

FARM MORTGAGES AND THE FARM DEBT MEDIATION ACT 2011 (VIC) EXPERIENCES AFTER 12 MONTHS OF THE ACT COMING INTO OPERATION

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Mortgage Disputes Legalwise Seminar, 13 March 2013**

Introduction

The Farm Debt Mediation Act 2011 (Vic) ('FDM Act') came into effect on 1 December 2011. The legislation was modelled on NSW legislation which had been established some sixteen years earlier, with some modifications¹. The primary purpose of the FDM Act is to provide the right for farmers in default on a farm mortgage to elect to mediate with the creditor to try to resolve the matter, or agree a plan of action which avoids the need for the creditor to enforce the debt through the Courts².

One difference with the NSW scheme (there are a number, which are discussed in more detail below) is that the Victorian Small Business Commissioner (VSBC) provides the mediation service for farm debt mediations. The VSBC, akin to the role of the Rural Assistance Authority (RAA) under the NSW scheme, also provides a certificate function under the FDM Act.

In Victoria, the FDM Act is jointly administered by the Department of Primary Industries ('the Department') and the VSBC. The Department provides initial information and assistance to farmers and creditors and refers farm debt disputes to the VSBC to arrange mediation.

More information about the FDM Act may be found at www.dpi.vic.gov.au/mediation. The Farm Debt Mediation Officer may be contacted on 136 186.

From 1 December 2011 to 31 December 2012, 96 applications for mediation had been received by the VSBC. An average of ten applications per month was received in the second half of this period, up from around 6 per month in the first half.

¹ Farm Debt Mediation Act 1994 (NSW)

² FDM Act, s 1

Of those 96 mediations applications, 56 mediations had been conducted, and signed Terms of Settlement were reached in 96% of cases. Seventeen matters settled between the parties before mediation.

This paper:

- provides an overview of the functions, jurisdiction and activities of the Victorian Small Business Commissioner;
- describes in detail the requirements of the FDM Act and the operational processes employed by the VSBC;
- highlights the differences between the Victorian and NSW farm debt mediation schemes; and
- highlights the key issues that have emerged in the first twelve months of operation of the FDM Act.

Overview of the role of the Victorian Small Business Commissioner

Jurisdiction

The VSBC is a statutory role established under the *Small Business Commissioner Act 2003* ('SBC Act'). The VSBC also operates under three other pieces of legislation:

- *Retail Leases Act 2003* ('RL Act')
- *Owner Drivers and Forestry Contractors Act 2005* ('ODFC Act')
- *Farm Debt Mediation Act 2011* (FDM Act)

The VSBC provides dispute resolution services under all four Acts. In the latter three Acts, disputes must first be referred to the VSBC for attempted resolution before a party can progress the dispute to the Victorian Civil and Administrative Tribunal or the Court system (with minor exceptions). Certificates are issued to enable progress of matters to the relevant jurisdiction. In the case of the SBC Act, there is no mandatory referral of disputes to the VSBC, but the dispute resolution services provided by the VSBC can be accessed by any business with a commercial dispute with another business, or government body.

There is no definition of 'small business' in any of the four Acts. During the Second Reading Speech on the Small Business Commissioner Bill 2003, the Treasurer referred to Victoria's small and medium businesses. The VSBC does not assess the size of a business to determine eligibility for access to the services.

The VSBC has a range of other functions (other than dispute resolution and prevention functions) under the SBC Act. The objective of this Act is 'to enhance a competitive and fair operating environment for small business in Victoria'.

Services

The VSBC provides three levels of services relating to dispute resolution and prevention.

- **Information and Education:** is provided via telephone and email, presentations, publications and website information.
- **Preliminary Assistance:** refers to the efforts of Dispute Management Officers in attempting to assist parties resolve the dispute through phone and email shuttle engagement.
- **Mediation:** services are offered where disputes remain and the parties agree to attend mediation. Mediation is conducted by an independent, expert mediator appointed by the VSBC.

