

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S223 of 2011

BETWEEN:

ROSLYN EDWINA WALLER

Appellant

and

HIGH COURT OF AUSTRALIA
FILED
12 JUL 2011
THE REGISTRY SYDNEY

HARGRAVES SECURED INVESTMENTS LIMITED

Respondent

10

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

1 These submissions are in a form suitable for publication on the Internet.

PART II: ISSUES

2 Three issues arise under the *Farm Debt Mediation Act 1994* (NSW).

3 **Farm mortgage:** The Act provides that a “farm mortgage” comprises a farm debt secured by a mortgage over a farm. The respondent, a creditor with a statutory charge over a farm, agreed to extinguish the only farm debt secured by the charge and to create a new farm debt secured by the charge. Was a new “farm mortgage” created?

20 4 **Certificate:** A statutory authority has power to issue a certificate upon the application of a person to whom a farm debt is owed if it is satisfied that mediation has taken place in respect of that farm debt. The authority issued a certificate based on a mediation that had taken place in respect of a farm debt that had been extinguished prior to the application. Did the authority have power to issue the certificate?

5 **Enforcement action:** The Act provides that any action taken to enforce a farm mortgage otherwise than in compliance with the Act is void. By contravening the Act, a mortgagee obtained an order for possession of the mortgaged farm and a money judgment for the amount owing under the mortgage. Must either or both of the order for possession and the money judgment be set aside?

Filed on behalf of the appellant on 11 July 2011:

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PART III: JUDICIARY ACT 1903

6 The appellant has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* (Cth) and has determined that the matter does not require notice to be given.

PART IV: CITATIONS

7 The judgments of the courts below have the following citations:

Waller v Hargraves Secured Investments Ltd [2010] NSWCA 300

Hargraves Secured Investments Limited v Waller [2009] NSWSC 1210

PART V: FACTS

10 8 The appellant (**Ms Waller**) is a farmer who owns property situated at Hargraves near Mudgee, New South Wales. On three occasions, the respondent (**Hargraves**) loaned money to Ms Waller for the purposes of the conduct of her farming operation, secured by a statutory charge on her farm under the *Real Property Act 1900* (NSW) (**RPA**).

9 Ms Waller defaulted under the third loan agreement. Hargraves commenced proceedings claiming an order for possession of the mortgaged property and judgment for the money owed under the mortgage.

10 It is common ground that Ms Waller is a “*farmer*”, her property is a “*farm*”, Hargraves was a “*creditor*”, its loans to Ms Waller were “*farm debts*” secured by one or more “*farm mortgages*”, and its claim for possession constituted “*enforcement action*”¹ within the meaning of s 4 of the *Farm Debt Mediation Act 1994* (NSW).¹

11 The primary judge granted the relief sought. Tobias JA and Sackville AJA dismissed the appeal. Macfarlan JA held that the claim for possession should have been dismissed,² but that the money judgment should stand.³

The first loan and the successful mediation

12 Hargraves advanced the first loan to Ms Waller in 2003. She defaulted in 2004.⁴

13 The advance was secured by a statutory charge on her farm arising from an instrument of mortgage registered under the RPA. The instrument included an ‘all monies’ clause extending to all money owing at any time.⁵

¹ Harrison J at [1]; Macfarlan JA at [16], [22]; Sackville AJA at [100] with whom Tobias JA agreed at [13].

² Macfarlan JA at [86].

³ Macfarlan JA at [90].

⁴ Harrison J at [3]; Macfarlan JA at [15]-[16].

⁵ Harrison J at [35]; Tobias JA at [4]; Macfarlan JA at [15].

- 14 On 7 October 2004, Hargraves gave a notice under s 8 of the Act informing Ms Waller
of its intention to take enforcement action in respect of the farm mortgage.⁶
- 15 The notice identified various acts of default by Ms Waller in relation to the first loan
agreement occurring between March 2004 and October 2004.⁷
- 16 In June 2005,⁸ Hargraves and Ms Waller participated in a mediation under the Act.
In July 2005, they entered into a deed of settlement and a second loan agreement.⁹
- 17 By the deed, the parties agreed that all disputes were “settled on the terms and
conditions in this Deed”.¹⁰ By the second loan agreement, Hargraves agreed to
advance the principal amount of the first loan as well as a further advance.¹¹ The
10 advance of the principal amount was treated as repaying the first loan in full.¹²
- 18 The Court of Appeal held¹³ that the second loan agreement superseded the first loan
agreement, discharged all debts under that agreement, and created a new farm debt.
- 19 The primary judge found the parties intended to replace the first loan agreement with
the second¹⁴ but held the second loan agreement merely varied the amount of the debt.¹⁵

The third loan and the certificate

- 20 On 29 August 2006, Hargraves and Ms Waller entered into a third loan agreement.¹⁶
- 21 The Court of Appeal held that the third loan agreement superseded the second loan
agreement, discharged all debts under it, and created another new farm debt.¹⁷
- 22 Ms Waller defaulted under the third loan agreement on 5 October 2006.¹⁸ There was
20 no mediation and Hargraves did not issue a notice pursuant to s 8 of the Act.¹⁹

⁶ Harrison J at [81]; Macfarlan JA at [16], [45]; Sackville AJA at [99] with whom Tobias JA agreed at [13].

⁷ Sackville AJA at [102] with whom Tobias JA agreed at [13].

⁸ Harrison J at [50]; Macfarlan JA at [16], [18], [28], [36], [45], [59], [68]. The date of 5 June 2005 appears to have been based on the affidavit of John Brian Gorman sworn 29 April 2008 at [13]. However, in his affidavit sworn 9 October 2009 at [18], Mr Gorman deposed to the date of the mediation as 2 June 2005. The former date appears to have been a typographical error adopted by all parties. The latter date is consistent with the primary judge’s finding that the certificate expired on 2 June 2008: [11], [31]. (See also footnote 27.)

⁹ Harrison J at [4], [7]; Macfarlan JA at [16], [28]-[29].

¹⁰ Harrison J at [4], [33]; Macfarlan JA at [28].

¹¹ Macfarlan JA at [29].

¹² Macfarlan JA at [82] with whom Tobias JA agreed at [10].

¹³ Macfarlan JA at [78]-[79] with whom Tobias JA agreed at [10].

¹⁴ Harrison J at [33].

¹⁵ Harrison J at [29], [36].

¹⁶ Macfarlan JA at [17].

¹⁷ Macfarlan JA at [83] with whom Tobias JA agreed at [10].

¹⁸ Harrison J at [17]; Macfarlan JA at [33].

- 23 Hargraves applied to the New South Wales Rural Assistance Authority²⁰ (**Authority**) for a certificate pursuant to s 11(1) of the Act that the Act did not apply to its farm mortgage, and the Authority purported to issue a certificate on 20 October 2006.²¹
- 24 The certificate identified the “*security instrument*” as Hargraves’ registered mortgage instrument under the RPA, and identified the same farm debt that was particularised in the s 8 notice issued on 7 October 2004.²²
- 25 The certificate stated the amount of the debt owing “*as at date of issue of Section 8 Notice*” as \$488,250, referring to Ms Waller’s indebtedness under the first loan agreement prior to the mediation.²³ By contrast, the only debt owed to Hargraves at the time of its application was at least \$644,933.33 under the third loan agreement.²⁴
- 10 26 Unlike the s 8 notice, no acts of default were identified in the certificate. The certificate was indorsed with a notation that it expired on 2 June 2008.²⁵
- 27 It was common ground that the foundation for the certificate was the mediation that occurred in June 2005 in respect of the first loan agreement.²⁶ The primary judge²⁷ and the Court of Appeal²⁸ regarded the Authority as having issued the certificate pursuant to s 11(1)(c)(i) of the Act.
- 28 On 1 November 2007,²⁹ Hargraves commenced proceedings claiming possession of Ms Waller’s farm property and judgment for the amount owing under the mortgage.³⁰
- 29 On 12 November 2009, the primary judge ordered Ms Waller to give possession of her farm to Hargraves and entered a money judgment in favour of Hargraves for the amount owing under the mortgage.
- 20 30 On 11 November 2010, Ms Waller’s appeal was dismissed by majority. Macfarlan JA held that the claim for possession should have been dismissed³¹ but that the money judgment should stand.³²

¹⁹ Harrison J at [1].

