

Howells' List

Barristers

*Who is the 'Farmer' for the  
Farm Debt Mediation Act 2011  
(Vic)*

Presentation to the Western District Law Association  
Inc

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# What is the purpose of the FDM Act?

- ▶ Key concept of the Act: enforcement action.
- ▶ A creditor who wishes to enforce a 'farm debt' must first issue a notice to mediate under the Act before any 'enforcement action' can be taken.
- ▶ This is reflected in the stated purpose in s.1 of the Act:

*The purpose of this Act is to provide for the efficient and equitable resolution of “farm debt” disputes by requiring a “creditor” to provide a “farmer” with the option to mediate before taking possession of property or other enforcement action under a “farm mortgage”*

# So what?

- ▶ Any “enforcement action” taken by a creditor not in compliance with the FDMA is void: s 6.
- ▶ Any purported contracting out of the FDMA is void: s 29.
- ▶ Any waiver of mediation rights under the FDMA is void: s 31.

The ‘farmer’ has statutory rights to protect the farmer’s commercial interests from imminent foreclosure or taking of possession by the ‘creditor’ that other debtors do not have.

# When does the FDMA apply?

*Constanditis v Equitrust Ltd* [2010] NSWSC 299 established that:

- ▶ The borrower must have been a “farmer” engaged in “farming operations”:
  - ▶ at the time of taking the “farm debt” *and*
  - ▶ at the time of any “enforcement action”
- ▶ The “farm debt” must have been incurred for the purpose of carrying on “farming operations”
- ▶ That “farm debt” was secured by a “farm mortgage”
- ▶ The “creditor” wants to take “enforcement action” under the “farm mortgage”.

# “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 the 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**

# Commencement day - FDMA

- ▶ 1 December 2011
- ▶ Where any ‘enforcement action’ commenced before 1 December 2011, such as the issuing of a statutory enforcement notice under s76 of the *Transfer of Land Act 1958* (Vic) for default of payment under the ‘farm mortgage’ but no further step was taken then the FDMA will **not** apply: *Muranna Park Pty Ltd v Southern Mortgages Ltd* [2017] VSC 522 per Croft J.

# What is a “farm debt”?

- ▶ Defined by section 3 to mean:

*a debt incurred by a ‘farmer’ for the purpose of of the conduct of a ‘farming operation’ that is secured wholly or partly by a ‘farm mortgage’.*

- ▶ Evidence needed: the loan application, business plan and similar documents provided to the creditor about the purpose for which the money was borrowed.
- ▶ Money borrowed to purchase land for sale for profit, which was in the interim used for farming operations (growing turf and cattle agistment) was **not** a “farm debt”: *Constanditis v Equitrust Ltd, supra*.

# Who is a “farmer”?

- ▶ Defined by section 3 to mean:
- ▶ *a person (whether an individual person or a corporation) who is solely or principally engaged in a farming operation*
- ▶ *including a person who owns land cultivated under a share-farming agreement*
- ▶ *the personal representatives of a deceased farmer.*



# Farmer - “a person”

- ▶ The definition of farmer refers to:
  - ▶ the **singular** ‘person’.
  - ▶ *s.24, Interpretation of Legislation Act 1984 (Vic)* - words in the singular include the plural (and vice versa)
- ▶ Provided the person is solely or principally engaged in a farming operation, then a ‘farmer’ could be:
  - ▶ an individual
  - ▶ a partnership
  - ▶ a company
  - ▶ possibly a joint venture,
  - ▶ a joint farmer relationship
  - ▶ personal representatives of a deceased farmer, who as a matter of law, must have been in individual person, whether in partnership or a sole trader.

# What is a “farming operation”?

- ▶ Defined by s.3 of the Act to mean 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 cultivation of soils, the gathering of crops or the rearing of livestock;
  - (c) any prescribed activities.

# What is not a ‘farming operation’?

- ▶ Commercial fish hatchery where fish were bred to sell to pet shops and aquariums was not a ‘farming operation’. The terms “farm”, “farm machinery” and “farming operation” are directed towards the carrying out of **traditional agricultural activities on land**. The Court of Appeal left open the question as to whether commercial fish farming for human consumption would be “farming operations”: *Craigie & Anor v Champion Mortgage Services Pty Ltd* [2007] NSWCA 15

# What is a “farm mortgage”?

- ▶ Defined by section 3 to include:

*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 PPSR Act in stock, crops or wool.*

# Comparison of definitions

## Farm Debt means

- ▶ a debt (not damages)
- ▶ incurred by a **farmer**
- ▶ for the purpose of the conduct of a farming operation
- ▶ that is secured wholly or partly by a farm debt

## Farm Mortgage includes

- ▶ not exhaustive definition
- ▶ any interest in, or power over any farm property securing obligations of the **farmer**
- ▶ whether the **farmer** is a debtor or guarantor