The VSBC charges each party to a mediation \$195, for an average 3-4 hour mediation³. The mediator cost is subsidised by the VSBC. All other services provided by the VSBC are at no cost to the parties.

Activities and Outcomes

The VSBC receives around 8,000 telephone calls per annum, and in the past two financial years has received in excess of 1,500 applications for assistance with a business dispute.

³ \$95 for ODFC Act disputes. \$195 applies for a complete mediation session for FDM Act disputes, regardless of duration on the day

Since 2003, over 11,000 applications for assistance have been received. Of these only around 2% have involved business-to-government disputes. Table 1 shows the profile of disputes by jurisdiction in 2011-12⁴.

TABLE 1: 2011-12 applications for VSBC assistance by Act

RL Act	1020
SBC Act	272
ODFC Act	49
FDM Act*	48
TOTAL	1510

*Commenced 1 November 2011

Not all matters progress to mediation. In 2011-12, 25% of applications were resolved through preliminary assistance prior to mediation. Also, the VSBC has no powers to compel parties to attend mediation⁵. In 2011-12, 25% of applications did not progress to mediation as the respondent party refused to participate, or the respondent party could not be contacted.

Since 2003, the VSBC has consistently achieved a settlement rate at mediation around 80%. Settlement occurs where the parties agree and sign a binding Terms of Settlement.

The Farm Debt Mediation Act 2011

Background

As indicated above, the FDM Act is based on similar legislation in NSW and fulfils an election commitment of the State Government to force banks and creditors to offer farmers mediation before initiating debt recovery proceedings.

⁴ VSBC *Annual Report 2011-12* at www.sbc.vic.gov.au

⁵ Note, however, the VSBC has a certificate function under the RL Act, the ODFC Act and FDM Act.

The NSW legislation was commented upon by the High Court in 2012⁶. These comments are also of relevance to the FDM Act. In *Waller v Hargraves Secured Investments*, the Court stated:

“It is difficult legislation. Its construction has engendered differences of judicial opinion. The difficulties may spring from the origins of the Act – in a Bill which was based on legislation in Iowa and Minnesota that had attracted criticism. The Bill was introduced by an Opposition member of the NSW Legislative Assembly. It was introduced at a time when the enactment of legislation depended on support from independents in the absence of agreement between the major parties...”

The Court continued:

*“The background to the Act lies in the notorious problems which face Australian farmers. They include harsh climatic conditions; the vulnerability of crops and animals to disease; unpredictable volatility in prices on world markets; the tendency of farmers to be asset-rich but cash-poor; their dependence on loans; the risk of speedy ejection from their land if there is entire freedom for creditors to enforce their general law rights, despite the possibility of remedying defaults if climatic and market conditions change; and the expense of and often delay in litigation as a method of keeping creditors within their rights. In contrast, **some perceive in mediation a capacity to produce much cheaper and speedier outcomes.**”*

[emphasis added]

Hence one of the roles of the VSBC under the FDM Act.

Scope

The FDM Act applies where a farmer undertaking a farming operation has a farm mortgage securing farm property, and the farmer is in default of the farm debt that is secured by the farm mortgage.⁷

⁶ [2012] HCA 4

⁷ See FDM Act s.3 for definitions.

Farmer is defined as a person (individual or corporation) who is solely or principally engaged in a farming operation.

Farming operation means any of the following activities undertaken for commercial gain:

- a) agricultural, pastoral, horticultural or apicultural activities;
- b) poultry farming, dairy farming or any business that consists of the cultivation of soils, the gathering of crops or the rearing of livestock;
- c) any prescribed activities.

Farming property means

- a) a farm or part of a farm; or
- b) farm machinery used by a farmer in connection with a farming operation; or
- c) a water share within the meaning of the Water Act 1989 issued to a farmer for the purposes of a farming operation.

