

Farm Debt Mediation Bill (No 2)

Government Bill

Explanatory note

General policy statement

This Bill will establish a farm debt mediation scheme that will require creditors with security interests in farm property to offer mediation to farmers before taking an enforcement action in relation to that debt. It will also allow farmers to initiate statutory mediation with a secured creditor.

The Bill is intended to provide for fair, equitable, and timely resolution of farm debt issues with 2 key objectives as follows:

- for farmers and secured creditors to meet in an equitable manner to constructively and objectively explore options for business turnaround; and
- to provide for a timely and dignified exit for those for whom few other options exist.

Levels of farm debt have been rising over recent years and farming is vulnerable to factors outside the control of farmers, such as climate fluctuations, market volatility, and disease or pest incursions (for example, *Mycoplasma bovis*). Farm debt is often complex, and resolving the debt problems of financially struggling farms can be a challenging and drawn-out process for farmers and lenders, especially as farmers face a significant power imbalance in their dealings with lenders.

Overview of farm debt mediation scheme

The statutory farm debt mediation scheme will provide a structured and consistent process for resolving farm debt problems that all parties can have confidence in. The scheme applies across all secured lenders, including non-bank lenders.

Under the statutory scheme, secured creditors of farm businesses will be required to offer statutory mediation before taking an enforcement action in relation to debt secured over farm property (including land, chattels, and licences). Farmers will also

be able to initiate mediation, without needing to meet any statutory criteria other than having debt secured over the farm business.

There is no obligation on either party to participate in mediation. However, if a farmer declines to mediate, the creditor will be able to apply for an enforcement certificate, which will allow enforcement action to proceed in line with the terms and conditions of the loan agreement. If the creditor declines to mediate, the farmer can apply for a prohibition certificate, which will prevent the creditor from taking any enforcement action related to that debt for 6 months.

What is farm debt?

The mediation scheme will apply to farm businesses that are solely or principally engaged in 1 or more of the following activities: agriculture (including sharemilking), horticulture, and aquaculture. The scheme also applies to a farm business engaged in an activity involving primary production carried out in connection with any of those activities. Wild harvest fishing and the hunting and trapping of animals are excluded. However, the Bill includes the ability to add a business activity by regulation to reflect possible changes in the farming sector in the future (for example, to include forestry activities). The scheme will not apply to lifestyle farms unless the farmer is solely or principally engaged in a primary production operation as defined in the Bill.

The mediation scheme will apply in relation to loans that are secured against farm property, such as farm land, farm machinery, livestock, and harvested crops and wool.

The Bill applies to all farm debt, including debt that was incurred before the establishment of the scheme. However, the restriction on enforcement actions does not apply if an enforcement action commenced prior to the restriction on enforcement actions coming into force.

Scheme administration

The department responsible for administering the Bill (the **Ministry**) will be the administering agency for the farm debt mediation scheme. The Ministry will support the implementation of the Bill by—

- ensuring efficient operation of the scheme (for example, by setting rules and issuing certificates):
- overseeing approved mediator organisations:
- ensuring that farmers have ready access to appropriate financial and business planning support:
- raising and maintaining awareness of the scheme:
- monitoring and reporting on the effectiveness of the scheme, with a view to continuous improvement in the scheme's performance.

Oversight of mediators

The Bill provides the Ministry with the power to approve mediation organisations that will be responsible for oversight of authorised farm debt mediators. Approved medi-

ation organisations will be required to meet certain standards and criteria, which will be set by the chief executive of the Ministry.

Approved mediation organisations will be responsible for authorising and monitoring the performance of farm debt mediators. They must ensure that authorised mediators are qualified and competent to act in this area of expertise, in accordance with standards and criteria set by the Ministry. The Ministry will maintain a list of approved mediation organisations. It is intended that the standards and criteria will require those organisations to maintain a publicly available list of authorised farm debt mediators.

Ensuring farm debt mediation is fit for purpose for tangata whenua

The scheme has been designed to allow for tikanga principles to be incorporated in the process of mediation where parties consider it appropriate. This approach acknowledges that tikanga differs across regions, and that it is important to provide for relevant and appropriate tikanga to be included in the mediation process.

The role of mediators will be critical to achieving fit for purpose mediation for Māori. It will be important that the Ministry works with Māori and relevant agencies to ensure that mediator skills and knowledge of tikanga are developed further in order to support full Māori participation in the scheme.

How it works

Once an invitation to mediate is accepted by the other party, the creditor must agree to one of the 3 mediators nominated by the farmer. Mediation costs will be shared equally unless other arrangements are agreed at the start of the process (in a procedure agreement). Farmers and creditors have up to 60 working days to complete the mediation process, unless parties agree to an extension to this. During this time, the restriction on enforcement actions remains in place.

At the end of the mediation process, the mediator provides the Ministry with a summary report. The mediator will also provide a copy of any mediation agreement that sets out agreed actions for future management of the debt, if one has been entered into.

Prohibition and enforcement certificates are an integral part of the scheme. In the absence of a mediation agreement, parties can apply to the Ministry to make a determination on whether a certificate will be issued. This determines whether an enforcement action can proceed or not.

- Farmers can apply for a prohibition certificate, which, if issued, has the effect of suspending any enforcement action for that debt for 6 months.
A prohibition certificate is issued when the creditor has declined to mediate or the creditor has not acted in good faith during the mediation process.
- Creditors can apply for an enforcement certificate, which allows the creditor to proceed with enforcement actions related to the debt. The certificate has a

duration of 3 years. The farmer will not be able to initiate further mediation processes in relation to that debt during this period.

An enforcement certificate is issued when the farmer has declined to mediate or the creditor has acted in good faith during the mediation process.

Either party can apply for an administrative review of the determination by the chief executive of the Ministry, during which time there is a stay on enforcement actions. An application must be made within 10 days.

Exceptions to scheme

The prohibition on taking an enforcement action without an enforcement certificate is lifted (and/or ongoing mediation halted) in order to protect the interests of secured creditors if certain actions are taken against a farmer by creditors, whether secured or unsecured.

Departmental disclosure statement

The Ministry for Primary Industries is required to prepare a disclosure statement to assist with the scrutiny of this Bill. The disclosure statement provides access to information about the policy development of the Bill and identifies any significant or unusual legislative features of the Bill.

A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=bill&subtype=government&year=2019&no=155>

Regulatory impact assessments

The Ministry for Primary Industries produced regulatory impact assessments in November 2018 and June 2019 to help inform the main policy decisions taken by the Government relating to the contents of this Bill.

Copies of these regulatory impact assessments can be found at—

- <https://www.mpi.govt.nz/dmsdocument/33010-regulatory-impact-statement>
- <https://www.mpi.govt.nz/dmsdocument/34845>
- <http://www.treasury.govt.nz/publications/informationreleases/ria>

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 provides that the Bill will come into force on 1 or more dates set by Order in Council. It is intended that *Part 1 and subparts 1 and 2 of Part 3* will commence first, on 1 February 2020. This will allow the approval of mediation organisations, and authorisation of mediators, before the requirement to mediate commences. The remainder of the Bill is intended to come into force on 1 October 2020.

