THE LAW SOCIETY
OF NEW SOUTH WALES

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22 May 2017

Dr Hanna Jaireth
Farm Debt Mediation Unit
NSW Rural Assistance Authority
DX 3037 Orange

By email: farm.debtmediation@raa.nsw.gov.au

Dear Dr Jaireth,

Farm Debt Mediation Act 1994 (NSW) Review

I write to you on behalf of the Law Society of NSW in relation to the review of the *Farm Debt Mediation Act 1994* (NSW) ("the FDMA"). The Rural Issues Committee welcomed the opportunity to discuss the operation of the FDMA with you at its meeting on 27 April 2017.

While the Law Society does not have concerns with the majority of the suggested amendments; we do have concerns with a number of proposals in the consultation paper and make the following comments for your consideration:

Consultation Question 69: Should the FDMA definition of "farm" or "primary production enterprise" extend the protection of the Act to a broader range of farmers using the ANZSIC code, but exclude wild-harvest such as fishing, hunting and trapping?

Consultation Question 70: Should the FDMA, regulations or guidelines require a farmer or creditor to establish that the Act applies to a "farmer" or "primary producer" because they are "solely or principally engaged in primary production"?

Consultation Question 71: Should the FDMA be amended to enable the RAA to require farmers and creditors to provide information to the RAA and/or the other party to establish that applicable definitions in the Act have been met?

While the Law Society does not take issue with more accurate definitions under the terms of the FDMA, we do have a difficulty with questions 70 and 71. Either the creditor will commence enforcement proceedings because in its view the FDMA does not apply to the particular mortgagor (in which case the issue will be determined by the Supreme Court), or the creditor will offer mediation. If the latter occurs, then the parties are necessarily in agreement that there is a farming operation and the FDMA applies. Intervention by the Rural Assistance Authority (RAA) to insist upon evidence of the farming operation when both parties agree seems superfluous.

Consultation Question 99: Should the FDMA be clarified so that subsequent mediations are not required for a farmer's default under a heads of agreement, contract, mortgage or other document that gives effect to the mediated agreement?

Consultation Question 100: Should the FDMA be amended to require that if a heads of agreement has been agreed, default under that agreement must occur before an application can be made for a s 11 certificate?

While we do not object to the suggested amendment of the definition of "farm debt" as suggested in paragraph 98 and Question 99 of the paper, we do not consider that the amendment proposed in Question 100 is appropriate. The proposed amendment concerning the issue of s 11 certificates is contrary to the intention of the FDMA. The FDMA was brought into effect to ensure satisfactory mediation occurs between a mortgagor/mortgagee before enforcement action. Once satisfactory mediation occurs then the RAA should issue an exemption certificate and become functus.

What this amendment seeks to do is to extend the operation of the FDMA over any mediated agreement, and to ultimately require that a creditor prove a default under the heads of agreement as a precursor for the issue of an exemption certificate. This would have the effect of the RAA effectively arbitrating on contractual issues between the parties for the purposes of issuing an exemption certificate. This is not what the FDMA was designed to do, and poses difficult administrative, evidentiary and review issues.

In addition, if the parties do not reach an agreement at mediation then the creditor is entitled to make an application for the issue of an exemption certificate. This would then mean that there would be effectively a split system for issue of the certificate.

In our view the FDMA should not be amended along the lines suggested in Question 100, and the issue of the certificate be tied into the original concept of "satisfactory mediation".

Consultation Question 111: Should FDMA s 5(2) be amended so that the Act does not apply to a farmer whose property is subject to proceedings under the *Family Law Act 1975* (Cth)?

Consultation Question 112: Should the FDMA be amended to ensure that the needs of separated joint debtors can be accommodated effectively in mediation, and if so, how?

It is the Law Society's opinion that s 5(2) does not require the amendment proposed (so that the FDMA does not apply to a farmer whose property is subject to proceedings under the *Family Law Act 1975* (FLA)). Such an amendment would unfairly prejudice those farmers subject to property settlement proceedings. A farmer subject to property settlement proceedings should have access to the benefits provided by the FDMA and be able to reach a mediated agreement with their bank, notwithstanding any dispute with their spouse/partner. While there may be circumstances where a farmer could agree something with a creditor without reference to their spouse/partner that might disadvantage the spouse/partner, in the majority of cases it is going to be in both parties' best interests for there to be a sensible agreed outcome with a financier, rather than enforcement proceedings and/or forced sales of what is likely to be in many circumstances, the primary matrimonial asset(s).

The FLA provides appropriate and adequate protection to parties to property settlement proceedings. The parties have the ability to join the financier to the proceedings and the Family Court has powers to make orders in respect of third party financiers. Part VIIIAA of the FLA overrides other laws and agreements so any person who considers that they have been disadvantaged by the FDMA processes has the ability to seek orders protecting their interests.

The Law Society suggests that there be further consultation with appropriate stakeholders as to whether there should be an amendment to the FDMA, or even the FLA, as to the possible introduction of a requirement that both spouses be informed of the proposed mediation, where the creditor has been given notice by a party that the property is subject to proceedings under the FLA, or where the parties are otherwise separated (and proceedings are yet to be initiated). This would protect the procedural interests of the parties to the marriage (or the parties to the relevant relationship under Part VIIIAB of the FLA) and the interests of third party creditors. The practical effect of the amendment would be to lessen the likelihood of orders being sought by an aggrieved spouse under Part VIIIAA of FLA if she or he had no notice of the mediation. Similarly it may reduce the likelihood of an agreement made during the FDMA process being undone if there are subsequent proceedings under s 79A(1) of the FLA where final property settlement orders are set aside upon the application "by a person affected by an order" under s79(1). Further consultation would allow for proper consideration of procedural issues that would arise from any amendment.

The introduction of a procedural requirement to inform all spouse parties of a mediation that may be convened under the FDMA would be congruent with the introduction of Part VIIIAA to the FLA in 2004 and related amendments, including the following:

- the amendment of section 79A (1) and the insertion of s79A (4) in 2005;
- the expansion of the property settlement section of FLA by the insertion of subsections (10), (10A) (11) to (17) in 2005; and
- the introduction of s79F, s79G, s79H and s79J in 2005;

where the intended purpose of the various amendments is to deal with the sometimes competing interests of third party creditors and parties to a marriage or de facto relationship that has broken down.

Consultation Question 169: Should the FDMA require parties to a mediation to be severally liable to the mediator for their agreed share of the costs of the mediation, and for all the other shared costs of the mediation, and that each party is responsible for other costs associated with preparation for and participation in the mediation?

The Law Society considers that each party should bear their own costs associated with the preparation for mediation, and the conduct of the mediation. The creditor should be entitled to a capped amount of $2,000 for legal advice on issues arising from the mediation.

Consultation Question 200: Should the NSWLRC's model "enforcement" provision for heads of agreement be included in the FDMA?

On most occasions the mortgagee will simply move to enforce its security on default of any heads of agreement. It will not be a case that the mortgagee will seek to enforce the heads of agreement. In our view, this provision goes to situations where there are settlements relating to unsecured money, and not to a situation where there is an underlying security that can be enforced on breach of any heads of agreement. We therefore oppose the proposed amendment.

Thank you for considering our submission. The contact person for this matter is Ms Rachel Geare, Senior Policy Lawyer, who can be contacted on 9926 0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,

Michael Tidball
Chief Executive Officer