²⁰ *Rural Assistance Act 1989* (NSW) s 4. It is a corporation and a statutory body representing the Crown.

²¹ Macfarlan JA at [18], [36]; Sackville AJA at [95] with whom Tobias JA agreed at [13].

²² Macfarlan JA at [36].

²³ Harrison J at [12]; Macfarlan JA at [36]; Sackville AJA at [102] with whom Tobias JA agreed at [13].

²⁴ Harrison J at [12].

²⁵ Harrison J at [11].

²⁶ Macfarlan JA at [36].

²⁷ Harrison J at [18], [31]; Macfarlan JA at [18]. This is a necessary inference from the conclusions of Harrison J that the Authority was required to be satisfied that satisfactory mediation had taken place in respect of the farm debt involved: [18] and that the expiry date of the certificate, 2 June 2008, was determined by s 11(5)(a): [31].

²⁸ Tobias JA at [10]-[11]; Macfarlan JA at [36], [44]; Sackville AJA at [106], [112]-[115], [122].

²⁹ Harrison J at [8]; cf Sackville AJA at [100].

³⁰ Macfarlan JA at [87].

PART VI: ARGUMENT

Summary of argument

- 31 The appeal must be allowed for three reasons.
- 32 *First*, section 8 of the Act applied to the respondent. There was no certificate in force “*in respect of the farm mortgage concerned*” within the meaning of s 8(3) because:
- (a) the “*farm mortgage concerned*” was the “*farm mortgage*” sought to be enforced by the respondent, comprising the farm debt owed under the third loan agreement and the respondent’s statutory charge on the farm; and
 - (b) there was no certificate in force in respect of that “*farm mortgage*” because:
 - i. the certificate dated 20 October 2006 was ultra vires and void; or
 - ii. alternatively, the certificate was issued in respect of a previous “*farm mortgage*”, comprising the farm debt owed under the first loan agreement and the respondent’s statutory charge on the farm.
- 10 33 *Secondly*, the respondent did not comply with section 8 of the Act. The words “*the farm mortgage*” in s 8(2) referred to the “*farm mortgage*” sought to be enforced by the respondent and no notice was given in respect of that “*farm mortgage*”.
- 34 *Thirdly*, as a consequence of the respondent’s non-compliance with the Act, section 6 requires the relief granted by the primary judge to be set aside. In particular:
- (a) The non-complying “*enforcement action*” was the inclusion in the respondent’s statement of claim of:
 - i. the claim for possession of the mortgaged property; and
 - ii. the claim for judgment in the amount owing under the mortgage,both of which answer the description of “*action to enforce the [farm] mortgage*”.
 - (b) Alternatively, the intention manifested by s 6 is that a creditor is forbidden, by taking enforcement action otherwise than in compliance with the Act, to improve its position with respect to the enforcement of its farm mortgage.
- The existence of the money judgment gives the respondent the benefit of an issue estoppel with respect to all findings concerning the mortgage which impermissibly improves its position with respect to enforcement.
- 20 35 For those reasons, the order for possession and the money judgment must be set aside.

³¹ Macfarlan JA at [86].

³² Macfarlan JA at [90].

Overview of statutory scheme

- 36 The object of the Act is to “*provide for the efficient and equitable resolution of farm debt disputes*” by making provision for mandatory mediation “*before a creditor can take possession of property or other enforcement action under a farm mortgage*” (s 3).
- 37 Effect is given to that object by prohibiting a creditor from taking enforcement action prior to notifying the farmer of its intention to do so (s 8(1)) and by prohibiting a creditor from taking enforcement action if a farmer has requested mediation (s 10(1)).
- 38 Creditors are persons “*to whom a farm debt is for the time being owed*” (s 4(1)). The Act applies to them “*only in so far as they are creditors under a farm debt*” (s 5(1)).
- 10 39 A creditor to whom money under a “*farm mortgage*” is owed by a farmer must not take “*enforcement action*” against the farmer in respect of “*the farm mortgage*” until at least 21 days have elapsed after the creditor has given a notice to the farmer (s 8(1)).
- 40 Within this period of 21 days, the farmer may notify the creditor in writing that the farmer requests mediation concerning “*the farm debt involved*” (s 9(1)). This step may also be taken voluntarily by a farmer where no notice has been given (s 9(1A)).
- 41 If the farmer requests mediation concerning “*the farm debt involved*”, the creditor must not take “*enforcement action*” in respect of “*the farm mortgage concerned*”, unless a certificate is in force under s 11 in respect of “*the farm mortgage*” (s 10(1)).
- 20 42 Any “*enforcement action*” taken otherwise than in compliance with the Act, including “*any ... action to enforce the [farm] mortgage*” (s 4(1)), “*is void*” (s 6).
- 43 Once the period of 21 days has elapsed without the farmer requesting mediation in accordance with s 9, there is no prohibition on the creditor taking enforcement action in respect of the farm mortgage.
- 44 Various other provisions of the Act prohibit creditors from contracting out of the Act and make it an offence for a creditor to be party to such an agreement (ss 20, 21).

The Court of Appeal

- 45 The decision of the Court of Appeal turned on the definition of “*farm mortgage*”. The prohibition on enforcement action in s 8 of the Act applied to the respondent unless there was a certificate in force “*in respect of the farm mortgage concerned*” (s 8(3)).
- 30 46 Macfarlan JA held that the term “*farm mortgage*” did not refer to “*the instrument of mortgage*”, but rather to the “*interest or power*” created by that instrument.³³
- 47 Accordingly, the term was to be construed “*as a reference to the interest in, or power over, the farm property that secures the particular farm debt that is the subject of the*

³³ Macfarlan JA at [49].

creditor's intended enforcement action",³⁴ and "an instrument of mortgage such as that being considered here is to be regarded, for the purposes of the Act, as giving rise to as many security interests (that is, mortgages) as there are separate debts".³⁵

- 48 Sackville AJA held that "there is nothing in the definition of 'farm mortgage' which refers to a particular farm debt being secured",³⁶ and that "[t]he farm mortgage is the interest in the appellant's property created by the mortgage instrument identified in the certificate".³⁷
- 49 Tobias JA conceded that the construction of Sackville AJA "might give rise to some unintended consequences" and observed that his Honour's solution was "not altogether satisfactory".³⁸ Tobias JA nevertheless agreed with Sackville AJA.³⁹
- 10 50 The majority erred in failing to distinguish between the "farm mortgage" that existed at the time of the first loan agreement, in respect of which a certificate had purportedly been issued, and the "farm mortgage" that existed at the time of the third loan agreement, in respect of which there could never have been a certificate in force.

