

CLAUSE NOTES

Farm Debt Mediation Bill 2024

- Clause 1** **Short title**
The Short title will be the *Farm Debt Mediation Act 2024*.
- Clause 2** **Commencement**
Provides for the commencement of the Bill to be by proclamation of the Governor, including by staged proclamation.
- Clause 3** **Object of Act**
Provides that the object of the Act is to provide for the efficient and equitable resolution of matters involving farm debts by requiring mediation before a Creditor can take possession of property or other enforcement action under a farm mortgage.
- Clause 4** **Act binds Crown**
This clause provides that the Act binds the Crown.
- Clause 5** **Interpretation**
This clause defines certain words and expressions used in the provisions of the Act.
- Clause 6** **Mediation**
Clause 6 defines the term *mediation* for the purposes of this Act.

Clause 7**Farming Operation**

This clause provides a definition of the term *farming operation* for the purposes of the Act. It specifically excludes business undertakings that primarily involve:

- harvesting wild fish; or
- hunting or trapping animals, birds or reptiles.

The clause also provides for specifying other kinds of business undertakings as either included or excluded from the definition of *farming operation* in the regulations.

Clause 8**Application of Act**

This clause sets out the circumstances where the Act is applicable, including by specifically excluding certain circumstances. Some of the key exclusions are that it does not apply in circumstances where the farmer is subject to certain bankruptcy or corporate administration processes.

Clause 9**Relationship of Act with other laws**

Provides that the Act does not affect the operation of certain other laws or categories of laws. For example, it ensures that the usual protections from unjust or unconscionable contracts remain available to the parties.

Clause 10**Contracting out of Act prohibited**

Provides that parties cannot agree to exclude, modify, or limit the application of this Act, or for a farmer or a guarantor to indemnify a Creditor for any loss or liability arising under the Act.

Also provides that it is an offence for a Creditor to breach this section. A penalty of up to 60 penalty units applies, which translates to a maximum of \$11,700 in the 2023-24 financial year.

- Clause 11** **Appointment of Farm Debt Mediation Commissioner**
- Provides for the appointment of the Farm Debt Mediation Commissioner by the Minister. The Farm Debt Mediation Commissioner must be a State Service officer or employee.
- The purpose of creating the role of Commissioner is to provide for arms-length decision-making in matters related to the farm debt mediation program. This is important because the current intention is for the Act to be administered by the Minister for Small Business and Consumer Affairs with support from Department of State Growth, the Secretary for which is on the Tasmania Development and Resources Board which could potentially be a Creditor affected by the Act. The creation of a Commissioner mitigates this and any future conflicts which might arise.
- Clause 12** **Commissioner’s functions and powers generally**
- Sets out the functions and powers of the Farm Debt Mediation Commissioner.
- Clause 13** **Delegation**
- This clause permits the Commissioner to delegate a function or power to a State Service employee or State Service Officer, except for the power of delegation.
- Clause 14** **Creditor must obtain exemption certificate before taking enforcement action**
- Provides that a Creditor is required to obtain an exemption certificate (applied for under clause 15 and determined by the Commissioner under clause 16) before taking enforcement action (refer to the definitions) in respect of a farm mortgage.
- If a Creditor takes enforcement action without an exemption certificate which is in force, that enforcement action is void and they can be penalised through a fine not exceeding 1,500 penalty units for a corporation, which translates to a maximum of \$292,500 in the 2023/24 financial year, or an individual may receive a fine not exceeding 300 penalty units which translates to a maximum of \$58,500 in the 2023/24 financial year.

Clause 15**Application for exemption certificate**

Provides that a Creditor under a farm mortgage may apply to the Commissioner for an exemption certificate specifying that this Act does not apply to the farm mortgage. The application must be made in a form approved by the Commissioner.

Clause 16**Determination of application for exemption certificate**

Provides that the Commissioner must grant an application for an exemption certificate if:

- the farmer is in default under the farm mortgage; and
- no prohibition certificate is in force in relation to the farm mortgage; and
- they are satisfied that at least one of the additional grounds in clause 16(3) applies.

