

*R Doug Woolerton*

## FARM DEBT MEDIATION

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### A BILL INTITULED

#### **An Act to make provision for mediation concerning farm debts**

BE IT ENACTED by the Parliament of New Zealand as follows:

5     **1. Short Title and commencement**—(1) This Act may be cited as the Farm Debt Mediation Act 1999.

(2) This Act comes into force 90 days after the day on which it receives the Royal assent.

10    **2. Interpretation**—In this Act, unless the context otherwise requires—

“Chief Executive” means the chief executive of the Ministry of Agriculture and Forestry:

- “Enforcement action”, in relation to a farm mortgage, means taking possession of property under the mortgage or any other action to enforce the mortgage, including the giving of any statutory enforcement notice, or the continuation of any action to that end already commenced; but does not include— 5
- (a) The completion of the sale of property held under the mortgage in respect of which contracts were exchanged before the commencement of this Act; or 10
- (b) The enforcement of a judgment that was obtained before the commencement of this Act:
- “Farm” means land on which a farmer engages in a farming operation: 15
- “Farm debt” means a debt incurred by the farmer for the purposes of the conduct of a farming operation that is secured wholly or partly by a farm mortgage:
- “Farmer” means any individual, corporation, co-operative, partnership or other association of persons that is solely or principally engaged in a farming operation for commercial purposes: 20
- “Farm mortgage” includes any interest in, or power over, any farm property securing obligations of the farmer whether as a debtor or guarantor, including any interest in, or power arising from, a hire purchase agreement relating to farm machinery: 25
- “Farming operation” means—
- (a) A farming (including dairy farming, poultry farming, and bee farming), pastoral, horticultural, or grazing operation; or 30
- (b) The production or raising of any other thing or animal prescribed by regulation:
- “Mediator” means a mediator accredited by the Service pursuant to a regime instituted by the Service under this Act: 35
- “Minister” means the Minister for Food, Fibre, Biosecurity and Border Control:
- “Secured creditor” means a person to whom a farm debt is for the time being owed by a farmer. 40

**3. Act to bind the Crown**—This Act binds the Crown.

**4. Administration of Act**—(1) The Chief Executive must, in accordance with the State Sector Act 1988 and regulations

made under this Act, appoint or designate administrators for the purposes of this Act.

(2) The Chief Executive is responsible for ensuring this Act is administered in an effective and efficient manner.

5     **5. Appointment of mediators**—Subject to regulations made under this Act, administrators may enter into agreements—

(a) For the services of mediators:

(b) For the services of experts—

10 relating to applications made under **section 7**, and such agreements may include provision for remuneration and travel and living expenses.

## PART 1

### APPLICATIONS FOR MEDIATION

15     **6. Notice period**—(1) A secured creditor to whom money under a farm mortgage is owed by a farmer must not take enforcement action against the farmer in respect of the farm mortgage until at least 21 days have elapsed after the creditor has given notice to the farmer under this section.

20     (2) Notice to the farmer must be in writing and must inform the farmer of the secured creditor's intention to take enforcement action in respect of the farm mortgage and of the availability of mediation under this Act.

25     **7. Applications**—(1) A farmer to whom notice has been given under **section 6** may apply to an administrator for either—

(a) A stay of proceedings against the farmer by all the farmer's creditors, a review of the farmer's financial affairs, and mediation between the farmer and all the farmer's creditors for the purpose of assisting them to reach a mutually acceptable arrangement; or

30     (b) A review of the farmer's financial affairs, and mediation between the farmer and all the farmer's secured creditors for the purpose of assisting them to reach a mutually acceptable arrangement.

35     (2) An application under **subsection (1)** must include the names and addresses of all the farmer's creditors.

**8. Farmers who may apply for mediation**—Only farmers,—

40     (a) Who are for any reason unable to meet their obligations as they generally become due; or

- (b) Who have ceased paying their current obligations in the ordinary course of business as they generally become due; or
- (c) The aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process would not be sufficient, to enable payment of all their obligations due,—

may apply under **section 7**.

