

Farm Business Debt Mediation Bill 2016

Explanatory Notes

FOR

Amendments to be moved during consideration in detail by The Honourable Bill Byrne MP Minister for Agriculture and Fisheries and Minister for Rural Economic Development

Title of the Bill

Farm Business Debt Mediation Bill 2016

Objectives of the amendments

The amendments to be moved during consideration in detail will:

- clarify when the Act will apply;
- enhance opportunities for farmers to take up mediation when served with notice of enforcement action;
- streamline the Act by enabling some details to be prescribed by regulation;
- clarify the right for farmers to have support attending mediation;
- ensure mediation is convenient and accessible for farmers;
- provide flexibility in the preparation of and varying from heads of agreement;
- reduce the potential for delay in resolving farm debt disputes because of inflexible cooling-off periods;
- make sensible exceptions to the blanket confidentiality restrictions;
- ensure the attribution of costs incurred by parties attending mediation is fair;
- clarify the grounds for when an exemption certificate may be issued to allow enforcement action to be taken;
- reduce the potential for delay in resolving farm debt disputes that could result from review of administrative decisions;
- ensure a farmer may apply for an enforcement action suspension notice in all appropriate circumstances
- ensure the provisions of the Act remain appropriate;
- ensure mortgages over farm machinery are subject to the requirements of the Act;

Achievement of the objectives

To achieve the objectives, the following changes to the Bill are proposed to:

- link the circumstances where the Act will not apply to default under a farm mortgage for a specific debt for which mediation has occurred, rather than to any default which may have occurred;
- amend to twenty the number of business days by which a farmer has to accept an invitation for mediation after receiving a notice of intention to take enforcement action from a mortgagee;
- provide for the process for choosing a mediator to be prescribed by Regulation;
- clarify that farmers are entitled to have more than one advisor at a mediation meeting;
- clarify that mediation meetings must be reasonably convenient for the farmer and may be conducted via teleconferencing or videoconferencing;
- clarify that mediators may prepare or supervise the preparation of a heads of agreement;
- provide for a heads of agreement to be varied by agreement in writing provided the farmer has had the opportunity to first seek legal advice;
- provide for the waiving or shortening of a cooling-off period and clarify when the cooling-off period starts and ends in those circumstances;
- clarify what documents or information from mediation will be excluded from civil, criminal or administrative proceedings;
- provide exceptions to the exclusion of documents or information from civil, criminal or administrative proceedings where QCAT conducts a proceeding or a part of a proceeding that is not open to the public or where the proceeding relates to violence or a threat of future violence, ongoing activity of a criminal nature being concealed or abuse of a child or another person;
- clarify that a party's costs for mediation which must be borne by the party, include the costs incurred in relation to the party's attendance at mediation, such as travel and accommodation;
- provide that external review by QCAT is not available for original decisions concerning enforcement action suspension certificates and exemption certificates;
- clarify when an original decision takes effect and how long a QCAT stay of the operation of an original decision will last;
- expand the meaning of default to include any grounds for taking enforcement action including a change to the value of the farm property which changes the loan to value ratio of the farm business debt;
- provide for the Minister to review the Act within five years of its commencement;
- expand the definition of *farm equipment* to include types of farming equipment as prescribed under and for consistency with the *Credit (Rural Finance) Act 1996*.

Alternative ways of achieving policy objectives

The Bill was referred to Parliament's Finance and Administration Committee for detailed consideration.

The Committee recommended that mediation entered into without being in default should not amount to a ground for an exemption certificate being issued for mortgagees to take

enforcement action, if this default occurred within three years of the mediation. However, this may potentially disadvantage a farmer where mediation was held more than three years prior to default occurring where the default had nothing to do with the matters discussed at the mediation. Instead, the currently proposed amendments are fairer because they ensure that satisfactory mediation conducted between the farmer and the mortgagee at any time prior to default is not grounds for issuing an exemption certificate. For a ground to be established for issuing an exemption certificate, satisfactory mediation must have occurred concerning matters related to the farmer's default, irrespective of the time between mediation and the default.

The Committee recommended that the Bill be strengthened to provide that a heads of agreement entered into during mediation be binding. However, this would have resulted in the loss of the safeguard for farmers (and mortgagees) provided by the cooling-off period. In acknowledgement that parties may be disadvantaged in some circumstances if there is a delay in acting upon a heads of agreement due to the imposition of a cooling-off period, the Bill is instead being amended to enable parties to waive all or part of a cooling-off period provided the parties agree and the farmer has had an opportunity to seek legal advice.

