

South Australia

## **Farm Debt Mediation Act 2018**

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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## Legislative history

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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 2018*.

### 2—Commencement

This Act will come into operation on a day to be fixed by proclamation.

### 3—Object of Act

The object of this Act is to provide for the efficient and equitable resolution of farm debt disputes by requiring creditors to provide farmers with the opportunity to have the disputes referred to mediation before the creditors are able to take possession of property or other enforcement action under farm mortgages.

### 4—Interpretation

(1) In this Act, unless the contrary intention appears—

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

*Commissioner* means the Small Business Commissioner;

*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—**

- 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.

**director** of a body corporate includes—

- (a) a person occupying or acting in the position of director or member of the governing body of the body corporate, by whatever name called and whether or not validly appointed to occupy or duly authorised to act in the position; and
- (b) any person in accordance with whose directions or instructions the directors or members of the governing body of the body corporate are accustomed to act;

**enforcement action**, in relation to a farm mortgage, means the taking of possession of property under the mortgage or any other action to enforce the mortgage, including 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
- (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 15;

**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;

**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; or
- (e) property of a prescribed kind;

***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 representative of a deceased farmer;

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

- (a) agricultural, pastoral, horticultural, viticultural, forestry 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) aquaculture or the propagation or harvesting of fish or other aquatic organisms for the purposes of aquaculture;
- (d) an activity prescribed by regulation;

***function*** includes a power, authority or duty;

***mediator*** means a person engaged by the 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 13;

***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 mediation of a prescribed class;

***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) a notice under section 55A of the *Law of Property Act 1936*; or
  - (b) any notice designated by the Minister as a statutory enforcement notice.
- (2) The Minister may by notice in the Gazette designate a notice under an Act to be a statutory enforcement notice.

- (3) The Minister may by further notice in the Gazette vary or revoke a notice under subsection (2).

## **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.

## **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 II Division 2 of that Act.

# **Part 2—Availability of mediation**

## **Division 1—Availability of mediation**

### **8—Notice of availability of mediation to be given**

- (1) A creditor must not take enforcement action against a farmer under a farm mortgage unless—
  - (a) the creditor has given notice to the farmer in accordance with this section; and
  - (b) 21 days have expired since the day on which notice was given.
- (2) Notice under subsection (1)—
  - (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
  - (c) must state that the farmer has 21 days from the day on which the notice was given to request mediation with the creditor in respect of the farm debt; and

- (d) must be given in a manner and form approved by the Commissioner.
- (3) This section does not apply to a creditor if an exemption certificate is in force in respect of the farm mortgage.

### **9—Farmer may request mediation**

- (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 notice under section 8 may, within 21 days from the day on which notice was given, notify the creditor, in a manner and form approved by the Commissioner, that the farmer requests mediation concerning the farm debt involved.
- (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 that the farmer requests mediation concerning the farm debt.
- (4) Notice of a request for mediation by a farmer under subsection (2) or (3) must be given in a manner and form approved by the Commissioner.

### **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 notice given to the farmer, agree or refuse to participate in mediation in respect of the farm debt involved.
- (2) Notice of a response by a creditor under subsection (1) to a request for mediation must be given in a manner and form approved by the Commissioner.
- (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 Commissioner under section 12 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, within 10 days after giving notice to the farmer under subsection (1), notify the Commissioner, in a manner and form approved by the Commissioner, that the parties have agreed to participate in mediation.

### **11—Enforcement action postponed to allow for mediation**

If a farmer has made a request for mediation under section 9, 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**

### **12—Application by farmer for issue of prohibition certificate**

- (1) A farmer is, on application to the Commissioner, entitled to be issued with a prohibition certificate if—
  - (a) the farmer is in default under a 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 because—
      - (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 since 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—
  - (a) be made in a manner and form approved by the Commissioner; and
  - (b) specify the circumstances under which the farmer made the request to participate in mediation; and
  - (c) if relevant, specify the circumstances of the creditor's refusal to participate in mediation.