The approach to the construction of the term "*farm mortgage*"

- 51 The majority erred did not determine or consider the ordinary meaning of the term "farm mortgage" and, in failing to do so, the majority erred.
- 52 The term "farm mortgage" is not defined by the Act "other than by having specifically included in its otherwise undefined meaning" certain interests and powers,⁴⁰ and by having excluded from its otherwise undefined meaning certain other interests.
- 20 53 The approach to the construction of the word "includes" where it appears in a statutory definition is well-established.⁴¹ There is no rule of construction which requires inclusive words to be read as exclusive of any elements which otherwise fall within the meaning of the word or expression being defined.⁴² It follows that the scope of the word or expression cannot be determined without reference to its undefined meaning.

³⁴ Macfarlan JA at [65].

³⁵ Macfarlan JA at [65].

³⁶ Sackville AJA at [116].

³⁷ Sackville AJA at [121].

³⁸ Tobias JA at [7].

³⁹ Tobias JA at [13].

⁴⁰ *Australian Cherry Exports Ltd v Commonwealth Bank of Australia* (1996) 39 NSWLR 337 at 338 per Priestley JA; see *Farm Debt Mediation Act 1994* (NSW) s 4(1).

⁴¹ *YZ Finance Co Pty Ltd v Cummings* (1964) 109 CLR 395 at 398-399 per McTiernan J with whom Windeyer J agreed, 401-402 per Kitto J, 405 per Menzies J. See also *R v Gray; Ex parte March* (1985) 157 CLR 351 at 364-365 per Gibbs CJ with whom Mason, Wilson, Brennan, Deane and Dawson JJ agreed.

⁴² *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 330 per Toohey, McHugh and Gummow JJ, citing *Favelle Mort Ltd v Murray* (1976) 133 CLR 580 at 588-589 per Barwick CJ, citing *Darling Island Stevedoring & Lighterage Co Ltd v Hussey* (1959) 102 CLR 482 at 492 per Dixon CJ.

- 54 It has also been held that, if the matters included are expansive in their operation then, ordinarily, the definition is not exclusive.⁴³ The position is otherwise only where it appears from the context that the definition was intended to be exhaustive.
- 55 There are 17 definitions in s 4(1) of the Act. Only two of those definitions use the word “*includes*” instead of providing an exhaustive definition. There is no basis for supposing that the word “*includes*” in the definition of “*farm mortgage*” was intended to have anything other than its ordinary expansive meaning.
- 56 Accordingly, the correct approach to the construction of the statutory definition was:
- 10 (a) *first*, to construe the words “*farm mortgage*” according to ordinary concepts, unaided by the inclusive and exclusive provisions, having regard to the whole of the Act including its scope, object and purpose; and
- (b) *secondly*, to modify that construction to the extent necessary to include or exclude such of the matters contained in the inclusive or exclusive provisions as might not otherwise have been included in it or excluded from it.
- 57 These submissions will apply that approach to arrive at the correct construction of the term “*farm mortgage*” and then proceed to answer the question of whether there was a certificate in force with respect to that “*farm mortgage*” (s 8(3)).

The ordinary meaning of “*farm mortgage*”

- 58 The term is a composite expression consisting of the words “*farm*” and “*mortgage*”, each of which has its own meaning:
- 20 (a) the word “*farm*” is defined in s 4(1) as “*land on which a farmer engages in a farming operation*” which is consistent with its ordinary meaning; and
- (b) the word “*mortgage*” has a technical legal meaning, discussed in the next section, referring to the conveyance of land as security for the performance of an obligation or the charging of land with payment of a debt.
- 59 The *prima facie* meaning of the expression “*farm mortgage*” appears to centre on the provision of a “*farm*” as security for the performance of an obligation.
- 60 More is required, however, before the provision of a “*farm*” as security for the performance of an obligation constitutes a “*farm mortgage*”.
- 30 61 The “*farm mortgage*” must also secure a “*farm debt*”, that requirement being demonstrated by the terms of Part 2 of the Act, s 5(1), and the definitions of “*creditor*” and “*farm debt*” in s 4(1):

⁴³ *Federal Commissioner of Taxation v St Hubert's Island Pty Ltd (in liq)* (1978) 138 CLR 210 at 216 per Stephen J, 224-225 per Mason J with whom Jacobs and Murphy JJ agreed, 243 per Aickin J.

- (a) *First*, the operative provisions of the mediation regime prescribed by Part 2 of the Act do not apply to mortgagees generally but apply only to “*creditors*”. Mediation under Part 2 can only take place in respect of a “*farm debt*”.
 - (b) *Secondly*, a “*creditor*” is a person “*to whom a farm debt is for the time being owed by a farmer*” and, by reason of s 5(1), the Act applies to creditors “*only in so far as they are creditors under a farm debt*”.
 - (c) *Thirdly*, the “*farm debt*” owed to the creditor is a debt which, amongst other things, must be “*secured wholly or partly by a farm mortgage*”. Thus a “*creditor*” will always be owed a “*farm debt*” under a “*farm mortgagee*”.
- 10 (d) *Fourthly*, a “*farm mortgage*” is a legal construct to which the Act applies, and there can be no meaningful reference to a “*farm mortgage*” outside of the Act.
- (e) *Fifthly*, by reason of the foregoing propositions, the Act neither contemplates nor applies to a “*farm mortgage*” which does not secure a “*farm debt*”.
- 62 It follows that every “*farm debt*” is secured by a “*farm mortgage*” and every “*farm mortgage*” secures a “*farm debt*”.
- 63 In conclusion, a “*farm mortgage*” arises only where a “*farm*” has been conveyed as security for, or a “*farm*” has been charged with payment of, a “*farm debt*”. The term “*farm mortgage*” refers to the complex of obligations existing in those circumstances.

The technical legal meaning of “mortgage”

- 20 64 This section supports the proposition that the word “*mortgage*” has a technical legal meaning involving the provision of security for the performance of an obligation.
- 65 The technical legal meaning of the term embraces, at law, a conveyance of land or an assignment of chattels by way of security; in equity, a charge of land with payment of a debt; and statutory charges created for securing the payment of a debt.
- 66 The “*classic definition of a mortgage*”⁴⁴ at common law is that given by Lindley MR:
*“a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given.”*⁴⁵
- 67 One of the “*central features*”⁴⁶ of a mortgage is that it provides security for the performance of an obligation – “*usually*”⁴⁷ and “*most frequently*”⁴⁸ a money debt.

⁴⁴ *Handeval Pty Ltd v Comptroller of Stamps (Vic)* (1985) 157 CLR 177 at 192 per Mason, Wilson, Deane and Dawson JJ. See also *Figgins Holdings Pty Ltd v SEAA Enterprises Pty Ltd* (1999) 196 CLR 245 at 261 per Gaudron, Gummow and Callinan JJ.

⁴⁵ *Santley v Wilde* [1899] 2 Ch 474 at 474 per Lindley MR.

⁴⁶ *Beyham Investments Pty Ltd v Belgot Pty Ltd* (1982) 149 CLR 494 at 499 per Gibbs CJ, Mason, Murphy and Wilson JJ.

