

House of Assembly—No 122

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South Australia

Farm Debt Mediation Bill 2015

A BILL FOR

An Act to provide for the mediation of disputes between farmers and creditors relating to debt incurred in the conduct of farming operations; and for other purposes.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Farm Debt Mediation Act 2015*.

5 2—Commencement

This Act will come into operation 3 months after assent.

3—Object of Act

10 The object of this Act is to provide for the efficient and equitable resolution of farm debt disputes by requiring a creditor to provide a farmer with the opportunity to have the dispute referred to mediation before the creditor is able to take possession of property or other enforcement action under a farm mortgage.

4—Interpretation

In this Act, unless the contrary intention appears—

commencement day means the day on which this Act comes into operation;

15 **creditor** means a person to whom a farm debt is for the time being owed by a farmer;

default, in relation to a farm mortgage, means a failure to perform an obligation that, under the terms of the mortgage, is a ground for enforcement action;

Examples—

20 1 Failure to pay the principal, interest or other money the payment of which is secured by a farm mortgage.

2 Failure to keep the property subject to the farm mortgage insured.

3 Failure to submit financial statements required by the creditor.

25 **enforcement action**, in relation to a farm mortgage, means taking possession of property under the mortgage or any other action to enforce the mortgage, including the giving of any statutory enforcement notice, or the continuation of any action to that end already commenced, but does not include—

(a) the completion of the sale of property held under the mortgage in respect of which a contract has been executed before the commencement day; or

30 (b) the enforcement of a judgment that was obtained before the commencement day;

exemption certificate means a certificate issued in respect of a farm mortgage under section 16;

farm means land on which a farmer engages in a farming operation;

farm debt means a debt incurred by a farmer for the purposes of the conduct of a farming operation that is secured wholly or partly by a farm mortgage;

farm machinery means any of the following goods or equipment acquired for the purposes of a farming operation:

- (a) a harvester, binder, tractor, plough or other agricultural implement;
- (b) any other goods or equipment of a class commonly used for the purposes of a farming operation that are prescribed by the regulations as farm machinery for the purposes of this definition;

farm mortgage includes an interest in, or power over, farm property securing obligations of the farmer (whether as a debtor or guarantor), including an interest in, or power arising from, a hire purchase agreement relating to farm machinery, but does not include—

- (a) a stock mortgage or a crop or wool lien; or
- (b) the interest of the lessor of any farm machinery that is leased; or
- (c) a security interest (within the meaning of section 12 of the *Personal Property Securities Act 2009* of the Commonwealth) in stock, crops or wool;

farm property means—

- (a) a farm or part of a farm; or
- (b) farm machinery used by a farmer in connection with a farming operation; or
- (c) an irrigation right within the meaning of the *Irrigation Act 2009* issued to a farmer for the purposes of a farming operation; or
- (d) an authority to take water under the *Natural Resources Management Act 2004* issued to a farmer for the purposes of a farming operation;

farmer means a person or body solely or principally engaged in a farming operation, and includes—

- (a) a person who owns land cultivated under a share-farming agreement; and
- (b) the personal representatives of a deceased farmer;

farming operation means any of the following activities undertaken for commercial gain:

- (a) agricultural, pastoral, horticultural or apicultural activities;
- (b) poultry farming, dairy farming or any business that consists of the cultivation of soils, the gathering of crops or the rearing of livestock;
- (c) an activity prescribed by regulation;

function includes a power, authority or duty;

mediator means a person engaged by the Small Business Commissioner under this Act to mediate farm debt disputes between creditors and farmers;

prohibition certificate means a certificate in respect of a farm mortgage issued under section 14;

satisfactory mediation means any of the following:

- (a) a mediation that has achieved a resolution of a farm debt dispute;
- (b) a mediation that has proceeded as far as it reasonably can in an attempt to achieve resolution of a farm debt dispute but has failed to resolve the dispute;
- (c) a prescribed mediation or class of mediation;

Small Business Commissioner means the person for the time being holding or acting in the office of Small Business Commissioner under the *Small Business Commissioner Act 2011*;

statutory enforcement notice means a notice approved by the Minister as a statutory enforcement notice for the purposes of this Act.