Clause 16(4) provides that the Commissioner may refuse to grant an application for an exemption certificate if satisfied that the farmer is justified in declining mediation in the circumstances and intends to mediate within a reasonable period, even if the above test for granting an application is met. They may also refuse an application if a mediator cannot commence the mediation within 3 months of the application or any other period they consider appropriate.

Clause 17**Duration of exemption certificate**

Provides the means for calculating the period an exemption certificate is in force and requires that the exemption certificate specifies the date on which it expires.

Clause 18**Application for prohibition certificate**

Provides that a farmer may apply to the Commissioner for a prohibition certificate if the farmer is in default and has requested the Creditor to mediate.

Clause 19**Determination of an application for a prohibition certificate**

Provides that the Commissioner must grant an application for a prohibition certificate if:

- the farmer is in default under the farm mortgage; and
- the farmer has given the Creditor a mediation request in respect of the farm debt concerns; and
- no exemption certificate is in force in relation to the farm mortgage; and
- they are satisfied that at least one of the additional grounds in 19(3) applies.

Clause 19(4) provides that the Commissioner may refuse to grant an application for a prohibition certificate where the Creditor has failed to respond to a mediation request if the Commissioner is satisfied that their failure to respond is justified in the circumstances and that they intend to mediate within a reasonable period. They may also refuse an application if a mediator cannot commence the mediation within 3 months of the application or any other period they consider appropriate.

Clause 20**Prohibition certificate not to be issued while exemption certificate in force**

Provides that a prohibition certificate cannot be issued by the Commissioner in relation to a farm mortgage while an exemption certificate is in force.

Clause 21**Duration of prohibition certificate**

Provides that a prohibition certificate has effect for a period of 6 months from the date it was issued.

Clause 22**Accreditation of mediators**

Sets out that the Commissioner may accredit or reaccredit people who are suitable and hold the appropriate qualifications, skills, knowledge, and experience to be mediators for the purposes of this Act. The Commissioner may also take into account any other matters they consider to be appropriate. They can accredit or reaccredit either on application using an approved form, or on their own initiative, which would, for example, allow the Commissioner to recognise the accreditation of mediators in other jurisdictions with minimal extra administration.

Accreditation can be subject to terms and conditions, and can be for any period determined by the Commissioner. The Commissioner can also suspend or revoke an accreditation in certain circumstances.

Clause 23**Functions of mediators**

Clause 23(1) sets out the functions of a mediator.

Clause 23(2) specifies what a mediator must not do in carrying out their functions, including advising a farmer or creditor about the law, encouraging or assisting a farmer or creditor in reserving or establishing legal rights, or acting as an adjudicator or arbitrator.

Clause 24**Creditor-initiated mediation**

Provides that a Creditor under a farm mortgage may give a notice inviting a farmer in default to participate in mediation.

Also provides that a farmer must respond within 20 days of the notice, and that the notice must specify that a failure to do so may constitute a ground for the grant of an exemption certificate. The notice must be made in a form approved by the Commissioner.

Clause 25**Farmer initiated mediation**

Provides that a farmer who is liable for a farm debt can invite mediation with a Creditor on the farm debt concerned whether or not they are in default, as long as a Creditor has not also provided a notice under clause 24.

Also provides that a Creditor must respond within 20 days of the notice, and that the notice must specify that a failure to do so may constitute a ground for the granting of a prohibition certificate. The notice must be made in a form approved by the Commissioner.

|

Clause 26**Farmer to nominate mediator**

Sets out the process for selection of mediator for a mediation process. If a farmer and Creditor agree to mediate, a farmer must nominate a mediator. The Creditor must either accept or reject the nominated mediator. If they reject the nominated mediator, the farmer must nominate a panel of three other mediators for the Creditor to choose from.

Clause 27**Requests for information**

Sets out a process for the mediator to facilitate an exchange of information between the two parties.

Also specifies that when preparing a summary of mediation under clause 39, the mediator is to consider whether any request for information made by a farmer or Creditor was reasonable, and whether information was provided in response to the request within a reasonable period. This does not limit the matters to which the mediator is required to consider when preparing a mediation summary.