### **13—Issue of prohibition certificate**

- (1) The Commissioner must issue a prohibition certificate to a farmer who is entitled to a certificate under section 12.
- (2) If mediation has taken place under this Act, the Commissioner must have regard to the 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 expires—
  - (a) 6 months after the day on which the prohibition certificate was issued; or
  - (b) on the day on which the farmer and creditor enter into mediation in respect of the farm debt,whichever is the earlier.

## **Division 3—Exemption certificate**

### **14—Application by creditor for issue of exemption certificate**

- (1) A creditor is, on application to the Commissioner, entitled to be issued with an exemption certificate if—
  - (a) a farmer is in default under a 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 because 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 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—
  - (a) be made in a manner and form approved by the Commissioner; and
  - (b) specify the circumstances of the farmer's default; and
  - (c) if relevant, specify the circumstances of the farmer's refusal to participate in mediation; and
  - (d) if relevant, set out 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.

### **15—Issue of exemption certificate**

- (1) The Commissioner must issue an exemption certificate to a creditor who is entitled to a certificate under section 14.
- (2) If mediation has taken place under this Act, the Commissioner must have regard to the 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 while the certificate is in force.

- (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.

### **16—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.

### **17—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 day of issue of the exemption certificate and ending on the third anniversary of the last day 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
- (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 day of issue of the exemption certificate and ending on the third anniversary of the day on which the indication was given to the Commissioner or creditor; or
- (d) if the farmer has failed to respond in writing, within 28 days, to an invitation referred to in section 18(a)(iii)—for the period commencing on the day of issue of the exemption certificate and ending on the third anniversary of the day that is 28 days after the invitation was given to the farmer; or
- (e) if a notice was given by the creditor under section 8—for the period commencing on the day of issue of the exemption certificate and ending on the day 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 day on which the certificate was issued.

## **Division 4—General**

### **18—When is a farmer or creditor presumed to have refused to participate in mediation?**

For the purposes of this Act—

- (a) a farmer is presumed to have refused to participate in mediation in the following circumstances:

- (i) 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 may require);
  - (ii) the farmer has notified the Commissioner or creditor that the farmer does not wish to enter into or proceed with mediation in respect of the farm debt;
  - (iii) the farmer has failed to respond within 28 days to an invitation that—
    - (A) is made by the creditor in a manner and form approved by the Commissioner; and
    - (B) invites the farmer to attend a mediation session; and
    - (C) indicates that a failure of the farmer to respond to the invitation might be taken to be an indication that the farmer refuses to take part in mediation in respect of the farm debt;
- (b) a creditor is presumed to have refused to participate in mediation in the following circumstances:
- (i) 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);
  - (ii) the creditor has notified, in a manner and form approved by the Commissioner, the Commissioner or the farmer that the creditor does not wish to enter into or proceed with mediation in respect of the farm debt.

## **Part 3—The Commissioner and mediation**

### **Division 1—The Commissioner and mediators**

#### **19—Administration of Act**

The Commissioner is responsible for the administration of this Act.

#### **20—Functions of Commissioner**

- (1) The Commissioner has the following functions under this Act:
- (a) to make arrangements to facilitate the resolution by mediation of farm debt disputes between farmers and creditors;
  - (b) to provide preliminary assistance to farmers and creditors who have agreed to participate in mediation in relation to farm debts by—
    - (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;
  - (d) to issue exemption certificates under Part 2 Division 3;
  - (e) to report to the Minister responsible for the administration of the *Livestock Act 1997* on the performance of functions by the Commissioner under this Act (without limiting the Commissioner's functions under section 5 of the *Small Business Commissioner Act 2011*);
  - (f) to perform any function conferred or imposed on the Commissioner under this Act.
- (2) The Commissioner is not subject to the Minister's control or direction in exercising functions under section 20(1)(a), (b), (c) or (d).
- (3) For the purposes of arranging for the resolution of farm debt disputes by mediation, the Commissioner—
- (a) may engage persons to conduct mediations; and
  - (b) must, when engaging persons under paragraph (a), ensure that those persons have the necessary skills and experience to conduct a mediation in a particular case.