5—Application of Act

- (1) This Act applies to creditors only in respect of farm debts.
- (2) This Act does not apply to—
 - (a) a farmer whose property is subject to control under Part X Division 2 of the *Bankruptcy Act 1966* of the Commonwealth; or
 - (b) a farmer whose property is the subject of a bankruptcy petition presented by any person; or
 - (c) a farmer that is an externally-administered body corporate within the meaning of the *Corporations Act 2001* of the Commonwealth.
- (3) This Act does not apply to a farm debt of less than \$50 000 or more than \$30 000 000.

6—Enforcement action in contravention of Act void

Enforcement action taken by a creditor to whom this Act applies otherwise than in compliance with this Act is void.

7—Relationship with other Acts

- (1) Nothing in this Act affects the operation of the following Acts:
 - (a) the *Limitation of Actions Act 1936*;
 - (b) the *National Consumer Credit Protection Act 2009* of the Commonwealth;
 - (c) the *Personal Property Securities Act 2009* of the Commonwealth.
- (2) Nothing in this Act affects the operation of the *Banking Act 1959* of the Commonwealth and, in particular, the duty of the Australian Prudential Regulation Authority under Part 2 Division 2 of that Act.

Part 2—Availability of mediation

Division 1—Availability of mediation

8—Notice of availability of mediation to be given

- 5 (1) A creditor who proposes to take enforcement action against a farmer under a farm mortgage must, before doing so, give written notice to the farmer in accordance with subsection (3).
- (2) The creditor must not take enforcement action until the expiry of the period of 21 days from the day the notice under subsection (1) was given.
- (3) A notice under subsection (1)—
- 10 (a) must state that the creditor intends to take enforcement action under the farm mortgage; and
- (b) must state that, under this Act, mediation between the farmer and the creditor is available; and
- 15 (c) must state that the farmer has 21 days from the date the notice was given to request mediation with the creditor in respect of the farm debt; and
- (d) must be in the prescribed form.
- (4) This section does not apply to a creditor if an exemption certificate has been issued in respect of the farm mortgage.

9—Farmer may request mediation

- 20 (1) A farmer who is liable for debt (whether or not the farmer is in default) may request mediation under this Act.
- (2) A farmer who is given a notice under section 8 may, within 21 days from the date the notice was given, notify the creditor in writing that the farmer requests mediation concerning the farm debt involved.
- 25 (3) A farmer to whom notice has not been given under section 8 and who is liable for a farm debt may notify a creditor in writing that the farmer requests mediation concerning the farm debt.
- (4) A farmer is not required to be in default before making a request under subsection (3).
- 30 (5) A request for mediation made by a farmer under subsection (2) or (3) must be in a form approved by the Minister.

10—Creditor may agree to or refuse mediation

- (1) A creditor who receives a request for mediation from a farmer under section 9 may, by written notice given to the farmer, agree or refuse to participate in mediation in respect of the farm debt involved.
- 35 (2) A response under subsection (1) to a request for mediation must be in a form approved by the Minister.

- (3) If a creditor refuses to participate in mediation with a farmer who has made a request under section 9—
- (a) where the farmer is not in default, the refusal by the creditor does not, of itself, give rise to any claim or other consequence under this Act;
 - (b) where the farmer is in default, the refusal by the creditor provides the farmer with grounds to apply to the Small Business Commissioner under section 13 for the issue of a prohibition certificate.
- (4) If a creditor agrees to participate in mediation with a farmer who has made a request under section 9, the creditor must—
- (a) by written notice, advise the Minister that the parties have agreed to participate in mediation; and
 - (b) provide the notice specified in paragraph (a) to the Minister within 10 days after giving notice under subsection (1).

11—Referral of mediation by Minister

If the Minister receives notice under section 10(4) that a creditor and a farmer have agreed to participate in mediation, the Minister must refer the details of the parties to the Small Business Commissioner for mediation as soon as practicable.

