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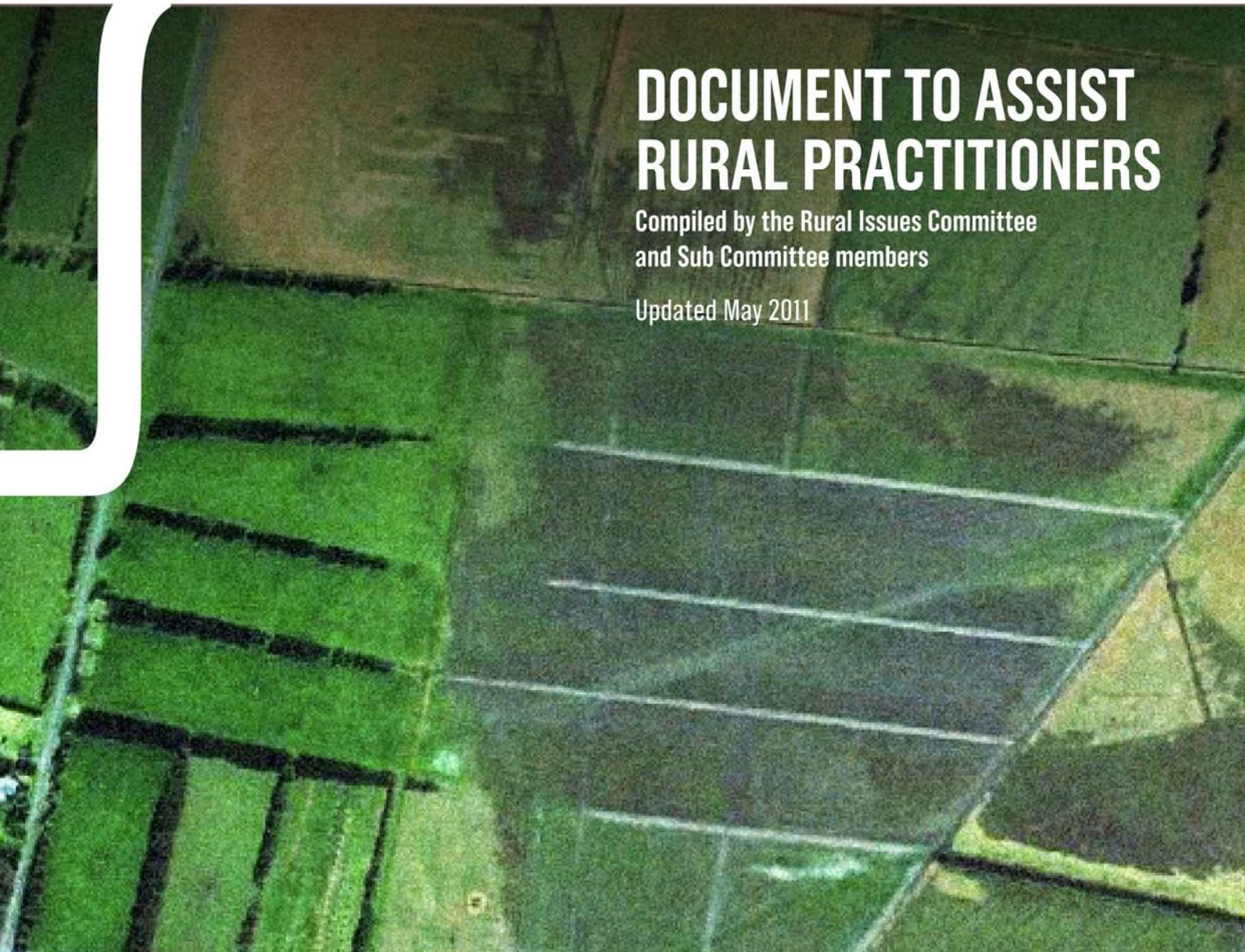

DOCUMENT TO ASSIST RURAL PRACTITIONERS

Compiled by the Rural Issues Committee
and Sub Committee members

Updated May 2011

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Compiled by the

RURAL ISSUES COMMITTEE

AND SUB COMMITTEE MEMBERS

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UPDATED MAY 2011

Cover: Aerial View of Numbaa, NSW, Australia

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1. Introduction

This publication covers some of the issues that are relevant to rural conveyancing. The aim is to be of practical assistance, especially to those practitioners who do not have a lot of experience in this area of conveyancing.

The material contained in this Document is not legal advice. It is intended to be a general outline for the guidance of practitioners and is not to be regarded as a binding set of principles. The procedures set out in the Document are not mandatory.

Peter Moffitt and Gale Mendham (Gordon Garling Moffitt, Grenfell), Bill Thompson, Tammy Holzheimer and Lisa Anderson (Commins Hendriks, Coolamon) and Frere Green (Lovett & Green, Warren) prepared the original paper. Peter, Bill and Frere are all members of the Law Society's Rural Issues Committee and have updated the Document, which has been prepared under the auspices and with the assistance of that Committee.

Please note that as part of the NSW Government restructure announced on 4 April 2011, the Land and Property Management Authority (LPMA) is abolished as a division of the NSW Government. As a result, the administration of the *Crown Lands Act 1989* and *Soil Conservation Act 1938* are transferred to the Department of Primary Industries, (a division of the Department of Trade and Investment, Regional Infrastructure and Services). The remaining land titles and land valuation functions formerly administered by LPMA are now administered by Land and Property Information (LPI), a division of the Department of Finance and Services.

