farm debt at any time. 5
- (2) However, a farmer may not request mediation under **subsection (1)** if there is an enforcement certificate in force in respect of the farm debt.
- (3) The request must—
- (a) be given to the creditor in writing; and
 - (b) comply with any published requirements (*see* **section 60**). 10

Compare: Farm Debt Mediation Act 1994 s 18B (New South Wales)

15 Creditor may request mediation at any time after default

- (1) A creditor who is owed a farm debt by a farmer may request mediation in accordance with this Act at any time after a farmer is in default of that farm debt. 15
- (2) However, a creditor may not request mediation under **subsection (1)** if there is a prohibition certificate in force in respect of the farm debt.
- (3) The request must—
- (a) be given to the farmer in writing; and
 - (b) comply with any published requirements (*see* **section 60**). 20

Compare: Farm Debt Mediation Act 1994 s 18A (New South Wales)

16 Reply to mediation request

- (1) A party must reply to a mediation request within 20 working days after receiving the request.
- (2) The reply must— 25
- (a) be in writing; and
 - (b) state whether the party agrees to mediate; and
 - (c) comply with any published requirements (*see* **section 60**).
- (2A) A creditor who declines to mediate must also state the reason for declining in their reply (*see also* **section 16A**). 30

- (3) *See* **section 18** (which provides that failure to reply to the mediation request is treated as a reply declining mediation).

Compare: Farm Debt Mediation Act 1994 ss 18A(3), (4), 18B(4), (5) (New South Wales)

16A Creditor must have good reason to decline to mediate

- (1) A creditor must agree to mediate unless there is a good reason for them to decline.
- (2) For the purposes of **sections 32(b) and 33(b)** (which provide for certificate applications on good faith grounds), the following may be treated as evidence that a creditor did not participate in the mediation process in good faith: 5
- (a) declining an earlier mediation request without good reason; or
- (b) failing to state a reason for declining an earlier mediation request.

17 Extension of time for farmer's reply

- (1) The chief executive may, on application by a farmer made within 5 working days after receiving a request under **section 15**, extend the time within which a reply must be given under **section 16(1)** if the chief executive considers an extension is reasonably required in the circumstances. 10
- (2) An application must be made in the way required by the chief executive.
- (3) An extension must be no longer than 10-20 additional working days. 15
- (4) The chief executive—
- (a) must make a decision on whether to grant an extension as soon as is reasonably practicable after receiving an application; and
- (b) must give written notice of the decision to the farmer and the other party as soon as practicable after making the decision. 20

18 When mediation is declined

- (1) A party **declines to mediate** if—
- (a) they fail to respond to a mediation request within the period specified in **section 16(1)** (as extended by **section 17**, if applicable); or
- (b) they indicate in writing to the chief executive or to the party who made the mediation request that they do not want to proceed with mediation; or 25
- (c) they indicate in any other manner that they do not want to proceed with mediation.
- (2) *See* **subpart 4** (which provides that declining to mediate may result in a certificate being issued). 30

Compare: Farm Debt Mediation Act 1994 ss 18A, 18B (New South Wales)

*Mediation process***19 Appointment of mediator**

- (1) If the reply under **section 16(2)** contains an agreement to mediate, a mediator must be appointed as follows— 35

- (a) the farmer must nominate a panel of 3 authorised mediators; and
 - (b) the creditor must accept 1 of those mediators.
- (2) A failure to comply with the provisions of this section within a reasonable time ~~without a reason that is justifiable in the circumstances~~ may be treated as evidence that a party has not participated in the mediation process in good faith 5
(see **section 24**).

Compare: Farm Debt Mediation Act 1994 s 18C (New South Wales)

20 Procedure agreement

- (1) Once a mediator is appointed, the parties and the mediator must enter into an agreement relating to the procedure for the mediation. 10
- (2) The procedure agreement must include an agreement as to how the costs and related expenses of the mediation will be shared (*but see section 21*).
- (3) The procedure agreement may include 1 or more of the following matters:
 - (a) who has authority to represent and bind the parties:
 - (b) who may attend the mediation, including any guarantors, interested parties, legal counsel, and experts: 15
 - (c) requirements as to confidentiality and privilege in respect of the mediator, the parties, and any other persons attending the mediation, including who may be informed about any confidential matter:
 - (d) whether the mediator may engage an expert assessor for a stated or any other purpose: 20
 - (e) how the procedure agreement may be varied or terminated:
 - (f) any other matter that the mediator and the parties agree is appropriate to best meet the needs and interests of the parties, having regard to the nature of the issues between the parties. 25
- (4) A procedure agreement is binding on the parties in accordance with its provisions.
- (5) The following may be treated as evidence that a party has not participated in the mediation process in good faith (*see section 24*):
 - (a) a failure to enter into a procedure agreement within a reasonable time: 30
 - (b) a failure to comply with the provisions of a procedure agreement without a good reason ~~that is justifiable in the circumstances~~.