The Bill currently provides for internal review of decisions by the Authority and external review of decisions by QCAT. Submissions to the Committee by both farmers' representatives and banking representatives raised concerns about the potential for delay in finalising decisions, particularly if internal review decisions were externally reviewed by QCAT, and the adverse impacts this could have on the outcomes for both farmers and mortgagees.

Alternative options include omitting review provisions altogether from the Bill or including a provision similar to a provision in the former Racing Act which required QCAT to hear matters within a certain timeframe. Neither of these options, however, are considered appropriate. Omitting review provisions altogether would run contrary to fundamental legislative principles which provide that legislation make administrative power subject to appropriate review. Binding QCAT to hear matters within a specified timeframe would be particularly onerous on QCAT, would be costly and also would not necessarily result in quicker resolution of matters - although QCAT may hear a matter within a certain timeframe, it may still take some time to finalise the decision on a review application.

The Committee recommended merely that at an appropriate time after passing the Bill, the internal and external appeals process be reviewed to ensure they are efficient and effective.

Instead, the Government acknowledges that reviews of decisions concerning exemption certificates and enforcement action suspension certificates by QCAT may delay decisions which may disadvantage both farmers and mortgagees. The amendments being made to the Bill provide that external reviews of decisions by QCAT will not apply to decisions concerning enforcement action suspension certificates and exemption certificates. These certificates will only be internally reviewable by the chief executive officer of the Authority. Decisions concerning mediator's accreditations will still be reviewable internally by the chief executive officer of the Authority and externally by QCAT as this two stage review process will not have a direct impact on decisions affecting farmers or mortgagees.

Estimated cost for government implementation

The removal of external review rights in some circumstances will reduce costs to government compared to the original provisions in the Bill.

Other amendments to the Bill are not expected to create any additional implementation costs for government.

Consistency with fundamental legislative principles

The amendments to be moved during consideration in detail are generally consistent with fundamental legislative principles with the exception of those amendments which reduce opportunities for external review of administrative decisions.

Reducing those provisions in Part 6 of the Bill which allow for review of administrative decisions, is a potential breach of the fundamental legislative principle in section 4(3)(a) of the *Legislative Standards Act 1992* that legislation should make rights and liberties or obligations dependent on administrative power only if the power is sufficiently defined and subject to appropriate review. The Bill is being amended such that it will only provide for external review by QCAT of original decisions concerning accreditations. There will be no external review provision for original decisions concerning enforcement action suspension certificates or exemption certificates.

Removing the external review can be justified on the basis that the resolution of a farm business debt dispute may be extended by many months where an external review of a decision is sought. Making a decision on an application for the issue of an enforcement action suspension certificate or an exemption certificate dependent upon the finalisation of an external review process could be unreasonable, particularly as this process may take up to 18 months to complete. This would potentially present a significant disadvantage to a farmer who may already be in financial difficulty and a mortgagee seeking to recover their loan because the debt owing could increase substantially during any delay reducing the likelihood that it could be covered by the eventual sale of the assets which would have adverse consequences for both the farmer and the mortgagee.

The fundamental legislative principle that legislation should not, without sufficient justification, unduly restrict ordinary activities is also a consideration in limiting external review provisions. The amendments in the Bill by setting aside external administrative review provisions reduce the potential interference of the Bill in ordinary activities.

Consultation

There has been no specific consultation undertaken on the proposed amendments.

Consistency with legislation of other jurisdictions

Some of the amendments represent departures from or variations of provisions in the *Farm Debt Mediation Act 1994* (NSW) upon which the Bill is largely based. For example, the *Farm Debt Mediation Act 1994* (NSW) contains a provision which provides for the confidentiality

of anything said or admitted during a mediation session and prevents the admissibility of those matters in future proceedings of a court or body authorised to hear such evidence. These amendments make some exceptions to those confidentiality requirements.

Submissions to the Committee raised concerns with the absolute approach adopted in the Bill with respect to confidentiality of information and the inadmissibility of matters or documents from mediation meetings in future civil, criminal or administrative proceedings. The amendments are an acknowledgement that an absolute approach to confidentiality may prove problematic and there may be proceedings where the presentation of matters previously raised in mediation can be justified. Consequently, the amendments provide a number of exceptions to the admissibility provisions.