2. Vendor's Duty of Disclosure

In land transactions the general rule has been *caveat emptor,* "let the buyer beware". It seems established at law that caveat emptor does not mean that the buyer must take a chance, but it means that he or she must take care.

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.

In general, the following are some basic propositions, which indicate that a vendor only has a limited duty to disclose matters relating to the property sold, and that the purchaser's remedies for non-disclosure are confined to a narrow range of situations:

- In an ordinary vendor and purchaser situation, there is no fiduciary relationship between the parties when they are negotiating the terms of the contract.

- 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.

- Mere silence by a vendor does not constitute fraud unless there is active concealment of a defect.

3. Pre-contract Enquiries

Pre-contract enquiries occur in respect of matters:

- not covered under the contract;
- not covered under the general law or any statute;
- for which the vendor has no duty of disclosure.

These matters generally relate to the quality of the subject matter of the sale and may perhaps be covered by 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 the minimum until the parties are bound by a binding 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. The purchaser's solicitor should cover, by pre-contract enquiry or by conditions inserted in the contract, those matters which are material for the purchaser and which need not be disclosed by the vendor.

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

Practitioners should consider including in the contract the purchaser's intended use of the land. Consideration should be given for the contract to contain provisions which enable it to be terminated if enquiries or tests reveal, for example, unacceptable residue or disease problems. Written answers to key questions should be sought from the vendor. The vendor's written authority to obtain specific information about the land from third parties should be obtained.

The Livestock Health and Pest Authority ("LHPA") and Department of Primary Industries can provide information about the existence and implications of adverse matters (as referred to in the *Conveyancing (Sale of Land) Regulation 2010*) and of certain other orders or notices affecting the property.

However LHPA and the Department of Primary Industries 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. In addition, unless the information is already on the public record or its release is specifically authorised, disclosure can breach policies and laws governing the confidential use of information held by government agencies.

4. Hillpalm v Heavens Door [2005] NSW CONV R 56/097

Practitioners are alerted to the possible ramifications for property lawyers of the above High Court decision of *Hillpalm v Heavens Door.* This case involved an appeal by Hillpalm Pty Limited ("the Appellant") against decisions made by the NSW Land and Environment Court and in the NSW Court of Appeal granting Heavens Door Pty Limited ("the Respondent") a right of carriageway, 10 metres wide, over land owned by the Appellant in northern NSW. The Land and Environment Court and subsequently the Court of Appeal held that:

By section 122 of the *Environmental Planning & Assessment Act 1979* ("the EP&A Act") a "breach of this Act", as referred to in section 123, includes a failure to comply with the conditions for which a consent is granted. The owner of lot 1 could, in 1978, have forced the owner of lot 2 to create the easement in question.

- The Council's consent to the subdivision operates to create a right *in rem* so that all later transferees of any lot may rely upon it. The transferee, from time to time, of any lot, which has the apparent benefit of any condition, may enforce that condition.

- The EP&A Act must take precedence over the system of registration of titles regulated by the *Real Property Act 1900.*

However, in a majority decision of 3-2 the High Court upheld the appeal and determined the Respondent was not entitled to an order in its favour for the registration of a right of way over Lot 2. It follows that practitioners acting for purchasers should, especially where the *current* plan for the land, shows an "intended" or "proposed" easement or right of way, make further enquiries (for example, with the local council) to ensure that there is no outstanding development consent condition requiring the creation of such an easement or any other matter that may impinge on the purchaser's right and title to the land and its use.

5. Pre-contract Enquiries for Rural Lands

Practitioners acting on the sale/purchase of rural lands should be aware of the following:

5.1 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 is increasing. In recent years residue incidents in the beef industry, for instance, have cost many millions of dollars. The residues of major concern to land purchasers are those, which persist in soil for prolonged periods (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 persist for variable periods. To combat specific residues in livestock targeted testing and on-farm management programs have been established. Most properties on residue management plans have the situation under control and the risk of contamination of animals is 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; or abandoned transformers and hydraulic equipment. They 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. Soil can be tested for specified residues.

The *Stock (Chemical Residues) Act 1975* aims to prevent livestock with unacceptable levels of drug and pesticide residues being slaughtered for human consumption. Residue-affected stock can be detained by an inspector or through an undertaking with the owner. Grazing of contaminated land may be prohibited by the Minister.

In the *Stock (Chemical Residues) Act 1975*, the critical definitions are (s3):

"Residue" means

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;

"Stock" means

a. cattle, sheep, goats and pigs; and

b. other animals or birds of a kind used for the food of people that the Minister, by order published in the Gazette, declares to be stock for the purposes of this Act.

The LHPA can advise, after exchange of contracts, whether the property is affected by any current orders, notices, or undertakings under this Act. However, most LHPAs will only release such information after exchange of contracts with the vendor's written approval. Proposed purchasers may be well advised to make those enquiries prior to exchange of contracts and thus, they will always need the current owners written approval before the appropriate LHPA will provide any information about residue history or status of the property etc. The purchaser should ask the vendor whether their tail tag is on a targeted testing list or the property has a residue management plan, and for any other available information about the property's residue history. Refer to part 7 of this document for a draft authority.