## 21—Functions of mediators

- (1) A mediator engaged by the 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—
    - (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) In carrying out a function under this Act, a mediator must not—
- (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—Commissioner must arrange mediation

If the Commissioner is notified under section 10(4) that the parties to a farm debt dispute have agreed to take part in mediation, the Commissioner must arrange for mediation of the dispute 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
  - (b) as much expedition as possible.
- (2) The Commissioner, having regard to any recommendations made by a mediator, may join any person that the Commissioner considers appropriate to join as a party to the mediation.
- (3) A mediator may call a pre-mediation conference.
- (4) The mediator may—
  - (a) conduct a pre-mediation conference with such procedures as the mediator 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.
- (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 Commissioner having regard to any recommendations made by a mediator.
- (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.
- (7) A mediator must, as soon as reasonably practicable after mediation conducted by the mediator has concluded, submit to the Commissioner a report on the mediation.

### **24—Confidentiality**

- (1) A person must not disclose any information obtained in the course of mediation under this Act, 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 or a document prepared for the purposes of, in the course of or in accordance with, mediation is 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 executed 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.

## 25—Mediation fees

- (1) A fee of an amount determined by the Commissioner is payable by each of the parties participating in mediation of a farm debt dispute under this Act.
- (2) The Commissioner may, for the purposes of this section, by notice in the Gazette or publication on a website selected by the Commissioner, determine the fee payable for mediation under this Act.
- (3) A fee for mediation payable by a party to mediation is recoverable by the Commissioner as a debt in a court of competent jurisdiction.
- (4) The Commissioner may wholly or partly waive or reduce a fee payable under this section.

## Part 4—General

### 26—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 that is entered into during or at the conclusion of mediation is reflected in any contract, deed, mortgage or other instrument executed as a result of that binding agreement.

## 27—Contracting out prohibited

- (1) A provision of an agreement or other instrument (whether or not in writing, 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.
- (2) A provision of an agreement or other instrument (whether or not in writing, 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.

## 28—Waiver of rights void

A waiver of mediation rights under this Act is void.

## 29—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 nothing in this Act derogates from the requirement to give the notice under the other Act.

## 30—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
  - (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
  - (d) be transmitted by email to an 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.

## 31—Offences by bodies corporate

- (1) If a body corporate is guilty of an offence against this Act (other than an offence against the regulations), each director of the body corporate is guilty of an offence and liable to the same penalty as is prescribed for the principal offence if the prosecution proves that—
  - (a) the director knew, or ought reasonably to have known, that there was a significant risk that such an offence would be committed; and
  - (b) the director was in a position to influence the conduct of the body corporate in relation to the commission of such an offence; and
  - (c) the director failed to exercise due diligence to prevent the commission of the offence.

- (2) The regulations may make provision in relation to the criminal liability of a director of a body corporate that is guilty of an offence against the regulations.

### **32—Regulations**

- (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—
  - (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.
- (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 Commissioner or a specified person or body.

## **Schedule 1—Transitional provision**

### **1—Transitional provision**

This Act applies to a farm debt (whether or not incurred before or after the commencement of section 8) in respect of which no enforcement action was taken before the commencement of that section.

## Legislative history

### Notes

- For further information relating to the Act and subordinate legislation made under the Act see the Index of South Australian Statutes or [www.legislation.sa.gov.au](http://www.legislation.sa.gov.au).

### Principal Act

Year	No	Title	Assent	Commencement
2018	7	<i>Farm Debt Mediation Act 2018</i>	2.8.2018	3.9.2018 ( <i>Gazette 30.8.2018 p3253</i> )