



THE LAW SOCIETY
OF NEW SOUTH WALES

FACTSHEET

PRE-CONTRACTUAL ENQUIRIES

This factsheet covers the recommended pre-contract enquiries for rural land

Buyer beware

Traditionally in land transactions the general rule has been caveat emptor, that is “let the buyer beware”. It seems established at law that caveat emptor does not mean that the buyer must take a chance; it means that he or she must take care.

In practice, it is not entirely clear in respect of which matters the purchaser should be aware or should take care. The purchaser has some protection against misrepresentation but the vendor only has a limited duty of disclosure of defects, or other matters relevant to the value or fitness of the subject matter of the sale.

Generally, a vendor only has a limited duty to disclose matters relating to the property sold; and the purchaser’s remedies for non-disclosure are confined to a narrow range of situations.

There is no duty on either party to a contract for the sale of land to disclose to the other party all material facts of which he or she is aware, or which materially affect the value or the subject matter of the sale.

Pre-contract Enquiries for Rural Land

General issues

Pre-contract enquiries occur in respect of matters that are:

- not covered under the contract;
- not covered under the general law or any statute; and
- not covered by any vendor duty of disclosure.

These matters generally relate to the quality of the subject matter of the sale and may perhaps be covered by the principle of caveat emptor. There is a fine balance between the need to make enquiries in order to protect the purchaser, and the need to keep expenditure to a minimum until the parties are bound by a contract. This should, of course, be a matter for communication between clients and their solicitors, and the subject of specific instructions.

The vendor’s solicitor should therefore know what his or her client is obliged to disclose during the sale process. The purchaser’s solicitor should cover, by pre-contract enquiry or by conditions inserted into the contract, those matters which are material for the purchaser and which otherwise need not be disclosed by the vendor.

Prospective purchasers of rural land are strongly advised to carefully inspect the property. They should also make appropriate enquiries to determine whether there are any current or potential problems that could affect the use of the land for their intended purposes.



Practitioners should consider the need to include in the contract the purchaser's intended use of the land. A purchaser's solicitor should consider the need to include conditions in the contract that would enable the purchaser to terminate if enquiries or tests reveal, for example, unacceptable residue or disease problems. The purchaser's solicitor should also seek the vendor's written responses to key questions, and his or her written authority to obtain specific information about the land from third parties.

The Local Land Services (<http://www.lls.nsw.gov.au/>) and Department of Primary Industries (<http://www.dpi.nsw.gov.au/>) can provide information about the existence and implications of any "adverse matters" (as referred to in the *Conveyancing (Sale of Land) Regulation 2010*), and of certain other orders or notices affecting the property.

However, these organisations cannot provide any other specific information about individual properties. This is because they do not possess detailed knowledge about every property, and may be unaware of information which could be important to the purchaser.

Specific issues

Practitioners acting on the sale or purchase of rural lands should be aware of the following matters that are currently regulated under a range of NSW statutes.

We note that the **Biosecurity Act 2015 (NSW)** has been passed by the NSW Parliament but is not due to commence operation until 2017. A number of the Acts outlined below will be repealed when the Act commences, and this fact sheet will be updated at that time.

Chemical Residues

The presence of chemical residues in animal and plant products can have a major impact on their marketability. Community sensitivity and market resistance to residues appears to be increasing. The residues of major concern to land purchasers are those that persist in soil for prolonged periods (that is, years or even decades).

Organochlorines were used for a number of years:

- around buildings, yards, fence posts and electricity poles for termite control;
- on fruit, vegetables and crops for pest control; and
- in dips for controlling parasites on cattle and sheep.

Organochlorine residues are of concern in meat and may occur in some vegetable crops. Examples of organochlorines include DDT, dieldrin and haptachlor.

Arsenicals were used in stock dips and on deciduous fruits. Heavy soil contamination can inhibit the establishment and growth of some trees and other crops.