5.2 Livestock Diseases

Some livestock diseases can persist on contaminated land even when the property is de-stocked when sold. Examples of such diseases include Johne's disease and anthrax. If the property sale includes stock, then a wider range of diseases can carry over, including some subject to regulatory control, such as footrot in sheep and enzootic bovine leucosis (EBL) in dairy cattle. Market assurance programs are established for Bovine Johne's disease ("BJD") in cattle. Information is available to members of NSW Farmers Association from their website as to the new approach to Johne's disease in stock and from the LHPA's website www.lhpa.org.au .

The *Stock Diseases Act 1923* aims to control proclaimed diseases of livestock. Stock movements may be restricted and stock owners are required to treat infected or at-risk stock.

Protection zones are declared in some parts of the State to prevent the introduction or spread of specified diseases. Zones are currently in place for:

- foot rot in sheep throughout much of the State;
- cattle tick in grazing livestock in the northeast.

After the exchange of contracts, LHPAs can advise whether any current orders, notices, or undertakings under this Act affect a property, and whether the

property lies within a protection zone. They cannot disclose, without the present owner's written permission, any other information about the disease history or status of the property, or the current owner's stock. Prospective purchasers should therefore 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.

5.3 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 phylloxera persist on land, while many other diseases and pests can occur in orchards, pastures, and crops acquired with the land.

The *Plant Diseases Act 1924* provides for 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. Zones are currently in place for:

- fruit fly in the Riverina and lower Murray;
- bunchy top of bananas on the North Coast;
- phylloxera 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.

5.4 Noxious Weeds

The *Noxious Weeds Act 1993* 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 land-holders. The list of declared noxious weeds varies from district to district.

Where an occupier fails to comply with the obligations of the Act, the local council or weeds county council may issue a weed control notice under section 18 requiring the occupier, at their 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; quality and saleability of product; or 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 LHPA.

5.5 Noxious Animals and Insects

The *Rural Lands Protection Act 1998* requires landholders to actively control "pests" on their properties, (see Part 11 of the Act). "Pest" is defined in the Act as being "any member of the animal kingdom declared by a pest control order to be a pest". Part 11 of the Act refers to the control on public and private land in the State of animals, birds, insects and other members of the animal kingdom that are pests.

After exchange of contracts, LHPA can advise whether any pest control orders have been made. They can also inform potential purchasers of any orders under sections 143 and 144 of the Act. 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.

5.6 Other Conditions of Land Use

The local council, Crown Lands NSW, NSW Office of Water, Environment Protection Authority and other government agencies control various aspects of rural land use, covering 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 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 LHPA 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.

5.7 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 looked into.

Obviously, the section 149 zoning certificate 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 150m 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.

6. Vendor Statutory Disclosure and Warranty

Practitioners must be aware of the current *Conveyancing (Sale of Land) Regulation 2010*, which came into effect on 1 September 2010. The Regulation, in Schedule 3, under the heading "Prescribed Warranties" provides as follows:

Part 1 – Warranty in Contract

1. The vendor warrants that, as at the date of the contract and except as disclosed in the contract:

   a. The land is not subject to any adverse affectation, and

2. For the purposes of this warranty

   a. Land is "subject to an adverse affectation**"** if anything listed in Part 3 of Schedule 3 to the *Conveyancing (Sale of Land) Regulation 2010* applies in respect of the land, and

   b. A public or local authority has a proposal in respect of the land if, and only if, the authority has issued a written statement the substance of which is inconsistent with there being no proposal of the authority in respect of the land, and

   c Without limiting the way in which it may otherwise be disclosed, an adverse affectation is taken to be disclosed in a contract if any of the following is attached to the contract:

      i a document stating or illustrating the effect of the adverse affectation,

      ii a document, issued by a public or local authority, to the effect that the authority, or another such authority, has a proposal referred to in Part 3 of that Schedule,

      iii a copy of the order, notice, declaration or other instrument-giving rise to the adverse affectation,

      iv a copy of the page of the Gazette in which the order, notice, declaration or other instrument giving rise to the adverse affectation was published, and

For those advising rural clients it is important to note that the following additional matters are covered, *inter alia,* under the warranty provided by the Regulation, being:

7. A proposal of TransGrid or an energy distributor (within the meaning of the *Energy Services Corporation Act 1995)* to acquire any right or interest in the whole or any part of the land.

9. A proposal to acquire any right or interest in the whole or any part of the land because of the *Pipelines Act 1967.*

11. A notice to or claim on the vendor by any person, evidenced in writing, in relation to:

   a. any common boundary or any boundary fence between the land and adjoining land, or

b. any encroachment onto any adjoining land by any building or structure on the land, or

c. any encroachment onto the land by any building or structure on any adjoining land, or

d. any access order, or any application for an access order, under the *Access to Neighbouring Land Act 2000.*

12. An order under section 124 of the *Local Government Act 1993* to demolish, repair or make structural alterations to a building which has not been fully complied with.

15. A right of way under section 164 or 211 of the *Mining Act 1992.*

16. A licence under section 13A of the *Water Act 1912.*

17. Any of the following under the *Stock Diseases Act 1923:*

a. an order under section 7(1)(c) or (d), 8(1)(a), (b), (c1), (d) or (f), 13(2) or 17(1),

b. a notice under section 8(1)(c),

c. a declaration under section 10, 11A or 15(1),

d. an undertaking under section 11,

e. appointment under section 12(a),

f. an authorisation under section 12(b).