- 68 In equity, the security operates as a charge on the land, with the agreement being the measure of the security. The position of the parties is that of “*secured creditor and debtor*”,⁴⁹ and the release of a debt also releases any security held in respect of it.⁵⁰
- 69 Under the RPA, a mortgage is not a conveyance or transfer of the mortgagor’s estate or interest in the land but is “*a charge on that estate or interest*” created by statute.⁵¹
- 70 Section 3(1)(a) of the RPA defines a “*mortgage*” to be “[a]ny charge on land (other than a covenant charge) created merely for securing the payment of a debt”, and s 57(1) provides that a mortgage under that Act “*has effect as a security*”.
- 71 In contrast to the breadth of the classic definition, a mortgage under the RPA is restricted “*to cases in which security is taken for a debt or a loan*”.⁵²
- 10

The statutory meaning of “farm mortgage”

- 72 The majority erred in holding that “*there is nothing in the definition of ‘farm mortgage’ which refers to a particular farm debt being secured*”.⁵³
- 73 The appellant has submitted that the ordinary meaning of the term “*farm mortgage*” refers to the conveyance of a “*farm*” as security for, or the charging of a “*farm*” with, payment of a “*farm debt*”. It follows that a “*farm mortgage*” cannot be identified without first identifying the particular “*farm debt*” in respect of which the farm has been conveyed as security or with which the farm has been charged.
- 74 For this reason, the legislature could not have intended the term “*farm mortgage*” to include a statutory charge on land which, although indefeasible, secures nothing.⁵⁴
- 20
- 75 The statutory definition of “*farm mortgage*”, correctly understood, does no more than modify the ordinary meaning of “*farm mortgage*” to include or exclude that which might not otherwise have been included in it or excluded from it.

⁴⁷ *Handeval Pty Ltd v Comptroller of Stamps (Vic)* (1985) 157 CLR 177 at 192 per Mason, Wilson, Deane and Dawson JJ.

⁴⁸ *Cambridge Credit Corporation Ltd v Lombard Australia Ltd* (1977) 136 CLR 608 at 615 per Barwick CJ, Mason and Jacobs JJ.

⁴⁹ *Figgins Holdings Pty Ltd v SEAA Enterprises Pty Ltd* (1999) 196 CLR 245 at 263 per Gaudron, Gummow and Callinan JJ.

⁵⁰ Tyler, Young & Croft, *Fisher & Lightwood’s Law of Mortgage* (2005) [34.2]; J & WT Clarke, *Sheppard’s Touchstone of Common Assurances* (1821) 342; *Cowper v Green* (1841) 7 M & W 633; 151 ER 920.

⁵¹ *Cambridge Credit Corporation Ltd v Lombard Australia Ltd* (1977) 136 CLR 608 at 615 per Barwick CJ, Mason and Jacobs JJ.

⁵² *Cambridge Credit Corporation Ltd v Lombard Australia Ltd* (1977) 136 CLR 608 at 615 per Barwick CJ, Mason and Jacobs JJ; see *Real Property Act 1900* (NSW) s 3(1)(a).

⁵³ Sackville AJA at [116] with whom Tobias JA agreed at [5], [13].

⁵⁴ This possibility is discussed in *Perpetual Trustees Victoria Ltd v English* [2010] NSWCA 32 at [79] per Sackville AJA with whom Allsop P and Campbell JA agreed.

- 76 The express inclusions and exclusions are of little assistance in this case as the only possible “*farm mortgages*” under consideration fall within the ordinary meaning of the term and are not excluded.
- 77 For completeness, however, it should be noted that the express inclusions expand the ordinary meaning to include interests in chattels. For example, interests in “*farm machinery*” such as tractors acquired for the purposes of a farming operation.
- 78 Since 2005,⁵⁵ the statutory definition also extends to interests in water access licences, which are capable of being offered as security for debts under the *Water Management Act 2000* (NSW). Such licences can be traded independently of the land.
- 10 79 On one view, the intention of the broad inclusive provisions, rather than to expand the ordinary notion of a “*farm mortgage*”, is to expand the scope of the prohibitions on “*enforcement action*” imposed by s 8(1) and s 10(1).
- 80 This is because a creditor must always be owed a “*farm debt*” secured by a “*farm mortgage*” but may seek to enforce obligations or exercise powers unrelated to payment of the debt. By including certain interests and powers in the definition of “*farm mortgage*”, action to enforce those interests and powers is prohibited.
- 81 In every case, however, the “*farm mortgage*” must nevertheless secure a “*farm debt*”, or the Act does not apply (s 5(1)).

Identification of “*the farm mortgage concerned*”

- 20 82 Tobias JA correctly held that:
- There can be no doubt that the reference in s 8(3) to “*the farm mortgage concerned*” is a reference to the farm mortgage in respect of which the creditor seeks to take enforcement action.*⁵⁶
- 83 On that basis, the following questions arise:
- What was the “*farm mortgage*” sought to be enforced by the respondent?
 - Was there a certificate in force with respect to that “*farm mortgage*”?
- 84 For the reasons advanced earlier in these submissions, the “*farm mortgage*” sought to be enforced by the respondent necessarily comprised either a conveyance of a “*farm*” for, or the charging of a “*farm*” with, payment of a “*farm debt*”.
- 30 85 In this case, the mortgage component took the form of a statutory charge on land under the RPA. The identification of the “*farm mortgage*” rests on the identification of the “*farm debt*” with which the land was charged.

⁵⁵ *Farm Debt Mediation Amendment (Water Access Licences) Act 2005* (NSW).

⁵⁶ Tobias JA at [7].

- 86 At the time at which the respondent commenced proceedings, the appellant's land was charged with the "*farm debt*" arising under the third loan agreement. It follows that the "*farm mortgage*" sought to be enforced by the respondent comprised the farm debt owed under the third loan agreement and the respondent's statutory charge.
- 87 There was no certificate in force in respect of that "*farm mortgage*" because:
- (a) the certificate purportedly issued on 20 October 2006 was ultra vires; or
 - (b) alternatively, the certificate was issued in respect of a previous "*farm mortgage*" comprising the farm debt owed under the first loan agreement and the respondent's statutory charge.
- 10 **The certificate was ultra vires and void**
- 88 There are two bases upon which the certificate in this is challenged:
- (a) The only farm debt identified by the certificate was that particularised in the earlier s 8 notice. The certificate was thus issued in contemplation of the first farm debt rather than the third farm debt, and the first farm debt had been extinguished by the time the respondent applied for a certificate.
 - (b) No reasonable authority could have reasonably formed a satisfaction that any kind of mediation had taken place in respect of the third farm debt as neither mediation nor an attempt to mediate ever took place in respect of that debt.
- 89 Section 11 of the Act provides that, "*on the application of a creditor under a farm mortgage*", the Authority must issue a certificate if, amongst other things, the Authority is satisfied of one of the three matters enumerated in s 11(1)(c).
- 20 90 In this context, the relevant satisfaction must be based on reasonable grounds.⁵⁷ Each of the three matters enumerated in s 11(1)(c) is directed to "*the farm debt involved*".
- 91 As the applicant must be a "*creditor*" and a person "*to whom a farm debt is for the time being owed*" (s 4(1)), the words "*the farm debt involved*" must refer to a farm debt owed to the creditor at the time of the application.
- 92 The certificate purportedly issued on 20 October 2006 identified "*the farm debt involved*" as the farm debt which existed "*as at date of issue of Section 8 Notice*".⁵⁸ The particulars appearing on the face of both instruments are identical.
- 30 93 The farm debt so identified was not a debt owed to the creditor at the time of its application. By failing correctly to identify "*the farm debt involved*", the Authority committed jurisdictional error.

⁵⁷ *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 150 [34] per Gleeson CJ, Gummow, Kirby and Hayne JJ; *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 per Dixon J.

⁵⁸ Harrison J at [12]; Macfarlan JA at [36]; Sackville AJA at [102] with whom Tobias JA agreed at [13].

