

FARM DEBT MEDIATION

1. THE MEDIATION PROCESS

The *Farm Debt Mediation Act* aims to provide a process for the resolution of farm debt disputes. Mediation is required before a creditor can take possession of a property or take other enforcement action under a farm mortgage. This process only takes effect if there has been a default under the mortgage. It is strongly recommended that farmers seek legal advice on a number of aspects of the process particularly to see whether or not the process is required in relation to their problem and more importantly, to see whether there is a defence to the threat of action by the creditor. For example, a “farm mortgage” can include a hire purchase agreement relating to farm machinery but interestingly, doesn’t include a stock mortgage or a crop lien or the interest of the lessor of any farm machinery that is leased.

The mediation process is regulated by the Act and is overseen by the NSW Rural Assistance Authority who can provide detailed information about what happens and when.

2. BEFORE MEDIATION

A bank (or other creditor) is required under the Act to issue a farmer in default with a Notice, which sets out a farmer’s right to mediate. The Notice is a form approved by the Authority. The Notice indicates that a farmer has **21 days** to return to the bank (or creditor) a Notice electing to go to mediation in relation to the particular debt. Each party has input into who the mediator will be (a list of names will be provided by the Authority) and the Authority expects that both the farmer and the bank (or other creditor) will undertake the mediation process in good faith and within a reasonable time. By statute the farmer is expected to complete the mediation process within **3 months**. By agreement between the parties that 3-month period can be extended.

3. THE MEDIATION

A farmer can attend the mediation with support persons (such as members of the family), financial advisors, legal advisors and any other person that they consider relevant to assist them in putting forward their arguments to the other party. The Mediator does not act as a Judge or Arbitrator. They are there to try and facilitate the parties into resolving their issues in a constructive way, so as to avoid the matter escalating into litigation. Usually mediation takes place over a period of a number of hours or sometimes they can last more than a day. It is really up to the parties and the Mediator as to how long they run for. If through that process the parties come to an agreement as to the way forward, that agreement is reduced into writing and usually referred to as a “Heads of Agreement”. That document is signed by both parties and under the Act the farmer is given a 14 day cooling off period so that if the farmer decides that he doesn’t want to proceed in accordance with the terms of the Agreement he must notify the Bank (or creditor) within 14 day period.

4. AFTER MEDIATION

If the farmer fails to mediate within the **3 months** or elects to withdraw from the Agreement within the **14 day** period then the Bank (or creditor) can apply to the NSW Rural Assistance Authority for what is known as a Section 11 Certificate. The Authority will issue that Certificate provided they are satisfied that a satisfactory mediation has taken place in respect of the matter or the farmer has declined to mediate or 3 months have elapsed after the notice was given by the Bank (or creditor) and the Bank (or creditor) has throughout that period attempted to mediate in good faith (whether or not a mediation session or satisfactory mediation took place during that period).

The process of the Rural Assistance Authority issuing the Section 11 Certificate is generally one where there is no set time limit however; from our experience they would normally issue within about **4 to 6 weeks** after an application is made for that certificate by the Bank or creditor.

5. COURT PROCEEDINGS

If the Bank (or creditor) obtains a Section 11 Certificate it then can take steps to enforce the farm mortgage. If that mortgage is over farmlands then they will be required to give a Notice under the Real Property Act that warns the farmer that possession proceedings will be taken unless monies are repaid within **1 month**.

After the **1 month** has lapsed the farmer should expect that the Bank (or creditor) will then issue appropriate proceedings for a possession order through the Supreme Court of NSW. The document that is issued by the Court on behalf of the Bank (or creditor) that commences the proceedings is called a "Statement of Claim". That document will be served on the farmer and from the date of service the farmer will have **28 days** to file any form of Defence to the claim or to make other satisfactory arrangements with the Bank (or creditor).

If the farmer fails to file a Defence or cannot come to some negotiated resolution then the Bank (or creditor) can then apply for a Default Judgement and will obtain an Order for Possession. Once the order is entered with the Court that document is then directed to the Sheriff's office where they undertake the process of gaining possession of the property. It can take from **2 to 3 months** to obtain Default Judgment, an Order and then have the Sheriff's office retake possession.

If the Statement of Claim were defended then the Court will set down a timetable for the preparation of evidence by both of the parties and the matter will ultimately be set down for a hearing which may well be, depending on the length of the hearing, some **6 to 8 months** from the issue of the Statement of Claim.

It is important that farmers respond initially to the Notice that sets out their rights to mediate. They should contact their legal advisor and seek advice.