Clause 28**Conduct of mediations**

The Commissioner is to determine the procedure for commencing and conducting a mediation, subject to the requirements of this clause.

Provides that a mediation session must be conducted with as little formality and technicality, and with as much expedition, as is possible.

Provides that mediator may:

- call a pre-mediation conference; and
- adjourn a mediation session if it appears that a party would be significantly disadvantaged because of the length of the mediation; and
- adjourn or terminate a mediation session if it appears that continuing to conduct the mediation would not be appropriate, having regard to:
 - the duration of a mediation session;
 - whether parties are able and willing to participate;
 - whether parties are engaging with the mediation session in good faith;
 - any risk to health or safety if mediation is continued; and
 - any other matters that are relevant in the opinion of the mediator.

Provides that a mediation is to be held in a place or time that is reasonably convenient for the parties. It also provides that a mediation session can be conducted electronically.

Clause 29**Mediations to be held in private**

States that a mediation session is not to be open to the public.

Clause 30**Confidentiality of mediation**

Provides that things said or admitted during a mediation session, or documents prepared for the purposes of, in the course of, or pursuant to a mediation session, are not admissible as evidence unless an exception applies under subclauses (3) or (4). Also notes in subclause (2) that this extends to steps taken in making arrangements for a mediation session or in the course of following up on the mediation session.

Clause 31**Disclosure of information**

Provides that a person must not disclose any information obtained in mediation or in connection with the administration or execution of this Act unless the disclosure meets requirements specified in this clause. A penalty of up to 60 penalty units applies which translates to \$11,700 in the 2023/24 financial year.

Clause 32**Representation and assistance during mediation**

Sets out how parties may be represented in a mediation.

Parties may only be represented by an Australian legal practitioner, or by an agent who is approved by the mediator, in the circumstances set out in clause 32(2). Subclause (6) provides that this does not prevent a corporation from being represented at the mediation by an officer of the corporation.

Approved representative parties must not attend a mediation unless they are given written authority by the farmer or the Creditor that they represent authorising them to enter into a mediation agreement.

Despite the rules in this clause about agents or legal representatives, a farmer who is a party to mediation is entitled to have an advisor present at the mediation. That advisor may be legally or otherwise professionally qualified but is not required to be. The farmer is entitled to call upon that advisor for advice and counsel during the mediation.

Subclause (3) provides that a mediator may place any conditions they think fit to ensure that no party is substantially disadvantaged by the mediator's approval of an Australian legal practitioner, or an agent, to represent a farmer or a Creditor at the mediation and these conditions must be complied with.

Clause 33**Costs of mediation**

Provides that parties are required to pay an equal share of any fee charged by the mediator for the mediation, unless otherwise agreed in writing. The parties are also responsible for their own costs and expenses associated with preparing for and participating in mediation.

Further provides that a party is to pay the whole of the mediators fees for an additional mediation, and all costs associated with the attendance by another party, if the party fails to give a written authority to an Australian legal practitioner, or agent, representing the party, and as a result of this more than one mediation session is required.

Provides that the Commissioner is not liable for any of the fees, costs or expenses of mediation or attendance of mediation for the purposes of this Act.

Clause 34**Draft mediation agreements**

Sets out the process for preparing draft mediation agreements, which may be formalised to become mediation agreements in accordance with clause 35.

Once satisfied that parties have agreed or are about to agree on an issue between them, the mediator must prepare a draft mediation agreement for the consideration of the parties that sets out the main points of agreement. This draft mediation agreement must include a statement specifying the cooling off period in accordance with clause 36(2).

Clause 35**Mediation agreements**

Sets out the process for entering into a binding mediation agreement.

If parties to a mediation are satisfied that a draft mediation agreement sets out the main points agreed by the parties during, or within the 24 hours after the end of, the mediation then the parties may enter into an agreement by signing the draft mediation agreement.

This agreement must include a cooling off period statement. The agreement may be varied or replaced by a further agreement in writing. Subclause 5 provides that the agreements are not invalidated due to minor defects or technical irregularities.