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, but does not include:

- a) any stock mortgage or any crop or wool lien;
- b) the interest of the lessor of any farm machinery that is leased; or
- c) a security interest within the meaning of section 12 of the Personal Property Securities Act 2009 (Cwth) in stock, crops or wool.

Farm debt means a debt incurred by a farmer for the purposes of the conduct of a farming operation that is secured wholly or partly by a farm mortgage.

Default in relation to a farm mortgage means failure to perform an obligation that, under the terms of the mortgage, is a ground for enforcement action.

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:

- a) the completion of sale of property held under the mortgage in respect of which contracts were exchanged before the commencement day; or
- b) the enforcement of a judgment that was obtained before the commencement day.

The process to mediation

A creditor cannot take enforcement action against a farmer in default under a farm mortgage unless it has given the farmer written notice that the creditor intends to take enforcement action, and that mediation is available⁸. The farmer has 21 days to respond. Importantly, if the farmer does not respond, the creditor may take enforcement action. Importantly also, enforcement action taken by a creditor otherwise than in compliance with the Act is void⁹.

If a farmer in default notifies the creditor it requests mediation and the creditor agrees, the creditor must notify the Department within 10 days¹⁰. The Department must then refer the details of the parties to the VSBC as soon as practicable¹¹. If the creditor refuses, the refusal provides grounds for the VSBC to issue a Prohibition Certificate, which prevents the creditor from taking enforcement for six months or until satisfactory mediation occurs, whichever is the earlier¹². Relevantly, a Prohibition Certificate does not prevent a creditor from taking enforcement action indefinitely.

A farmer can initiate a request for mediation without waiting for notification from the creditor, and can do so whether or not it is in default¹³. If in default, refusal by the creditor is grounds for issuing a Prohibition Certificate (provided other criteria are satisfied)¹⁴. If not in default, refusal by the creditor has no consequence under the FDM Act¹⁵.

If a farmer has requested mediation, the creditor cannot take enforcement action unless an Exemption Certificate is issued by the VSBC¹⁶. An Exemption Certificate enables a creditor to take enforcement action relating to specific farm mortgage/s, exempting the creditor from the mediation processes of the FDM Act.

⁸ FDM Act, s 8

⁹ FDM Act, s 6

¹⁰ FDM Act, s 10 (4)

¹¹ FDM Act, s 11

¹² FDM Act, s 10 (3)

¹³ FDM Act, s 9 (2) & (3)

¹⁴ FDM Act, s 10 (b) (3)

¹⁵ FDM Act, s 10 (3) (a)

¹⁶ FDM Act, s 12

Arranging and Conducting Mediation

The VSBC receives details of the parties from the Department and proceeds to organise mediation¹⁷. Each of the parties is contacted to ensure they understand the working of the FDM Act and the mediation service, and seeking information regarding prospective dates, times and locations for mediation.

Representatives of parties are identified and included in the logistics management to arrange mediation. The VSBC is active in encouraging the farmer to contact a Rural Financial Counsellor ('RFC') if they have not already done so. The RFC can assist the farmer by providing emotion support while at the same time explaining the gravity of the situation, assisting in analysing the farmer's financial situation and identifying possible options to address the default, and assisting with documentation. The RFC (if attending mediation) does so as a support person to the farmer, not as a representative.

Mediations can be held in regional locations or in the VSBC offices in the Melbourne CBD to meet the needs of the parties (as far as possible). In one case, mediation was held in Adelaide. Around half of the mediations held to date have been in the CBD.

As with all VSBC mediations, an independent mediator is appointed to conduct the mediation at the agreed location. The VSBC maintains a list of mediators, which includes both city based and regional mediators.

Each party to a FDM Act mediation pays \$195 for a mediation session. The balance of the costs of the mediator, any travel and accommodation and venue hire, is paid by the VSBC.

