

# + Information sheet – good faith

## A. What acting in good faith means under the *Farm Business Debt Act 2017 (Qld) (the Act)*

In the absence of definitive principles this information sheet has been developed to assist the notion of good faith. The implied doctrine of good faith has been sourced from multiple areas of Australian Contract Law. The Guidelines for conducting mediation outline guiding principles and a supporting information sheet that provide examples allowing all parties the opportunity to establish proof in their actions in and around the mediation process that demonstrates good faith.

These guiding principles include but not limited to:

1. Respect for the parties; and
2. Respect for the process; and
3. Provision of relevant material; and
4. Attending with a preparedness and capacity to act and reflect on all propositions put forward by the other side with an open mind and genuine consideration.

## B. Examples of how a farmer and/or mortgagee can act in good faith for the purposes of legislation

### 1. Respect for the parties

An intergenerational farmer is not in default on a farm business debt, however continues to struggle from extended drought conditions and gives a request for mediation notice to the mortgagee.

Appreciating the underlying circumstances, the mortgagee provides all relevant documentation and allows reasonable time for the farmer to seek appropriate advice; prepare cashflow budgets; and review of the other relevant documentation relating to the debt and mortgage. The farmer continues to meet obligations, agree the timeline for commencement and conclusion of mediation and provides full and complete disclosure of their up to date financial position.

### 2. Respect for the process

A farmer is in default of a farm business debt and subsequently receives an enforcement action notice from the mortgagee along with the mediation information package. Rather than ignoring the notice, the farmer asks for mediation and responds with a request for mediation notice that includes 3 mediators from which the mortgagee can choose and a request for documents relating to the farm debt and mortgage. The mortgagee actively responds with all relevant documents and both parties engage appropriately throughout the mediation process and sign a Heads of Agreement. It's important to note that a mortgagee's decision not to forgive or reduce the farm business debt doesn't demonstrate a lack of good faith.

### 3. Provision of relevant material

On receipt of a request for documents from the farmer the mortgagee complies by providing copies of all relevant documents relating to the farm business debt. The mediator chosen to arrange and conduct mediation has subsequently reviewed the request for documents by both parties and is comfortable with the level of disclosure. On realizing a certain document is not easily accessible, the mortgagee seeks agreement from both the farmer and mediator for a longer period to locate and provide this information in compliance with the Act and ensuring the farmer and mediator are fully informed.

**4. Attending with a preparedness and capacity to act and reflect on all propositions put forward by the other side with an open mind and genuine consideration.**

A farmer and mortgagee in preparing for participating in mediation adopt the following intentions:

- Be well-prepared to explain where you are “coming from” as well as be willing to deal with issues and questions raised by the other party;
- They and their advisors are present, fully informed and have authority to resolve the dispute;
- Are willing to accept that new information and/or developments may arise;
- Be prepared to make concessions where appropriate;
- Focus on the problem, not on the people associated with it;
- Remember that mediation is not well-served by many tactics borrowed from litigation;
- If proposing an offer of settlement or refusing same, explain the rationale behind your position; and
- Spend energy and time thinking through and discussing approach. Consider options, alternatives and “what ifs” in advance.

**C. Examples of not acting in good faith for the purposes of the legislation**

Note: the below list is a guide only whereby the absence of preferred behaviours does not necessarily mean a party is not acting in good faith:

- Being unprepared and not allowing sufficient time for a meeting;
- Not having authority to make decisions or sign Heads of Agreement;
- Refusal or delay without consultation to provide relevant documents;
- Posturing and disrespectful comments and behavior;
- Not listening to or discussing issues;
- Focusing on own case and not listening to others;
- Not exploring alternatives and options; and
- Not explaining why inflexible with position.

**D. Possible consequences of not acting in good faith for the purposes of legislation**

Proposed offence provisions of the Act

| Clause    | Offence   | Proposed maximum penalty                  |
|-----------|---|---|
| <b>12</b> | <p><b>Restriction on mortgagee enforcement action Farm Business Debt Mediation Act 2017</b></p> <ol style="list-style-type: none"> <li>1. A mortgagee must not take enforcement action under a farm mortgage unless—               <ol style="list-style-type: none"> <li>(a) this Act does not apply in relation to the farmer or the farm mortgage; or</li> <li>(b) an exemption certificate is in force for the farm mortgage.</li> </ol> <p><small>Note: If a corporation commits an offence against this provision, an executive officer of the corporation may be taken, under section 89, to have also committed the offence</small></p> </li> <li>2. Enforcement action that is taken by a mortgagee in relation to a farm mortgage in contravention of subsection 1 has no effect.</li> <li>3. Subsection 2 applies despite any other Act or law.</li> </ol>   | 100 penalty units                         |
| <b>31</b> | <p><b>Ensuring heads of agreement is given effect accurately</b></p> <ol style="list-style-type: none"> <li>1. This section applies if a farmer and mortgagee who entered into a heads of agreement for a farm business debt are also the parties to a contract, mortgage or other document entered into to give effect to the heads of agreement.</li> <li>2. The mortgagee must ensure the contract, mortgage or other document gives effect to the heads of agreement accurately.</li> </ol> <p><small>Note for subsection 2: If a corporation commits an offence against this provision, an executive officer of the corporation may be taken, under section 89, to have also committed the offence.</small></p>  | 100 penalty units                         |
| <b>83</b> | <p><b>Disclosing information</b></p> <p>A person must not disclose any information obtained in a mediation meeting or in connection with the administration of this Act unless the disclosure is made—</p> <ol style="list-style-type: none"> <li>a. if the information is about a person—by, or with the consent, of the person; or</li> <li>b. with the consent of the person from whom the information was obtained; or</li> <li>c. to the extent necessary to perform the person’s functions under or in relation to this Act; or</li> <li>d. as reasonably required for the purpose of referring a party or parties to mediation to a 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</li> <li>e. as otherwise required or allowed by law; or</li> <li>f. with another lawful excuse.</li> </ol> | 20 penalty units or 6 months imprisonment |