Polychlorinated byphenyls (PCBs) were used in transformers and hydraulics, which can leak and leave hot spots of contamination.

Cadmium occurs in soils which have been heavily treated with phosphatic fertilisers, and can be taken up by leafy and root vegetables.

Residues arising from the recent use of other chemicals can occur in animals and plants, and can persist for variable periods. Targeted testing and on-farm management programs have been established to combat specific residues in livestock.



Most properties on residue management plans have the situation under control and the risk of contamination of animals is likely to be low. However, new property owners are required to continue implementation of the management plan at their own expense.

Prospective purchasers should inspect the property for evidence of potential sites of residual contamination, such as:

- pesticide storage sheds
- used drums or disposal sites;
- buildings, yards, or fences treated for termites
- current or abandoned dip sites and rubbish dumps
- diesel and fuel storage areas, or
- abandoned transformers and hydraulic equipment.

Prospective purchasers should also inquire about:

- chemical maintenance records
- native vegetation management
- current and past agricultural practices on the property and in the district, such as intensive vegetable, fruit, cotton, or tobacco production, which could increase the risk of soil residues
- whether their property identification code (PIC) is on a 'targeted testing list'
- if the property has a residue management plan
- whether any other information about the residue history of the property is available, and
- whether the owner will consent to the testing of soil for specified residues, where appropriate.

The *Stock (Chemical Residues) Act 1975* (NSW) aims, among other things, to prevent the slaughter for human consumption of livestock with unacceptable levels of drug and pesticide residues. Under the Act, residue-affected stock can be detained by an inspector or through an undertaking with the owner. The Minister has various powers, including the power to restrict or prohibit the grazing of stock on contaminated land.

Under section 3 of the Act, "stock" is defined to include cattle, sheep, goats and pigs, and other animals or birds of a kind used for human food that the Minister declares to be stock (for the purposes of the Act) by an order published in the Gazette. In addition, "residue" is defined to mean:

- (a) a substance remaining in the body tissues or secretions of stock resulting from the use of or contact with any pesticide, drug or other chemical whether of the same or of a different kind or nature; or
- (b) a natural secretion, which is present in the body tissues of stock in an abnormal concentration.

The Local Land Services can advise whether the property is affected by any current orders, notices, or undertakings under the Act. However, most Local Land Services will only release this information after contracts have exchanged, and with the vendor's written consent. Proposed purchasers may be well advised to make those enquiries prior to exchange of contracts, with consent.



In addition, the purchaser should ask the vendor:

- whether their tail tag is on a targeted testing list;
- whether the property has a residue management plan; and
- for any other available information about the property's residue history.

Livestock Diseases

Some livestock diseases can persist on contaminated land even after the stock has been removed from the property. Bovine Johne's disease ("BJD") and anthrax are examples of such diseases.

If the property sale includes stock, a wider range of diseases may be present. This includes some diseases that are subject to regulatory control, such as footrot in sheep and enzootic bovine leucosis ("EBL") in dairy cattle. Market assurance programs have been established for BJD in cattle. The NSW Farmers Association can provide information regarding the new approach to BJD in stock. Information is also available on the Local Land Services ("LLS") and Department of Primary Industries' websites, as well as the Animal Health Australia website.

On 1 July 2016 the Management of BJD changed in most Australian states including NSW. BJD remains a notifiable disease and LLS continue to provide certification. However, Animal Health Australia has developed a nationally coordinated 'Beef Cattle Assurance Scheme' to replace the former Cattle Market Assurance Program. A National Cattle Health Declaration (formerly known as a Cattle Health Statement) should be requested before buying cattle. Examples of questions a prospective property purchaser may wish to ask include; 'Does the property hold cattle health declarations for all purchases? (NB: declarations should be kept for 7 years), and 'Does the property have a biosecurity plan?'. Detailed information is available on the Animal Health Australia website.