FDM Act mediations can take a little longer to organise than other VSBC mediations, partly due (in some cases) to difficulty in contacting the farmer in the first instance, multiple parties being involved, and if in a regional location, ensuring an adequate venue for the mediation. The average time to arrange mediations to date (from the time the party details are received by the VSBC) is 6.9 weeks. This duration follows the 21 day notice period the creditor must give the farmer to respond to the default notification, and the time the response is received and forwarded by the creditor to the Department, and then to the VSBC. Parties may subsequently seek postponement of scheduled mediations if their circumstances change.

¹⁷ FDM Act, s 20 (1) (a)

FDM Act mediations are also, on average, of longer duration than other VSBC mediations: around 4 ¾ hours compared with 3 ½ - 4 hours. VSBC practice to date has been to schedule full day mediations for FDM Act mediations; this may change particularly where the dispute relates to farm machinery rather than farm land.

A VSBC Mediation Agreement is signed by all parties prior to commencement of the mediation, and separate confidentiality agreements if required of others attending (e.g. RFC). The FDM Act has strong confidentiality and disclosure provisions around the mediation¹⁸.

If the parties at mediation can reach terms of settlement, those terms are drafted and signed by the parties. A settlement rate of 96% has been achieved for FDM Act mediations completed by 31 December 2012. Signed Terms of Settlement become a binding contract between the parties.

Following mediation, the mediator completes a brief Mediation Report on the mediation outcome and process for the VSBC¹⁹. Parties are provided VSBC feedback forms which seek an assessment of the mediation service offered, and the mediator on the day.

After mediation – Certificate process

The FDM Act provides for the issuing by the VSBC of Exemption Certificates and Prohibition Certificates if certain criteria are satisfied. An Exemption Certificate enables a creditor to take enforcement action. A Prohibition Certificate prevents enforcement action for six months, or until satisfactory mediation has occurred (whichever is earlier).

If criteria are satisfied, the VSBC has no discretion in issuing certificates under the FDM Act.

Exemption Certificate²⁰

An Enforcement Certificate is not needed if a farmer fails to respond within 21 days to a creditor notification of default, intention to take enforcement action, and availability of mediation. However, a number of creditors have preferred to go through a process to gain an Exemption Certificate notwithstanding farmer failure to respond in 21 days.

¹⁸ FDM Act, ss 26 & 27

¹⁹ The VSBC must have regard to this report to determine whether satisfactory mediation has occurred – FDM Act, s 16 (4)

²⁰ FDM Act, Part 2, Division 3

The FDM Act introduces the concept of 'satisfactory mediation'²¹. Satisfactory mediation means any of the following:

- a) a mediation that has achieved a resolution of a farm debt dispute;
- b) a mediation that has proceeded as far as it reasonably can in an attempt to achieve resolution of a farm debt dispute but has failed to resolve the dispute;
- c) a prescribed mediation or a mediation belonging to a prescribed class of mediations [of which none have been prescribed to date].

Relevantly, a failure of a creditor to agree to reduce or forgive any debt does not, of itself, demonstrate lack of good faith by the creditor or that satisfactory mediation has not occurred²².

The VSBC must issue an Exemption Certificate to a creditor on application if:²³

- a) the farmer is in default;
- b) no Prohibition Certificate in relation to the farm mortgage is in force; and
- c) the VSBC is satisfied that:
 - i. satisfactory mediation has occurred; or
 - ii. the farmer has refused to mediate; or
 - iii. at least 3 months have elapsed since the initial notice to the farmer (or an agreed longer period) and no mediation or satisfactory mediation has occurred.

Refusal by the farmer to mediate is presumed where the farmer has failed to take part in mediation in good faith; has unreasonably delayed entering into or proceeding with mediation; has indicated to the Department or creditor that it does not wish to mediate; or has failed to respond in writing within 28 days to an invitation to mediate from the creditor.²⁴

Where there are mediated Terms of Settlement, this is prima facie evidence to the VSBC that satisfactory mediation has occurred.