21 Costs of mediation

- (1) A farmer must not be required to pay more than \$2,000 towards half of the costs and related expenses of the mediator. 35
- (2) ~~In all other respects, the parties~~ A creditor must meet ~~their~~ its own costs and expenses in relation to the mediation process.

- (3) If a procedure agreement contravenes **subsection (1)**, or is silent as to costs, the parties must be treated as having agreed that the farmer will pay ~~half of \$2,000 towards~~ the costs and related expenses of the mediator and ~~that the creditor will pay the balance of those costs and related expenses other half.~~
- (4) *See also* **section 56** (which provides that a provision of an agreement that overrides this section is unenforceable) and **section 57A** (which provides for cost sharing in the case of a multi-party mediation). 5

Example

A viticulturist has a loan agreement with a creditor and incurs farm debt under that agreement. The viticulturist defaults on payments, and the creditor initiates mediation under this Act. 10

The loan agreement contains a clause that says the creditor can recover its costs of enforcement of the agreement by adding those costs to the balance of the debt owed by the viticulturist. The parties do not agree on anything specific regarding mediation costs in the procedure agreement they enter into. 15

Both the viticulturist and the creditor spend some time preparing for the mediation, and engage expert assistance as part of that preparation.

The parties agree on a mediator. The mediator's costs and expenses for the mediation, including for time spent preparing for the mediation and actively mediating, come to a total of \$5,500 exclusive of GST. 20

The costs of the mediator and the mediation process are dealt with as follows:

- The viticulturist must pay \$2,000 towards the mediator's costs.
- The creditor must pay the balance of the mediator's costs (\$3,500 plus the amount of the GST).
- The creditor cannot add the balance of the mediator's costs to the debt owed by the viticulturist or recover those costs from the viticulturist in any other way. 25
- The creditor cannot add the costs of its preparation for the mediation (including any costs of expert assistance) to the debt owed by the viticulturist or recover those costs from the viticulturist in any other way. 30
- The parties are free to come to an agreement that assists the viticulturist in paying for the costs of their preparation for the mediation (including the viticulturist's costs of expert assistance).

A farmer has a loan agreement with a creditor, and incurs farm debt under that agreement. The loan agreement contains a clause that says the creditor can recover its costs of enforcement of the agreement by adding those costs to the balance of the debt due. 35

~~That clause is unenforceable so far as it relates to the creditor's half of the mediator's costs and expenses, and the creditor's own costs of mediation.~~

Compare: Farm Debt Mediation Act 1994 s 18I (New South Wales) 40

22 Conduct of mediation

- (1) A mediator—

- (a) may, having regard to the purpose of this Act and the needs of the parties, follow any procedures (whether structured or unstructured) or do any things that the mediator considers appropriate to resolve the issues between the parties promptly and effectively; and
- (b) may receive any information, statement, admission, document, or other material, in any way or form the mediator thinks fit, whether or not it would be admissible in judicial proceedings. 5
- (1A) A mediator must discuss the advantages and disadvantages of a multi-party mediation with the creditor and farmer if the mediator considers it appropriate (having regard to the purpose of this Act and the needs of the parties). 10
- (2) The provisions of the procedure agreement prevail over **subsection (1)**.
- (3) A mediator does not have power to determine any matter, even if the mediator is required to do so by the parties.
- Compare: 2006 No 84 s 81
- 23 Duration of mediation process** 15
- (1) The parties must proceed to mediation as soon as is reasonably practicable after a procedure agreement is entered into.
- (2) ~~A~~The mediation process may not continue beyond the date that is 60 working days after the date of a mediation request, except with agreement of the parties.
- 24 Parties must mediate in good faith** 20
- (1) The parties must participate in the mediation process in good faith.
- (2) ~~Declining A failure by a creditor to agree to reduce or forgive a debt or to vary the terms of a debt does not, by itself, demonstrate that the creditor did not participate in the mediation~~process in good faith.
- (3) *See* **subpart 4** in relation to when good faith is relevant to a certificate being issued. 25
- Compare: Farm Debt Mediation Act 1994 s 14(5) (New South Wales)
- 25 Mediation report**
- (1) At the end of the mediation, the mediator must give a report to the chief executive. 30
- (2) The report must include—
- (a) a summary of the ~~conduct of the~~ mediation process; and
- (aa) the names of the parties to the farm debt; and
- (ab) the address for service nominated by each party to the farm debt (see section 59); and 35
- (b) ~~a copy of any mediation agreement entered into between the parties; and~~
- (c) any other information specified in published requirements (*see* **section 60**).

