

Queensland



FARM DEBT MEDIATION BILL 2003

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DICTIONARY

2003

A BILL

FOR

**An Act to require mediation of farm debt disputes, and for related
purposes**

The Parliament of Queensland enacts—

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PART 1—PRELIMINARY

2

1 Short title

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This Act may be cited as the *Farm Debt Mediation Act 2003*.

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2 Commencement

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This Act commences 2 months after assent or on an earlier day fixed by proclamation.

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3 Object

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The object of this Act is to provide for the mediation of farm debt disputes before a creditor can take possession of property or other enforcement action under a farm mortgage.

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4 Definitions

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The dictionary in schedule 2 defines particular words used in this Act.

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5 Application of Act

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(1) This Act applies to—

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(a) a farm mortgage that was entered into before the commencement of this Act; and

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(b) a liability or obligation that arose under a farm mortgage before the commencement of this Act; and

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(c) a liability or obligation under an approved assistance scheme under the *Rural Adjustment Authority Act 1994*.

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(2) This Act applies to creditors only in as far as they are creditors under a farm debt.

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(3) This Act does not apply to—

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- (a) a farmer whose property is subject to control under the *Bankruptcy Act 1966* (Cwlth), part X, division 2; or
- (b) a farmer whose property is the subject of a bankruptcy petition; or
- (c) a farmer, being a corporation, that is an externally administered corporation within the meaning of the Corporations Law.
- 6 Enforcement action in contravention of Act void**
- Enforcement action taken by a creditor to whom this Act applies other than in compliance with this Act is void.
- 7 Relationship with other Acts**
- (1) Nothing in this Act affects the operation of any other Act or law that deals with the granting of relief in relation to harsh, oppressive, unconscionable or unjust contracts or on the grounds of hardship.
- (2) Nothing in this Act is to be construed as affecting the operation of the *Banking Act 1959* (Cwlth) and, in particular, the duty of the Reserve Bank under division 2 of part II of that Act.
- (3) The requirements of this Act, in as far as they apply to the provision of consumer credit, are in addition to, and do not affect, the requirements of the Consumer Credit Code or any Act or law amending or replacing the Act.
- (4) Other than as provided in this section, this Act has effect despite any other Act.

PART 2—MEDIATION

- 8 No enforcement action until notice of availability of mediation given**
- (1) A creditor who is owed money by a farmer under a farm mortgage must not take enforcement action against the farmer in relation to the farm mortgage until at least 21 days after the creditor has given a notice to the farmer under this section.

(2) The notice must—	1
(a) be in a form approved by the Authority; and	2
(b) inform the farmer of the creditor's intention to take enforcement action in relation the farm mortgage; and	3
(c) inform the farmer of the availability of mediation under this Act in relation to farm debts.	4
(3) This section does not apply if a certificate is in force under section 11 in relation to the farm mortgage.	5
(4) Despite subsection (1), a notice must not be issued to a farmer in relation to a farm property to which an exceptional circumstances certificate related until 12 months interest is unpaid after the certificate stopped having effect.	6
(5) In this section—	7
“ exceptional circumstances certificate ” means an exceptional circumstances certificate under the <i>Farm Household Support Act 1992</i> (Cwlth).	8
9 Farmer may request mediation	9
(1) A farmer who has been given notice under section 8 may, within 21 days after the notice was given, notify the creditor in writing that the farmer requests mediation of the farm debt.	10
(2) The notice may be in the form approved by the Authority.	11
(3) However, failure to use the approved form does not invalidate the notice.	12
10 Enforcement action postponed to allow for mediation	13
(1) Once a farmer has given a creditor a notice under section 9 requesting mediation, the creditor—	14
(a) must not take enforcement action in relation to the farm mortgage unless a certificate is in force under section 11 in relation to the farm mortgage; and	15
(b) must conduct an audit of the procedures, records, and fees charged in relation to the farmer's farm mortgage.	16

(2) The audit report must be certified by the Queensland Audit Office and a certified copy of the audit report presented at the mediation.

(3) The Queensland Audit Office cost for certification is to be paid by the creditor.

(4) This section does not invalidate a statutory enforcement notice or other process given to fulfil a condition precedent to the taking of enforcement action, but operates to prohibit the taking of action, or the enforcement by a court or tribunal of the process, except as provided by section 11(9).