Part 1

Preliminary provisions

Part 1 sets out the preliminary provisions of the Bill.

Clause 3 sets out the purpose of the Bill, which is to provide parties to farm debt with the opportunity to use mediation to reach an agreement on the present arrangements and future conduct of financial relations between them before an enforcement action is taken in relation to farm property.

Clauses 4 and 5 provide a guide to the Bill and to the mediation process provided for by the Bill.

Various key terms are defined in *clause 6*, including terms such as enforcement action, farm debt, farm property, farmer, and primary production operation. In summary,—

- an enforcement action is an action taken to enforce a security interest in farm property. Common enforcement actions include issuing a notice under section 119 of the Property Law Act 2007, and using a power of sale under a mortgage instrument:
- farm debt is debt incurred by a farmer where that debt meets 2 requirements. First, the debt was incurred solely or principally for the purpose of conducting a primary production operation. Secondly, the debt is secured wholly or partly by a security interest in farm property:
- farm property is any property that is used for or in connection with the primary production operation of the farmer. Property is defined very widely:
- a farmer is a person who is solely or principally engaged in a primary production operation:
- a primary production operation is a business undertaking that primarily involves agriculture, horticulture, or aquaculture.

Schedule 1 of the Bill (*see clause 7*) contains the transitional, savings, and related provisions that provide for the following:

- the Bill applies to any farm debt, whether that debt was incurred before or after the commencement of *clause 10*:
- the restriction in *clause 10* does not apply to an enforcement action if that action was commenced or was in progress before *clause 10* commenced, or if that action is linked to another enforcement action and that other enforcement action was commenced or was in progress before *clause 10* commenced.

Part 2

Restrictions on enforcement of farm debt

Subpart 1—Restrictions on enforcement of farm debt

This subpart sets out the principal restriction on the enforcement of farm debt.

Clause 10 contains the principal restriction. It provides that a creditor must not take an enforcement action under a security interest in farm property—

- unless an enforcement certificate is in force in respect of the relevant farm debt:
- if there is a prohibition certificate in force in respect of the relevant farm debt.

Clause 11 provides that the restriction in *clause 10* does not apply if the parties have entered into a mediation agreement under the Bill. In that case, the creditor does not need to get an enforcement certificate in order to take an enforcement action, but does have to comply with the terms of the mediation agreement (for example, the mediation agreement may state that an enforcement action cannot be taken unless certain circumstances arise). However, if the mediation agreement was entered into more than 3 years ago, the restriction in *clause 10* will apply again.

Clause 12 provides that the restriction in *clause 10* does not apply if the farmer is subject to an insolvency proceeding or process (such as liquidation, receivership, or bankruptcy). In these cases, the creditor does not need to get an enforcement certificate in order to take an enforcement action.

Clause 13 provides that an enforcement action taken without an enforcement certificate (or when there is a prohibition certificate in effect) is void. However, any enactment or law that gives protection to third parties who purchase farm property from or through a creditor in good faith will still apply.

Subpart 2—Mediation process

This subpart provides for the various aspects of the mediation process. The total time allowed for mediation is 60 working days (*see clause 22*), although the parties can agree between themselves to extend this.

Clauses 14 to 17 set out how a mediation request may be sent and responded to. There is no obligation to request mediation. However, if a creditor wants to take an enforcement action under a security interest in farm property, the creditor needs to make a mediation request (unless *clause 11* or *12* applies).

A farmer may make a mediation request at any time (*clause 14*), while a creditor may only make a mediation request if the farmer is in default of the farm debt (*clause 15*).

The other party has 20 working days to respond to a mediation request (*see clause 16*), although extensions are possible for farmers (*see clause 17*).

Clause 18 sets out when a party has declined to mediate. A failure to respond to a mediation request within the required time frame is treated as if the party has declined to mediate. If a party declines to mediate, the other party may have grounds to apply for an enforcement certificate or a prohibition certificate (*see clauses 32 and 33*).

Clauses 19 to 25 set out the mediation process. The farmer and the creditor are required to participate in this process in good faith (*see clause 24*), and failure to participate in good faith may be a ground to apply for an enforcement certificate or a prohibition certificate (*see clauses 32 and 33*).

Clause 24(2), as well as various other clauses within this subpart, includes indications as to what may and may not be considered good faith in the circumstances (*see*, for example, *clause 20(5)(a)*). However, these provisions do not limit the meaning of good faith, and the chief executive of the administering Ministry may take into account any relevant matters when making a determination under *clause 36 or 37*.

The mediation process ends with the mediator providing a report on the mediation to the chief executive (*see clause 25*). This report may be used as evidence that a party has not participated in the mediation in good faith. The parties to mediation will receive a copy of the report if an application for an enforcement certificate or a prohibition certificate is made (*see clauses 34(5) and 35*).

Subpart 3—Mediation agreement

This subpart deals with how mediation agreements may be entered into.

Clauses 27 and 28 provide that an agreement reached between the parties in the course of mediation must be recorded in a mediation agreement.

Clause 29 provides that a mediation agreement is binding on the parties. A non-binding agreement between the parties is not a mediation agreement for the purposes of this Bill. In that case, the parties could instead apply for an enforcement certificate or a prohibition certificate if the relevant grounds are satisfied (*see clauses 32 and 33*).

Clauses 30 and 31 give the farmer a 10-working-day cooling-off period in which the farmer may cancel a mediation agreement. If a mediation agreement is cancelled under *clause 30*, it is treated as if it had never been entered into. The mediation agreement is not enforceable during this period. If a creditor takes an enforcement action in reliance on a mediation agreement and that mediation agreement is subsequently cancelled under *clause 30*, the enforcement action is taken in contravention of *clause 10* and so is void (*see clause 13*).

Subpart 4—Enforcement and prohibition certificates

This subpart provides for enforcement certificates and prohibition certificates.

Clauses 32 and 36 set out the grounds for an application for, and the issue of, an enforcement certificate.

In the case of an enforcement certificate, a creditor may apply on the grounds that the farmer declined to mediate (*see clause 18*), or on the grounds that the creditor has participated in the mediation in good faith (*see clause 24*).

The chief executive will issue a certificate if—

- the farmer is in default of the farm debt (*clause 36(a)*); and
- there is no prohibition certificate in force in respect of the farm debt (*clause 36(b)*); and
- the chief executive is satisfied that the relevant grounds are established (*clause 36(c)*).

Clauses 33 and 37 set out similar arrangements for an application for and the issue of a prohibition certificate.

The other party gets notified that an application has been made (*clause 35*), and both parties get notified of the chief executive's decision (*clause 38*). This decision can be subject to administrative review (*see clause 48*).

Enforcement certificates are in force for a period of 3 years (*clause 40*). The commencement date will be specified by the chief executive in the certificate. In many cases, it is anticipated that the commencement date will be the date on which mediation ended (*see section 15 of the Farm Debt Mediation Act 1994 (NSW) for comparison*). However, the chief executive retains flexibility to specify other dates where that is appropriate. The decision on what date to specify in the certificate will be a judicially reviewable decision.