- 94 The majority in the Court of Appeal erred in holding that “*a certificate might issue in respect of a debt that has since been extinguished*”,⁵⁹ and erred in failing to hold that this certificate was ultra vires because it had been issued in those circumstances.
- 95 The second challenge concerns the satisfaction of the Authority. It was common ground that the foundation for the certificate was the mediation in respect of the first loan agreement.⁶⁰ The primary judge⁶¹ and the Court of Appeal⁶² regarded the certificate as having been issued by the Authority pursuant to s 11(1)(c)(i) of the Act.
- 96 Subparagraphs (ii) and (iii) do not expressly refer to “*the farm debt involved*”, but the only rational construction of those subparagraphs is that the term “*mediate*” is to be read as meaning “*mediate in respect of the farm debt involved*”.
- 10 97 Thus the farmer’s declination to mediate under subparagraph (ii) or the creditor’s failure to attempt to mediate in good faith under subparagraph (iii) must be in respect of “*the farm debt involved*” and not some other debt (such as a different farm debt or a non-farm debt).
- 98 There can be no suggestion that the section contemplates mediation in respect of a debt that is owed to a person other than the applicant for the certificate, or that it contemplates mediation in respect of a debt that is no longer owed at all.
- 99 In this case, the only farm debt owed to the respondent at the time of its application arose from the third loan agreement. The parties agreed and the primary judge found 20 there had been no mediation in respect of that farm debt.⁶³
- 100 The term “*satisfactory mediation*” is defined by s 4(1A) as meaning “*a mediation*” answering one of three descriptions. However, there cannot have been “*a mediation*” under s 4 where there has been “*no mediation*” in respect of the farm debt involved.
- 101 It follows that there were no grounds upon which the Authority could have attained the degree of satisfaction required by s 11(1)(c)(i).
- 102 For similar reasons, the grounds in subparagraphs (ii) and (iii) were also not available:
- (a) in relation to s 11(1)(c)(ii), Ms Waller never declined to mediate; and
 - (b) in relation to s 11(1)(c)(iii), the respondent could not have attempted to mediate in good faith in respect of “*the farm debt involved*” during the three

⁵⁹ Sackville AJA at [126] with whom Tobias JA agreed at [13]; cf Macfarlan JA at [56].

⁶⁰ Macfarlan JA at [36].

⁶¹ Harrison J at [18], [31]; Macfarlan JA at [18]. This is a necessary inference from the findings of Harrison J that the Authority was required to be satisfied that satisfactory mediation had taken place in respect of the farm debt involved: [18] and that the expiry date of the certificate, 2 June 2008, was determined by s 11(5)(a): [31].

⁶² Tobias JA at [10]-[11]; Macfarlan JA at [36], [44]; Sackville AJA at [106], [112]-[115], [122].

⁶³ Harrison J at [1].

months after it gave the s 8 notice, for the reason that the third loan agreement did not exist until almost two years after that notice was given.

- 103 The conclusion must be that the Authority's power to issue the certificate was not enlivened. As the certificate is unlawful administrative action open to collateral challenge,⁶⁴ it must be denied legal force and effect.⁶⁵

The certificate was issued in respect of a previous “farm mortgage”

- 104 In the alternative, if the certificate was not void, it could only have been issued in respect of a previous “farm mortgage” and not the “farm mortgage” sought to be enforced by the respondent.

- 10 105 When the respondent extinguished the farm debt owed under the first loan agreement:
- (a) the “farm mortgage” comprising the farm debt under that loan agreement and the respondent's statutory charge was extinguished; and
 - (b) the Act ceased to apply to the respondent (s 5(1)).

- 106 The Act recommenced its application with the incurrence of the new farm debt under the second loan agreement and the concomitant creation of a new “farm mortgage”.

- 107 The same process occurred when the respondent agreed to extinguish the farm debt owed under the second loan agreement and to create another new farm debt. In the circumstances of this case, that process gave rise to a third “farm mortgage”.

- 108 The authorities cited by the Court of Appeal supported this approach:

- 20 “[I]f a bank has an ‘all moneys’ mortgage and at any stage it debits that account with an amount which the customer owes where the customer incurred that debt for the purpose of a farming operation, there is a farm debt and if that farm debt is secured, then there is a farm mortgage.”⁶⁶

- 109 In this case, the certificate issued by the Authority identified only the farm debt owed under the first loan agreement. It follows that the certificate could not have been issued in respect of any “farm mortgage” other than the “farm mortgage” comprised of the first farm debt and the respondent's statutory charge.

- 110 That was not the “farm mortgage” which the respondent sought to enforce.

⁶⁴ *Ousley v R* (1997) 192 CLR 69 at 79-80 per Toohey J, 87 per Gaudron J, 105 per McHugh J, 124 per Gummow J and 147-148 per Kirby J.

⁶⁵ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 506 [76] per Gaudron, McHugh, Gummow and Kirby JJ.

⁶⁶ *Varga v Commonwealth Bank of Australia* (1996) 7 BPR 15,052.

The Court of Appeal's construction

- 111 The majority in the Court of Appeal erred in holding that “[t]he farm mortgage is the interest in the appellant’s property created by the mortgage instrument identified in the certificate”.⁶⁷
- 112 That conclusion is tantamount to an assertion that “the farm mortgage is the statutory charge created by the Real Property Act” and, logically, that “farm mortgage” means “mortgage”. The majority held that the words of the statute were “reasonably clear”.⁶⁸
- 113 However, if the “apparently plain” words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, “they may wear a very different appearance”.⁶⁹
- 10 114 In relation to this Act, the context, general purpose and policy of a statutory provision may be “surer guides to its meaning than the logic with which it is constructed”.⁷⁰ The modern approach to statutory construction uses ‘context’ in its widest sense.⁷¹
- 115 Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions.⁷²
- 116 The consequence of the majority’s conclusion that “farm mortgage” means “the statutory charge created by the Real Property Act” is this: where a creditor with an ‘all moneys’ mortgage under the RPA gives a notice to a farmer under s 8, and the farmer does not request mediation within 21 days in accordance with s 9(1), the farmer forfeits the protection of the Act with respect to that mortgage for all time.
- 20 117 This is because the prohibition in s 8(1) has no application where 21 days have elapsed after the notice was given, and the prohibition in s 10(1) has no application unless the farmer has requested mediation in accordance with s 9.

⁶⁷ Sackville AJA at [121] with whom Tobias JA agreed at [7], [13].

⁶⁸ Sackville AJA at [132] with whom Tobias JA agreed at [5], [13].

⁶⁹ *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ, citing *Isherwood v Butler Pollnow Pty Ltd* (1986) 6 NSWLR 363 at 388 per McHugh J.

⁷⁰ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ, citing *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397 per Dixon CJ.

⁷¹ *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.

⁷² *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [70] per McHugh, Gummow, Kirby and Hayne JJ, citing *Australian Alliance Assurance Co Ltd v Attorney-General (Q)* [1916] St R Qd 135 at 161 per Cooper CJ and *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565 at 574 per Gummow J.