The *Stock Diseases Act 1923* (NSW) which controls declared diseases among livestock will be repealed by the *NSW Biosecurity Act 2015* (likely to commence in 2017).

Purchasers' solicitors should ask questions about any disease risks or problems with any stock on the property and the control measures which have been put in place.

After the exchange of contracts, LLS can advise whether the property is affected by any current orders, notices, or undertakings under this Act; and whether the property lies within any protection zone under the *Stock Diseases Act 1923*. Generally they cannot disclose any other information about the disease history or status of the property, or the owner's stock, without the owner's consent.

Purchasers' solicitors should ask the vendor whether any market assurance programs cover the property's herd or flock. They should also ask about disease risks or problems in the stock, and the control measures being used.



Plant Diseases and Pests

Vegetables, fruits, cereals, and other crops are susceptible to a wide range of diseases and pests. Soil-borne pests such as phyloxera persist on land. Many other diseases and pests can occur in orchards, pastures, and crops acquired with the land.

The *Plant Diseases Act 1924* (NSW) has powers to control plant diseases and pests. Inspectors can require owners or occupiers to comply with specified conditions under the Act, and can destroy neglected fruit trees.

Protection zones are declared in parts of the State to prevent the introduction or spread of specified pests or diseases. Examples include:

- fruit fly in the Riverina and lower Murray;
- bunchy top of bananas on the North Coast;
- phyloxera of grape vines in the Murrumbidgee Irrigation Area, Sunraysia,
- Hunter Valley, Mudgee and Central Tablelands;
- potato cyst nematode and bacterial wilt in seed potatoes in the northern,
- central and southern highlands, and
- diseases of rice in the Riverina.

Rural land purchasers who intend operating a horticultural or cropping enterprise should make themselves aware of relevant disease and pest problems, protection zones, and regulations which apply in that district. Details of the disease/pest history and current status of the property should be sought from the vendor.

Noxious Weeds

The *Noxious Weeds Act 1993* (NSW) makes the occupier of land responsible for the control of specified weeds such as blackberry, serrated tussock, and Bathurst burr, which can all spread and cause problems for neighbouring landholders. The list of declared noxious weeds varies from district to district. A list of weeds can be viewed on the Department of Primary Industries weeds website.

Where an occupier fails to comply with the obligations under the Act, the local council or weeds county council may issue a weed control notice (under section 18 of the Act). Such an order may require the occupier, at his or her expense, to carry out specified weed control work. If this work is not done, the council may initiate legal proceedings in the Local Court, or carry out the work themselves and recover costs from the occupier.

After land is sold, the new owner or occupier may also be bound by any previous notices and may be liable for any outstanding costs. Prospective purchasers should therefore apply to the relevant council for a certificate on whether any weed control notices are in force, or expenses payable for particular land.

Many common weeds that are not declared noxious can also affect productivity, the quality and saleability of product, or the amenity of the property. Prospective purchasers should therefore inspect the land for weeds, realising that they might not be evident at certain times of the year. They should also ask the vendor about any weed problems. Search enquiries can be made of the local council or Local Land Service.



Noxious Animals and Insects

Part 10 of the *Local Land Services Act 2013* deals with the control on public and private land of animals, birds, insects or other animals that are pests. A “pest” is defined as any member of the animal kingdom declared by a pest control order to be a pest. The Act provides for the making of pest control orders, and other types of orders.

After exchange of contracts, the Local Land Service can advise whether any pest control orders have been made. They can also inform potential purchasers of certain orders. An existing order extends to the new owner or occupier and places the same obligations on them. The prospective purchaser should also inspect the property for signs of noxious animal and insect activity, and ask the current owner about any pest problems they may have experienced.

Other Conditions of Land Use

The local council, NSW Crown Lands, NSW Office of Water, NSW Environment Protection Authority and other government agencies control various aspects of rural land use. This covers areas as diverse as development and building approval, land clearing, irrigation, and intensive livestock production. These agencies must be contacted for further information and approvals.