18. Any of the following under the *Stock (Chemical Residues) Act 1975:*

a. an order under section 5(1)(d) or (e)(ii) or 11(1) or (2),

b. a requirement under section 7(1) or 8(1),

c. an undertaking under section 7A(1), or

d. a restriction or prohibition under section 12(1).

19. Any of the following under the *Soil Conservation Act 1938*:

a. a requirement under section 15A(1) or 22(1),

b. notification under section 17(1) or (7)(c) or 20(1),

c. a notice under section 18.

20. Any direction under section 38(1) of the *Native Vegetation Act 2003*.

21. Any application for an order under the *Trees (Disputes Between Neighbours) Act 2006* or any order under that Act that requires work to be carried out in relation to a tree if that work has not been carried out fully in compliance with that order.

It can be seen how important it is to make those enquiries from a vendor farming client as to whether he or she has received any notices within the meaning of the Regulations pursuant to the *Water Act 1912*, the *Stock Diseases Act 1923*, the *Stock (Chemical Residues) Act 1975*, the *Soil Conservation Act 1938*, the *Native Vegetation Act 2003*, the *Energy Services Corporations Act 1995*, the *Pipelines Act 1967*, the *Access to Neighbouring Land Act 2000* and the *Mining Act 1992* (as amended). If the vendor has received any of those notices and does not disclose them, then there is obviously a breach of warranty, with all the consequences for either vendor or purchaser that flow from that breach.

7. What to Ask a Vendor's Solicitor

The purchaser's solicitor should alert the purchaser to the problem of land contamination in general terms with particular reference to the type of property, the enquiries (technical and legal) that should be made and the contractual provisions that could be inserted to protect the purchaser. The onus however, should be on the purchaser to decide what degree of risk the purchaser is prepared to accept, what enquiries the purchaser desires to make and whether to incur the necessary expenditure pre-contract or post-contract. There is no reason why, before the contract is entered into, the purchaser's solicitor could not approach the appropriate regulatory authorities, including the Council, local Catchment Management Authority, Environment Protection Authority and Department of Primary Industries, to obtain whatever information they will provide regarding the property. It is probably best, however, to encourage the purchaser to make those enquiries themselves and to satisfy themselves as to those enquiries due to the technical nature of those enquiry results.

It is suggested that, upon receipt of instructions or advices from the agent or a purchaser/client that a contract is on its way, the purchaser's solicitor write initially to the vendor's solicitors seeking replies to pre-contract enquiries. It would be advisable to include in the letter that it is based on those replies that the purchaser will be entering into the contract. Some of the questions that could be asked are as follows:

- Has the vendor received any notices whether in writing or orally concerning the following:

  i Chemical residues;

  ii Livestock diseases;

  iii Plant diseases and pests;

  iv Noxious weeds, animals and insects;

  v Native title or protected species;

  vi Proposals to mine any part of the property pursuant to the *Mining Act 1992,* and

  vii Native vegetation.

    - If town water is connected to the property, who is the water supplier?

    - If there is a water licence or water entitlement, please provide any documentary evidence of this and confirm the address of the relevant authority.

    - Please confirm particulars of:

      * the LHPA that covers the area;

      * the local council that covers the area and the contact person who is responsible for town planning?

* the owner's access arrangements in relation to the lands i.e. by a public road, enclosure permit or through another property, and

* whether or not there are any enclosure permits attaching to the Land. If so, please provide particulars or details of applications to purchase yet to be dealt with.

- Please provide particulars of current stock grazing on the property and when they will be removed.

- If applicable, please confirm the area of crop passing with the property, the value of the crop, or alternatively, confirm the area the purchaser can prepare for cropping prior to settlement.

    - For capital gains tax purposes will the vendor agree to an apportionment of the purchase monies i.e. for the homestead and immediate area of 2.5 ha and the balance of the property and improvements?

    - (Discuss the above with the purchaser's accountant and whether or not the usual depreciation clause is to be inserted in the contract).

    - Is the property presently leased and/or share farmed?

    - Is there any application made to the Crown to purchase and if so, what is the status of that application (if Crown land)

The purchaser's solicitor will need to send to the vendor's solicitors an authority addressed to the LHPA, which can be along the following lines:

I/We, …….. of …….., the vendor(s)(occupier(s)) of the lands referred to in the attached Schedule of Lands, hereby authorise and direct the LHPA to supply to the purchaser's solicitors, …… any information about chemical residue, disease, and pest status of the land, or stock presently on the land, which could affect the suitability of the lands for the purchaser's purposes.

As referred to above, it is important for the vendor's solicitor to ask his/her client, at the time of obtaining instructions, whether the property or any part of it is share farmed or leased. If there is a sharefarmer or lessee, sometimes there can be difficulties, especially if a crop has been sown, in obtaining vacant possession, at least prior to harvest.

Practitioners' attention is drawn to section 3 of the *Agricultural Tenancies Act 1990*, which provides that the objects of the Act are:

a. to encourage agricultural landowners and their tenants and sharefarmers to have regard, in farming practices to the principles of ecologically sustainable development (as described by section 6(2) of the *Protection of the Environment Administration Act 1991)* insofar as they are capable of applying to those farming practices and, to maintaining sustainable agricultural production and preventing the degradation of the environment, and

b. to encourage the use of written agreements for agricultural tenancies and to set out terms that are taken to apply to all agricultural tenancies, including terms setting out rights of the parties, and

c. to provide a mechanism for resolution of disputes by the parties to agricultural tenancies themselves through mediation, and

d. to provide an arbitration mechanism for settling disputes between parties to agricultural tenancies that is outside the court system (the procedures for such arbitration to be as quick, cheap and free of legal technicality as is consistent with doing justice between the parties).