12—Enforcement action postponed to allow for mediation

If a farmer, under section 9(2) or (3), has requested mediation with a creditor, the creditor must not take enforcement action in respect of the farm mortgage concerned unless an exemption certificate is in force.

Note—

Enforcement action taken in breach of this section is void under section 6.

Division 2—Prohibition certificate

13—Application by farmer for issue of prohibition certificate

- (1) A farmer is, on application to the Small Business Commissioner, entitled to be issued with a prohibition certificate if—
- (a) the farmer is in default under the farm mortgage; and
 - (b) an exemption certificate is not in force in respect of the farm mortgage; and
 - (c) the farmer has notified a creditor in accordance with section 9(2) or (3) that the farmer requests mediation concerning the farm debt; and
 - (d) following the farmer's request for mediation under section 9(2) or (3)—
 - (i) satisfactory mediation has not taken place as—
 - (A) the creditor has refused to participate in mediation (or has failed to respond to the farmer's request for mediation); or
 - (B) mediation has commenced but the creditor does not wish to continue to participate in mediation; or

- (ii) at least 3 months have elapsed after a request was made by the farmer under section 9(2) or (3) and throughout that period the farmer has attempted to participate in mediation in good faith but no satisfactory mediation has taken place between the farmer and the creditor.

(2) An application under subsection (1) must specify—

- (a) the circumstances under which the farmer made the request to participate in mediation; and
(b) if relevant, the circumstances of the creditor's refusal to participate in mediation.

14—Issue of prohibition certificate

- (1) The Small Business Commissioner must issue a prohibition certificate to a farmer who is entitled to a certificate under section 13.
- (2) If mediation has taken place under this Act, the Small Business Commissioner must have regard to the written report of the mediator who conducted the mediation to determine whether satisfactory mediation has occurred.
- (3) A creditor must not commence enforcement action against a farmer if a prohibition certificate is in force in respect of the farm mortgage held by that creditor.
- (4) A prohibition certificate ceases to be in force on the earlier of—
- (a) the expiry of 6 months after the date of issue of the prohibition certificate; or
(b) the day on which the farmer and creditor enter into mediation in respect of the farm debt.

Division 3—Exemption certificate

15—Application by creditor for issue of exemption certificate

- (1) A creditor is, on application to the Small Business Commissioner, entitled to be issued with an exemption certificate if—
- (a) the farmer is in default under the farm mortgage; and
(b) a prohibition certificate is not in force in respect of the farm mortgage; and
(c) —
- (i) in the case of a creditor who gave notice under section 8 in relation to the farm debt in respect of the farm mortgage—
- (A) satisfactory mediation under this Act has taken place; or
(B) satisfactory mediation has not taken place as the farmer has refused to participate in mediation; or
(C) at least 3 months (or such longer period agreed to in writing by the creditor and farmer) has elapsed since the notice was given and throughout that period the creditor made attempts to participate in mediation in good faith but satisfactory mediation has not taken place; or

(ii) in any other case—satisfactory mediation has taken place under an alternative dispute resolution process (other than the dispute resolution process provided for by this Act).

(2) An application under subsection (1) must specify—

- (a) the circumstances of the farmer's default; and
- (b) if relevant, the circumstances of the farmer's refusal to participate in mediation; and
- (c) if relevant, details of any alternative dispute resolution process (other than the dispute resolution process provided for by this Act) that has occurred between the farmer and the creditor in relation to the farm debt.

16—Issue of exemption certificate

(1) The Small Business Commissioner must issue an exemption certificate to a creditor who is entitled to a certificate under section 15.

(2) If mediation has taken place under this Act, the Small Business Commissioner must have regard to the written report of the mediator who conducted the mediation to determine whether satisfactory mediation has occurred.

(3) If an exemption certificate has been issued in respect of a farm mortgage, this Act (other than this Division) does not apply to the creditor who holds the farm mortgage.