11 Certificate that Act does not apply to farm mortgage

(1) The Authority must, on the application of a creditor under a farm mortgage, issue a certificate that this Act does not apply to the farm mortgage if the Authority is satisfied that—

- (a) satisfactory mediation has taken place in relation to the farm debt; or
- (b) the farmer has declined to mediate in relation to the farm debt; or
- (c) 3 months have elapsed after a notice was given by the creditor under section 8 and the creditor has throughout that period attempted to mediate in good faith. whether or not satisfactory mediation has taken place during that period.

(2) If the creditor has agreed in writing to extend the period that will be available to the farmer for the conclusion of mediation between the parties to beyond 3 months, the reference in subsection (1)(c) to a period of 3 months is taken to be a reference to the extended period.

(3) For subsection (1)(c), a failure by a creditor to agree to reduce or forgive any debt does not, of itself, demonstrate a lack of good faith on the part of a creditor in attempting to mediate.

(4) A farmer is presumed to have declined to mediate if any of the following circumstances is established—

- (a) the farmer has failed to take part in mediation in good faith or has unreasonably delayed entering into or proceeding with mediation;
- (b) the farmer has indicated in writing to the Authority or to the creditor that the farmer does not wish to enter into or proceed with mediation in relation to the farm debt;

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- (c) the farmer has failed to respond in writing, within 28 days, to an invitation that—
- (i) is made in writing by the creditor and is identified as an invitation under this paragraph; and
 - (ii) invites the farmer to attend a mediation session; and
 - (iii) indicates that a failure of the farmer to respond in writing to the invitation might be taken to be an indication that the farmer declines to mediate in relation to the farm debt.
- (5) A certificate may be given under this section, unless subsection (1)(c) applies, whether or not a notice has been given under section 8.
- (6) A certificate under this section remains in force until the date stated by the Authority in the certificate.
- (7) The date is to be calculated on the basis that the period for which the certificate is to be in force is—
- (a) if satisfactory mediation in relation to the farm debt has taken place—the period starting on the date the certificate was issued and ending on the 3rd anniversary of the last date of the mediation; or
 - (b) if the farmer has failed to take part in mediation in good faith—the period starting on the date the certificate was issued and ending on the 3rd anniversary of the last date of the mediation; or
 - (c) if the farmer has indicated in writing that the farmer does not wish to enter into or proceed with mediation—the period starting on the date the certificate was issued and ending on the 3rd anniversary of the date the indication was given to the Authority or creditor; or
 - (d) if the farmer has failed to respond in writing, within 28 days, to an invitation mentioned in subsection (4)(c)—the period starting on the date the certificate was issued and ending on the 3rd anniversary of the date that is 28 days after the invitation was given to the farmer; or
 - (e) if a notice was given by the creditor under section 8—the period starting on the date the certificate was issued and ending on the date that is 3 years and 3 months after the date the notice was given; or

- (f) if any other case in which a certificate is issued—the period of 3 years starting on the date the certificate was issued.

(8) A certificate may not be issued after the date on which a certificate would, if issued, expire under subsection (7).

(9) The expiry of a certificate under this section does not affect any proceedings for recovery of a farm debt, or for the exercise or enforcement of any right of the creditor, already taken or started by a creditor while the certificate was in force, and any proceedings may be continued and concluded as if the certificate were still in force.

(10) The reference in subsection (9) to the start of proceedings does not include a reference to the giving of any statutory enforcement notice or other action taken to fulfil a condition precedent to the enforcement of a right otherwise that through proceedings in a court or tribunal.

12 Cooling off period after mediated agreement

(1) There is to be a cooling off period for any written agreement entered into by a farmer during, or at the end of, a mediation session between the farmer and a creditor.

(2) The cooling off period may be extended by agreement between the farmer and the creditor.

(3) The cooling off period starts when the agreement is entered into and ends at 5 pm on the 14th day after the day on which the agreement is entered into, or at a later time on that or another day, as may be agreed by the farmer and the creditor.

(4) A statement in the form approved by the Authority, relating to the cooling off period, is required to be included in every written agreement entered into by a farmer during, or at the end of, a mediation session.

(5) If the agreement does not contain the statement required under subsection (4), the cooling off period is extended until the time the creditor gives the statement to the farmer.

(6) The cooling off period, as extended, ends at 5 pm on the 14th day after the statement is given.

(7) If either party fails to re-enter mediation, the aggrieved party may, within 90 days after the failure, start an appeal of the mediation agreed to, to a Court of competent jurisdiction.

(8) The Authority may not issue a certificate under section 11 to a creditor on the ground that satisfactory mediation in relation to a farm debt has taken place if—

(a) a written agreement relating to the farm debt was entered into during or at the end of, the mediation session; and

(b) the cooling off period has not expired.