- (3) The chief executive may require a mediator to give any further information that the chief executive considers reasonably necessary.
- (3A) The mediator must give the parties to the mediation a copy of the mediation report.
- (4) The contents of a mediation report may be used as evidence that a party has not participated in the mediation process in good faith (*see section 24*). 5
- (5) ~~Nothing in the Official Information Act 1982 applies to a mediation report.~~
- Compare: Farm Debt Mediation Act 1994 s 18O (New South Wales)

Confidentiality

- 26 Matters covered in mediation are confidential** 10
- (1) The mediation agreement and any other matters shared, discussed, agreed, admitted, or determined in, or in the course of, mediation are confidential and—
- (a) must not be disclosed by the parties, the mediator, or persons attending the mediation; and 15
- (b) are not admissible in a court, tribunal, or other forum or before a person acting judicially.
- (2) The provisions of the procedure agreement prevail over **subsection (1)**.
- (3) However, **subsection (1)** does not restrict disclosure—
- (a) by a mediator, to the extent that disclosure is necessary for ~~in~~ a mediation report (*see section 25*); or 20
- (b) by a farmer or a creditor, to the extent that disclosure is necessary for ~~in~~ an application for a certificate or in an application for administrative review of a decision whether or not to issue a certificate (*see sections 34, 48, and 50*); or 25
- (c) where disclosure is authorised by the High Court; or
- (d) where disclosure is otherwise required by law.
- (4) Despite **subsection (1)**, a mediation agreement is admissible for the purpose of enforcing that agreement (*see section 29*).

Subpart 3—Mediation agreement 30

- 27 Mediation agreement**
- (1) Any agreement reached between the parties in the course of a mediation must be recorded in a mediation agreement.
- (2) Failure to reach agreement or to enter into a mediation agreement does not, by itself, demonstrate that the parties have not participated in the mediation process in good faith (*see section 24*). 35
- Compare: Farm Debt Mediation Act 1994 s 18K (New South Wales)

28 Preparation of and entry into mediation agreement

- (1) The mediator must prepare a draft mediation agreement setting out the main points of agreement between the parties.
- (2) A draft mediation agreement must comply with any published requirements (see **section 60**). 5
- (3) The parties may enter into a mediation agreement by signing it.
- (4) A mediation agreement can be varied or replaced in the same manner as it is entered into.
- (5) A defect in form or a technical irregularity does not invalidate a mediation agreement. 10

Compare: Farm Debt Mediation Act 1994 s 18J (New South Wales)

29 Enforcement of mediation agreement

- (1) A mediation agreement is binding on the parties who enter into it.
- (2) However, a mediation agreement is not enforceable by a creditor unless the time during which the farmer may cancel the agreement under **section 30** has expired and the farmer has not given notice of cancellation within that time. 15
- (3) *See also **section 11*** (which provides that the restrictions ~~on enforcement actions contained in **section 10**~~ does not apply if the parties have entered into a mediation agreement under this Act).

Compare: 1986 No 121 s 36N

20

30 Right to cancel mediation agreement

- (1) A farmer may cancel a mediation agreement by giving written notice of the cancellation to the creditor (or the creditor's legal representative) within 10 working days after the date on which the mediation agreement is signed by the parties. 25
- (2) This section does not limit a person's right to cancel a mediation agreement under any other enactment or law.
- (3) See **section 57A** for cancellation notices in the case of a multi-party mediation.

Compare: 1986 No 121 s 36M; 2003 No 52 s 27

30

31 Effect of cancellation

- (1) If a mediation agreement is cancelled under **section 30**, the agreement is treated as if it had never been entered into.
- (2) Cancellation of a mediation agreement under **section 30** does not, by itself, demonstrate that the creditor did not participate in the mediation process in good faith. 35

Compare: Farm Debt Mediation Act 1994 s 18M (New South Wales)

Subpart 4—Enforcement and prohibition certificates

*Application for and issue of certificates***32 Grounds for enforcement certificate**

A creditor who is owed farm debt by a farmer may apply to the chief executive for an enforcement certificate in relation to the farm debt on either of the following grounds: 5

- (a) that the farmer declined to mediate (*see section 18*):
- (b) that the creditor participated in the mediation process in good faith (*see sections 16A and 24section 24*).

Compare: Farm Debt Mediation Act 1994 s 15(3) (New South Wales) 10

33 Grounds for prohibition certificate

A farmer who owes farm debt to a creditor may apply to the chief executive for a prohibition certificate on either of the following grounds:

- (a) that the creditor declined to mediate (*see section 18*):
- (b) that the creditor did not participate in the mediation process in good faith (*see sections 16A and 24section 24*). 15

34 Application for certificate

(1) A person must apply for a certificate—

- (a) ~~within 10 working days of the grounds under **section 32 or 33** (as applicable) arising; or~~ 20
- (b) ~~in the case of an application that is made following cancellation of a mediation agreement under **section 30**, within 20 working days of the date on which the mediation agreement was cancelled.~~

(1A) A person who applies for a certificate on the grounds that a party declined to mediate (**section 32(a) or 33(a)**, as applicable) must apply for a certificate within 10 working days after the grounds arise. 25

(1B) A person who applies for a certificate on good faith grounds (**section 32(b) or 33(b)**, as applicable) must apply for a certificate—

- (a) within 10 working days after being given the mediation report; or
- (b) in the case of an application made following cancellation of a mediation agreement under **section 30**, within 20 working days after being given notice of the cancellation. 30

(1C) The chief executive may extend the period specified in **subsection (1A) or (1B)** for as long as is reasonably necessary if the chief executive considers an extension is reasonably required in the circumstances. 35

(2) A person must apply for a certificate in the way that is specified by the chief executive.