(4) The expiry of an exemption certificate does not affect any proceedings for recovery of a farm debt, or for the exercise or enforcement of any right of the creditor, already taken or commenced by a creditor while the exemption certificate was in force, and any proceedings may be continued and concluded as if the certificate were still in force.

(5) The reference in subsection (4) to the commencement of proceedings does not include a reference to the giving of any statutory enforcement notice or other action taken in order to fulfil a condition precedent to the enforcement of a right otherwise than through proceedings in a court or tribunal.

17—Creditor may satisfactorily participate in mediation without forgiving or reducing farm debt

A failure by a creditor to agree to reduce or forgive any debt does not, of itself, demonstrate a lack of good faith on the part of a creditor in participating in, or attempting to participate in, mediation.

18—Duration of exemption certificate

An exemption certificate remains in force—

- (a) if satisfactory mediation in respect of the farm debt concerned has taken place—for the period commencing on the date of issue of the exemption certificate and ending on the third anniversary of the last date of the mediation; or
- (b) if the farmer has failed to take part in mediation in good faith—for the period commencing on the date of issue of the exemption certificate and ending on the third anniversary of the last date of the mediation; or

- 5
- (c) if the farmer has indicated in writing that the farmer does not wish to enter into or proceed with mediation—for the period commencing on the date of issue of the exemption certificate and ending on the third anniversary of the date on which the indication was given to the Minister or creditor; or
- (d) if the farmer has failed to respond in writing, within 28 days, to an invitation referred to in section 19(1)(c)—for the period commencing on the date of issue of the exemption certificate and ending on the third anniversary of the date that is 28 days after the invitation was given to the farmer; or
- 10 (e) if a notice was given by the creditor under section 8—for the period commencing on the date of issue of the exemption certificate and ending on the date that is 3 years and 3 months after the date the notice was given; or
- (f) in any other case—for the period of 3 years commencing on the date on which the certificate was issued.

Division 4—General

19—When is a farmer or creditor presumed to have refused to participate in mediation?

- 15
- (1) A farmer is presumed to have refused to participate in mediation in the following circumstances:
- 20 (a) the farmer has failed to take part in mediation in good faith or has not entered into or proceeded with mediation within 3 months of a notice of availability under section 8 being given or a request for mediation under section 9 being made (as the case requires);
- (b) the farmer has indicated in writing to the Minister or to the creditor that the farmer does not wish to enter into or proceed with mediation in respect of the farm debt;
- 25 (c) the farmer has failed to respond in writing within 28 days to an invitation that—
- (i) is made in writing by the creditor; and
- (ii) invites the farmer to attend a mediation session; and
- 30 (iii) indicates that a failure of the farmer to respond in writing to the invitation might be taken to be an indication that the farmer refuses to participate in mediation in respect of the farm debt.
- (2) A creditor is presumed to have refused to participate in mediation in the following circumstances:
- 35 (a) the creditor has failed to take part in mediation in good faith or has not entered into or proceeded with mediation within 3 months of a notice of availability under section 8 being given or a request for mediation under section 9 being made (as the case requires);
- 40 (b) the creditor has indicated in writing to the Minister or to the farmer that the creditor does not wish to enter into or proceed with mediation in respect of the farm debt.

Part 3—The Small Business Commissioner and mediation

Division 1—The Small Business Commissioner and mediators

20—Functions of the Small Business Commissioner

- (1) The Small Business Commissioner has the following functions:
- 5 (a) to make arrangements to facilitate the resolution by mediation of farm debt disputes between farmers and creditors that are referred to the Commissioner by the Minister;
- (b) to provide preliminary assistance to farmers and creditors who have agreed to participate in mediation in relation to farm debts by—
- 10 (i) giving both parties advice about their rights and obligations in relation to the mediation process; and
- (ii) encouraging full and open communication between the parties in relation to the dispute;
- (c) to issue prohibition certificates under Part 2 Division 2;
- 15 (d) to issue exemption certificates under Part 2 Division 3;
- (e) to report to the Minister on the performance of functions by the Commissioner under this Act;
- (f) to perform any function conferred or imposed on the Commissioner under this Act.
- 20 (2) The Small Business Commissioner is not subject to the Minister's control or direction in exercising functions under section 20(1)(a), (b), (c) and (d).
- (3) For the purposes of arranging for the resolution of farm debt disputes by mediation, the Small Business Commissioner may engage persons with the requisite skills and experience to conduct mediations.