Similarly, the *Farm Debt Mediation Act 1994* (NSW) provides for a cooling-off period and also provides that the period may be extended by agreement between the parties to mediation. The Bill also provides for a cooling-off period which may be extended by agreement between the parties. However, the amendments will also allow the period to be waived entirely or shortened by agreement. This amendment recognises the potential disadvantage parties may face in some circumstances due to a protracted cooling-off period.

The amendments to the Bill also provide for a heads of agreement to be varied by agreement between the parties and be in writing. The *Farm Debt Mediation Act 1994* (NSW) provides for a heads of agreement to be drawn up but not for it to be varied. The amendments acknowledge that the circumstances and conditions surrounding a heads of agreement may change over time and to protect the farmer. The amendments provide that a variation can only be made if the farmer has had a reasonable opportunity to seek legal advice about the variation.

Notes on provisions

Amendment 1 Amendment of clause 11 (Application of Act)

Amendment 1 amends clause 11 of the Bill to clarify that the exception to the application of the Act relates to a farmer for a particular farm business debt. The amendment clarifies that the Act will not apply to a particular farm business debt, where the farmer and the mortgagee have previously taken part in mediation for that particular debt under the Act and as a result they have entered into a heads of agreement and the farmer has defaulted under the farm mortgage in relation to that particular debt. This amendment ties the default to a particular farm business debt rather than to any default which may have occurred under another farm mortgage.

Amendment 2 Amendment of clause 14 (Notice of intention to take enforcement action)

Amendment 2 amends clause 14 of the Bill to provide that the day by which a farmer has to ask for mediation must be no less than 20 business days after having received a notice of intention to take enforcement action from the mortgagee.

Amendment 3 Amendment of clause 18 (Nominating mediator)

Amendment 3 amends clause 18 of the Bill to omit the detail for choosing a mediator and allow for a regulation to prescribe the way in which a mediator must be chosen.

Amendment 4 Amendment of clause 24 (Farmer entitled to advisor)

Amendment 4 amends clause 24 of the Bill to clarify that a farmer may have one or more advisors at a mediation meeting.

Amendment 5 Amendment of clause 24 (Farmer entitled to advisor)

Amendment 5 amends clause 24 to reflect the clarified context of the provision - that there can be one or more advisors.

Amendment 6 Amendment of clause 24 (Farmer entitled to advisor)

Amendment 6 amends clause 24 to reflect the clarified context of the provision - that there can be one or more advisors.

Amendment 7 Amendment of clause 25 (Mediation meetings)

Amendment 7 amends clause 25 to provide that mediation meetings are to be conducted at a place and time that is reasonably convenient for the farmer and may be held, if the parties agree, using communication technologies that enable mediation meetings to be held remotely rather than face to face, such as teleconferencing and videoconferencing.

Amendment 8 Amendment of clause 26 (Heads of agreement)

Amendment 8 amends clause 26 of the Bill to allow the mediator to personally prepare or supervise the preparation of the main points of agreement for a heads of agreement. The Bill originally required the mediator to personally prepare the main points of agreement for a heads of agreement.

Amendment 9 Amendment of clause 26 (Heads of agreement)

Amendment 9 amends clause 26 of the Bill to provide that the approved form for the heads of agreement must state that the cooling-off period may be waived by agreement between the parties. (Amendment 10 provides for it to be waived.) The Bill originally only allowed the period to be extended by agreement. The amendment moves provisions which provide for the heads of agreement to state that a farmer may revoke the heads of agreement and the rights to compensation that may and do not arise if the agreement is revoked, from clause 27 to clause 26.

Amendment 10 Amendment of clause 27 (Cooling-off period)

Amendment 10 amends clause 27 of the Bill to clarify when the cooling-off period ends and allow the period to end earlier or later by agreement than 10 business days after the heads of agreement is entered into. The Bill originally did not allow it to end earlier than 10 business days after the heads of agreement is entered into. The amendment also provides that the parties to a heads of agreement may agree to shorten or extend the cooling-off period as the Bill only allowed the cooling-off period to be extended by agreement. The amendment provides that an agreement to waive or shorten a cooling-off period only applies if the farmer has had a reasonable opportunity to seek legal advice about the heads of agreement and the cooling off period being waived or shortened and the agreement is in writing.