- (3) The chief executive may specify—
- (a) the form that must be used to make an application; and
 - (b) the information or other evidence or documents that must be provided with the application.
- (4) The chief executive may require an applicant to provide any further information that the chief executive considers reasonably necessary. 5
- ~~(5) If an application is made, the chief executive must give a copy of the relevant mediation report to the applicant.~~
- Compare: Farm Debt Mediation Act 1994 ss 9, 13 (New South Wales)

35 Notice to other party 10

- ~~(1) If an application for a certificate is made, the chief executive must—~~
- ~~(a) notify the other party to the farm debt that an application has been made; and~~
 - ~~(b) give a copy of the relevant mediation report to the other party.~~
- (1A) The chief executive must notify the other party to the farm debt if an application for a certificate is made. 15
- ~~(2) A notice under **subsection (1)(a)** The notification must state the grounds on which the application was ~~has been~~ made.~~

36 Issue of enforcement certificate

- The chief executive must, after receiving an application under **section 34**, issue an enforcement certificate in respect of farm debt if— 20
- (a) the farmer is in default of the farm debt; and
 - (b) there is no prohibition certificate in force in respect of the farm debt; and
 - (c) the chief executive is satisfied that the grounds set out in the application are established. 25

Compare: Farm Debt Mediation Act 1994 s 14 (New South Wales)

37 Issue of prohibition certificate

- The chief executive must, after receiving an application under **section 34**, issue a prohibition certificate in respect of farm debt if—
- (a) there is no enforcement certificate in force in respect of the farm debt; and 30
 - (b) the chief executive is satisfied that the grounds set out in the application are established.

Compare: Farm Debt Mediation Act 1994 s 10 (New South Wales)

38 Notice of decision

- (1) The chief executive must, as soon as practicable after deciding whether to issue a certificate, give written notice of the decision to the applicant and to the other party to the farm debt.
- (2) The notice must— 5
- (a) state the reasons for the decision; and
 - (b) advise the parties of their right to apply for administrative review under **section 48**; and
 - (c) enclose a copy of any certificate that is issued as a result of the decision.

39 Content of certificate

10

A certificate must—

- (a) state the names of the current parties to the farm debt; and
- (b) identify the security interest that the certificate relates to; and
- (c) state the date the certificate takes effect from; and
- (d) state the period the certificate is in force for. 15

*Duration and effect***40 Duration of certificate**

- (1) A certificate—
- (a) takes effect from the date stated in the certificate; and
 - (b) in the case of an enforcement certificate, is in force for 3 years; and 20
 - (c) in the case of a prohibition certificate, is in force for 6 months.
- (2) *But see section 54* (which provides that certain applications for administrative review act as a stay on enforcement action).

Compare: Farm Debt Mediation Act 1994 s 15 (New South Wales)

41 Effect of expiry of enforcement certificate

25

The expiry of an enforcement certificate does not affect an enforcement action (the **action**), and the action may continue and be completed as if the enforcement certificate were still in force, if—

- (a) the action was commenced or is in progress before the expiry of the enforcement certificate; or 30

- (b) the action is linked to another enforcement action, and that other enforcement action was commenced or was in progress before the expiry of the enforcement certificate.

Example

Before an enforcement certificate expires, an order is obtained to appoint a receiver of farm property. That order does not become void if the certificate expires, and the receiver may be appointed and exercise their powers.

Compare: Farm Debt Mediation Act 1994 ss 8(4), 15(5) (New South Wales)

Part 3 General provisions

Subpart 1—Mediators

42 Approval of mediation organisations

- (1) The chief executive may approve an organisation (whether incorporated or unincorporated) as an approved mediation organisation.
- (2) In deciding whether to give approval, the chief executive must apply any criteria referred to in **section 47(1)(a)**.
- (3) An approval may be made on any terms and conditions referred to in **section 47(1)(b)**.
- (4) The chief executive must ensure that a list of all approved mediation organisations is published on an Internet site that is maintained by or on behalf of the Ministry.