²¹ FDM Act, s 4

²² FDM Act, s 17

²³ FDM Act, s 16

²⁴ FDM Act, s 19 (1)

On application for an Exemption Certificate the VSBC writes to the farmer advising of the application, the grounds of the application, and requesting within 28 days any comments the farmer may wish to make. This practice is consistent with NSW practice and affords the farmer procedural fairness.

After receipt of any response from the farmer, or 28 days, the VSBC will determine whether or not to issue the Exemption Certificate. In rare cases, further information may be sought from either party to enable the VSBC to be satisfied that the criteria are (or are not) met.

Consideration of whether satisfactory mediation has occurred by the VSBC is not influenced by the content of any Terms of Settlement, but is influenced by the existence of signed Terms of Settlement. The Mediator Report is also taken into consideration²⁵.

The approach of creditors to Exemption Certificates varies, and may depend on the content of Terms of Settlement reached. If the farmer meets its obligations under the Terms of Settlement, a creditor may not need an Exemption Certificate as there may be no 'enforcement' needed as part of those Terms. Some creditors appear not to apply for an Exemption Certificate until (and if) the farmer breaches the Terms or the Terms require enforcement action.

Other creditors apply for an Exemption Certificate soon after mediation, often where Terms of Settlement have not been breached or trigger events or dates have not been reached. While the creditor may not use the Exemption Certificate to take enforcement action unless Terms are breached, this action can confuse and anger farmers. As noted above, the VSBC does not have discretion if the criteria for an Exemption Certificate have been met.

As at 31 December 2012, 26 Exemption Certificates had been issued, and 3 not issued. The major reason for issuing certificates has been 'satisfactory mediation'.

Prohibition Certificate²⁶

A similar model applies for the application and issuing of a Prohibition Certificate, from the farmer's perspective.

²⁵ FDM Act, s 16 (4)

²⁶ FDM Act, Part 2, Division 2

The criteria to be satisfied for the VSBC to issue a Prohibition Certificate are²⁷:

- a) the farmer is in default; and
- b) the farmer has requested mediation; and
- c) an Exemption Certificate is not in force in relation to the farm mortgage; and
- d) the VSBC is satisfied that:
 - i. the creditor has refused to mediate; or
 - ii. the creditor does not want to continue to mediate; or
 - iii. the creditor has failed to respond within 21 days to a request from a farmer to mediate; or
 - iv. at least 3 months has elapsed since the farmer's request to mediate, and throughout that period the farmer has attempted to mediate in good faith but no mediation or satisfactory mediation has taken place.

Refusal by the creditor to mediate is presumed if the creditor has failed to take part in good faith in mediation; has unreasonably delayed entering into or proceeding with mediation; or has indicated in writing to the Department or the farmer that it does not wish to mediate.²⁸

As with Exemption Certificate applications, on receipt of an application the VSBC writes to the creditor seeking any comments within 28 days, following which a decision whether to issue or not is made (or rarely, further information is sought).

As at 31 December 2012, one Prohibition Certificate has been issued, and two not issued.

Differences between the Victorian and NSW FDM Acts

There are seven main differences:

1. As indicated above, the Victorian scheme is jointly administered by the Department and the VSBC. The NSW scheme is administered by the RAA.
2. The VSBC arranges mediations in Victoria. In NSW, the RAA directs parties to a panel of (accredited) mediators. Parties agree on a mediator and organise details with the mediator generally without RAA involvement.