(9) For this section, an agreement is taken to be entered into at the end of a mediation session if it is entered into within 24 hours of the end of the session and relates to matters the subject of the mediation session.

13 Rights during cooling off period

(1) The farmer may, during a cooling off period arising under section 12, serve a written notice on the creditor or the creditor's solicitor to the effect that the farmer rescinds the agreement subject to the cooling off period.

(2) The notice of rescission must be signed by the farmer or the farmer's solicitor.

(3) On service of a notice of rescission signed in accordance with this section, the agreement is taken to have been rescinded at the start of the agreement.

(4) If rescission occurs, the farmer or creditor is entitled to make a claim for the compensation, adjustment or accounting that is just and equitable between the farmer and the creditor if a party has received a benefit under the agreement.

(5) This section and section 12 do not affect any right or remedy available otherwise than under this section or section 12.

(6) A creditor may not make a claim under subsection (4) if the only basis of the claim is the rescission of the agreement under this section.

PART 3—GENERAL PROVISIONS FOR MEDIATION

14 Arrangements for mediation

(1) The Authority is to institute arrangements for the accreditation of suitably qualified and experienced persons as mediators for this Act and is

to consult with the Australian Bankers Association and the Queensland Farmers' Federation on those arrangements.

(2) The Authority is to make arrangements for the referral of parties to mediation for this Act.

(3) The Authority is not liable for any of the costs of or associated with mediation for this Act.

15 Functions of mediators

(1) The functions of a mediator are—

- (a) to mediate impartially or attempt to mediate impartially between the farmer and creditor for the purpose of arriving at an agreement for the present arrangements and future conduct of financial relations among them; and
- (b) to ensure all required documentation is available at the time of the mediation; and
- (c) to ensure that an agreement clarifying the matters on which mediation will occur is signed by the farmer and creditor on the day of the start of mediation.

(2) It is not a function of a mediator—

- (a) to advise a farmer or creditor about the law; or
- (b) to encourage or assist a farmer or creditor in reserving or establishing legal rights; or
- (c) to act as an adjudicator or arbitrator.

16 Conduct of mediation sessions

(1) The procedure for starting and conducting a mediation session is to be as determined by the Authority.

(2) Mediation sessions are to be conducted with as little formality and technicality, and with as much expedition, as possible.

(3) The rules of evidence do not apply to mediation sessions.

(4) A mediation session is not open to the public.

(5) Persons who are not parties to a mediation session—

(a) may be present at or participate in the session in an advisory or representative capacity if authorised to do so under section 19; or	1 2
(b) may otherwise be present at or participate in the session with the permission of the mediator.	3 4
17 Confidentiality of mediation sessions	5
(1) Evidence of anything said or admitted during a mediation session and a document prepared for, in the course of or pursuant to, a mediation session are not admissible in any proceedings in a court or before a person or body authorised to hear and receive evidence.	6 7 8 9
(2) In this section—	10
“mediation session” includes any steps taken in the course of making arrangements for a mediation session or in the course of the follow-up of a mediation session.	11 12 13
18 Disclosure of information	14
A person must not disclose any information obtained in a mediation session or in connection with the administration or execution of this Act unless the disclosure is made—	15 16 17
(a) with the consent of the person from whom the information was obtained; or	18 19
(b) in connection with the administration or execution of this Act; or	20
(c) as reasonably required for the purpose of referring a party to mediation to any person, agency, organisation or other body and, with the consent of the parties to the mediation, for the purpose of aiding in the resolution of an issue between the parties; or	21 22 23 24
(d) in accordance with a requirement imposed by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth; or	25 26 27
(e) with other lawful excuse.	28
Maximum penalty—20 penalty units or 6 months imprisonment.	29

PART 4—THIRD PARTY ENTITLEMENTS

19 Representation

(1) A party to mediation is not entitled to be represented by an agent unless it appears to the mediator that—

- (a) an agent should be permitted to facilitate the mediation; and
- (b) the agent proposed to be appointed has sufficient knowledge of the issue concerned to enable the agent to represent the party effectively; and
- (c) the mediator approves.

(2) Subsection (1) does not prevent a corporation that is a party to a mediation from being represented at the mediation by an officer of the corporation.

(3) If the mediator approves of the representation of a party by an agent, the approval of the mediator may be given subject to the conditions that the mediator considers reasonable to ensure that the other party to the mediation is not substantially disadvantaged by the agent appearing at the mediation and, if the mediator does approve, the entitlement of the agent to represent the party is subject to compliance by the agent with the conditions.