Clause 41 provides that enforcement actions that are commenced before an enforcement certificate expires can continue after the certificate expires.

Part 3

General provisions

Subpart 1—Mediators

Mediation under *Part 2* of the Bill can only be carried out by an authorised mediator. This subpart sets out an approval and authorisation scheme that allows mediators to be authorised.

Clauses 42 to 44 set out the approval and authorisation process. The process is generally summarised as follows:

- the chief executive of the Ministry approves an organisation as an approved mediation organisation (*clause 42*);
- an approved organisation authorises individual people to be mediators for the purposes of the Bill (*clause 44*).

The chief executive can set out various requirements that apply to the authorisation and approval processes (*see clause 47*). A notice containing a requirement under this clause is a disallowable instrument, but not a legislative instrument, for the purposes of the Legislation Act 2012. *Clause 47* contains an alternative method of publication (notice in the *Gazette* and publication on the administering Ministry's website).

If a person is acting as a mediator under the Bill,—

- the mediator must act independently (*clause 45*); and
- the mediator has no criminal or civil liability, unless the mediator has acted in bad faith (*clause 46*).

Subpart 2—Administrative review of decisions

Two types of decisions made by the chief executive may be administratively reviewed: a decision on whether to issue an enforcement certificate or a prohibition

certificate, and a decision whether to approve a mediation organisation. This subpart sets out the process and time limits on those administrative reviews.

An application for review must be made within 10 working days after notice of the decision is given (*clause 48*). That period can be extended by the chief executive.

The chief executive has 20 working days to complete the review and make a determination (*clause 52*). That period can also be extended.

If the administrative review relates to a decision on whether to issue a certificate,—

- the other party to the farm debt is notified if an application is made, and is given an opportunity to make written submissions (*clause 50*); and
- even though an enforcement certificate may have been issued, the creditor cannot take an enforcement action until the chief executive has determined an application (*clause 54*).

An appeal can be made to the High Court on a question of law only (*clause 55*).

Subpart 3—Miscellaneous

This subpart contains various miscellaneous matters that relate to the Bill. *Clauses 57 and 58* in particular extend the application of the principal restriction in *clause 10*.

Clause 56 prohibits contracting out of the Bill. A provision in an agreement that overrides the Bill is unenforceable. However, this does not apply to a provision in an agreement that imposes a stricter duty on a creditor.

Clause 57 deals with situations where a guarantee is given in connection with a farm debt owed by the farmer. This clause provides that the debt owed to the creditor by the guarantor is to be treated as if it formed part of the relevant farm debt that the farmer owes to the creditor. As a result, a creditor is restricted from taking an enforcement action under a security interest granted by the guarantor in the same way that a creditor is restricted from taking an enforcement action under a security interest granted by the farmer.

Clause 58 deals with actions by the creditor to appoint an administrator, a liquidator, or a receiver of a farmer. This clause provides that those actions are to be treated as if they were an enforcement action under a security interest in farm property for the purposes of *clause 10*. As a result, a creditor is restricted from taking one of those actions in the same way that a creditor is restricted from taking an enforcement action under a security interest in farm property.

Clause 59 sets out how the chief executive may give a notice under the Bill.

Clause 60 allows the chief executive to publish notices setting out requirements relating to mediation requests, replies to mediation requests, mediation reports, and mediation agreements. Notices under this section are not disallowable instruments for the purposes of the Legislation Act 2012 and do not have to be presented to the House of Representatives under section 41 of that Act. *Clause 60* provides for an alternative method of publication for notices under this clause (notice in the *Gazette* and publication on the Ministry's website). The equivalent of these notices in the New South

Wales regime are the approved forms that the relevant authority can issue under the Farm Debt Mediation Act 1994 (NSW).

Clause 61 allows regulations to specify a kind of business undertaking for the purposes of the definition of primary production operation. This allows for the types of business activities covered by the Bill to be extended. *Clause 61* also allows regulations to be made regarding the payment of fees and charges.

Clause 62 provides for consequential amendments to the Personal Property Securities Act 1999 and the Property Law Act 2007.

Hon Damien O'Connor

Farm Debt Mediation Bill (No 2)

Government Bill

Contents

	Page
1 Title	3
2 Commencement	3
Part 1	
Preliminary provisions	
3 Purpose of Act	3
4 Outline of Act	4
5 Outline of mediation initiation and process	5
6 Interpretation	5
7 Transitional, savings, and related provisions	9
8 Act binds the Crown	9
9 Status of examples	9
Part 2	
Restrictions on enforcement of farm debt	
Subpart 1—Restrictions on enforcement of farm debt	
10 When creditor cannot take enforcement action	9
11 Restriction does not apply if parties enter into mediation agreement	10
12 Restriction does not apply if farmer is subject to insolvency proceeding or process	10
13 Enforcement action in contravention is void	11
Subpart 2—Mediation process	
<i>How mediation commenced</i>	
14 Farmer may request mediation at any time	11
15 Creditor may request mediation at any time after default	12
16 Reply to mediation request	12

Farm Debt Mediation Bill (No 2)

17	Extension of time for farmer’s reply	12
18	When mediation is declined	12
	<i>Mediation process</i>	
19	Appointment of mediator	13
20	Procedure agreement	13
21	Costs of mediation	14
22	Conduct of mediation	14
23	Duration of mediation	15
24	Parties must mediate in good faith	15
25	Mediation report	15
	<i>Confidentiality</i>	
26	Matters covered in mediation are confidential	15
	Subpart 3—Mediation agreement	
27	Mediation agreement	16
28	Preparation of and entry into mediation agreement	16
29	Enforcement of mediation agreement	16
30	Right to cancel mediation agreement	17
31	Effect of cancellation	17
	Subpart 4—Enforcement and prohibition certificates	
	<i>Application for and issue of certificates</i>	
32	Grounds for enforcement certificate	17
33	Grounds for prohibition certificate	17
34	Application for certificate	17
35	Notice to other party	18
36	Issue of enforcement certificate	18
37	Issue of prohibition certificate	18
38	Notice of decision	19
39	Content of certificate	19
	<i>Duration and effect</i>	
40	Duration of certificate	19
41	Effect of expiry of enforcement certificate	19
	Part 3	
	General provisions	
	Subpart 1—Mediators	
42	Approval of mediation organisations	20
43	Suspension or cancellation of approval	20
44	Authorisation of mediators	21
45	Conflicts of interest	21
46	Exclusion of liability	22
47	Requirements for mediation organisations and mediators	22

	Subpart 2—Administrative review of decisions	
48	Decisions subject to administrative review	22
49	Application for administrative review	23
50	Opportunity to make submissions	23
51	Conduct of administrative review	23
52	Determination of application	24
53	Notice of determination	24
54	Application for administrative review acts as stay	24
55	Appeals on question of law	24
	Subpart 3—Miscellaneous	
56	No contracting out	24
57	Guarantors	25
58	Appointment of administrator, liquidator, or receiver	25
59	Notices	26
60	Published requirements	26
61	Power to make regulations by Order in Council	26
62	Amendments to other enactments	27
	Schedule 1	28
	Transitional, savings, and related provisions	
	Schedule 2	29
	Amendments to other enactments	

The Parliament of New Zealand enacts as follows:

1 Title

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

2 Commencement

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

Part 1

10

Preliminary provisions

3 Purpose of Act

The purpose of this Act is to provide parties to farm debt with the opportunity to use mediation to reach an agreement on the present arrangements and future conduct of financial relations between them before an enforcement action is taken in relation to farm property. 15

4 Outline of Act

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

Example

A farmer borrows money from a bank to purchase additional land and stock. As part of that loan, the farmer gives a mortgage over the farm land to the bank. 5

The farmer stops repaying the loan.