- 118 Once that occurs, the requirement to issue a notice under s 8 will never again arise with respect to that mortgage, and the farmer is no longer entitled to request mediation in accordance with s 9. In the absence of a prohibition on enforcement action, it does not matter whether a certificate has been issued under s 11 or not.
- 119 In practice, the problem will arise in the following way. Lenders are notorious for using ‘all moneys’ mortgages as a matter of course, securing such debts as may be owed from time to time. The borrowing habits of farmers have been recognised by at least one judge at first instance:
- 10 “*It is quite common with farmers and graziers for a debt to be incurred to a bank and then to be completely repaid when there is a good season, but then further obligations to the bank to build up during bad seasons or even between wool clips.*”⁷³
- 120 The majority erred in assuming that ‘once a farm mortgage, always a farm mortgage’. Although that may apply to mortgages, it has no application to “farm mortgages”.
- 121 On the majority’s construction, a single failure to mediate will irretrievably deprive a farmer of a right to mediate under the Act with respect to any farm debts subsequently secured by an ‘all moneys’ mortgage, even where there is no relationship between the farm debts or there has been a passage of some years between debts.
- 122 That consequence cannot be said to promote “*the efficient and equitable resolution of farm debt disputes*”. A construction which promotes that object is to be preferred.
- 20 123 The provisions of the Act do not satisfactorily deal with the case of a registered mortgage expressed to be an ‘all moneys’ mortgage. Such a mortgage may secure both “farm debts” and non-farm debts.
- 124 However, in that case, a further consequence of the construction favoured by the majority is this: if the farmer never defaults in respect of a “farm debt” secured by the mortgage, the mortgage will never be enforceable, regardless of the number or extent of the farmer’s defaults with respect to non-farm debts secured by the same mortgage.
- 125 That consequence follows from the conclusion of the majority that the term “farm mortgage” refers to the legal interest or statutory charge, and not to that interest insofar as it secures a farm debt, or to that charge insofar as land is charged with the farm debt.
- 30 126 In this example, the construction adopted by the majority facilitates the resolution of farm debt disputes, but almost precludes the resolution of non-farm debt disputes.
- 127 The solution to that problem is to invoke s 5(1) of the Act to limit its application to creditors “*only in so far as they are creditors under a farm debt*” (s 5(1)). That solution is not capable of being reconciled with the majority’s conclusion that the Act does not refer to any particular farm debt being secured.

⁷³ *Varga v Commonwealth Bank of Australia* (1996) 7 BPR 15,052 per Young J.

- 128 There is, of course, nothing in the Act to compel a distinction between farm debts secured by separate instruments of mortgage and farm debts secured by a single instrument of mortgage expressed to secure ‘all moneys’ owed. The same result should obtain in both cases. The provisions of the Act do not recognise any mortgage that is not a “*farm mortgage*” and do not recognise instruments of mortgage at all.
- 129 The Act is remedial in character and must be beneficially construed “*so as to give the most complete remedy which is consistent ‘with the actual language employed’ and to which its words ‘are fairly open’*”.⁷⁴
- 130 The construction advanced by the appellant is consistent with the language of the Act and is one to which its words are fairly open. It promotes the object and purpose of the Act and avoids the “*unintended consequences*”⁷⁵ of the decision of the majority.
- 10 131 For these reasons the appellant’s construction is to be preferred.
- The “*enforcement action*” contemplated by the Act**
- 132 The majority in the Court of Appeal did not consider whether s 6 of the Act required either or both of the order for possession and the money judgment to be set aside.
- 133 It is common ground that the claim for possession fell within the definition of “*enforcement action*”.⁷⁶ The question is whether the claim for a money judgment in the amount owing under the mortgage was similarly precluded.
- 20 134 The object of the Act is expressly addressed to the resolution of “*farm debt disputes*”. Section 5(1) provides that the Act applies in respect of creditors “*only in so far as they are creditors under a farm debt*”.
- 135 There is no principled justification for permitting creditors to destroy the operation of the mandatory mediation regime by obtaining money judgments in respect of farm debts that would otherwise have to be mediated.
- 136 The sole protection provided by the Act for farmers is mediation. A “*farm mortgage*” must secure a “*farm debt*”. For mediation to provide any protection, *first*, the mediation must take place in respect of the particular farm debt and, *secondly*, prior to mediation, the status quo must be maintained.
- 137 In an earlier decision, Cole JA was correct to hold⁷⁷ that the only “*enforcement action*” contemplated by the Act is “*enforcement action*” taken after there has been compliance with the provisions of Part 2 of the Act; in particular, mediation in respect
- 30

⁷⁴ *Khouri v Government Insurance Office (NSW)* (1984) 165 CLR 622 at 638 per Mason, Brennan, Deane and Dawson JJ.

⁷⁵ Tobias JA at [7]; Macfarlan JA at [63].

⁷⁶ Macfarlan JA at [22], [44].

⁷⁷ *Australian Cherry Exports Ltd v Commonwealth Bank of Australia* (1996) 39 NSWLR 337 at 346 C-F per Cole JA; cf 340 per Priestley JA, 343 per Clarke JA.

of the farm debt involved. Any “*enforcement action*” that is not contemplated by the Act cannot be said to be taken in compliance with the Act and is void under s 6.

- 138 This is consistent with s 11(6), which provides that the expiry of a certificate “*does not affect any proceedings for recovery of a farm debt ... and any such proceedings may be continued and concluded as if the certificate were still in force*”. Proceedings for recovery of a farm debt are precluded in the absence of a certificate.

The effect of the money judgment

- 139 Section 6 requires the money judgment in this case to be set aside in any event.
- 140 The intention manifested by s 6 is that a creditor is forbidden, by taking enforcement action otherwise than in compliance with the Act, to improve its position with respect to the enforcement of its farm mortgage.
- 141 The respondent’s claims for an order for possession and for a money judgment on the amount owing under the mortgage were brought together in a single proceeding and heard together in a single hearing.
- 142 Evidence adduced to prove one claim was evidence available to prove the other claim. The primary judge made findings of fact in respect of both claims and neither the primary judge nor the parties distinguished between the evidence adduced to prove each claim or the findings of fact to be made in respect of each claim.
- 143 It follows that the claim for a money judgment was at trial, and remains on appeal, inextricable from the claim for possession.
- 144 The existence of the money judgment improves the respondent’s position with respect to the enforcement of its farm mortgage in two ways:
- (a) *First*, the merger of the debt sued upon in the judgment⁷⁸ means the respondent is no longer a “*creditor*” (s 4(1)). Thus the Act no longer applies to the respondent (s 5(1)) and there is no farm debt dispute capable of mediation. Unless the money judgment is set aside, there is nothing to prevent the respondent from immediately recommencing proceedings for possession.
- (b) *Secondly*, the money judgment gives rise to an issue estoppel preventing the appellant from alleging or denying any “*state of fact or law ... the existence of which is a matter necessarily decided by the prior judgment*”.⁷⁹ The prior judgment necessarily determined the factual foundation for the respondent’s right to possession and has improved its position with respect to enforcement.

⁷⁸ *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 597 per Gibbs CJ, Mason and Aickin JJ; *Blair v Curran* (1939) 62 CLR 464 at 532 per Dixon J. There was nothing in the loan agreements or the mortgage to prevent that merger.

⁷⁹ *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 597 per Gibbs CJ, Mason and Aickin JJ.

145 It is not possible for this or any other court to set aside the reasons for decision of the primary judge or the findings of fact made by the primary judge. The only way in which that end might be achieved is by setting aside the orders made by the primary judge, and for that reason the money judgment must be set aside.

The particular “*enforcement action*” in this case

146 The term “*enforcement action*” is defined in relation to a farm mortgage but is otherwise undefined. In relation to a farm mortgage, the term includes “*any ... action to enforce the [farm] mortgage*” (s 4(1)).