Compare: 2013 No 79 s 6

43 Suspension or cancellation of approval

- (1) The chief executive may suspend or cancel the approval of an organisation as an approved mediation organisation on any ground referred to in **section 47(1)(c)**.
- (2) If the chief executive suspends an approval for any period (the **suspension period**),—
- (a) the organisation is not an approved mediation organisation during the suspension period; but
- (b) every authorisation of a mediator made by the approved mediation organisation under **section 44** continues during the suspension period.
- (3) If the chief executive cancels the approval of an organisation as an approved mediation organisation,—
- (a) every authorisation of a mediator made by the approved mediation organisation under **section 44** continues for a period of 6 months from the date of cancellation of the organisation's approval and then ends; and

- (b) the chief executive may authorise a mediator to act, or to continue to act, in respect of a mediation under this Act beyond that 6-month period.
- (4) In the event of a cancellation or suspension of an approval, the chief executive may—
- (a) supervise those mediators who were authorised by the organisation (including, for example, by monitoring and enforcing the terms and conditions of the mediator’s authorisation or cancelling that authorisation); or 5
- (b) enter into an agreement with 1 or more other approved mediation organisations for the supervision of those mediators. 10

Compare: 2013 No 79 ss 7, 8

44 Authorisation of mediators

- (1) An approved mediation organisation may authorise a person to be a mediator for the purposes of this Act.
- (2) An authorisation may only be given to a person if that person is qualified and competent to act as a mediator under this Act. 15
- (3) In deciding whether a person meets the criteria in **subsection (2)**, the approved mediation organisation must apply the qualification and competency requirements referred to in **section 47(1)(d)**.
- (4) An authorisation may be made on any terms and conditions that the approved mediation organisation thinks appropriate. 20
- (5) An approved mediation organisation may suspend or cancel an authorisation in the same manner.

Compare: 2013 No 79 s 9

45 Conflicts of interest 25

- (1) A mediator—
- (a) must act independently when deciding how to deal with any particular matter; and
- (b) must be independent of the parties to the mediation.
- (2) A mediator who has a conflict of interest must— 30
- (a) disclose it to the parties to the mediation; and
- (b) withdraw from the mediation unless the parties agree otherwise.
- (2A) If a mediator withdraws after they have been appointed, a new mediator must be appointed by the parties using the process set out in **section 19**.
- (3) A party who agrees under **subsection (2)(b)** to a mediator continuing to act loses any right to object to the mediator’s acting on the basis of any conflict of 35

interest disclosed by the mediator under **subsection (2)(a)** before the party agreed.

Compare: 2006 No 84 s 104

46 Exclusion of liability

Unless a mediator has acted in bad faith, the mediator has no criminal or civil liability in respect of— 5

- (a) any act done or omitted in the course of performing any of their functions under this Act; or
- (b) any words spoken or written at, or for the purposes of, ~~the hearing of any~~ a mediation; or 10
- (c) anything in any mediation report.

Compare: 2006 No 84 s 122; 2019 No 21 s 65

47 Requirements for mediation organisations and mediators

- (1) The chief executive may, by written notice, set out requirements relating to—
 - (a) the criteria that the chief executive must apply when deciding whether to approve an organisation as an approved mediation organisation: 15
 - (b) the terms and conditions on which the chief executive may approve an organisation:
 - (c) the grounds on which the chief executive may suspend or cancel the approval of an organisation: 20
 - (d) the qualification and competency requirements that must be met for a person to be authorised as a mediator.
- (2) The qualification requirements under **subsection (1)(d)** may include matters that disqualify a person from being authorised as a mediator.
- (3) If a notice is made under **subsection (1)**, the chief executive must ensure that— 25
 - (a) a notice is published in the *Gazette* stating that the notice has been made and giving details of where it is published; and
 - (b) the notice is published on an Internet site that is maintained by or on behalf of the Ministry. 30
- (4) A notice under this section is a disallowable instrument, but not a legislative instrument, for the purposes of the Legislation Act 2012 and must be presented to the House of Representatives under section 41 of that Act.

Compare: 2013 No 79 s 15

Subpart 2—Administrative review of decisions

48 Decisions subject to administrative review

- (1) The following people may apply for administrative review of the following decisions ~~a decision under this Act~~:
- (a) a farmer or a creditor affected by a decision on whether to issue a certificate under **subpart 4 of Part 2**: 5
- (b) a mediation organisation affected by a decision under **section 42 or 43**.
- (2) An application must be made within 10 working days after the day on which the notice of the decision is given. 10
- (3) The chief executive may, on an application made within the 10-working-day period, extend the time to make the application for the administrative review.

49 Application for administrative review

- (1) A person must apply for administrative review in the way that is specified by the chief executive. 15
- (2) The chief executive may specify—
- (a) the form that must be used to make an application; and
- (b) the information or other evidence or documents that must be provided with the application.
- (3) The chief executive may require an applicant to provide any further information that the chief executive considers reasonably necessary. 20

50 Opportunity to make submissions

In the case of an application by a farmer or a creditor, the chief executive must—

- (a) notify the other party to the farm debt that an application has been made; and 25
- (b) allow the other party an opportunity to make a written submissions.