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

However, the bank must invite the farmer to mediate, and engage in that mediation in good faith, before the bank can use that power of sale. 10

- (2) Under **Part 2**,—
- (a) a creditor cannot take an enforcement action in relation to farm property unless the creditor has an enforcement certificate (*see section 10*); and
 - (b) an enforcement certificate will not be issued unless the creditor has participated in mediation in good faith (*see sections 32 and 36*). An enforcement certificate lasts for 3 years (*see section 40*). An enforcement certificate could also be issued if the farmer has declined to mediate (*see section 18*). 15
- (3) **Part 2** also allows a farmer to initiate mediation in relation to a farm debt, and allows a farmer to obtain a prohibition certificate if the relevant grounds are established (*see sections 33 and 37*). A prohibition certificate stops a creditor from taking an enforcement action for 6 months (*see sections 10 and 40*). 20
- (4) In addition, **Part 2** sets out requirements relating to— 25
- (a) how mediation is commenced and the mediation process. A guide to the mediation process is set out in **section 5**;
 - (b) how mediation agreements may be entered into and when they may be enforced (*see subpart 3 of Part 2*);
 - (c) the application for, and issue of, certificates (*see subpart 4 of Part 2*). If the parties do not enter into a mediation agreement, or if the farmer cancels the agreement under **section 30**, the farmer or the creditor may have grounds for applying for a certificate (*see sections 32 and 33*). 30
- (5) The restriction on enforcement actions under **section 10** does not apply if the parties enter into a mediation agreement (*see section 11*). However, the terms of the mediation agreement are binding on the parties and can be enforced (*see section 29*). If a mediation agreement is more than 3 years old, the restriction on enforcement actions applies again (*see section 11*). 35

- (6) In addition, the restriction on enforcement actions does not apply if the farmer is subject to an insolvency proceeding or process, such as liquidation or bankruptcy (*see section 12*).
- (7) **Part 3** allows mediation organisations to be approved. Once approved, those mediation organisations can authorise a person to be a mediator. *See subpart 1 of Part 3*. Mediation must be carried out by an authorised mediator. 5
- (8) **Part 3** also contains a process for reviewing decisions to issue a certificate or to approve an organisation, and other miscellaneous matters.
- (9) This section and **section 5** are a guide only to the general scheme and effect of this Act. 10

5 Outline of mediation initiation and process

- (1) A farmer or a creditor may initiate mediation using the procedure set out in **sections 14 to 17**. At any point during this process, a party may decline to mediate. Declining to mediate includes failing to reply to a request (*see section 18*). 15
- (2) Once the farmer and creditor have agreed to mediate, the mediation process begins. The parties have 60 working days to complete the mediation process. However, this period can be extended if both parties agree (*see section 23*).
- (3) The mediation process contains the following steps:
- (a) the parties appoint a mediator (*see section 19*): 20
 - (b) the parties enter into a procedure agreement (*see section 20*). This agreement sets out the arrangements between the parties about how the mediation will be conducted. The agreement must include an agreement about the costs of mediation, but the farmer cannot be required to pay more than half of those costs (*see section 21*): 25
 - (c) mediation is conducted using that procedure agreement (*see section 22*):
 - (d) the mediator gives a report to the chief executive (*see section 25*). That report includes a summary of the conduct of the mediation, and a copy of any relevant mediation agreement. 30
- (4) The farmer and creditor must participate in each step of the mediation process in good faith (*see section 24*). Failure to participate in good faith can result in a certificate being issued.

6 Interpretation

- (1) In this Act, unless the context otherwise requires,— 35
- approved mediation organisation** means a mediation organisation that is approved under **section 42**
- authorised mediator** means a mediator who is authorised under **section 44**
- certificate** means an enforcement certificate or a prohibition certificate

- chief executive** means the chief executive of the Ministry
- creditor** means a person to whom a farm debt is owed by a farmer
- default**, in relation to a farm debt, means a failure to perform an obligation or the occurrence of an event that, under the terms of the farm debt or the security interest, gives the creditor a right to take an enforcement action 5
- enforcement action**, in relation to a security interest in farm property,—
- (a) means an action that is taken to enforce a security interest in farm property following a default; and
 - (b) includes—
 - (i) appointing a receiver of the farm property under a power contained in an instrument relating to the security interest; or 10
 - (ii) applying for an order for the appointment of a receiver of the farm property for the purpose of enforcing the security interest; or
 - (iii) serving a notice under section 119 or 128 of the Property Law Act 2007; or 15
 - (iv) entering into possession, or assuming control, of the farm property for the purpose of enforcing the security interest; or
 - (v) appointing a person to enter into possession or assume control of the farm property (whether as agent for the creditor or for the farmer) for the purpose of enforcing the security interest; or 20
 - (vi) exercising, as creditor or as a receiver or person so appointed, a right, power, or remedy existing because of the security interest, whether arising under an instrument relating to the security interest, under a written or unwritten law, or otherwise
-
- Example** 25
- A farmer misses a payment that is due under a farm debt that is secured by a mortgage over crops.
- The creditor sends a letter reminding the farmer to make the payment. That letter is not an enforcement action.
- Payment is still not made. The creditor sends another letter, which includes a notice under section 128 of the Property Law Act 2007 for the purposes of accelerating the debt. That letter is an enforcement action. 30
-
- enforcement certificate** means an enforcement certificate issued under **section 36**
- farm debt** means a debt incurred by a farmer (whether as principal debtor or guarantor) that,— 35
- (a) at the time it is incurred, is incurred solely or principally for the purpose of conducting a primary production operation; and

- (b) is secured wholly or partly by a security interest in farm property (whether granted by the farmer or a guarantor)

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

Example 1

5

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

Example 2

A farmer is engaged in agriculture. The tractor and hay baler used on the farm are farm property.

Example 3

10

A farmer owns 2 vehicles. One is used on the farm, and is farm property. The other is used for personal purposes, and is not farm property.