The *Agricultural Tenancies Act 1990* extends to tenancies in existence immediately before the repeal of the *Agricultural Holdings Act 1941* or created by the exercise of an option granted before its repeal. All arbitrations are now conducted under the Act (subject to the very rare exception where the matter was referred to arbitration, i.e. an arbitrator had been appointed, prior to the commencement of the amending Act and the arbitration has not been completed).

Under this Act, an owner and a tenant have the right to have the provisions for the agreement creating a tenancy reduced to writing and signed (section 5). The parties should certainly be encouraged to reduce their agreement to writing, dealing comprehensively with the terms of the tenancy before its commencement. Some of those terms are governed by the Act and are included as terms of the tenancy by force of the legislation.

Solicitors practising in this area should have a good working knowledge of the Act and obtain specific instructions from a vendor farming clients as to whether any person other than the vendor is using the land and, if so, under what circumstances.

Many share farming/lease agreements are oral and are deemed to be a periodic tenancy from year to year. In those circumstances it will be necessary to give 12 months' notice (sections14(2) and 14(3)). If the sharefarmer/lessee has commenced ground preparation for a crop, then the notice cannot expire until one month after the end of the cropping program. One can see that, in some circumstances, it may be necessary to give 18 months' notice (see sections14(3) and 14(5)).

Under Part 1, section 4 of the definitions:

"tenancy" is defined as:

a lease or licence, an agreement for a lease or licence, a tenancy at will or a share farming arrangement or any other arrangement by which a person who is not the owner of the farm has a right to occupy or use it.

"tenant" is defined as:

a share farmer and any person whose right of occupancy or use of a farm is derived from the tenant, but does not include a tenant employed by the owner.

These definitions can be interpreted very widely and may include agreements for agistment. The Act mainly deals with two broad categories, being compensation for improvements arising out of the use of the farming property and termination of the tenancy.

Practitioners should make themselves aware of section 14 of the Act, especially as to the constraints of termination:

14. Termination of Tenancy

1. A tenancy for a fixed term with no provision for holding over terminates at the end of the fixed term without the necessity for any notice.

2. A periodic tenancy (other than a tenancy from year to year) cannot be terminated unless written notice of termination is served by a party on the other party so as to give notice at least equivalent to the length of the tenancy period.

3. In addition to the requirements of subsection (2), a periodic tenancy (other than a tenancy from year to year) cannot be terminated unless written notice of the termination is served by a party on the other party so as to give notice of at least:

    a. in the case of a share farming arrangement for crop growing a period of 1 month, ending at least 1 month after the end of the current annual cropping program, and

    b. in any other case, a period of 1 month.

4. A tenancy from year to year cannot be terminated unless written notice of termination is served by a party on the other party so as to give not less than 6 months' notice before the end of the tenancy period.

5. In addition to the requirements of subsection (4), a tenancy from year to year cannot be terminated unless written notice of termination is served by a party on the other party so that the period of notice ends at least 1 month after the end of the annual cropping program.

6. This section does not apply to termination for a breach of the tenancy or where the tenant and the owner have otherwise agreed on the notice to be given.

Agricultural tenancies can be a disaster area for the unwary rural conveyancer. Practitioners' attention is drawn to the case of *Hohn & Anor v Mailler*[2003] NSWCA 122. *Hohn's* case was not brought under the Act and nor were the decisions made with reference to the Act.

Briefly, the facts were the Mailler family purchased land that was subject to an agricultural lease. The lessee, Hohn & Anor, planted a crop of sorghum prior to the end of the lease. When the Mailler family harvested the crop, the lessee commenced legal action citing a "re-entry for harvest" provision in the lease.

The case turned on a point of construction under contract law and did not involve an interpretation of the Act. There are concerns about the implications of the decision upon leases and share farming agreements under the Act. Section 14 of the Act covers the termination of tenancies under the Act but does not currently make provisions for the situation where a fixed term tenancy includes a "holding over" provision.

8. Access and Area

8.1 Access

Another issue to address when acting for either a vendor or a purchaser of rural lands is what access is available and whether it is a legal access or access that can be terminated. Quite often what vendors assumed to be legal access to a property is in fact access across a stock route, or through a neighbour's land, which is subsequently found not to be legal access at all. The lack of access or legal access can cause a series of problems and it is not unusual, in some instances, for farming lands to be land-locked. It is incumbent upon the practitioner to ascertain that the access to the property is a legal access that is by way of a formed road.

8.2 Area

The actual area of the property being purchased should of course be clarified especially if the purchase price is calculated at a dollar per hectare/acre basis. It is also advisable to clarify particulars of easements, rights of way or any covenants that are attached to the land and full copies of plans and documents should be obtained. It is helpful to colour code the lands being purchased (or sold) on a parish map setting out the different location of each lot.

To assist in plotting, up to date Cadastral maps can be downloaded free of charge from the LPI website, online search information, www.lpi.nsw.gov.au.

The vendor's solicitor's draft contract should provide a Schedule of Lands, setting out the Lot numbers/Portions, Deposited Plans and the area in hectares (and acres), and of course Title Reference(s).