21—Functions of mediators

- (1) A mediator engaged by the Small Business Commissioner under section 20 has the following functions—
- (a) to mediate farm debt disputes between creditors and farmers by assisting the parties to reach agreement about—
- 30 (i) present arrangements between them; and
- (ii) if the financial relationship between the parties is to be ongoing—the future conduct of the parties;
- (b) to perform any other function conferred on the mediator by or under this Act.
- (2) A mediator must not, in carrying out his or her functions under this Act—
- 35 (a) advise a farmer or creditor about the law; or
- (b) encourage or assist a farmer or creditor in reserving or establishing legal rights; or

- (c) act as an adjudicator or arbitrator.

Division 2—The mediation process

22—Referral of farm debt disputes for mediation

5 The Small Business Commissioner must arrange for each farm debt dispute referred for mediation under Part 2 to be the subject of mediation by a mediator.

23—Conduct of mediation

- (1) A mediation must be conducted with—

(a) as little formality and technicality as proper mediation of the farm debt permits; and

10 (b) as much expedition as possible.

- (2) The Small Business Commissioner, having regard to any recommendations made by a mediator, may join any person that he or she considers appropriate to join as a party to the mediation.

- (3) A mediator may call a pre-mediation conference.

- 15 (4) The mediator may—

(a) conduct a pre-mediation conference with such procedures as it thinks fit; and

(b) without limiting paragraph (a), allow the parties to participate in a pre-mediation conference by means of telephone, video link or any other system or method of communication.

- 20 (5) A party to a mediation may be represented by—

(a) a legal practitioner (within the meaning of the *Legal Practitioners Act 1981*); or

(b) any other person considered appropriate by the Small Business Commissioner having regard to any recommendations made by a mediator.

- 25 (6) Despite subsection (5), the mediator may meet with a party to the mediation (alone or together with another party) in the absence of their representative if—

(a) the mediator considers it appropriate to do so; and

(b) the relevant party agrees to meet the mediator in the absence of their representative.

- 30 (7) Costs and expenses associated with the appointment and work of a mediator are to be determined by the Small Business Commissioner and paid by the parties in the proportions agreed to by the parties or, if the parties cannot agree, in equal shares.

24—Confidentiality

- 35 (1) A person must not disclose any information obtained in mediation or in the administration of this Act except—

(a) as required or authorised by or under this Act or any other Act or law; or

(b) with the written consent of the person from whom the information was obtained or to whom the information relates; or

- (c) in connection with the administration of this Act; or
- (d) as is reasonably required to refer any party or parties to mediation to any person, agency, organisation or other body and, with the written consent of the parties to the mediation, to aid in the resolution of an issue between those parties; or
- (e) to an authority responsible under the law of a place outside this State, where the information is required for the proper administration of that law; or
- (f) to an agency or instrumentality of this State, the Commonwealth or another State or a Territory of the Commonwealth for the purposes of the proper performance of its functions; or
- (g) in accordance with the regulations.

Maximum penalty: \$10 000.

- (2) Subsection (1) does not prevent disclosure of statistical or other data that could not reasonably be expected to lead to the identification of any person to whom it relates.
- (3) Information that has been disclosed under subsection (1) for a particular purpose must not be used for any other purpose by—
 - (a) the person to whom the information was disclosed; or
 - (b) any other person who gains access to the information (whether properly or improperly and whether directly or indirectly) as a result of that disclosure.

Maximum penalty: \$10 000.

