WHAT IS A "FARM"?

[Editorial introduction: A radical experiment by the New South Wales legislature to force creditors and farmers to mediate is now 12 years old. The experiment is the *Farm Debt Mediation Act 1994* (NSW). In *Craigie v Champion Mortgage Services Pty Ltd* [2007] NSWCA 15, the New South Wales Court of Appeal has examined the concept of "farm debt" under the Act, holding that a fish hatchery which grows fish for pet shops is not a "farm", but leaving open the question whether a fish hatchery which grows fish for human consumption is a "farm".]

The *Farm Debt Mediation Act 1994* is important for lenders and solicitors alike operating in New South Wales. The Act was designed to prevent heart-rending scenes of the kind where farmers, having been on a property for several generations, are evicted amid scuffles with the Sheriff and with news cameras rolling. Under the Act, a lender cannot enforce its contractual rights unless there has first been a mediation between the farmer and the lender. This not only slows down the enforcement juggernaught, but also should bring to the farmer's attention the fact that there is a serious problem to be faced. Typically the mediation process (if the farmer chooses to participate) can take anywhere between three to six months. A common outcome of mediation is that the lender agrees to allow the farmer time either to refinance or to sell part or all of the farm property. Young CJ in Eq has noted that the legislation is based on similar legislation in the US state of Iowa (see *Varga v Commonwealth Bank of Australia* (1996) 7 BPR 15,052; NSW Conv R 55-797[Author: media neutral case citations prior to 1999 not valid; please confirm correct case – Thanks, Ed.). During parliamentary debates on the Bill when first enacted the then Minister for Agriculture, in opposing the Bill (for it had been introduced by the Opposition, not by the Government), pointed out that publications from the *Iowa State University Press* indicated that the legislation's only effect was to force healthy borrowers to pay a premium for borrowed funds.

When underwriting farm loans, New South Wales lenders must factor in the applicability of the Act, including where necessary reducing the loan-to-value ratio they are prepared to lend to, or charge an increased interest rate to compensate for the longer enforcement cycle. Lawyers acting for lenders must remember that s 6 of the Act renders void any enforcement taken in contravention of the Act. The farmer will then be entitled to costs against the lender and the lender may arguably be entitled to indemnity from the solicitor (for negligence). Accordingly, whether a debt is covered by the Act is a serious and topical question.

In *Lawloan Mortgages Pty Ltd v Hancock* [2001] NSWSC 607, Bergin J determined that a company engaged in running a riding school fell outside the definition of "farming operations". In *Liberty Funding Pty Ltd v Ivosevich* [2002] NSWSC 140 [Author – please confirm – Thanks, Ed.], Simpson J considered a case where the borrower operated a small market garden whilst also engaging in other occupations including as a computer consultant, finance broker, property developer, mercantile agent, cleaner and private investigator. In the loan application form, the borrower described himself as a "computer programmer" with a second job as a "computer specialist". However, he gave evidence that his other jobs occupied only two to three days per week, and often only at night, whilst the balance of his time was occupied in attending to horticultural matters. This evidence was accepted, the mortgagee neither leading any significant evidence to the contrary nor cross-examining the borrower. The result was that the Act was found to apply, the mortgagee's judgment was set aside, the writ of possession was stayed, and the mortgagee was ordered to pay the mortgagor's costs of the proceedings.

The latest case on the Act is *Craigie v Champion Mortgage Services Pty Ltd* [2007] NSWCA 15. The Court of Appeal upheld a finding by Johnson J that a fish hatchery which raised fish for pet shops was not a farm for the purposes of the *Farm Debts Mediation Act*. In a unanimous decision, Hodgson JA (speaking for the Court) cited with approval the trial judge's reasoning that:

> In my view ... "farming operations" covered by [the Act] ought to be confined to traditional agricultural pursuits extended only so far as the Act provides.

However, Hodgson JA went on to leave open the possibility that fish raised for human consumption might be within the purview of the Act:

> In my opinion, insofar as the primary judge concluded that a fish hatchery operation for the purpose of supplying fish for pet shops and aquariums is not in the meaning of farming operation within the Act, his conclusion was correct. There may be more difficult questions in determining whether operations of the nature of raising fish for the purpose of human consumption fall within that meaning.

The Court of Appeal also held the trial judge did not err in having regard to US legislation and case law.

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