²⁷ FDM Act, s 14

²⁸ FDM Act, s 19 (2)

3. The VSBC charges a subsidised \$195 per mediation session per party. The NSW RAA does not subsidise the commercial fees published by its panel of mediators.
4. In NSW there is a 14 day cooling-off period following signing Terms of Settlement. There is no cooling-off period in Victoria.
5. The terminology of Exemption and Prohibition Certificates is common, but means the opposite in NSW as in Victoria (ie in NSW, an Exemption Certificate stops the creditor taking enforcement action, as does a Prohibition Certificate in Victoria).
6. The Victorian FDM Act has a provision enabling the VSBC to issue an Exemption Certificate if satisfied that the farm debt has been satisfactorily mediated under an alternative dispute resolution scheme²⁹. No such provision exists in the NSW Act. (The Victorian provision reflects the existence of the NSW Act when the Victorian Act commenced. A consequence is that if a farmer has property in both States, an initial successful mediation in NSW will enable a Victorian Exemption Certificate to be issued; the opposite is not the case). The VSBC and the Department work co-operatively with the RAA on cross-border issues.
7. There are penalty provisions in the NSW Act³⁰ for:
 - a. a creditor's failure to reflect accurately in any document the terms agreed at mediation;
 - b. breach of non-disclosure provisions by either party;
 - c. a creditor being party to any agreement seeking to avoid, modify or restrict the operation of the Act, or seeking to have a farmer indemnify a creditor for any loss or liability arising under the Act.

The only penalty provision in the Victorian Act is for breach of non-disclosure provisions³¹.

Issues Emerging in the first 12 months of the FDM Act

Definition of Enforcement Action

What constituted 'enforcement action' and whether or not it had commenced at 1 December 2011 was a (mainly) transitional issue.

²⁹ FDM Act, s 16 (3)

³⁰ Farm Debt Mediation Act 1994 (NSW) ss 11C, 16 & 20

³¹ FDM Act, s 27

On one occasion a farmer applied for a Prohibition Certificate on grounds the creditor had actively refused to mediate. The creditor claimed that the FDM Act did not apply because it had taken enforcement action prior to the commencement of the Act. This action was the issuing of various 'Default Notices' before 1 December 2011.

Based on legal advice, the VSBC determined that the creditor had not taken enforcement action against the farmer because:

- although the creditor had taken steps to take possession of the farm equipment, the farmer in fact remained in possession of the mortgaged equipment;
- no statutory enforcement notice had been given within the meaning of the Act; and
- no action had been taken to enforce the remedies available to the creditor under the agreement.

Having satisfied other criteria under s 14 of the FDM Act, the VSBC issued the farmer a Prohibition Certificate.

Subsequent to the Certificate, the creditor agreed to enter into mediation. The farmer also agreed to mediate. The VSBC arranged mediation and the parties entered into Terms of Settlement. In the Mediator Report, the mediator commented:

"Both parties very satisfied with the result."

Good Faith

One of the assessments the VSBC may need to make in the context of its certificate function is whether the parties have taken part in mediation in 'good faith'. This expression is not defined under the FDM Act. The VSBC itself does not mediate farm debt disputes. This is the function of mediators contracted under the Act³².

In order to assist the VSBC in this regard, the Mediation Report requires the mediator to comment, inter alia, on a number of good faith indicia. This includes:

- Did the party adequately present their position?

³² FDM Act, s 21

- Were party's issues and concerns isolated/identified?
- Were each party's issues/concerns discussed face to face sufficiently to enable the other party to appreciate the other's perspective?
- Were party's options for settlement canvassed?
- Was the party prepared to consider/discuss the other's settlement options?
- Did the party move off initial position?
- Was the party at all times competent to continue the mediation?
- Did the party attend mediation with authority to settle within any range that could reasonably be anticipated?
- Did the party agree that nothing further could be gained by continuing mediation?
- Did the party discontinue mediation, at a time when the other party wanted to continue?
- Attendance and punctuality
- Honesty
- Candidness
- Flexibility on preliminary or trivial matters
- Disruptive or inconsistent behaviour.

Note that a creditor may satisfactorily mediate without forgiving or reducing farm debt³³.

To date, the VSBC has not issued any Exemption Certificate or Prohibition Certificate on grounds a party has failed to take part in mediation in good faith³⁴.