Many farming land lots/portions are recorded in an Auto Consol and practitioners should be aware that when lands are split between two purchasers, thus splitting an Auto Consol, a request could be made to the LPI to have separate titles issue. This can be of great assistance at completion date especially when there are different incoming mortgagees.

9. Crown Lands

9.1 Roads

Crown public roads generally provide lawful access to freehold and leasehold land where little or no subdivision has occurred since the original Crown subdivision of NSW, early in the nineteenth century.

These roads are part of the State's public road network, and the majority have not been formed or constructed. In some parts of the State, these roads contain significant native vegetation and provide a wildlife corridor in an otherwise cleared landscape.

Crown public roads are managed under the *Roads Act 1993*, as are all other public roads in the State.

9.2 Occupation of Crown Roads

An enclosure permit (EP):-

- does not provide the holder with any title to the Crown road or watercourse;
- requires that the land must remain available for access if required, and
- authorises grazing, which is the only permissible use of an enclosure permit.

The value of an EP to a landowner is not only the land's grazing value, but also the saving in the cost of fencing the road out from their (adjoining) property.

An EP (formerly known as a Road Permit) authorises the enclosure of a Crown road or watercourse by the holder of adjoining freehold or leasehold land. The permit allows the adjoining landholder to fence a Crown road as part of his/her own property. The permit may be issued, subject to conditions, including payment of an annual rent to the State.

An EP can only be granted to the holder of the adjoining land.

It is advisable to annex to the contract a copy of a search from the LPI (currently $71.20) setting out the location of the EP by way of map and other relevant details.

9.3 Closing and Purchasing Crown Roads

Rents

In 2004, the Government undertook reforms of the *Crown Lands Act 1989*. This reform included amendments to the rental regime for EPs over Crown Roads. The reform required rental on EPs to be set at market rent subject to

a statutory minimum. As at 28 April 2010, this statutory minimum was $412.00 plus GST.

The Minister for Lands' media release of 30 June 2010 advised the following concessions:

- for those applicants who have applied to close a Crown road prior to 10 June 2006, all rent relating to a corresponding EP is waived until the application (and any disposal) is finalised,
- for those EPs that are part of a conservation agreement, rent continues to be reduced to $50.00 a year,
- for all other EP holders, a rental fee of $140.00 pa plus GST applies for the 2010/11 financial year.

As from the 1 July 2010, EP rent for farmers will be $140.00 per year (previously $350.00 for three years).

The LPI has agreed that they will accept one application form and one fee of $475.00 if there are a number of different EPs, which attach to the lands owned by a different family member, company or a trust, provided that there is the one business operating the farmlands. For example, if a trading partnership operates the farmlands which include blocks owned by the husband solely, the wife solely, the husband and wife jointly, and a company then one application can be lodged.

Neighbours can also lodge a joint application to save the initial fee.

The advantages of lodging an application to purchase an EP include:

- Application and processing fees are significantly reduced.
- Lodging an application avoids the possibility that rental for lands contained within the permit may revert to 'Market rental'.

If a farmer wishes to purchase a Crown road, the following will apply:

- Farmers are able to amalgamate EPs so that only one application for conversion needs to be made. This can also reduce rental payable whilst the application is being processed.
- In addition to the fees, farmers will have to pay the value of the land. This value will now be no more than the valuation used to determine local

council rates, the value of any improvements on the land will not be taken into account, and the value may be reduced where the land is affected by easements, covenants or poor terrain. The LPI has indicated that it is expected that photographic evidence of affectations on the land will be sufficient rather than it being necessary to go to the expense of arranging an independent valuation.

- The purchase price can be paid by three equal annual instalments.
- If an application was submitted prior to 10 June 2006, no further rental will be payable pending finalisation of the application.
- If a farmer does not want to purchase the lands contained within the EP then rental will continue to be payable. Farmers can elect to cancel their permit and fence the Crown road out of their property. The problem with this option is that fencing could be expensive and unused roads could be a harbour for pests and weeds.

Common concerns

Property owners may be concerned at:

- seemingly unnecessary Crown roads through their properties;
- the need for payment of rent for the land enclosed, and
- the public's continued right of access over these roads.

What happens when a property enclosing a Crown road is sold?

When a property enclosing a Crown road is sold, the EP remains and the new owner of the land is liable for payment of the EP rent (including any arrears of rent and interest). The new holder of the land must notify their local Crown Lands office, in writing, within 28 days of the date of the sale.

Generally annual rent for an EP is payable in advance. However, concessions may apply, please refer to 'Rents' above.

9.4 Perpetual Leases

Special purchase offer for perpetual leases

The special purchase offer for perpetual leases has expired and those leases, which are not subject to an application for purchase, will have their annual rent changed to a market based rent.

Perpetual leaseholders will still be able to apply for purchase of leases at the concessional price, however a market based rent will apply pending the outcome of the application.

The purchase price is not payable by annual instalments.

Unless the lease is in an urban area, a restriction on subdivision, and/or restriction on separation of multiple lots, will be imposed on conversion to freehold.

Conversion of Perpetual Leaseholds (lands excluding Western Lands Lease)

Although the date to convert Perpetual Leases to freehold land at lower rates has expired (30 June 2009), holders of Perpetual Leases still have the opportunity to convert their Perpetual Leases to freehold land.

Lodging an application prior to the 30 June 2009 deadline would have secured rental. Rental payable can now be expected to be no less then $440.00 per annum, (which is inclusive of GST but subject to CPI increases) with the rent determined by the market value of the land.