Amendment 11 Amendment of clause 28 (Mediator's obligations after heads of agreement entered)

Amendment 11 numbers the provisions of clause 28 as a consequence of the insertion of subsection (2) in amendment 13.

Amendment 12 Amendment of clause 28 (Mediator's obligations after heads of agreement entered)

Amendment 12 amends clause 28 of the Bill to provide that the mediator must ensure each party to mediation has a copy of the signed agreement. The agreement must state, if the cooling-off period is waived, that there is no cooling-off period, otherwise it must state the dates on which the cooling-off period starts and ends.

Amendment 13 Amendment of clause 28 (Mediator's obligations after heads of agreement entered)

Amendment 13 amends clause 28 of the Bill to provide that if the parties to mediation agree to shorten or extend the cooling-off period after the heads of agreement is signed, the mediator must ensure that each party has a copy of the agreement which states that the cooling-off period is either shortened or extended and the agreed day for the ending of the cooling-off period.

Amendment 14 Amendment to insert new clause 28A (Heads of agreement binds parties)

Amendment 14 inserts new clause 28A to clarify that when a heads of agreement is signed by both parties to a mediation it becomes binding, on the parties whilst it is in effect.

Amendment 15 Amendment to insert new clause 30A (Varying heads of agreement)

Amendment 15 inserts new clause 30A (Varying heads of agreement) to provide that a heads of agreement or any contract, mortgage or document to give effect to a heads of agreement, may be varied at any time by agreement between the parties provided the farmer has had a reasonable opportunity to seek legal advice about varying the agreement and the agreement is in writing. The amendment excludes variations of the cooling-off period which are provided for by amendment 13 which amends clause 28 to allow for shortening or extending the cooling-off period.

Amendment 16 Amendment of clause 38 (Confidentiality)

Amendment 16 amends clause 38 of the Bill to clarify that a document prepared for the purpose of being given to a party to a mediation under clauses 21 or 22 is inadmissible in any civil, criminal or administrative proceeding. This amendment will ensure the clause does not apply to those documents which may be provided under clauses 21 or 22 which are already in either the farmer's or mortgagee's possession.

Amendment 17 Amendment of clause 38 (Confidentiality)

Amendment 18 amends clause 38 of the Bill to provide an exception to those matters which are inadmissible in an administrative proceeding where a proceeding or part of a proceeding before QCAT is not open to the public. The amendment also provides an exception to those matters which are inadmissible in any civil, criminal or administrative proceeding where the proceeding relates to either violence or a threat of violence or ongoing activity of a criminal nature being concealed or the abuse of a child or another person.

Amendment 18 Amendment of clause 39 (Costs)

Amendment 18 amends clause 39 of the Bill to clarify that a party's costs for mediation, which must be borne by themselves, includes costs incurred in relation to the mediation which may include such things as travel and accommodation.

Amendment 19 Amendment of clause 47 (Duration)

Amendment 19 amends clause 47 of the Bill to omit the numbering of subsection 47(1) as subsection 47(2) is omitted by amendment 20.

Amendment 20 Amendment of clause 47 (Duration)

Amendment 20 amends clause 47 of the Bill to correct an error. The amendment omits 47(2) which is inconsistent with the provision as a whole as it indicated the duration of the enforcement action suspension certificate is determined from the time the parties agreed to mediation. Clause 47(2) is unnecessary as the duration of the certificate stated in the previously

numbered 47(1), ends on the earlier of the last day of mediation or six months and 15 business days after a notice refusing mediation is given.

Amendment 21 Amendment of clause 48 (Applying for exemption certificate)

Amendment 21 amends clause 48 of the Bill which states the requirements for an application for an exemption certificate. The amendment clarifies that the application by the mortgagee is for an exemption certificate to allow taking enforcement action in relation to the farmer's default under the farm mortgage.

Amendment 22 Amendment of clause 49 (Grounds)

Amendment 22 amends clause 49 of the Bill such that the first ground is where satisfactory mediation for the farm business debt considered matters relating to the farmer's default. Originally this ground for issuing an exemption certificate in the Bill did not link the satisfactory mediation to the farmer's default. The effect was that satisfactory mediation conducted between the farmer and the mortgagee even a long time prior to default, was grounds for issuing an exemption certificate.

Amendment 23 Amendment of clause 49 (Grounds)

Amendment 23 amends clause 49 of the Bill to ensure that the further ground for issuing an exemption certificate relates to the agreement between the farmer and the mortgagee to mediate about matters relating to the farmer's default under the farm business debt.