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

guarantee means a guarantee, an indemnity, or a liability given, assumed, or undertaken by a guarantor 15

guarantor—

- (a) means a person who—
- (i) guarantees the performance of a debtor's obligations under a debt; or 20
 - (ii) indemnifies a creditor against any loss that the creditor may incur in connection with the debt; or
 - (iii) assumes liability for performing the obligations of a debtor under the debt; but
- (b) does not include such a person to the extent that the person indemnifies a creditor against any loss that the creditor may incur in connection with the debt under a contract of insurance 25

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

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

mediation agreement means an agreement between the parties to the mediation entered into in accordance with **section 27** 30

mediation report—

- (a) means a report given by the mediator to the chief executive under **section 25(1)**; and
- (b) includes any further information given by the mediator to the chief executive under **section 25(3)** 35

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

- mediator** means an impartial third person appointed by the parties to the mediation to assist the parties to reach an agreement for the present arrangements and future conduct of financial relations between the parties
- Ministry** means the department of State that, with the authority of the Prime Minister, is responsible for the administration of this Act 5
- primary production operation—**
- (a) means a business undertaking that primarily involves 1 or more of the following activities:
- (i) agriculture (including sharemilking):
 - (ii) horticulture: 10
 - (iii) aquaculture:
 - (iv) an activity involving primary production that is carried out in connection with 1 or more of the activities set out in **subparagraph (i), (ii), or (iii)**; and
- (b) includes a business undertaking of a kind specified in regulations; but 15
- (c) does not include a business undertaking that primarily involves 1 or more of the following activities:
- (i) wild harvest fishing:
 - (ii) the hunting and trapping of animals or birds
- procedure agreement** means an agreement relating to procedure for the mediation agreed between the parties in accordance with **section 20** 20
- prohibition certificate** means a prohibition certificate issued under **section 37**
- property—**
- (a) means any real or personal property in New Zealand; and 25
- (b) includes any consent or permit granted under the Resource Management Act 1991
- security interest** means—
- (a) a security interest as defined in section 17 of the Personal Property Securities Act 1999; or 30
- (b) a mortgage as defined in section 4 of the Property Law Act 2007.
- (2) In this Act, a farmer is subject to an **insolvency proceeding or process** if any of the following apply:
- (a) the farmer is in liquidation under the Companies Act 1993 or under any other enactment: 35
 - (b) the farmer is in voluntary administration or subject to a deed of company arrangement under Part 15A of the Companies Act 1993:

- (c) a receiver has been appointed and is acting in relation to the whole, or substantially the whole, of the assets and the undertaking of the farmer:
- (d) the farmer is subject to a compromise with its creditors that has been approved under Part 14 of the Companies Act 1993:
- (e) an order that an arrangement or a compromise is binding on the farmer has been made under Part 15 of the Companies Act 1993: 5
- (f) the farmer is in statutory management under the Corporations (Investigation and Management) Act 1989 or any other enactment:
- (g) the farmer is an undischarged bankrupt:
- (h) a person is appointed in respect of, or another event occurs that indicates the start of, a process in New Zealand or in any other country in which the farmer was incorporated, created, or established that is similar to any of those set out in **paragraphs (a) to (g)**. 10
- (3) In this Act, an enforcement action (the **action**) is **linked** to another enforcement action if the action and the other enforcement action relate to— 15
- (a) the same default; and
- (b) the same security interest; and
- (c) the same farm property.
- 7 Transitional, savings, and related provisions**
- The transitional, savings, and related provisions set out in **Schedule 1** have effect according to their terms. 20
- 8 Act binds the Crown**
- This Act binds the Crown.
- 9 Status of examples**
- (1) An example used in this Act is only illustrative of the provisions to which it relates. It does not limit those provisions. 25
- (2) If an example and a provision to which it relates are inconsistent, the provision prevails.

Part 2

Restrictions on enforcement of farm debt 30

Subpart 1—Restrictions on enforcement of farm debt

10 When creditor cannot take enforcement action

- (1) A creditor must not take an enforcement action under a security interest in farm property unless an enforcement certificate is in force in respect of the relevant farm debt. 35

- (2) A creditor must not take an enforcement action under a security interest in farm property if there is a prohibition certificate in force in respect of the relevant farm debt.
- (3) This section does not affect an enforcement action under a security interest in relation to property that is not farm property. 5
- (4) *See* **subpart 4** for when a certificate may be issued.
- (5) *See also* **section 54** (which provides that certain applications for administrative review act as a stay on enforcement action).
- (6) *See also* **section 57** (which provides that enforcement actions in relation to security interests granted by guarantors are also subject to this provision) and **section 58** (which provides that actions to appoint an administrator, a liquidator, or a receiver of a farmer are also subject to this provision). 10

Compare: Farm Debt Mediation Act 1994 ss 5(3)(c), 8(1) (New South Wales)

11 Restriction does not apply if parties enter into mediation agreement

Section 10 does not apply if the parties have, at any time in the 3 years before the enforcement action, entered into a mediation agreement under this Act in relation to the farm debt. 15

Example 1

At the end of a mediation process, the parties enter into a mediation agreement. In the agreement, the creditor agrees that the farmer can do various things before the creditor will take an enforcement action. 20

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

Because there is a mediation agreement, the restriction in **section 10** does not apply. This means that the enforcement action is not void. 25

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

Example 2

A farmer defaults 3 years after a mediation agreement is entered into. The creditor wants to take an enforcement action. 30

Because the mediation agreement was entered into more than 3 years before the default, the restriction in **section 10** applies. If the creditor wants to take an enforcement action in respect of the default, the creditor must first obtain an enforcement certificate.

12 Restriction does not apply if farmer is subject to insolvency proceeding or process 35

- (1) **Section 10** does not apply if the farmer under the relevant farm debt is subject to an insolvency proceeding or process.

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

Example

While a farmer is in bankruptcy, a creditor serves notice under section 128 of the Property Law Act 2007. That notice does not become void when the farmer is discharged from bankruptcy, and the creditor may continue to exercise its power to sell the mortgaged goods. 10

13 Enforcement action in contravention is void

- (1) An enforcement action taken in contravention of **section 10** is void. 15
- (2) However, nothing in **subsection (1)** affects—
 - (a) section 184 of the Property Law Act 2007 (which provides protection to a person who purchases mortgaged property from a mortgagee or receiver); and
 - (b) section 124 of the Personal Property Securities Act 1999 (which provides, in the case of transfer of collateral sold by a secured party, for a purchaser to acquire good title to goods); and 20
 - (c) section 51 of the Land Transfer Act 2017 (which provides, in the case of a transfer of an estate or interest in land, for title by registration except as provided for by that section); and 25
 - (d) the provisions of any other enactment or law that protects a purchaser who purchases farm property from or through a creditor in good faith, or any person claiming through such a purchaser.

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

Subpart 2—Mediation process 30

How mediation commenced

14 Farmer may request mediation at any time

- (1) A farmer who owes a farm debt to a creditor may request mediation in relation to the farm debt at any time.
- (2) However, a farmer may not request mediation under **subsection (1)** if there is an enforcement certificate in force in respect of the farm debt. 35
- (3) The request must—

- (a) be given to the creditor in writing; and
- (b) comply with any published requirements (*see section 60*).

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

15 Creditor may request mediation at any time after default

- (1) A creditor who is owed a farm debt by a farmer may request mediation at any time after a farmer is in default of that farm debt. 5
- (2) However, a creditor may not request mediation under **subsection (1)** if there is a prohibition certificate in force in respect of the farm debt.