Clause 36**Cooling off period for mediation agreements**

Provides the method for determining the cooling off period for mediation agreements.

The cooling off period expires at 5pm on the 10th business day after the mediation agreement was entered into, unless the draft mediation agreement did not include a cooling off period statement, in which case the 10 business day period does not start until the farmer is given the cooling off period statement by the Creditor.

Sets out that the Commissioner is not to issue an exemption certificate to a Creditor on the ground that satisfactory mediation in respect of a farm debt has taken place if a mediation agreement is in force in relation to the debt but the cooling off period is not expired.

Clause 37**Rights during cooling-off period**

Sets out the process by which a farmer can rescind a mediation agreement during the cooling off period.

A farmer may serve a written notice on the Creditor or the Creditor's legal representative that the farmer rescinds the mediation agreement subject to the cooling off period. This notice must be signed by the farmer or the farmer's legal representative. Once this notice is served in accordance with the rules, the mediation agreement is taken to never have been in force ('rescinded *ab initio*' essentially means rescinded from the outset, rather than from the time of the notice).

If the agreement is rescinded, the farmer or Creditor is entitled to make a claim for such compensation, adjustment or accounting as is just and equitable between the parties where a party has received a benefit under the mediation agreement. A Creditor may not make a claim under this section if the only basis of the claim is the rescission of the mediation agreement under this section.

Clause 38**Implementing mediation agreement**

Provides that it is an offence for a Creditor to be a party to any contract, deed, mortgage or other instrument which purportedly results from, or is pursuant to, a mediation agreement, but which fails to reflect the relevant mediation agreement.

A penalty not exceeding 60 penalty units applies which translates to a maximum of \$11,700 in the 2023/24 financial year.

Clause 39**Summary of mediation**

Sets out that a mediator must prepare a summary of the conduct and results of the mediation, including any agreement entered into by the parties. The summary must be in a form approved by the Commissioner.

Clause 40**Interpretation**

This clause defines certain words and expressions used in the provisions of Division 5. This includes the definition of 'aggrieved person', which can be a farmer or Creditor in the case of a decision relating to a prohibition or exemption certificate, or a mediator in relation to their accreditation.

Clause 41**Review of decisions of Commissioner**

An aggrieved person may apply to the Minister within 20 business days, or a longer period as allowed by the Minister, for a review of the following decisions by the Commissioner:

- a decision to grant or refuse a prohibition certificate;
- a decision to grant or refuse an exemption certificate;
- a decision to accredit or reaccredit, or to refuse to accredit or reaccredit, a person as a mediator;
- a decision to suspend or revoke the accreditation of a mediator.

The application must be made in a form approved by the Commissioner. The Minister:

- may invite affected persons to submit material for consideration as part of the review;
- may affirm, vary, or set aside and substitute the original decision;
- must give notice of their decision in accordance with subclause 6, including a statement of reasons;
- must make their determination within 30 business days, although doing so later than that does not invalidate the determination; and
- may delegate their functions under this clause.

Clause 42**Stay of reviewable decisions**

Sets out that when an application for a review of a decision to grant an exemption certificate is made, enforcement action must not be undertaken until the applicant is notified of the reviewer's decision.

Sets out that when an application for a review of a decision to refuse a prohibition certificate is made, the Creditor must not take enforcement action until the Creditor is notified of the reviewer's decision.

Clause 43**Regulations**

This clause authorises the Governor to make regulations for the purposes of this Act.

The regulations may provide that a contravention of the regulations is an offence and impose a fine of up to 50 penalty units. This translates to a maximum of \$9,750 in the 2023/24 financial year. In the case of continuing offence, a further fine of up to 10 penalty units for each day during which the offence continues may be imposed, which translates to a maximum of \$1,950 in the 2023/24 financial year.

Clause 44**Administration of Act**

This clause states that, until provided for in an Administrative Arrangement Order, the Act will be administered by the Minister for Small Business and Consumer Affairs, and the department responsible to the Minister in relation to the administration of the Act is the Department of State Growth.