Amendment 24 Amendment of clause 49 (Grounds)

Amendment 24 amends clause 49 of the Bill such that the further ground for issuing an exemption certificate where the farm business debt is secured in part by a farm mortgage in another State, relates to the farmer failing or not intending to mediate about matters relating to the farmer's default.

Amendment 25 Amendment of clause 52 (Deciding application)

Amendment 25 amends clause 52 of the Bill to reflect that the grounds upon which the Authority must decide to approve an application for an exemption certificate, are all linked, by the amendments made to clause 49, to the farmer's default.

Amendment 26 Amendment of clause 77 (When original decision takes effect)

Amendment 26 amends clause 77 of the Bill to reflect that an original decision for an application to issue an enforcement action suspension certificate or exemption certificate will not be subject to external review. The amendment provides that the original decision takes effect when the chief executive officer decides the application for internal review of the decision, otherwise it does not take effect until the last day to apply for an internal review of the decision.

Amendment 27 Amendment of clause 78 (QCAT may stay operation of original decision)

Amendment 27 amends clause 78 of the Bill to reflect that an original decision for an application in relation to a mediator's accreditation may be stayed by QCAT only until the last day to apply for an external review of the internal review decision. However, if an external review is not applied for, the stay must not extend past the time when the chief executive officer of the Authority decides the internal review decision. The amendment reflects the fact that external reviews will only apply to accreditation decisions.

Amendment 28 Amendment of clause 79 (Review starts with internal review)

Amendment 28 omits clause 79 of the Bill which provides that a person may not apply for a review of an original decision unless there has been an internal review of the decision. Clause 79 is omitted as it does not fit the amended structure of the Bill which will provide external review for a limited number of decisions.

Amendment 29 Amendment of clause 81 (Reviewing original decision)

Amendment 29 amends clause 81 of the Bill to insert a new subsection (1A) which will provide for the chief executive officer to extend the period in which to make an internal review decision on an application for the issue of an enforcement action suspension certificate or an exemption certificate. Without the possibility of an extension, existing clause 81(7) would provide that the original decision is taken to have been confirmed if an internal review decision was not made within 30 business days. This would mean in effect, that the decision was never reviewed.

Amendment 30 Amendment of clause 81 (Reviewing original decision)

Amendment 30 amends clause 81 of the Bill to insert a new subsection (5A) to ensure that subsections (6) and (7), which provide for matters that trigger the option of applying for an external review under clause 82, apply only to accreditation decisions. The effect is that only accreditation decisions are amenable to external review.

Amendment 31 Amendment of clause 82 (Applying for external review)

Amendment 31 amends clause 82 of the Bill to provide that the section allowing for external review of a decision applies to a person who applied for an internal review of an accreditation decision and who must be given a review notice of the internal review decision.

Amendment 32 Amendment to insert a clause after clause 90 (Approved forms)

Amendment 32 amends the Bill to insert a new clause 90A (Review of Act) to provide that the Minister must review the Act within five years after 1 July 2017 (i.e. its commencement date) to decide if its provisions remain appropriate. The amendment further provides that the Minister must table a copy of the review report in the Legislative Assembly as soon as practicable after the review has finished.

Amendment 33 Amendment of Schedule 1 (Dictionary)

Amendment 33 inserts a new definition for the term *accreditation decision* which means an original decision about a person's accreditation as a mediator or an application for accreditation as a mediator. An original decision about a person's accreditation would include decisions about amendment, suspension or cancellation of their accreditation.

Amendment 34 Amendment of Schedule 1 (Dictionary)

Amendment 34 replaces the definition of the term *default* to broaden the meaning of the term to encompass any ground which exists for enforcement action to be taken by the mortgagee against the farmer under the terms of the mortgage.

Amendment 35 Amendment of Schedule 1 (Dictionary)

Amendment 35 amends the definition of *farm property* to include a vehicle, machine, tool or other thing that is usually used to carry out a farming business. This will ensure the Act applies to mortgages over farm equipment as well as mortgages over farm land and water rights.

Amendment 36 Amendment of Schedule 1 (Dictionary)

Amendment 36 amends the definition of *statutory enforcement notice* which refers to the *Water Act 2000* the provisions of which have been substantially amended and renumbered. This amendment is a consequence of that renumbering.