51 Conduct of administrative review

- (1) The chief executive must review the legal basis of, and any assessment or other matters relevant to, the decision under review. 30
- (2) The chief executive must determine the review on the papers, unless the chief executive considers it is not appropriate to do so.
- (3) The chief executive must consider—
- (a) the application; and
- (b) any written submissions made by the applicant or by the other party; and 35

- (c) any further information provided by the applicant under **section 49(3)**; and
- (d) any other information that the chief executive considers relevant.
- (4) The individual who made the reviewable decision under a delegation by the chief executive must not review the decision. 5
Compare: 2018 No 4 Schedule 7 cl 3
- 52 Determination of application**
- (1) The chief executive must determine an application within 20 working days after the day on which the application is received.
- (2) The chief executive must determine an application by— 10
(a) confirming the decision under review; or
(b) withdrawing the decision under review and, if appropriate, substituting a new decision in its place.
- (3) The chief executive may extend the period specified in **subsection (1)** for determining an application for as long as is reasonably necessary if, in the chief executive's opinion, the circumstances of the case do not allow a determination to be made within the specified period. 15
Compare: 2018 No 4 Schedule 7 cl 4
- 53 Notice of determination**
- (1) The chief executive must, as soon as practicable after determining an application, give written notice of the determination to the applicant and, in the case of an application by a creditor or a farmer, to the other party to the farm debt. 20
- (2) The notice must—
(a) state the reasons for the determination; and
(b) enclose a copy of any certificate that is issued as a result of the determination. 25
- 54 Application for administrative review acts as stay**
- (1) This section applies if an application for administrative review is made under **section 49** in relation to— 30
(a) a decision to grant an enforcement certificate; or
(b) a decision to refuse a prohibition certificate.
- (2) Despite **sections 10 and 40**, a creditor must not take enforcement action until notice of the determination is given under **section 53**.
Compare: Farm Debt Mediation Act 1994 s 18Q (New South Wales)
- 55 Appeals on question of law** 35
- There is a right of appeal to the High Court, on a question of law only, against any determination under **section 52**.

Subpart 3—Miscellaneous

56 No contracting out

- (1) The provisions of this Act have effect despite any provision to the contrary in any agreement.
- (2) A provision of an agreement that has the effect of overriding a provision of this Act (whether directly or indirectly) is unenforceable. 5
- (3) Nothing in **subsection (1) or (2)** applies in respect of a provision that imposes a stricter duty on the creditor than would be imposed under this Act.
- (4) In this section, **agreement** includes any contract, guarantee, arrangement, or understanding. 10

Compare: 1986 No 121 s 5C

57 Restriction applies to guarantorsGuarantors

- (1) ~~A debt incurred by a guarantor under a guarantee that is given in connection with a farm debt, or under an existing guarantee that applies in connection with a farm debt, is to be treated as forming part of that farm debt (and, accordingly, the restriction in **section 10** applies to any enforcement action in relation to under a security interest granted by the guarantor in connection with that farm debt).~~ 15

Example

A creditor lends money to a company. The company is a farmer, and it owns the farming business and its associated assets. It is the borrower under the loan, and the loan is a farm debt. 20

However, the company does not own the land that the farm is located on. Instead, the land is owned by the 2 directors of the company and a third person who, together, hold that land as trustees of a family trust. 25

As part of the loan arrangements, the trustees give the creditor an unlimited guarantee (guaranteeing the payment of the debts that the company owes to the creditor). This guarantee is given in connection with the farm debt of the company.

The trustees also give the creditor a mortgage over the land. This mortgage is a security interest over farm property. 30

Because the guarantee was given in connection with a farm debt, the debt that the trustees owe to the bank (if the guarantee is called upon) is treated as part of the farm debt that the farmer incurred. This means that the restriction in **section 10** applies to an enforcement action in relation to the mortgage.

The creditor must enter into mediation with the company (the farmer) and obtain an enforcement certificate before it can take an enforcement action in relation to the mortgage given by the family trust. If the company and the creditor agree in the procedure agreement, the trustees can attend the mediation. 35

- (2) A debt incurred by a guarantor under a farm debt guarantee is to be treated as forming part of the farm debt. 40

- (3) An action is to be treated as if it were an enforcement action in relation to a security interest in farm property if the action—
- (a) is of a kind set out in **section 9A(1)**; and
 - (b) is taken in relation to any property owned by a guarantor (whether or not that property is farm property); and 5
 - (c) is taken in connection with a guarantor’s obligations as a guarantor under a farm debt guarantee.
- (4) An action is to be treated as if it were an enforcement action in relation to a security interest in farm property if the action—
- (a) is of a kind set out in **section 9A(3)**; and 10
 - (b) is taken in relation to a guarantor (rather than a farmer); and
 - (c) is taken in connection with a guarantor’s obligations as a guarantor under a farm debt guarantee.
- (5) Accordingly, the restriction in **section 10** applies to—
- (a) any enforcement action (within the meaning of **section 9A**) in relation to a security interest granted by the guarantor in connection with the farm debt; 15
 - (b) actions of a kind set out in **section 9A(1)** taken against non-farm property owned by a guarantor, as well as farm property;
 - (c) actions of a kind set out in **section 9A(3)** (appoint an administrator of a guarantor, etc) taken in relation to a guarantor. 20
- (6) In this section, **farm debt guarantee** means—
- (a) a guarantee given in connection with a farm debt; or
 - (b) an existing guarantee that applies in connection with a farm debt.