However, a successful application to convert a Perpetual Lease to freehold land is not without its restrictions and is subject to certain conditions.

During the process of the application a covenant to protect conservation values can be imposed should such values be identified by the LPI, for the purposes of protecting the environment, protecting or managing natural resources, or protecting cultural, heritage or other significant values of the land or any item or work on the land, in accordance with section 77A of the *Crown Lands Act 1989*.

According to section, 77B of the *Crown Lands Act 1989* a covenant can be imposed to restrict the separation of multiple lots, and/or the land in question from being subdivided.

In addition, there is the opportunity for the Government to negotiate to purchase the converted land from the landholder, but this will involve market value being paid or sale price negotiated with the landholder.

Increased Crown Rental on Perpetual Leases from 1 July 2009

The Department of Lands advised years ago that Crown rentals would increase if a person did not apply to convert their lands to freehold. All holders of Perpetual Leases had until 30 June 2009 to lodge an application to purchase and avoid the rent increases.

One practitioner reported that a client who was paying rent of $400.00 per annum until 14 April 2010had the rent increased to $1,820.00 per annum after that date. The rent was calculated by multiplying the land value, being $455,000.00 (as per the most recent Valuer General's notice) by 0.4%, therefore the rental was $1,820.00 per annum.

The rent for 14 April 2011 until 14 April 2012 will increase in accordance with the consumer price index and in the third year, the rent will be reviewed at a percentage of the land value yet to be determined. After the three years it is proposed that the rental will be 0.8% of the current land value. If the rental was 0.8% of $455,000.00 then the amount payable per annum will be $3,640.00 which is equivalent to almost one half of the balance owing to the Crown, as set out below, to convert the lands to freehold.

Balance payable to the Crown to convert a Perpetual Lease to Freehold

The steps involved are as follows:

1. Lodge an application to purchase with payment of the prescribed non-refundable application fee (currently $398.00).

2. Once the application has been lodged, the obligation to pay rent will cease once the application to purchase has been granted, then any credit amount will be deducted from the purchase price. The purchase price is then payable within six weeks of the date of the letter of offer however; the LPI will consider an application to pay within 6-12 months.

3. The purchase price to convert the leasehold to freehold is the lesser of either:

    a. 3% of the current land value as determined by the Valuer General's notice of valuation.

    b. The original Crown debt plus CPI increases.

In the example given in the paragraph above on Crown Rental on Perpetual Leases, 3% of the land value was $6,837.00, whilst the capital value plus CPI increases was $5,699.00.

Conveyancing issue where there is a Perpetual Lease

The vendors and purchasers in a rural conveyance will need to deal with these issues prior to finalising the Special Conditions of exchange of contract.

For example, they will need to consider who will be responsible for:

- the application fee;
- rent and debt owing to the Crown, or
- the obligations under a Perpetual Lease including rent and any conversion costs?

9.5 Other Continued Tenure Leases

Perpetual Leases where the rent is predetermined, Term Leases (Conditional lease, Crown lease and Prickly Pear leases held for a term of years) and Special Leases which are held in perpetuity are also subject to the *Crown Lands (Continued Tenures) Act 1989*. The holder of one of these leases may lodge an application for conversion, but the special purchase price is not applicable for these leases. The purchase price will be either the notified value recorded in the Department's records, or the market value of the land.

The previous allowance for payment of the purchase price over a period of up to 32 years is no longer available for any lease purchased under the provisions of the *Crown Lands (Continued Tenures) Act 1989*. If the application for purchase was lodged after 30 June 2004, the full purchase

price is generally payable within 6 weeks of the date of the approval or other title commencement date. As with any Crown land, the amendments to the *Crown Lands Acts* empower the Minister to impose covenants for the protection of the environment and other conservation values by a restriction on use, a public positive covenant, or by restriction on subdivision of the land (including restriction on subdivision of multiple lots comprising a former lease).

9.6 Leases and Licences

Leases

A lease of Crown land enables exclusive use over a particular piece of land for a specified term and purpose. The information in this section refers to leases granted under the *Crown Land Act 1989*, and not perpetual leases, special leases or term leases which are subject to the *Crown Lands (Continued Tenures) Act 1989.*

Licences

A Crown land licence is a contractual agreement that grants the licensee a personal right to occupy and use Crown land for a particular purpose. It does not grant exclusive possession of the land, as is the case with a lease, and may permit the land to be used by other persons.

Concessions and Hardship Relief

The Department of Primary Industries administers leases, licences and occupancies over Crown land under the provisions of the *Crown Lands Acts.* The Department charges annual market rent for tenures on Crown land and provides a range of concessions to individuals and organisations. More information is available from the NSW Crown Lands website www.crownland.nsw.gov.au.

9.7 Incomplete purchase

An incomplete purchase is a tenure describing Crown land that is in the process of being purchased. These tenures were previously known as:

- auction purchases;
- after auction purchases;
- conditional purchases;
- improvement purchases;
- residential lease purchases;
- returned soldiers special holding purchases;
- settlement purchases;
- soldiers group purchases;
- special purchases;
- suburban holding purchases;
- tender purchases;
- after tender purchases;
- town lands lease purchases;
- weekend lease purchases;

- irrigation farm purchases;
- non-irrigable purchases, or
- town land purchases.

From 1 July 2004, the purchase price of any land purchased is payable in full on settlement.