**9. Administrator's duties upon receiving application—** 10

- (1) On receipt of a duly completed application under **section 7**, the administrator must immediately—
  - (a) Give notice of the application to—
    - (i) Each person whose name is listed as a creditor in the application, in the case of an application under **section 7 (1) (a)**; or 15
    - (ii) Each person whose name is listed as a secured creditor in the application, in the case of an application under **section 7 (1) (b)**;
  - (b) In the case of an application under **section 7 (1) (a)**, issue a 30-day stay of proceedings against the farmer by all the farmer's creditors, and give notice thereof to each person whose name is listed as a creditor in the application; and 20
  - (c) Determine whether the farmer is eligible under this Act to make that application, which determination may be based upon a preliminary review of the farmer's financial affairs. 25
- (2) In the case of an application under **section 7 (1) (b)**, a determination by the administrator under **subsection (1) (c)** is final and is not subject to appeal. 30

**10. Amendment of application—**A farmer who has made an application under **section 7 (1) (a) or (b)** may, at any time before the termination of the mediation, request permission from the administrator to amend the application to be an application under **section 7 (1) (a) or (b)**, as the case may be, and the administrator may grant that permission if satisfied that the farmer is eligible to apply under the relevant section. 35

PART 2

STAY OF PROCEEDING

5 **11. Effect of stay of proceedings**—(1) Notwithstanding any other enactment, during any period in which a stay of proceedings is in effect, no creditor of the farmer may—

(a) Enforce any remedy against the property of the farmer;  
or

10 (b) Commence or continue any proceedings or any action, execution or other proceedings, judicial or extra-judicial, for the recovery of a debt, the realisation of any security, or the taking of any property of the farmer.

15 **12. Extension of stay of proceedings**—(1) Where the administrator considers an extension of the 30-day period to be essential to the formulation of an arrangement between a farmer and the farmer's creditors, the administrator may extend that period for a maximum of three further periods of 30 days each.

20 (2) The administrator must give notice of any extension granted under **subsection (1)** to the farmer and to each person whose name is listed as a creditor in the farmer's application.

25 **13. Termination of stay of proceedings**—(1) If the administrator determines, pursuant to **section 9(1)(c)** that the farmer is not eligible to make the application, the administrator must direct that the stay of proceedings be terminated.

(2) If the administrator is of the opinion that—

(a) Either the farmer or the majority of the creditors listed in the application—

30 (i) Refuse to participate in the mediation; or

(i) Refuse to continue to participate in good faith in the mediation:

(b) The mediation will not result in an arrangement between the farmer and the majority of creditors listed in the application:

35 (c) The farmer has, by any act or omission, jeopardized his or her assets,—

the administrator may direct that the stay of proceedings be terminated.

40 (3) Where the administrator directs, pursuant to this section, that a stay of proceedings be terminated, the administrator must so inform the farmer and all the creditors listed in the application.

- (4) A stay of proceedings terminates on—
  - (a) The signing of an arrangement under **section 23**; or
  - (b) The farmer making an assignment under the Insolvency Act 1967.

## PART 3

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## MEDIATION

**14. Financial review**—(1) Where the administrator determines that the farmer is eligible to make the application, the administrator must as soon as possible undertake, or cause an expert referred to in **section 5 (b)** to undertake, a detailed review of the farmer's financial affairs. 10

(2) The review—

(a) Must include the preparation of—

- (i) An inventory of all the assets of the farmer; and
- (ii) Financial statements of the farmer's farming operation; and 15

(b) May, in the case of an application under **section 7 (1) (b)**, include a recommendation that one or more creditors who are not secured creditors participate in the mediation; and 20

(c) May include the preparation of recovery plans for the purpose of reaching financial arrangements with creditors.