147 A distinguishing feature of the facts in this case is that the respondent based its claim for a money judgment “*in direct terms upon the terms of the mortgage instrument*”.⁸⁰

148 The covenant sued upon was in the mortgage. Relevantly, the respondent did not plead:

- (a) any entitlement to repayment of the principal sum; or
- (b) any breach of an obligation to repay the principal sum,

other than by reference to “*Registered Mortgage No. 9940985D*”.⁸¹

149 It follows that the respondent could not succeed at trial without tendering the mortgage instrument and proving its terms.

150 Decisions of judges in the Court of Appeal⁸² and at first instance⁸³ are consistent with the view that the question of whether an action to recover a debt constitutes “*action to enforce the mortgage*” is to be answered by reference to whether the action is “*dependent upon the existence of the mortgage*” or whether the creditor “*could prove the debt without any reference to a mortgage*”.

151 In other cases, “*enforcement action*” has been held to include the appointment of a receiver pursuant to a power of appointment conferred by a security,⁸⁴ and to exclude service of a statutory demand and the commencement of winding up proceedings.⁸⁵

152 The word “*enforce*” in the Act under consideration is used in the context of a “*farm mortgage*” which consists of both a contract⁸⁶ and a security.⁸⁷ In this case, the

⁸⁰ Macfarlan JA at [87].

⁸¹ Amended statement of claim at [3], [19]-[22].

⁸² *Australian Cherry Exports Ltd v Commonwealth Bank of Australia* (1996) 39 NSWLR 337 at 342 per Priestley JA, 343 per Clarke JA.

⁸³ *Commonwealth Bank of Australia v Trellis Holdings* (1996) 19 ACSR 319 at 321 per McLelland CJ in Eq; *Underwood v Commonwealth Bank of Australia* (1995) 56 FCR 145 at 149 per Lindgren J.

⁸⁴ *Constantinidis v Equititrust Ltd* [2010] NSWSC 299 at [17] per Barrett J.

⁸⁵ *Australian Cherry Exports Ltd v Commonwealth Bank of Australia* (1996) 39 NSWLR 337 at 339-340 per Priestley JA, 343 per Clarke JA.

⁸⁶ *Pavey & Matthews Pty Ltd v Paul* (1986) 162 CLR 221 at 226 per Mason and Wilson JJ.

respondent elected to rely on covenants in the security and should be regarded as taking action to enforce the farm mortgage.

- 153 This is consistent with the approach taken generally under the RPA. This Court has held that the personal liability of the mortgagor for the mortgage debt is "*intimately connected*" with the rights of property arising out of the mortgage transaction.⁸⁸ A covenant to repay will attain indefeasibility upon registration of the mortgage.⁸⁹

PART VII: LEGISLATION

- 154 The applicable statutes and regulations as they existed at the relevant time are set out verbatim in the annexure. The provisions are still in force, in that form, at the date of 10 making these submissions.

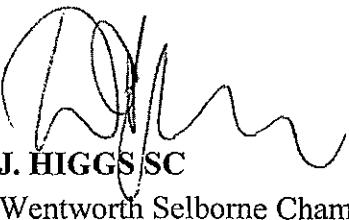
PART VIII: ORDERS SOUGHT

- 155 Appeal allowed with costs.
- 156 Order that the orders made by the Court of Appeal on 11 November 2010 be set aside and, in their place, order that:
- (a) the appeal to that court be allowed with costs; and
 - (b) the orders made by Harrison J on 12 November 2009 be set aside and, in their place, order that:
 - i. the proceeding be dismissed; and
 - ii. the plaintiff pay the defendant's costs.

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Dated: 11 July 2011

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⁸⁷ *Mayfair Trading Co Pty Ltd v Dreyer* (1958) 101 CLR 428 at 448 per Dixon CJ.

⁸⁸ *Consolidated Trust Co Ltd v Naylor* (1936) 55 CLR 423 at 434 per Dixon and Evatt JJ.

⁸⁹ *PT Ltd v Maradona Pty Ltd* (1992) 25 NSWLR 643 at 681 per Giles J.



New South Wales

Farm Debt Mediation Act 1994 No 91

Status information

Currency of version

Current version for 1 July 2010 to date (generated 14 March 2011 at 13:32).
Legislation on the NSW legislation website is usually updated within 3 working days.

Provisions in force

All the provisions displayed in this version of the legislation have commenced. For commencement and other details see the Historical notes.

Part 1 Preliminary

1 Name of Act

This Act may be cited as the *Farm Debt Mediation Act 1994*.

2 Commencement

This Act commences 2 months after the date of assent, except in so far as commenced sooner by proclamation.

3 Object

The object of this Act is to provide for the efficient and equitable resolution of farm debt disputes. Mediation is required before a creditor can take possession of property or other enforcement action under a farm mortgage.

4 Definitions

(1) In this Act:

Authority means the New South Wales Rural Assistance Authority constituted by the *Rural Assistance Act 1989*.

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

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.

Note. Examples of default on the part of a farmer include failure to pay the principal, interest or other money the payment of which is secured by a farm mortgage; failure to keep the property subject to the farm mortgage insured; and failure to submit financial statements required by the creditor.

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 of this Act, or
- (b) the enforcement of a judgment that was obtained before the commencement of this Act.

exemption certificate means a certificate of exemption from enforcement action that is issued under section 9B.

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

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.

farm machinery means:

- (a) a harvester, binder, tractor, plough or other agricultural implement, or
- (b) any other goods of a class commonly used for the purposes of a farming operation that are prescribed by the regulations as being farm machinery for the purposes of this Act,

if the goods are acquired 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, or
- (b) the interest of the lessor of any farm machinery that is leased.

farm 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) an access licence (within the meaning of the *Water Management Act 2000*) held by a farmer in connection with a farming operation.

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.

farming operation means:

- (a) a farming (including dairy farming, poultry farming and bee farming), pastoral, horticultural or grazing operation, or
- (b) any other operation prescribed by the regulations for the purposes of this definition.

function includes a power, authority or duty.

Heads of Agreement, in relation to a mediation, means heads of agreement referred to in section 11AA.

hire purchase agreement has the same meaning as it has in the *Duties Act 1997*.

mediator means a mediator for the time being accredited by the Authority pursuant to arrangements instituted by the Authority under

this Act, and **mediation** means mediation by such an accredited mediator.

statutory enforcement notice means:

- (a) a notice under section 57 (2) (b) of the *Real Property Act 1900*, or
 - (b) a notice under section 111 (2) (b) of the *Conveyancing Act 1919*, or
 - (b1) a notice under section 71X (1) (b) of the *Water Management Act 2000*, or
 - (c) a notice, given under any Act or statutory instrument, that is prescribed by the regulations as being within the scope of this definition.
- (1A) A reference in this Act to **satisfactory mediation** is a reference to:
- (a) a mediation that has achieved a resolution of a farm debt dispute, or
 - (b) a mediation 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
 - (c) a mediation specified or of a class described in regulations made for the purposes of this subsection to be a satisfactory mediation.
- (2) This Act extends to:
- (a) a farm mortgage that was entered into before the commencement of section 6, and
 - (b) a liability or obligation that arose under a farm mortgage before the commencement of section 6.

4A Notes

Notes included in this Act do not form part of this Act.

5 Application of Act

- (1) This Act applies in respect of creditors only in so far as they are creditors under a farm debt.
- (2) This Act does not apply in respect of:
- (a) a farmer whose property is subject to control under Division 2 of Part X of the *Bankruptcy Act 1966* of the Commonwealth, or
 - (b) a farmer whose property is the subject of a bankruptcy petition presented by any person, or
 - (c) a farmer, being a corporation, that is an externally administered corporation within the meaning of the *Corporations Act 2001* of the Commonwealth.