Competing Certificate Applications

On two occasions the VSBC has received applications for an Exemption Certificate and a Prohibition Certificate relating to the same farm debt dispute. The FDM Act makes no specific provision for this.

In one difficult case, the creditor considered that satisfactory mediation had occurred, with all but one matter being resolved (but not documented) at mediation and the last matter on the table requiring adjournment for further consideration by the farmer. The farmer subsequently

³³ FDM Act, s 17

³⁴ FDM Act, s 19

sought a variation to the remaining matter, prompting the creditor to stop further negotiation and seek an Exemption Certificate.

In response, the farmer sought a Prohibition Certificate on the grounds that the creditor had not engaged in good faith / refused to continue to mediate. In this case, the VSBC requested the parties to undertake another mediation, as it appeared that the parties were close to settlement, and each had been somewhat disingenuous in dealings post mediation. Terms of Settlement were reached at that subsequent mediation.

In the second case, the husband and wife farmers were estranged and involved in Family Court proceedings. Three farm debts were in each name, and a jointly held company name. Mediation was conducted but no Terms of Settlement were reached as (according to the Mediation Report) the farmers used the forum to pursue matters relating to the Family Court proceedings, and could not make decisions on joint assets. The creditor sought an Exemption Certificate on grounds of satisfactory mediation (proceeded as far as it reasonably could). In response the solicitor for the farmers lodged an application for a Prohibition Certificate on the grounds that the creditor refused to continue to mediate (the solicitor had requested the creditor engage in another mediation following the next Family Court hearing, which the creditor had declined to do. The creditor's response was that it was not reasonable to mediate while the Family Court matters were unresolved (hearings had been adjourned twice), and its losses were increasing. In this case, given the circumstances, the VSBC was not satisfied that the creditor had refused to continue to mediate. The VSBC further considered that it could not delay consideration of the certificate applications for finality of Family Court matters, as this could extend for a lengthy period, and had already been adjourned twice. The VSBC issued the Exemption Certificate and did not issue the Prohibition Certificate.

Attribution of Legal Costs - Void

On two occasions it came to the VSBCs attention that a creditor had added to the farmer's debt the creditor's legal costs in complying with the FDM Act, consistent with its interpretation of their financial facility documentation. Based on legal advice, the VSBC advised both creditors that section 29 of the FDM Act makes any agreement seeking to avoid, modify or restrict the operation of the FDM Act, or seeking to indemnify a creditor for any loss or liability arising under the Act, void. Both creditors subsequently agreed to reverse the transaction and amend their policy on attribution of legal fees for matters under the FDM Act.

To the extent a creditor seeks to attribute legal costs relying on any loan contract between itself and a farmer, the VSBC considers such action void under the FDM Act. The VSBC considers that section 29 of the Act prevents a creditor from relying on a loan contract to require a farmer to pay, inter alia:

- the creditor's costs of issuing a section 8 notice;
- the creditor's costs of a mediation; and
- the creditor's costs of applying for an Exemption Certificate.

To reinforce this message, the VSBC has written to the following bodies about this issue: the Australian Bankers' Association; Australian Finance Conference; Abacus – Australian Mutuals Limited; and the Law Institute of Victoria.

Rights to Certificates in Terms of Settlement

By virtue of the VSBC Mediation Agreement, parties agree to provide the VSBC with a copy of any Terms of Settlement.

Some FDM Act Terms of Settlement have included clauses to the effect that if the farmer was in breach of any of the Terms, the VSBC would (automatically) issue an Exemption Certificate. The criteria for the issue of an Exemption Certificate, however, are set out in section 16 of the FDM Act. The VSBC has advised mediators, farmers, RFCs and creditors that an agreement between the parties to a dispute cannot override or direct the VSBCs statutory obligations under the FDM Act.

Default under a Farm Mortgage

Under section 15 of the FDM Act, a creditor may apply for an Exemption Certificate if, inter alia, the farmer is in default under the farm mortgage. Under section 16 of the Act, the VSBC must issue a Certificate if, inter alia, the farmer is in default under the farm mortgage.