(3) The results of a review under this section must take the form of a report prepared by or on behalf of the administrator. 25

**15. Mediation**—Following the preparation of a financial review, the administrator must,—

(a) In accordance with the regulations, appoint a mediator:

(b) Inform—

(i) The farmer and all the creditors listed in the application, in the case of an application made under **section 7 (1) (a)**; or 30

(ii) The farmer, all the secured creditors listed in the application, and any creditors mentioned in a recommendation under **section 14 (2) (b)**, in the case of an application made under **section 7 (1) (b)**,— 35

as the case may be, of the appointment of the mediator:

(c) Provide a copy of the financial report to the mediator and all persons who will be participating in the mediation. 40

**16. Conduct of mediation**—(1) The procedure for commencing and conducting mediation is to be determined by regulation.

5 (2) Mediation sessions are to be conducted with as little formality and technicality, and with as much expedition as possible.

(3) The rules of evidence do not apply to mediation sessions.

(4) A mediation session is not open to the public.

(5) Persons who are not parties to a mediation session—

10 (a) May be present at or participate in the session in an advisory or representative capacity if authorised to do so under **section 20**; or

(b) May otherwise be present at or participate in the session with the permission of the mediator.

15 **17. Functions of mediator**—(1) The function of the mediator is to mediate impartially or attempt to mediate impartially between the farmer and creditors for the purpose of arriving at an agreement for the present arrangements and future conduct of financial arrangements among them.

20 (2) It is not a function of a mediator—

(a) To advise a farmer or creditor about the law; or

(b) To encourage or assist a farmer or creditor in reserving or establishing legal rights; or

(c) To act as an adjudicator or arbitrator.

25 **18. Confidentiality of mediation**—Evidence of anything said or admitted during mediation and a document prepared for the purposes of, in the course of or pursuant to, a mediation are not admissible in any proceedings in a court or before a person or body authorised to hear and receive evidence.

30 **19. Disclosure of information**—(1) A person must not disclose any information obtained during mediation or in connection with the administration or execution of this Act unless that disclosure is made—

35 (a) With the consent of the person from whom the information was obtained; or

(b) In connection with the administration or execution of this Act; or

40 (c) As reasonably required for the purpose of referring any party or parties to mediation to any person, agency, organisation, or other body and, with the consent of the parties to the mediation, for the purpose of aiding in the resolution of an issue between those parties; or

(d) In accordance with a requirement imposed by any other enactment; or

(e) With other lawful excuse.

(2) Any person who contravenes this section is liable upon summary conviction to a maximum fine of \$2,000.

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**20. Representation during mediation**—(1) A party to mediation is not entitled to be represented by an agent unless it appears to the mediator that—

(a) An agent should be permitted to facilitate the mediation; and

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(b) The agent proposed to be appointed has sufficient knowledge of the issue concerned to enable the agent to represent the party effectively—

and the mediator so approves.

(2) **Subsection (1)** does not prevent a company that is a party to a mediation from being represented at the mediation by an officer of the corporation.

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(3) If the mediator approves the representation of a party by an agent, the approval of the mediator may be given subject to such conditions as the mediator considers reasonable to ensure that the other party to the mediation is not substantially disadvantaged by the agent appearing at the mediation and, if the mediator does so approve, the entitlement of the agent to represent the party is subject to compliance by the agent with the conditions.

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(4) A farmer who is party to mediation is entitled to have present at any mediation session an adviser, who may be legally or otherwise professionally qualified, and is entitled to call upon that advisor for advice and counsel during the session.

**21. Termination of mediation**—(1) In the case of an application under **section 7 (1) (a)**, the mediation terminates when a termination of the stay of proceedings pursuant to **section 13 (2)** takes effect.

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(2) In the case of an application under **section 7 (1) (b)**, the administrator must terminate or refuse mediation if satisfied that—

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(a) Satisfactory mediation in respect of the farm debts concerned has already taken place; or

(b) The farmer or the majority of creditors listed in the application refuse to mediate in respect of the farm debts; or

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(c) Three months have elapsed after a notice was given by the creditor under **section 6** and the creditor has



throughout that period attempted to mediate in good faith (whether or not satisfactory mediation has taken place during that period).