There are also a number of other factors which could affect people buying agricultural land:

- As well as local council rates, most rural land is subject to annual Local Land Service rates, and additional rates and fees apply in the Western Division
- Purchasers of crown leases should be aware of the special conditions and obligations which apply
- Many farming industries are subject to licensing and other legal requirements designed, for example, to assist disease control, allow trace-back of produce, or provide for orderly marketing arrangements. People must familiarise themselves with these requirements before engaging in an agricultural enterprise.
- High soil levels of certain residues can impose constraints on where a house can be built, and
- Some agricultural developments may require council consent such as intensive farming.

Land Use Planning

There are many features of agricultural land which may not be governed by legislation but which can significantly affect the land’s suitability—such as topography, climate, soils, water availability and natural vegetation. Other relevant features include infrastructure and other improvements, such as road access, sheds, yards, fences, water and power supply. Established horticulture and overall farm layout are also important.

The viability of any proposed agricultural enterprise or pursuit should be closely examined before land is bought with that purpose in mind. Marketing, enterprise requirements, farm planning, farming techniques and business management should all be considered.

The section 149 zoning certificate (issued under the *Environmental Planning and Assessment Act 1979*) should be closely read and understood, and the proposed purchaser urged to make enquiries from the local council.

Any proposed change of use of the property must be clarified with the local council before exchange of contracts. As practitioners may be aware, such industries as cattle feed lots, extensive piggeries, poultry and egg production and dairies have numerous environmental considerations that must be addressed.



Minimum lots that can be created by subdivisions and the council's policy specification on the provision of appropriate entrances to each lot should also be checked closely. Councils may require additional setback for dwellings 150 metres from adjoining rural properties to ensure that normal farming practices such as aerial spraying can proceed without prejudice to rural lifestyle or farm management. Practitioners should also be aware of the GST implications of a change of use of farming lands.

Mining and Mineral Exploration

Prospective purchasers should be aware that rural land may be subject to mining and mineral exploration titles or application under the *Mining Act 1992* (NSW) or the *Petroleum (Onshore) Act 1991* (NSW).

An exploration title can only be carried out subject to a specific access arrangement with the landholder and activity is usually short term with minimal environment impact.

A mining lease or application for a mining lease has significant implications for use of rural land. Whether a mining lease or application affects the rural land ought to be investigated as part of a pre purchase enquiry with the relevant planning authority.

Whether a property lies within a proclaimed Mine Subsidence District should be investigated when a purchaser is considering buying rural land that is within a current or former underground coal mining area. The Mine Subsidence Board has the power to regulate surface land use within a Mine Subsidence District by controlling subdivision and establishing guidelines for the design and construction of utility services and buildings.

Purchasers can apply to the Mine Subsidence Board for a certificate to inform the purchaser whether the land is within the Mine Subsidence District, whether approval has been obtained for improvements or alterations on the land, and whether the improvements have been the subject of any claims for subsidence damage.

Swimming Pools

Under the *Conveyancing (Sale of Land) Regulation 2010*, the following are now prescribed documents for contracts for the sale of land that includes a pool:

- A certificate of compliance issued under the *Swimming Pools Act 1992* (NSW),
- A relevant occupation certificate and a certificate of registration for the swimming pool, or
- A certificate of non-compliance issued under the *Swimming Pools Regulation 2008*.

However, the new requirements do not apply to certain properties, such as units in strata complexes or community schemes.

Septic Systems

The Law Society understands that some rural councils are not inspecting and registering septic systems. A purchaser's solicitor should clarify prior to exchange of contracts whether the septic is required to be registered, and council's requirements.

Members of the Law Society's Rural Issues Committee are aware of some matters in rural areas where a council has inspected septic systems after exchange of contracts and required the systems to be upgraded at a cost of up to \$10,000.

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