(4) A farmer who is a party to mediation is entitled to have an adviser present at any mediation session, who may but need not be legally or otherwise professionally qualified, and is entitled to call on the adviser for advice and counsel during the session.

(5) Nothing in subsection (4) affects the operation of section 16(1) to (3).

(6) For subsection (4), a farmer is entitled to legal assistance under the *Legal Aid Queensland Act 1997*.

(7) A contravention of this section does not invalidate a mediation.

20 Exclusion of personal liability of mediators and certain other persons

A matter or thing done or omitted to be done by a mediator or a person acting under the direction of a mediator does not, if the matter or thing was done or omitted to be done in good faith for the purposes of executing this

Act, subject the mediator or person personally to an action, liability, claim 1
or demand. 2

PART 5—MISCELLANEOUS 3

21 Act binds the Crown 4

This Act binds the Crown in right of Queensland and, so far as the 5
legislative power of Parliament permits, the Crown in all its other 6
capacities. 7

22 Contracting out prohibited 8

(1) A provision of an agreement or other instrument, whether in writing 9
or not and whether entered into before or after the commencement of this 10
Act, by which a person seeks to avoid, modify or restrict the operation of 11
this Act is void. 12

(2) A provision of an agreement or other instrument, whether in writing 13
or not and whether entered into before or after the commencement of this 14
Act, by which a person seeks to have a farmer, whether as debtor or 15
guarantor, or a guarantor indemnify a creditor for any loss or liability 16
arising under this Act is void. 17

(3) A creditor who is a party to an agreement or other instrument 18
mentioned in subsection (1) or (2) is guilty of an offence. 19

Maximum penalty—100 penalty units. 20

23 Waiver of rights void 21

A waiver of mediation rights under this Act is void. 22

24 Notices by mortgagee 23

If land is subject to a farm mortgage and another Act requires the 24
mortgagee to give notice to the mortgagor before exercising, in relation to 25
the land, a power or right conferred by the other Act or by the farm 26
mortgage— 27

- (a) nothing in this Act derogates from the requirement to give the notice under the other Act; and 1
2
- (b) a notice required by this Act to be given before the exercise of the power or right does not fail to comply with this Act only because it includes matter required to be specified in a notice required by the other Act to be given before exercise of the power or right. 3
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25 Manner of giving notice or other document 7

(1) If this Act requires or permits a notice or other document to be given, whether personally or by post, to the Authority or a mediator, the notice or other document may be given by leaving it at, or by sending it by post to— 8
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- (a) the office of the Authority; or 11
- (b) if it has more than one office, any one of its offices. 12

(2) If this Act requires or permits a notice or other document to be given to a person, other than the Authority or a mediator, the notice or other document may be given— 13
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- (a) to an individual— 16
 - (i) by delivering it to the individual personally; or 17
 - (ii) by leaving it at, or by sending it by post, telex, fax or similar electronic facility to, the address of the place of residence or business of the individual last known to the person giving the notice or other document; or 18
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- (b) to a body corporate— 22
 - (i) by leaving it at the registered office of the body corporate with an officer of the body corporate; or 23
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 - (ii) by delivering it to a director or secretary of the body corporate personally; or 25
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 - (iii) by sending it by post, telex, fax or similar electronic facility to the registered office of the body corporate or the address of the place of residence or business of a director or secretary of the body corporate. 27
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(3) Nothing in subsection (1) or (2)— 31

- (a) affects the operation of another law that authorises the service of a notice or other document otherwise than as provided in subsection (1) or (2); or 32
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34

- (b) affects the power of a court or tribunal to authorise service of a notice or other document otherwise than is provided in subsection (1) or (2). 1
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3

26 Date notice or other document is given 4

For this Act, a notice or other document is taken to be given— 5

- (a) for a notice or other document given personally—on the date it bears or the date it is received by the addressee, whichever is the later; or 6
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8
- (b) for a notice or other document sent by post—on the date it bears or the date when it would have been delivered in the ordinary course of post, whichever is the later; or 9
10
11
- (c) for a notice or other document sent by fax or some other form of electronic transmission—on the date it bears or the date on which the machine from which the transmission was sent produces a report indicating that the notice or other document was sent to the fax or other number of the addressee, whichever is the later. 12
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27 Proceedings for offences 17

A proceeding for an offence against this Act may be taken in a summary way under the *Justices Act 1886*. 18
19

