

## Legal Alert



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### *Farm Debt Mediation Act 2011 (Vic): A new paradigm for the enforcement of farm mortgages in Victoria*

Creditors seeking to take possession or other enforcement action under a farm mortgage in Victoria will need to comply with the requirements of the *Farm Debt Mediation Act 2011 (Vic) (Act)* failing which any such enforcement action may be void and could result in the creditor and any officer who knowingly authorised or permitted the contravention of the Act to be prosecuted.

The Act is scheduled to come into operation on 1 July 2012 (or an earlier proclamation date) (the Commencement Date) and will apply to:

- outstanding farm debts incurred before the Commencement Date and in respect of which enforcement action has not been commenced; and
- all other farm debts incurred on or after the Commencement Date.

### Scope of the Act

The Act prevents a creditor from commencing enforcement action in respect of a "farm debt" that is wholly or partly secured by a "farm mortgage" unless the creditor has provided the farmer with the option to mediate.

The Act applies to a "farm debt" which is a debt incurred by a farmer for the purposes of the conduct of a "farming operation" that is wholly or partially secured by a farm mortgage.

A "farm mortgage" is defined as a mortgage over "farm property" which secures the obligations of a farmer as a debtor or guarantor but does not include any stock mortgage or any crop or wool lien, any farm machinery that is leased or any security interest within the meaning of the *Personal Property Securities Act 2009 (Cth)* in respect of stock, crops or wool. A "farm property" is a farm or any part of a farm or farm machinery used in connection with a farming operation or a water share issued to a farmer under the *Water Act 1989 (Vic)* for the purposes of a farming operation.

Under the Act, "farming operation" is given a broad meaning and includes any of the following activities undertaken for commercial gain:

- Agricultural, pastoral, horticultural or apicultural activities.
- Poultry farming, dairy farming or any business that consists of the cultivation of soils, the gathering of crops or the rearing of livestock.
- Any prescribed activities.

The Act defines "enforcement action" broadly and includes taking possession of property under a farm mortgage or any other action to enforce the mortgage including the giving of notices under the *Transfer of Land Act 1958* (Vic) (or any other relevant statutory notice) or the continuation of any such action already commenced but does not include the completion of the sale of property held under the farm mortgage in respect of which contracts were exchanged before the Commencement Date or the enforcement of a judgment that was obtained before the Commencement Date.

The broad definition of enforcement action will preclude creditors from appointing a receiver or receiver and manager to farm property until the mediation procedures prescribed by the Act have been complied with.

However, the Act does not apply to:

- a farmer whose property is or may become subject to control under a personal insolvency agreement under Part X of the *Bankruptcy Act 1966* (Cth);
- a farmer whose property is the subject of a bankruptcy petition presented by any person; or
- a farmer, being a corporation, that is an externally administered corporation within the meaning of the *Corporations Act 2001* (Cth).

## Obligations of creditors under the Act

Before commencing enforcement action under a farm mortgage, the creditor must give 21 days' written notice to the farmer. The notice must state that:

- the creditor intends to take enforcement action under the farm mortgage;
- under the Act, mediation between the farmer and the creditor is available; and
- the farmer has 21 days from the date of service of the notice to request mediation with the creditor in respect of the farm debt.

## When can a creditor refuse to mediate?

A farmer may request mediation notwithstanding that they have not been served with a notice from the creditor and regardless of whether they are in default under the terms of the farm mortgage.

The creditor may, by written notice, refuse to mediate with a farmer who is not in default, as such refusal will not give rise to a claim against the creditor or any other consequence under the Act.

A creditor, however, should not refuse to mediate with a farmer who is in default under the farm mortgage. A refusal to mediate in such circumstances will provide the farmer with grounds to apply to the Small Business Commissioner of Victoria (SBC) for the issue of a "prohibition certificate". If a prohibition certificate is issued by the SBC, the creditor will be unable to commence enforcement action against the farmer for a period of up to six months.

To avoid this situation, creditors must ensure that:

- they respond to a farmer's request for mediation within 21 days of such request being made;
- they do not unreasonably delay entering into the mediation;
- they take part in the mediation in good faith; and
- they do not refuse to continue to mediate.

## The mediation process

The Act requires the mediation to be conducted with as little formality and technicality as proper mediation of the farm debt permits and as expeditiously as possible.

The SBC may join any person that he/she considers appropriate to join as a party to the mediation. However, the Act is silent on how a non-party to the farm mortgage can be bound by a decision of the SBC to join them to the mediation process.

Parties to the mediation may be represented by a solicitor or by any other person considered appropriate by the SBC having regard to the recommendations made by the mediator.

The SBC may fix a fee for the mediation session and if such a fee is not fixed by the SBC, the costs of the mediation shall be determined by the SBC and paid by the parties in the proportions that they agree or, if they cannot agree, in equal shares.

The Act provides for the mediation process to be confidential and prohibits evidence being given in court proceedings of anything said or admitted during the mediation. Further, any document prepared for the purposes of, or in accordance with, the mediation is inadmissible in any court proceedings and information obtained during the course of the mediation must be kept confidential except in certain limited circumstances.

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

To ensure compliance with this aspect of the Act, creditors will need to satisfy themselves that the farmer is represented throughout the course of the mediation and in respect of the recording of the binding agreement reached as a result of the mediation.

## When can a creditor enforce a farm mortgage?

Where a farmer has requested mediation, the creditor cannot begin enforcement action in respect of the farm mortgage without an exemption certificate being issued by the SBC.

The SBC will issue an exemption certificate if:

- the farmer is in default under the farm mortgage;
- there is no prohibition certificate in force; and
- one of the following applies:
  - mediation has taken place in respect of the farm debt but no settlement was reached;
  - mediation has not taken place due to the farmer's refusal to mediate; or
  - mediation has not taken place within three months of the creditor giving the farmer notice and during this time the creditor has attempted to mediate in good faith.

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A farmer will be deemed to have refused to mediate if:

- the farmer has not mediated in good faith;
- the farmer has indicated in writing that he/she does not wish to enter into the mediation; or
- the farmer has not responded within 28 days of receiving an invitation to attend a mediation session.

## Consequences of contravention of the Act

Any enforcement action commenced by a creditor under a farm mortgage in contravention of the Act will be void. A contravention of the Act may also rise to criminal proceedings. Further, and more significantly, liability under the Act extends to any officer of the creditor who knowingly authorised or permitted the contravention.

## Can the operation of the Act be excluded?

No. Any provision of an agreement which seeks to limit or exclude the operation of the Act or the liability of a creditor under the Act will be void. Further, any provision of an agreement by which the creditor seeks to be indemnified by a farmer (whether as debtor or guarantor) or a guarantor for any loss or liability arising under the Act is also void.

## Practical steps for creditors

- Creditors should familiarise themselves with the requirements under the Act and ensure that from the Commencement Date no enforcement action is taken under a farm mortgage where the Act requires such a notice to be given.
- Creditors should prepare and implement procedures and protocols to ensure that the mediation notice under the Act is served on a farmer before enforcement action (including the service of any statutory notice under a farm mortgage) is taken.
- Creditors should engage in the mediation process in good faith and ensure that any agreement reached with the farmer as a result of the mediation is fairly and accurately reflected in a binding agreement. A failure by the creditor to agree to reduce or forgive any debt does not of itself demonstrate a lack of good faith.
- Consideration will need to be given as to whether the farmer is adequately represented during the course of the mediation process and in relation to the documentation of any binding agreement reached in the course of the mediation process.

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