Example 25

A creditor lends money to a company. The company is engaged in the growing of hops and owns the farming business and its associated assets. It is the borrower under the loan, and the loan is a farm debt.

However, the company does not own the land that the farm is located on. Instead, the farm land is owned by the 2 directors of the company and a third person who, together, hold that farm land as trustees of a family trust. The family trust also owns a residential property nearby. 30

As part of the loan arrangements, the trustees give the creditor an unlimited guarantee (guaranteeing the payment of the debts that the company owes to the creditor). This guarantee is given in connection with the farm debt of the company. 35

The trustees give the creditor a mortgage over the farm land and the residential property. This mortgage is a security interest.

Because the guarantee was given in connection with a farm debt, the debt that the trustees owe to the bank (if the guarantee is called upon) is treated as part of the farm debt that the farmer incurred. This means that the restriction in **section 10** 40

applies to any enforcement action by the creditor, including (for example) the exercise of the mortgagee's power to sell the farm land or residential property.

The creditor must enter into mediation with the company (the farmer) and obtain an enforcement certificate before it can take an enforcement action in relation to the mortgage given by the family trust. If the company and the creditor agree, the trustees could attend the mediation or be added as a party.

5

Compare: 2003 No 52 s 119(1)

57A Multi-party mediation

- (1) This section applies if there is a multi-party mediation.
- (2) Each party to the mediation must enter into the procedure agreement under **section 20**. 10
- (3) Each reference to the farmer in **section 21(1) and (3)** is to be treated as if it were a reference to the farmer together with any other party to the mediation who is not a creditor (and, accordingly, the amount is the maximum amount that a farmer and any non-creditor party can collectively be required to pay). 15
- (4) A mediation agreement is binding on the parties who enter into it (see **section 29(1)**).
- (5) Any party to the mediation agreement, other than a creditor, may exercise the right of cancellation under **section 30**.
- (6) The notice of cancellation under **section 30** must be given to all the parties who entered into the agreement. 20
- (7) If a mediation agreement is cancelled, the agreement is treated as if it had never been entered into by any of the parties (see **section 31**).
- (8) The notices under **sections 35, 38, 50, and 53** must be given to all parties to the mediation who are parties to the farm debt that the application relates to. 25

57B Appointment of receiver allowed by court order in event of urgency

- (1) This section applies if—
 - (a) the creditor has reasonable grounds to believe that there is an event of urgency; and
 - (b) but for **section 10**, a creditor would have a power to appoint a receiver or a right to apply for an order for the appointment of a receiver of farm property. 30
- (2) A creditor may apply to the High Court for an order allowing the creditor to appoint a receiver despite the restriction in **section 10**.
- (3) The court may make an order if it is satisfied that— 35
 - (a) there is an event of urgency; and
 - (b) the appointment of a receiver is necessary or desirable—
 - (i) to safeguard the interests of the creditor; or

- (ii) in the case of an application in respect of an event of urgency described in **subsection (7)(c)**, to safeguard the welfare of the animals.
- (4) The court may make an order on whatever terms and conditions the court thinks fit. 5
- (5) In imposing any terms and conditions, the court must balance—
- (a) the need to allow the receiver to eliminate or minimise the effects of the event of urgency; and
- (b) the need to preserve, to the extent possible, the parties’ opportunity to use mediation for the purpose set out in **section 3**. 10
- (6) The terms and conditions may, without limitation,—
- (a) specify whether, and if so how and when, mediation must occur under this Act;
- (b) modify or suspend, in whole or in part,—
- (i) the receiver’s powers under the Receiverships Act 1993 or any other enactment or instrument (for example, by restricting the receiver from taking any enforcement action): 15
- (ii) the terms and conditions of any instrument relating to the creditor’s security interest:
- (c) specify the duration of the appointment (for example, by specifying that the receiver must cease to act as such from a specified date or in the event of specified circumstances occurring): 20
- (d) provide for how the receivership may be terminated and the effect of that termination.
- (7) In this section, an **event of urgency** means 1 or more of the following: 25
- (a) the whole or part of any farm property subject to the creditor’s security interest has been or will be destroyed, endangered, removed, or sold contrary to the terms of the farm debt or the security interest:
- (b) the whole or part of any farm property subject to the creditor’s security interest has been or will be damaged contrary to the terms of the farm debt or the security interest, resulting in a substantial decline in the value of the property: 30
- (c) an animal that is subject to the creditor’s security interest has been suffering or will suffer unreasonable or unnecessary pain or distress.
- 58 Appointment of administrator, liquidator, or receiver** 35
- (1) An action of a creditor specified in **subsection (2)** is to be treated as if it were an enforcement action under a security interest granted by a farmer for the purposes of **section 10** (and, accordingly, the restriction in **section 10** applies to those actions).