- (3) The request must—

- (a) be given to the farmer in writing; and 10
- (b) comply with any published requirements (*see section 60*).

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

16 Reply to mediation request

- (1) A party must reply to a mediation request within 20 working days after receiving the request. 15
- (2) The reply must—
 - (a) be in writing; and
 - (b) state whether the party agrees to mediate; and
 - (c) comply with any published requirements (*see section 60*).
- (3) *See section 18* (which provides that failure to reply to the mediation request is treated as a reply declining mediation). 20

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

17 Extension of time for farmer's reply

- (1) The chief executive may, on application by a farmer made within 5 working days after receiving a request under **section 15**, extend the time within which a reply must be given under **section 16(1)** if the chief executive considers an extension is reasonably required in the circumstances. 25
- (2) An application must be made in the way required by the chief executive.
- (3) An extension must be no longer than 20 additional working days.
- (4) The chief executive— 30
 - (a) must make a decision on whether to grant an extension as soon as is reasonably practicable after receiving an application; and
 - (b) must give written notice of the decision to the farmer and the other party as soon as practicable after making the decision.

18 When mediation is declined 35

- (1) A party **declines to mediate** if—

- (a) they fail to respond to a mediation request within the period specified in **section 16(1)** (as extended by **section 17**, if applicable); or
 - (b) they indicate in writing to the chief executive or to the party who made the mediation request that they do not want to proceed with mediation; or 5
 - (c) they indicate in any other manner that they do not want to proceed with mediation.
- (2) *See* **subpart 4** (which provides that declining to mediate may result in a certificate being issued). 10
- Compare: Farm Debt Mediation Act 1994 ss 18A, 18B (New South Wales)

Mediation process

19 Appointment of mediator

- (1) If the reply under **section 16(2)** contains an agreement to mediate, a mediator must be appointed as follows—
- (a) the farmer must nominate a panel of 3 authorised mediators; and 15
 - (b) the creditor must accept 1 of those mediators.
- (2) A failure to comply with the provisions of this section within a reasonable time without a reason that is justifiable in the circumstances may be treated as evidence that a party has not participated in the mediation in good faith (*see* **section 24**). 20
- Compare: Farm Debt Mediation Act 1994 s 18C (New South Wales)

20 Procedure agreement

- (1) Once a mediator is appointed, the parties and the mediator must enter into an agreement relating to the procedure for the mediation.
- (2) The procedure agreement must include an agreement as to how the costs and related expenses of the mediation will be shared (*but see* **section 21**). 25
- (3) The procedure agreement may include 1 or more of the following matters:
- (a) who has authority to represent and bind the parties:
 - (b) who may attend the mediation, including any guarantors, interested parties, legal counsel, and experts: 30
 - (c) requirements as to confidentiality and privilege in respect of the mediator, the parties, and any other persons attending the mediation, including who may be informed about any confidential matter:
 - (d) whether the mediator may engage an expert assessor for a stated or any other purpose: 35
 - (e) how the procedure agreement may be varied or terminated:

- (f) any other matter that the mediator and the parties agree is appropriate to best meet the needs and interests of the parties, having regard to the nature of the issues between the parties.
- (4) A procedure agreement is binding on the parties in accordance with its provisions. 5
- (5) The following may be treated as evidence that a party has not participated in the mediation in good faith (*see section 24*):
- (a) a failure to enter into a procedure agreement within a reasonable time:
- (b) a failure to comply with the provisions of a procedure agreement without a reason that is justifiable in the circumstances. 10

21 Costs of mediation

- (1) A farmer must not be required to pay more than half of the costs and related expenses of the mediator.
- (2) In all other respects, the parties must meet their own costs and expenses in relation to the mediation. 15
- (3) If a procedure agreement contravenes **subsection (1)**, or is silent as to costs, the parties must be treated as having agreed that the farmer will pay half of the costs and related expenses of the mediator and the creditor will pay the other half.
- (4) *See also section 56* (which provides that a provision of an agreement that overrides this section is unenforceable). 20

Example

A farmer has a loan agreement with a creditor, and incurs farm debt under that agreement. The loan agreement contains a clause that says the creditor can recover its costs of enforcement of the agreement by adding those costs to the balance of the debt due. 25

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

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

22 Conduct of mediation 30

- (1) A mediator—
- (a) may, having regard to the purpose of this Act and the needs of the parties, follow any procedures (whether structured or unstructured) or do any things that the mediator considers appropriate to resolve the issues between the parties promptly and effectively; and 35
- (b) may receive any information, statement, admission, document, or other material, in any way or form the mediator thinks fit, whether or not it would be admissible in judicial proceedings.
- (2) The provisions of the procedure agreement prevail over **subsection (1)**.

- (3) A mediator does not have power to determine any matter, even if the mediator is required to do so by the parties.

Compare: 2006 No 84 s 81

23 Duration of mediation

- (1) The parties must proceed to mediation as soon as is reasonably practicable after a procedure agreement is entered into. 5
- (2) A mediation process may not continue beyond the date that is 60 working days after the date of a mediation request, except with agreement of the parties.

24 Parties must mediate in good faith

- (1) The parties must participate in the mediation in good faith. 10
- (2) A failure by a creditor to agree to reduce or forgive a debt or to vary the terms of a debt does not, by itself, demonstrate that the creditor did not participate in the mediation in good faith.
- (3) *See **subpart 4*** in relation to when good faith is relevant to a certificate being issued. 15

Compare: Farm Debt Mediation Act 1994 s 14(5) (New South Wales)

25 Mediation report

- (1) At the end of the mediation, the mediator must give a report to the chief executive.
- (2) The report must include— 20
- (a) a summary of the conduct of the mediation; and
 - (b) a copy of any mediation agreement entered into between the parties; and
 - (c) any other information specified in published requirements (*see **section 60***).
- (3) The chief executive may require a mediator to give any further information that the chief executive considers reasonably necessary. 25
- (4) The contents of a mediation report may be used as evidence that a party has not participated in the mediation in good faith (*see **section 24***).
- (5) Nothing in the Official Information Act 1982 applies to a mediation report. 30

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

Confidentiality

26 Matters covered in mediation are confidential

- (1) The matters discussed, agreed, admitted, or determined in, or in the course of, mediation are confidential and—
- (a) must not be disclosed by the parties, the mediator, or persons attending the mediation; and 35

- (b) are not admissible in a court, tribunal, or other forum or before a person acting judicially.
- (2) The provisions of the procedure agreement prevail over **subsection (1)**.
- (3) However, **subsection (1)** does not restrict disclosure—
 - (a) by a mediator in a mediation report (*see* **section 25**); or 5
 - (b) by a farmer or a creditor in an application for a certificate or in an application for administrative review of a decision whether or not to issue a certificate (*see* **sections 34, 48, and 50**); or
 - (c) where disclosure is authorised by the High Court; or
 - (d) where disclosure is otherwise required by law. 10
- (4) Despite **subsection (1)**, a mediation agreement is admissible for the purpose of enforcing that agreement (*see* **section 29**).