28 Aiding, abetting and attempts 20

(1) A person who aids, abets, counsels or procures, or by act or omission is in any way directly or indirectly concerned in or a party to, the commission of an offence against this Act or the regulations is taken to have committed the offence and is liable to the penalty for the offence. 21
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(2) A person who attempts to commit an offence against this Act or the regulations commits an offence and is punishable as if the attempted offence had been committed. 25
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29 False or misleading certificates 28

(1) A person must not issue a certificate under this Act that the person knows is false or misleading in a material particular. 29
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Maximum penalty—100 penalty units. 31

(2) It is enough for a complaint against a person for an offence against subsection (1) to state that the information was ‘false or misleading’, without specifying whether it was false or whether it was misleading.

30 Offences by corporations

(1) If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each officer of the corporation is taken to have contravened the same provision if the officer knowingly authorised or permitted the contravention.

(2) An officer of a corporation may be proceeded against and convicted under this section whether or not the corporation has been proceeded against or been convicted under this section.

(3) Nothing in this section affects any liability imposed on a corporation for an offence committed by the corporation against this Act.

(4) In this section—

“**officer**” means a director of the corporation or a person who is otherwise concerned in its management.

31 Limitation

Despite anything in any Act, proceedings for an offence against this Act may be brought within 3 years after the commission of the offence or, with the consent of the Attorney-General, at any later time.

32 Regulation-making power

(1) The Governor in Council may make regulations under this Act.

(2) Without limiting subsection (1), regulation may impose a penalty of not more than 10 penalty units for a contravention of a provision of a regulation.

33 Legal Aid Queensland Act 1997 amended

Schedule 1 amends the *Legal Aid Queensland Act 1997*.

SCHEDULE 1

1

**AMENDMENT OF LEGAL AID QUEENSLAND
ACT 1997**

2

3

section 33

4

1 Section 11—

5

insert—

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‘(5) Legal assistance must be given to an applicant if the applicant is a
farmer who is a party to mediation under the *Farm Debt Mediation
Act 2003*.’.

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8

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SCHEDULE 2

1

DICTIONARY

2

section 4

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“Authority” means the Queensland Rural Adjustment Authority under the *Rural Adjustment Authority Act 1994*.

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“creditor” means a person to whom a farm debt is for the time being owed by a farmer.

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“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—

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(a) the completion of the sale of property held under the mortgage in relation to which contracts were exchanged before the commencement of this Act; or

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(b) the enforcement of a judgement that was obtained before the commencement of this Act.

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“farm” means land on which a farmer engages in a farming operation.

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“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.

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“farmer” means a person (whether an individual person or a corporation) who is solely or principally engaged in a farming operation and includes a person who owns land cultivated under a share-farming agreement and the personal representatives of a deceased farmer.

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“farming operation” means—

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(a) a farming (including dairy farming, poultry farming and bee farming), pastoral, horticultural or grazing operation; or

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(b) any other operation prescribed under a regulation for this definition.

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SCHEDULE 2 (continued)

“farm machinery” means—	1
(a) a harvester, binder, tractor, plough or other agricultural implement; or	2 3
(b) any other goods of a class commonly used for the purposes of a farming operation that are prescribed under a regulation as being farm machinery for this Act;	4 5 6
if the goods are acquired for the purposes of a farming operation.	7
“farm mortgage” includes any interest in, or power over, any farm property securing obligations of the farmer whether as a debtor or guarantor, but does not include—	8 9 10
(a) any stock mortgage or any crop or wool lien; or	11
(b) the interest of the lessor of any farm machinery that is leased.	12
“farm property” means a farm or part of a farm.	13
“hire purchase agreement” has the same meaning as it has in the <i>Duties Act 2001</i> .	14 15
“mediator” means a mediator for the time being accredited by the Authority under arrangements instituted by the Authority under this Act.	16 17 18
“Queensland audit office” means the Queensland audit office under the <i>Financial Administration and Audit Act 1977</i> .	19 20
“satisfactory mediation” means a mediation—	21
(a) that has achieved a resolution of a farm debt dispute; or	22
(b) that has proceeded as far as it reasonably can in an attempt to achieve a resolution of a farm debt dispute but has nevertheless failed to resolve the dispute; or	23 24 25
(c) prescribed under a regulation to be a satisfactory mediation.	26
“statutory enforcement notice” means a notice, given under an Act or statutory instrument, that is prescribed under a regulation for this definition.	27 28 29