- (2) The actions are—
- (a) ~~appointing an administrator of a farmer under section 239K of the Companies Act 1993; or~~
 - (b) ~~applying for an order for the appointment of an administrator under section 239L of the Companies Act 1993; or~~ 5
 - (c) ~~appointing a liquidator of a farmer under section 241 of the Companies Act 1993; or~~
 - (d) ~~applying for an order for the appointment of a liquidator under section 241 of the Companies Act 1993; or~~
 - (e) ~~appointing a receiver of the whole, or substantially the whole, of the assets and undertaking of a farmer.~~ 10
- 59 Notices**
- ~~The chief executive may give notice under this Act by sending it to the recipient's last known place of residence, place of business, or registered address.~~
- The chief executive may give notice under this Act— 15
- (a) by sending it to the recipient's last known place of residence, place of business, or registered address; or
 - (b) by sending it to the recipient's address for service set out in the mediation report (see **section 25**), in the case of a notice under **sections 35, 38, 50, and 53.** 20
- 60 Published requirements**
- (1) The chief executive may, by written notice, set out requirements relating to—
 - (a) the manner or content of mediation requests (*see* **sections 14 and 15**):
 - (b) the manner or content of a reply to a mediation request (*see* **section 16**): 25
 - (c) the content of a mediation report (*see* **section 25**):
 - (d) the manner or content of a mediation agreement (*see* **section 28**).
 - (2) If a notice is made under **subsection (1)**, the chief executive must ensure that—
 - (a) a notice is published in the *Gazette* stating that the notice has been made and giving details of where it is published; and 30
 - (b) the notice is published on an Internet site that is maintained by or on behalf of the Ministry.
 - (3) Notices under this section are not disallowable instruments for the purposes of the Legislation Act 2012 and do not have to be presented to the House of Representatives under section 41 of that Act. 35

- 61 Power to make regulations by Order in Council**
- (1) The Governor-General may, by Order in Council, make regulations for 1 or more of the following purposes:
- (a) ~~specifying a business or class of business~~ ~~a kind of business undertaking~~ for the purposes of the definition of primary production ~~business operation~~ in **section 6**: 5
 - (b) requiring the payment to the Ministry of fees and charges for applications under **sections 34 and 49**:
 - (c) providing for any other matters contemplated by this Act, necessary for its administration, or necessary for giving it full effect. 10
- (2) Regulations made under **subsection (1)(b)** may—
- (a) make different provision for different cases on any differential basis:
 - (b) prescribe any of the following:
 - (i) the method by which the fees or charges are to be assessed:
 - (ii) the persons liable to pay the fees or charges: 15
 - (iii) when the fees or charges must be paid:
 - (iv) circumstances in which the fees or charges may be refunded, remitted, or waived (wholly or partly).
- (3) The chief executive may refuse to perform or exercise a function, power, or duty until the prescribed fee, charge, or cost is paid. 20
- (4) Any fee or charge payable to the Ministry under the regulations is recoverable by the Ministry in any court of competent jurisdiction as a debt due to the Ministry.
- 62 Amendments to other enactments**
- The Acts listed in **Schedule 2** are amended in the manner set out in that schedule. 25

Schedule 1
Transitional, savings, and related provisions

s 7

Part 1
Provisions relating to this Act as enacted

5

1 Application of Act

This Act applies to any farm debt, whether that debt was incurred before or after the commencement of **section 10**.

2 Enforcement actions in progress before commencement of section 10 may continue

10

Section 10 does not apply to an enforcement action (the **action**) if—

(a) the action was commenced or was in progress before the commencement of that section; or

(b) the action is linked to another enforcement action, and that other enforcement action was commenced or was in progress before the commencement of that section.

15

Schedule 2

Amendments to other enactments

s 62

Personal Property Securities Act 1999 (1999 No 126)

After section 134, insert:

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*Enforcement of security interests in farm property***134A Enforcement of security interests in farm property**Nothing in this Part limits the Farm Debt Mediation Act **(No 2) 2019**.**Property Law Act 2007 (2007 No 91)**

After section 136, insert:

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136A Farm Debt Mediation Act (No 2) 2019 not limitedNothing in this subpart, subpart 6, or subpart 7 limits the Farm Debt Mediation Act **(No 2) 2019**.**Legislative history**

18 June 2019

Introduction (Bill 155–1)

27 June 2019

First reading and referral to Primary Production Committee