Subpart 3—Mediation agreement

27 Mediation agreement

- (1) Any agreement reached between the parties in the course of a mediation must be recorded in a mediation agreement. 15
 - (2) Failure to reach agreement or to enter into a mediation agreement does not, by itself, demonstrate that the parties have not participated in the mediation in good faith (*see* **section 24**).
- Compare: Farm Debt Mediation Act 1994 s 18K (New South Wales) 20

28 Preparation of and entry into mediation agreement

- (1) The mediator must prepare a draft mediation agreement setting out the main points of agreement between the parties.
 - (2) A draft mediation agreement must comply with any published requirements (*see* **section 60**). 25
 - (3) The parties may enter into a mediation agreement by signing it.
 - (4) A mediation agreement can be varied or replaced in the same manner as it is entered into.
 - (5) A defect in form or a technical irregularity does not invalidate a mediation agreement. 30
- Compare: Farm Debt Mediation Act 1994 s 18J (New South Wales)

29 Enforcement of mediation agreement

- (1) A mediation agreement is binding on the parties.
- (2) However, a mediation agreement is not enforceable by a creditor unless the time during which the farmer may cancel the agreement under **section 30** has expired and the farmer has not given notice of cancellation within that time. 35

- (3) *See also section 11* (which provides that the restrictions on enforcement actions contained in **section 10** do not apply if the parties have entered into a mediation agreement under this Act).
Compare: 1986 No 121 s 36N
- 30 Right to cancel mediation agreement** 5
- (1) A farmer may cancel a mediation agreement by giving written notice of the cancellation to the creditor (or the creditor’s legal representative) within 10 working days after the date on which the mediation agreement is signed by the parties.
- (2) This section does not limit a person’s right to cancel a mediation agreement under any other enactment or law. 10
Compare: 1986 No 121 s 36M; 2003 No 52 s 27
- 31 Effect of cancellation**
- (1) If a mediation agreement is cancelled under **section 30**, the agreement is treated as if it had never been entered into. 15
- (2) Cancellation of a mediation agreement under **section 30** does not, by itself, demonstrate that the creditor did not participate in the mediation in good faith.
Compare: Farm Debt Mediation Act 1994 s 18M (New South Wales)
- Subpart 4—Enforcement and prohibition certificates
- Application for and issue of certificates* 20
- 32 Grounds for enforcement certificate**
- A creditor who is owed farm debt by a farmer may apply to the chief executive for an enforcement certificate in relation to the farm debt on either of the following grounds:
- (a) that the farmer declined to mediate (*see section 18*): 25
- (b) that the creditor participated in the mediation in good faith (*see section 24*).
- Compare: Farm Debt Mediation Act 1994 s 15(3) (New South Wales)
- 33 Grounds for prohibition certificate**
- A farmer who owes farm debt to a creditor may apply to the chief executive for a prohibition certificate on either of the following grounds: 30
- (a) that the creditor declined to mediate (*see section 18*):
- (b) that the creditor did not participate in the mediation in good faith (*see section 24*).
- 34 Application for certificate** 35
- (1) A person must apply for a certificate—

- (a) within 10 working days of the grounds under **section 32 or 33** (as applicable) arising; or
 - (b) in the case of an application that is made following cancellation of a mediation agreement under **section 30**, within 20 working days of the date on which the mediation agreement was cancelled. 5
- (2) A person must apply for a certificate in the way that is specified by the chief executive.
- (3) The chief executive may specify—
- (a) the form that must be used to make an application; and
 - (b) the information or other evidence or documents that must be provided with the application. 10
- (4) The chief executive may require an applicant to provide any further information that the chief executive considers reasonably necessary.
- (5) If an application is made, the chief executive must give a copy of the relevant mediation report to the applicant. 15
- Compare: Farm Debt Mediation Act 1994 ss 9, 13 (New South Wales)

35 Notice to other party

- (1) If an application for a certificate is made, the chief executive must—
- (a) notify the other party to the farm debt that an application has been made; and 20
 - (b) give a copy of the relevant mediation report to the other party.
- (2) A notice under **subsection (1)(a)** must state the grounds on which the application has been made.

36 Issue of enforcement certificate

- The chief executive must, after receiving an application under **section 34**, issue an enforcement certificate in respect of farm debt if— 25
- (a) the farmer is in default of the farm debt; and
 - (b) there is no prohibition certificate in force in respect of the farm debt; and
 - (c) the chief executive is satisfied that the grounds set out in the application are established. 30

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

37 Issue of prohibition certificate

- The chief executive must, after receiving an application under **section 34**, issue a prohibition certificate in respect of farm debt if—
- (a) there is no enforcement certificate in force in respect of the farm debt; and 35
 - and

- (b) the chief executive is satisfied that the grounds set out in the application are established.

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

38 Notice of decision

- (1) The chief executive must, as soon as practicable after deciding whether to issue a certificate, give written notice of the decision to the applicant and to the other party. 5
- (2) The notice must—
- (a) state the reasons for the decision; and
- (b) advise the parties of their right to apply for administrative review under **section 48**; and 10
- (c) enclose a copy of any certificate that is issued as a result of the decision.

39 Content of certificate

A certificate must—

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

Duration and effect

40 Duration of certificate 20

- (1) A certificate—
- (a) takes effect from the date stated in the certificate; and
- (b) in the case of an enforcement certificate, is in force for 3 years; and
- (c) in the case of a prohibition certificate, is in force for 6 months.
- (2) *But see section 54* (which provides that certain applications for administrative review act as a stay on enforcement action). 25

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

41 Effect of expiry of enforcement certificate

The expiry of an enforcement certificate does not affect an enforcement action (the **action**), and the action may continue and be completed as if the enforcement certificate were still in force, if— 30

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

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

Example

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

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

Part 3 General provisions

Subpart 1—Mediators

42 Approval of mediation organisations

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

Compare: 2013 No 79 s 6

43 Suspension or cancellation of approval

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

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

Compare: 2013 No 79 ss 7, 8

44 Authorisation of mediators

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

Compare: 2013 No 79 s 9

45 Conflicts of interest 25

- (1) A mediator—
- (a) must act independently when deciding how to deal with any particular matter; and
- (b) must be independent of the parties to the mediation.
- (2) A mediator who has a conflict of interest must— 30
- (a) disclose it to the parties to the mediation; and
- (b) withdraw from the mediation unless the parties agree otherwise.
- (3) A party who agrees under **subsection (2)(b)** to a mediator continuing to act loses any right to object to the mediator’s acting on the basis of any conflict of interest disclosed by the mediator under **subsection (2)(a)** before the party agreed. 35

Compare: 2006 No 84 s 104

46 Exclusion of liability

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

- (a) any act done or omitted in the course of performing any of their functions under this Act; or 5
- (b) any words spoken or written at, or for the purposes of, the hearing of any mediation; or
- (c) anything in any mediation report.