5 (2) For the purposes of **subsection (2) (c)**, a failure by a creditor to agree to reduce or forgive any debt does not in itself demonstrate a lack of good faith on the part of a creditor in attempting to mediate.

(3) A farmer is presumed to have declined to mediate if any of the following circumstances are established:

10 (a) The farmer has failed to take part in mediation in good faith or has unreasonably delayed entering into or proceeding with mediation:

(b) The farmer has indicated to the administrator and to the creditor that the farmer does not wish to enter into or proceed with mediation in respect of the debt concerned:

15 (c) The farmer has failed to respond in writing, within 28 days, to an invitation that—

20 (i) Is made in writing by the creditor and is identified as an invitation under this section; and

(ii) Invites the farmer to attend a mediation session; and

(iii) Indicates that a failure of the farmer to respond in writing to the invitation might be taken to be an indication that the farmer declines to mediate in respect of the farm debt.

#### PART 4

##### MISCELLANEOUS

30 **22. Contravention by creditor**—(1) Subject to **subsection (2)**, any act done by a creditor in contravention of **sections 6 or 11** is null and void.

(2) **Subsection (1)** does not—

(a) Affect the title to property of the person who purchased the property in good faith from the creditor; or

35 (b) Confer on the farmer any remedy against such a person.

**23. Arrangements to be in writing**—Where a farmer enters into an arrangement with any creditor as a result of the mediation, the administrator must ensure that the arrangement is recorded in writing and signed by all parties thereto.

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**24. Limitation on new applications**—(1) Notwithstanding any other provision of this Act, where a farmer makes an application under **section 7 (1) (a)**, that farmer, or any person who is related to that farmer within the meaning of the regulations, is not entitled to make a new application under that section in respect of substantially the same farming operation for a period of two years after— 5

(a) The date on which the first application was made, where the farmer did not enter into an arrangement with the creditors during the stay of proceedings; or 10

(b) The date on which the arrangement was signed, where the farmer entered into an arrangement with the creditors—

unless, before making the new application, the person seeking to apply obtains the written consent of the administrator. 15

(2) Notwithstanding any other provision of this Act, where a farmer makes an application under **section 7 (1) (b)**, that farmer, or any person who is related to that farmer within the meaning of the regulations, is not entitled to make a new application under that section in respect of substantially the same farming operation for a period of two years after— 20

(a) The date on which the first application was made, where the farmer did not enter into an arrangement with the creditors within the period prescribed for the mediation; or 25

(b) The date on which the arrangement was signed, where the farmer entered into an arrangement with the creditors—

unless, before making the new application, the person seeking to apply obtains the written consent of the administrator. 30

**25. Personal liability**—No person engaged in the administration of this Act is personally liable for acts or omissions done in good faith in the performance of their duties under this Act.

**26. Contracting out prohibited**—(1) A provision of an agreement or other instrument (whether in writing or not and whether entered into before or after the commencement of this Act) by which a person seeks to avoid, nullify, or restrict the operation of this Act is void. 35

(2) A provision of an agreement or other instrument (whether in writing or not and whether entered into before or after the commencement of this Act) by which a person seeks to have a farmer (whether as a debtor or guarantor) or a 40

guarantor indemnify a creditor for any loss or liability arising under this Act is void.

**27. Waiver of rights void**—A waiver of mediation rights under this Act is void.

5     **28. Forms and content**—(1) Regulations may establish forms and other documents for carrying out the purposes and provisions of this Act and may determine the information to be included in such documents.

10     (2) Without limiting the generality of **subsection (1)**, the regulations may determine—

    (a) The manner of amending an application:

    (b) The manner of informing or notifying persons, where such is required by this Act.

15     **29. Regulations**—The Governor-General may from time to time, by Order in Council, make regulations consistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed, or that are necessary or expedient for giving effect to the provisions of this Act and the due administration thereof.