

ALERT

21 DECEMBER 2011

Farm Debt Mediation Act

Introduction

The *Farm Debt Mediation Act 2011* (Vic) (**Act**) came into operation on 1 December 2011. The Act covers all farm mortgages in Victoria (including mortgages over part of a farm, certain farm machinery and water shares) and makes it compulsory for creditors to offer mediation to farmers before taking possession or other enforcement action under a farm mortgage. Failure to comply with the scheme can result in a creditor being unable to commence enforcement action for a period of up to six months and may lead to criminal prosecution. Lenders should be aware of their obligations under the scheme and implement processes and procedures to ensure those obligations are met.

The scheme

The Act prohibits creditors from taking any enforcement action in respect of a farm mortgage unless the creditor has provided the farmer/debtor with the option to mediate. Creditors holding an interest in, or power over, any farm property, which secures the obligations of a farmer (as debtor or guarantor) are now required

to give the farmer 21 days' notice of their intention to commence enforcement action. The notice must state that:

- (a) the creditor intends to take enforcement action under the farm mortgage;
- (b) under the Act, mediation between the farmer and the creditor is available; and
- (c) 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.

If a farmer does not respond to an offer to mediate within the 21 day notice period, the creditor may begin commencement action in the ordinary manner.

If a farmer elects to proceed to mediation, the creditor must, by written notice, agree or refuse to mediate. If the farmer is not in default, a refusal to mediate will not give rise to any claim against the creditor or any other consequence under the Act. However, creditors should not refuse to mediate with a farmer who is in default, because this may result in the creditor being issued



with a 'prohibition certificate' that prohibits the creditor from commencing enforcement action for a period of up to six months. To avoid being issued with a prohibition certificate, creditors should ensure that they:

- (a) respond to a request for mediation within 21 days;
- (b) do not unreasonably delay entering into the mediation;
- (c) mediate in good faith; and
- (d) do not refuse to continue in the mediation.

Farmers may initiate mediation even if they are not in default, and even if they have not been served with a notice from the creditor. The obligations on the creditor are the same regardless of which party initiates the process.

The mediation

The mediation process is managed by the Victorian Small Business Commissioner, and is required to be conducted as expeditiously and with as little formality and technicality as proper mediation of the debt permits. Parties may be represented by a lawyer or other such appropriate person, and must each pay a fee of \$195 per session.

Settlements agreements are binding. If no settlement is reached, creditors may obtain an 'exemption certificate' enabling them to immediately commence enforcement action. An exemption certificate will not be issued if the creditor is deemed to have mediated in bad faith.

Consequences of contravention

Any enforcement action commenced by a creditor in contravention of the Act is void and may give rise to criminal proceedings against the creditor (including against the directors if the creditor is a company).

Comment

The Farm Debt Mediation Scheme has significant consequences for lenders in the farming sector and we recommend that lenders become familiar with their obligations under the Act. We recommend also that lenders review their portfolios to identify loans caught by the agreement and update their recovery procedures to ensure they comply with their obligations under the Act.

Please contact us if you have any questions or concerns relating to your obligations under the scheme or require any assistance in preparing the prescribed forms/notices.

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