6 Enforcement action in contravention of Act void

Enforcement action taken by a creditor to whom this Act applies otherwise than in compliance with this Act is void.

7 Relationship with other Acts

- (1) Nothing in this Act affects the operation of the *Contracts Review Act 1980* or any other Act or law that deals with the granting of relief in respect of 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* of the Commonwealth and, in particular, the duty of the Reserve Bank under Division 2 of Part II of that Act.
- (3) (Repealed)
- (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 to whom money under a farm mortgage is owed by a farmer must not take enforcement action against the farmer in respect of the farm mortgage until at least 21 days have elapsed after the creditor has given a notice to the farmer under this section.
- (2) Notice to the farmer is to be in writing in a form approved by the Authority (informing the farmer of the creditor's intention to take enforcement action in respect of the farm mortgage and of the availability of mediation under this Act in respect of farm debts).
- (3) This section does not apply if a certificate is in force under section 11 in respect of the farm mortgage concerned.

9 Farmer may request mediation

- (1) A farmer to whom notice has been given under section 8 may, within 21 days after the notice was given, notify the creditor in writing that the farmer requests mediation concerning the farm debt involved.
- (1A) A farmer who has not been given notice under section 8 but who owes money to a creditor in relation to a farm debt may notify the creditor in writing that the farmer requests mediation concerning the farm debt involved. A farmer may request mediation under this subsection whether or not the farmer is in default.
- (2) The Authority may approve a form for the purposes of a notification under this section and a notification given to a creditor in that form is sufficient notification for the purposes of this section. Failure to use the approved form does not of itself invalidate a notification given by a farmer.
- (3) If a farmer requests mediation but subsequently refuses to mediate, this Act ceases to apply to the farm mortgage concerned.

9A Creditor may agree to or decline mediation

- (1) A creditor who has received a request from a farmer to mediate may, by notice in writing given to the farmer, agree or decline to mediate in respect of the farm debt involved.
- (2) A refusal by a creditor to mediate does not, of itself, give rise to any claim or other consequence under this Act if the farmer is not in default.
- (3) If a farmer is in default, a refusal by a creditor to mediate may result in the issuance of an exemption certificate.

9B Exemption certificates

- (1) A farmer who is in default and who has requested a creditor to mediate in respect of the farm debt involved (whether or not the farmer has been given a notice under section 8) may apply to the Authority for a certificate of exemption from enforcement action (*exemption certificate*) if the creditor does not mediate.
- (2) The Authority must issue an exemption certificate if:
 - (a) the farmer is in default under a farm mortgage, and
 - (b) the farmer has requested the creditor to mediate in respect of the farm debt involved, and
 - (c) no certificate under section 11 is in force in relation to the farm mortgage, and
 - (d) the Authority is satisfied that:
 - (i) the creditor does not wish to enter into or proceed with mediation, or
 - (ii) the creditor has failed to respond in writing to the request to mediate, within 21 days after the receipt of the request, or
 - (iii) 3 months have elapsed after a request was made by the farmer under section 9 and the farmer has throughout that period attempted to mediate in good faith but no satisfactory mediation has taken place between the farmer and the creditor.
- (3) While an exemption certificate is in force in relation to a farm mortgage:
 - (a) no certificate can be issued by the Authority under section 11, and
 - (b) no enforcement action can be taken by the creditor.
- (4) An exemption certificate ceases to be in force on the earlier of the following:
 - (a) 6 months after the day on which the creditor declined to mediate,
 - (b) the day on which the farmer and creditor enter into mediation in respect of the farm debt.

10 Enforcement action postponed to allow for mediation

- (1) Once a farmer has given a creditor a notification in accordance with section 9 requesting mediation, the creditor must not take enforcement action in respect of the farm mortgage concerned unless a certificate is in force under section 11 in respect of the farm mortgage.

- (2) This section does not invalidate any statutory enforcement notice or other process given, served or executed in order to fulfil a condition precedent to the taking of any enforcement action, but operates to prohibit the taking of the action concerned, or the enforcement by a court or tribunal of any such process, except as provided by section 11 (6).

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:
- (a) the farmer is in default under the farm mortgage, and
 - (b) no exemption certificate is in force in relation to the farm mortgage, and
 - (c) the Authority is satisfied that:
 - (i) satisfactory mediation has taken place in respect of the farm debt involved, or
 - (ii) the farmer has declined to mediate, or
 - (iii) 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 a mediation session or satisfactory mediation took place during that period).
- (1A) If the creditor has (in whatever terms employed) 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) (iii) to a period of 3 months is taken to be a reference to the extended period.
- (1B) 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.
Note. Satisfactory mediation may nevertheless have taken place between the farmer and the creditor despite such failure to agree (see section 4 (1A)).
- (2) 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 respect of the debt concerned,

- (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 respect of the farm debt.
- (3) (Repealed)
- (4) A certificate may be given under this section (except where subsection (1) (c) (iii) applies) whether or not any notice has been given under section 8.
- (5) A certificate under this section remains in force until the date specified by the Authority in the certificate. The date specified 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 respect of the farm debt concerned has taken place, the period commencing on the date of its issue and ending on the third 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 commencing on the date of its issue and ending on the third 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 commencing on the date of its issue and ending on the third 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 referred to in subsection (2) (c), the period commencing on the date of its issue and ending on the third 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 commencing on the date of its issue and ending on the date that is 3 years and 3 months after the date the notice was given, or
 - (f) in any other case in which a certificate is issued, the period of 3 years commencing on the date the certificate was issued.
- (5A) A certificate may not be issued after the date on which any such certificate would, if issued, expire under subsection (5).
- (6) 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 commenced by a creditor while the certificate was in force, and any such proceedings may be continued and concluded as if the certificate were still in force.

- (7) The reference in subsection (6) to the commencement of proceedings does not include a reference to the giving of any statutory enforcement notice or other action taken in order to fulfil a condition precedent to the enforcement of a right otherwise than through proceedings in a court or tribunal.

11AA Heads of Agreement

- (1) If it appears to a mediator that a farmer and a creditor who are parties to a mediation have agreed, or are about to agree, on an issue between them, the mediator must personally prepare for the consideration of the parties a document setting out the main points of agreement on the issue.
Note. Failure to comply with this section may result in the withdrawal of the accreditation of a mediator (see section 12 (3)).
- (2) If the parties are satisfied that the document sets out the main points agreed on by them during, or within 24 hours of the end of, a mediation, the parties may enter into Heads of Agreement by signing the document.
Note. Under section 17 (3A), a person representing a party to a mediation must have written authority to enter into Heads of Agreement.

11A Cooling off period for Heads of Agreement

- (1) There is to be a cooling off period for any Heads of Agreement. The cooling off period may be extended by agreement between the farmer and the creditor.
- (2) The cooling off period commences when the Heads of Agreement are entered into and ends at 5 pm on the 14th day after the day on which the Heads of Agreement are entered into, or at such later time on that or another day, as may be agreed by the farmer and the creditor.
- (3) A statement in the form approved by the Authority, relating to the cooling off period, is required to be included in every Heads of Agreement.
- (4) If Heads of Agreement do not contain a statement required under subsection (3), the cooling off period is extended until such time as a statement, in the form approved by the Authority, relating to the cooling off period, is given to the farmer by the creditor for the purposes of this subsection. The cooling off period, as so extended, ends at 5 pm on the 14th day after the statement is given.