- (4) Evidence of anything said or admitted during mediation and a document prepared for the purposes of, in the course of or in accordance with, mediation are not admissible in any proceedings in a court or before a person or body authorised to hear and receive evidence.
- (5) Subsection (4) does not apply to—
 - (a) any contract, deed, mortgage or other instrument entered into as a result of, or in accordance with, any binding agreement entered during mediation; or
 - (b) any report on the mediation by the mediator who conducted it.
- (6) In this section—

mediation includes any steps taken in the course of making arrangements for mediation.

Part 4—General

25—Agreement reached by parties at mediation

A creditor must ensure that any binding agreement relating to the farm debt made between the creditor and the farmer, entered into during or at the conclusion of mediation, is reflected in any contract, deed, mortgage or other instrument entered into as a result of that binding agreement.

26—Contracting out prohibited

- (1) A provision of an agreement or other instrument, (whether in writing or not and whether entered into before, on or after the commencement of this Act) by which a person seeks to avoid, modify or restrict the operation of this Act is void.
- 5 (2) A provision of an agreement or other instrument (whether in writing or not and whether entered into before, on or after the commencement of this Act) by which a person seeks to have a farmer (as debtor or guarantor) or a guarantor indemnify a creditor for any loss or liability arising under this Act is void.

27—Waiver of rights void

10 A waiver of mediation rights under this Act is void.

28—Notices by mortgagee

If land is subject to a farm mortgage and another Act requires the mortgagee to give notice to the mortgagor before exercising in relation to the land a power or right conferred by the other Act or by the farm mortgage—

- 15 (a) nothing in this Act derogates from the requirement to give the notice under the other Act; and
- (b) a notice required by this Act to be given before the exercise of the power or right is not to be taken to fail to comply with this Act only because it includes matter required to be specified in a notice required by the other Act to be
- 20 given before the exercise of the power or right.

29—Service

- (1) A notice or other document required or authorised to be given or sent to, or served on, a person under this Act may—
- (a) be given to the person personally; or
- 25 (b) be posted in an envelope addressed to the person at the person's last known residential or (in the case of a corporation) registered address; or
- (c) be left for the person at the person's last known residential or (in the case of a corporation) registered address with someone apparently over the age of 16 years; or
- 30 (d) be transmitted by fax or email to a fax number or email address.
- (2) Without limiting the effect of subsection (1), a notice or other document required to be given or sent to, or served on, a person for the purposes of this Act may, if the person is a company or registered body within the meaning of the *Corporations Act 2001* of the Commonwealth, be served on the person in accordance with that Act.

30—Offences by bodies corporate

- (1) If a body corporate is guilty of an offence against this Act, each director and the manager of the body corporate are guilty of an offence and liable to the same penalty as is prescribed for the principal offence unless the director or the manager (as the case may be) proves that he or she could not by the exercise of due diligence have prevented the commission of the offence.
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- (2) A person referred to in this section may be prosecuted and convicted of an offence against this section whether or not the body corporate has been prosecuted or convicted of the principal offence committed by the body corporate.

31—Regulations

- 5 (1) The Governor may make such regulations as are contemplated by this Act, or as are necessary or expedient for the purposes of this Act.
- (2) Without limiting the generality of subsection (1), the regulations may—
- 10 (a) be of general or limited application and vary in operation according to factors stated in the regulation; and
- (b) prescribe fines, not exceeding \$5 000, for offences against the regulations; and
- (c) prescribe fees or charges in respect of matters under this Act, and provide for the waiver or refund of such fees or charges; and
- (d) make provisions of a saving or transitional nature.
- 15 (3) The regulations may—
- (a) be of general application or vary in their application according to prescribed factors; and
- (b) provide that a matter or thing in respect of which regulations may be made is to be determined according to the discretion of the Minister or a specified
- 20 person or body.

Schedule 1—Transitional provision

1—Transitional provision

This Act applies to—

- 25 (a) a farm debt incurred at any time before or after the commencement of section 8; and
- (b) any farm debt outstanding on the commencement of section 8 in respect of which no enforcement action had been taken before the commencement of that section.