A recent case raised the issue of whether the farmer was (still) in default following Terms of Settlement which agreed to cancel one provision of the mortgage (which was in breach and had triggered the mediation) and replace it with another prospective provision. While the VSBC does not have regard to the content of Terms of Settlement to determine if satisfactory mediation has occurred (the process and conduct of parties, and the existence of signed

Terms are key considerations), based on legal advice the VSBC must also be satisfied that the farmer is in default at the time of application of the Exemption Certificate, and (also) at the time of issuing such Certificate. In considering the issue of default, the VSBC needs to take into account whatever is appropriate to determine if this criterion is satisfied, which may include any Terms of Settlement, as such Terms can vary a farm mortgage.

In this case the VSBC determined not to issue an Exemption Certificate as it could not be satisfied that the farmer was in default under the farm mortgage at the time of application. The creditor subsequently applied for a new Exemption Certificate on grounds that the farmer had breached the Terms of Settlement so was now in default under the farm mortgage. After giving the farmer the opportunity to comment on the new application, the VSBC issued a Certificate, satisfied, inter alia, the farmer was in default under the farm mortgage at the time of application and also at the time of issuing the Certificate.

Exemption Certificate applications despite Terms of Settlement

As noted above, agreed Terms of Settlement do not prevent a creditor from applying for an Exemption Certificate following satisfactory mediation, and the VSBC must issue a Certificate if all criteria are satisfied under section 16 of the FDM Act. This has caused some confusion and anger for a few farmers, querying the relationship between Terms of Settlement and an Exemption Certificate. In response, the VSBC has amended its Mediation Guide to seek to explain the difference between its statutory role to determine an Exemption Certificate before a creditor can take enforcement action, and any binding contract between the parties via agreed Terms of Settlement³⁵.

Cross-border issues

As noted above, where a farmer has farm property in both Victoria and NSW, the lack of a 'recognition of alternative schemes' in the NSW Act means that mediation is typically being undertaken in NSW, with an Exemption Certificate then applied for in Victoria³⁶. The VSBC considers the downside for both parties is the higher mediation costs under the NSW scheme. The VSBC, the Department and the RAA are working together co-operatively to address this issue.

³⁵ VSBC Mediation Guide available at www.sbc.vic.gov.au

³⁶ FDM Act, s 16 (3)

Concluding Comments

The VSBC is assisting farmers and creditors resolve their farm debt disputes via mediation, consistent with the purpose of the FDM Act.

While in some cases mediation results in agreed Terms of Settlement which enable the farmer to continue to farm, albeit agreeing to sell some stock, machinery or property, in other cases mediation is more about 'exiting with dignity'. This means the farmer agreeing to sell the farm, or some other assets, over an agreed timeframe, without being dragged through the Courts and/or bankrupted, at more economic and personal cost.

For many farmers, where farms have been in the family for generations, the loss of the farm (if that is the unfortunate outcome) is a devastating experience which would only be worsened by the cost and duration of litigation.

Most creditors operating under the FDM Act have had experience with the NSW scheme, making the introduction of the Victorian legislation (albeit with some differences) relatively smooth.

There are some differences in mediations conducted by the VSBC for farm debt disputes compared with other matters, relating to managing more complex logistics but also the greater emotion attached to a dispute whereby a farmer may lose part or all of their farm. VSBC mediators have had to apply all of their skills to manage these often complex and emotional situations.

It is very pleasing therefore to receive positive feedback on the VSBC mediation service for farm debt disputes, such as the following statement from a NSW based creditor:

"The professionalism of the mediators continues to impress in Victoria".

The VSBC appreciates such comments and will continue to work with the Department, creditors (and their representatives) and farmers (and their representatives, including RFCs) to resolve farm debt disputes and determine related Certificates, consistent with its role under the FDM Act.