Compare: 2006 No 84 s 122

47 Requirements for mediation organisations and mediators 10

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

Compare: 2013 No 79 s 15

Subpart 2—Administrative review of decisions

48 Decisions subject to administrative review

- (1) The following people may apply for administrative review of a decision under this Act: 35
 - (a) a farmer or a creditor affected by a decision on whether to issue a certificate under **subpart 4 of Part 2**:

- (b) a mediation organisation affected by a decision under **section 42 or 43**.
- (2) An application must be made within 10 working days after the day on which the notice of the decision is given.
- (3) The chief executive may, on an application made within the 10-working-day period, extend the time to make the application for the administrative review. 5
- 49 Application for administrative review**
- (1) A person must apply for administrative review in the way that is specified by the chief executive.
- (2) The chief executive may specify— 10
- (a) the form that must be used to make an application; and
- (b) the information or other evidence or documents that must be provided with the application.
- (3) The chief executive may require an applicant to provide any further information that the chief executive considers reasonably necessary. 15
- 50 Opportunity to make submissions**
- In the case of an application by a farmer or a creditor, the chief executive must—
- (a) notify the other party to the farm debt that an application has been made; and 20
- (b) allow the other party an opportunity to make written submissions.
- 51 Conduct of administrative review**
- (1) The chief executive must review the legal basis of, and any assessment or other matters relevant to, the decision under review.
- (2) The chief executive must determine the review on the papers, unless the chief executive considers it is not appropriate to do so. 25
- (3) The chief executive must consider—
- (a) the application; and
- (b) any written submissions made by the applicant or by the other party; and
- (c) any further information provided by the applicant under **section 49(3)**; and 30
- (d) any other information that the chief executive considers relevant.
- (4) The individual who made the reviewable decision under a delegation by the chief executive must not review the decision. 35
- Compare: 2018 No 4 Schedule 7 cl 3

52 Determination of application

- (1) The chief executive must determine an application within 20 working days after the day on which the application is received.
- (2) The chief executive must determine an application by—
- (a) confirming the decision under review; or 5
 - (b) withdrawing the decision under review and, if appropriate, substituting a new decision in its place.
- (3) The chief executive may extend the period specified in **subsection (1)** for determining an application for as long as is reasonably necessary if, in the chief executive's opinion, the circumstances of the case do not allow a determination to be made within the specified period. 10

Compare: 2018 No 4 Schedule 7 cl 4

53 Notice of determination

- (1) The chief executive must, as soon as practicable after determining an application, give written notice of the determination to the applicant and to the other party. 15
- (2) The notice must—
- (a) state the reasons for the determination; and
 - (b) enclose a copy of any certificate that is issued as a result of the determination. 20

54 Application for administrative review acts as stay

- (1) This section applies if an application for administrative review is made under **section 49** in relation to—
- (a) a decision to grant an enforcement certificate; or
 - (b) a decision to refuse a prohibition certificate. 25
- (2) Despite **sections 10 and 40**, a creditor must not take enforcement action until notice of the determination is given under **section 53**.

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

55 Appeals on question of law

There is a right of appeal to the High Court, on a question of law only, against any determination under **section 52**. 30

Subpart 3—Miscellaneous

56 No contracting out

- (1) The provisions of this Act have effect despite any provision to the contrary in any agreement. 35

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

Compare: 1986 No 121 s 5C

57 Guarantors

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

Example

A creditor lends money to a company. The company is a farmer, and it owns the farming business and its associated assets. It is the borrower under the loan, and the loan is a farm debt. 15

However, the company does not own the land that the farm is located on. Instead, the land is owned by the 2 directors of the company and a third person who, together, hold that land as trustees of a family trust. 20

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

The trustees also give the creditor a mortgage over the land. This mortgage is a security interest over farm property. 25

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

The creditor must enter into mediation with the company (the farmer) and obtain an enforcement certificate before it can take an enforcement action in relation to the mortgage given by the family trust. If the company and the creditor agree in the procedure agreement, the trustees can attend the mediation. 30

Compare: 2003 No 52 s 119(1)

58 Appointment of administrator, liquidator, or receiver 35

- (1) An action of a creditor specified in **subsection (2)** is to be treated as if it were an enforcement action under a security interest granted by a farmer for the purposes of **section 10** (and, accordingly, the restriction in **section 10** applies to those actions).

- (2) The actions are— 40

- (a) appointing an administrator of a farmer under section 239K of the Companies Act 1993; or
 - (b) applying for an order for the appointment of an administrator under section 239L of the Companies Act 1993; or
 - (c) appointing a liquidator of a farmer under section 241 of the Companies Act 1993; or 5
 - (d) applying for an order for the appointment of a liquidator under section 241 of the Companies Act 1993; or
 - (e) appointing a receiver of the whole, or substantially the whole, of the assets and undertaking of a farmer. 10
- 59 Notices**
- The chief executive may give notice under this Act by sending it to the recipient's last known place of residence, place of business, or registered address.
- 60 Published requirements**
- (1) The chief executive may, by written notice, set out requirements relating to— 15
 - (a) the manner or content of mediation requests (*see sections 14 and 15*):
 - (b) the manner or content of a reply to a mediation request (*see section 16*):
 - (c) the content of a mediation report (*see section 25*):
 - (d) the manner or content of a mediation agreement (*see section 28*). 20
 - (2) If a notice is made under **subsection (1)**, the chief executive must ensure that—
 - (a) a notice is published in the *Gazette* stating that the notice has been made and giving details of where it is published; and
 - (b) the notice is published on an Internet site that is maintained by or on behalf of the Ministry. 25
 - (3) Notices under this section are not disallowable instruments for the purposes of the Legislation Act 2012 and do not have to be presented to the House of Representatives under section 41 of that Act.
- 61 Power to make regulations by Order in Council** 30
- (1) The Governor-General may, by Order in Council, make regulations for 1 or more of the following purposes:
 - (a) specifying a kind of business undertaking for the purposes of the definition of primary production operation in **section 6**:
 - (b) requiring the payment to the Ministry of fees and charges for applications under **sections 34 and 49**: 35

-
- (c) providing for any other matters contemplated by this Act, necessary for its administration, or necessary for giving it full effect.
 - (2) Regulations made under **subsection (1)(b)** may—
 - (a) make different provision for different cases on any differential basis:
 - (b) prescribe any of the following: 5
 - (i) the method by which the fees or charges are to be assessed:
 - (ii) the persons liable to pay the fees or charges:
 - (iii) when the fees or charges must be paid:
 - (iv) circumstances in which the fees or charges may be refunded, remitted, or waived (wholly or partly). 10
 - (3) The chief executive may refuse to perform or exercise a function, power, or duty until the prescribed fee, charge, or cost is paid.
 - (4) Any fee or charge payable to the Ministry under the regulations is recoverable by the Ministry in any court of competent jurisdiction as a debt due to the Ministry. 15

62 Amendments to other enactments

The Acts listed in **Schedule 2** are amended in the manner set out in that schedule.

Schedule 1
Transitional, savings, and related provisions

s 7

Part 1
Provisions relating to this Act as enacted

5

1 Application of Act

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

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

10

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

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

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

15

Schedule 2

Amendments to other enactments

s 62

Personal Property Securities Act 1999 (1999 No 126)

After section 134, insert:

5

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

After section 136, insert:

10

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