An application for an Incomplete Purchase, which was lodged prior to 1 July 2004, may be paid by annual instalments (including interest) over a period of up to 32 years, subject to a minimum annual instalment of $350.00 plus CPI calculated on the instalment. The interest rate is currently 8% (reducible) per annum.

Extra payments or pay out the incomplete purchase at any time during the term of the purchase may be made. There are no penalties for paying out the incomplete purchase early, and many holders choose to pay them out as soon as they are advised that their applications have been successful.

Payment of purchase price

While the land remains as an incomplete purchase, there are certain notations on the Certificate of Title that record the Crown's interest in the land. These notations relate to the requirement for payment of balance of purchase and other monies, forfeiture provisions, and restrictions on subdivision.

When all monies owing to the Crown have been paid, the Department of Primary Industries will provide the holder with a document to be lodged at its Queens Square office in Sydney, for removal of the notations from the title. The restrictions of subdivision in most instances will remain on the title.

Transfer of an Incomplete Purchase

Where an incomplete purchase is transferred with monies still owing, section 5 of the *Crown Lands (Continued Tenures) Act 1989* requires outstanding monies to be paid in full within 3 months of the registration of the transfer. The only exception to this is in the case of an inter-family transfer and then only on request by the affected parties. If approval is given using this exception, the new owner can continue with the existing payment structure.

10. Water Entitlements

For water licences and associated water trading (the buying and selling of water licences or annual allocation water), New South Wales is currently operating under two pieces of legislation. If your vendor is in an area where a water sharing plan has commenced, the licence comes under the *Water Management Act 2000*. If not, the licensing provisions of the *Water Act 1912* still apply. Information is available on the website www.water.nsw.gov.au to determine whether or not the licence is under the *Water Management Act2000* or the *Water Act 1912.*

An owner or occupier of land is entitled to take water from any river, estuary or lake to which the land has frontage or from an aquifer underlying the land and use the water for domestic consumption and stock watering. In some areas there are water supply authorities with power to levy water service and charges. Those rates or charges are a charge on the land and are recoverable by the charging authority. The owner of the land and the purchaser are each liable to the charging authority for the amount of rates or charges outstanding at the time of the transfer of the land.

There is provision in the *Water Management Act 2000* for the issue of various categories of access licences entitling the holder to take specified volumes of water.

It is important for practitioners to check the water entitlements relating to the land and normally a vendor's solicitor should annex to the contract copies of all water licences and details of any irrigation rights, including the amount of water that can be pumped for irrigation purposes, and details of all bores.

Examples of entitlements are:

- an access licence, which is not tied to the land and is tradeable subject to Water Sharing Plan rules;
- works approval (i.e. pump site, channels etc), which are site specific;
- land use approval (authorised land), which also is site specific.

Note that access licences may be subject to security interests, including mortgages and company charges.

A register of access licences is maintained at the LPI and the recording of dealings, and access licences, and forms used are similar to dealings with land.

Access licences may be held in multiple ownership. However, the holders of an access licence should be familiar with the manner in which it is held. If held as joint tenants, upon the death of one of the holders, the licence automatically passes to the surviving holder or holders, notwithstanding the provisions of the will of the deceased holder. Those holding as tenants in common will hold in specific proportions and the share of a holder may be transferred, or upon death will pass according to the terms and conditions of that person's will. When drafting a will for a holder of rural lands, that has a Water Access Licence, practitioners should obtain specific instructions as to who is to be the beneficiary of that Water Access Licence – see part 10.9 of this Document.

10.1 Register of Access Licences

As stated above, this register is held at the LPI and a certificate of title for the access licence will be issued to the holder (or mortgagee). Each access licence will show its details, including:

- share component;
- extraction component;
- water source;
- expiry date;
- conditions;
- water management plan;
- ownership;
- any mortgage or other encumbrance, and
- old *Water Act* licence number.

The access licence register is available to the public in the same manner as the register of land titles.

10.2 Recording of Dealings in the Access Register

Section 71A of the *Water Management Act 2000* provides that dealings and various other matters set out in that section must be recorded in the access licence register.

10.3 Other Registers

There are several other registers as required under the *Water Management Act 2000* and operated by the NSW Office of Water:

- applications and approval register;
- available water determination register, and
- register of irrigation corporations.

10.4 Dealings with Access Licences

Dealing with access licences are covered in various sections of the *Water Management Act 2000* (sections 71L-7ZA). It is proposed in this paper only to deal with the following dealings:

- Transfers of access licences – section 71M;
- Subdivision and consolidation of access licences – section 71P;
- Assignment of rights under an access licence – section 71Q;
- Assignment of water allocation between access licences – section 71Q, and
- Term Transfers – section 71N.

<u>Transfer of Access Licences</u>

This will be the most common type of dealing and will usually involve the straightforward sale of a property; including the access licence works

approval and land use approval. The conveyancing procedure will be similar to the current procedure for land transactions, except that additional documents concerning the access licence will be required, such as discharge of the vendor's mortgage, transfer and mortgage by the purchaser to his or her financier. Transfer forms can be downloaded from the LPI website. If the licence is to be changed from the existing works or land use approval then application is to be lodged under section 71W.

Other transfers of access licences can involve situations where the licence is not to be used on any other land, or where it is to be transferred to other lands, in which case the procedures will depend upon whether those other lands hold land use and works approvals or not.

Subdivision and Consolidation of Access Licences

Holders of access licences may subdivide an access licence by cancelling it and issuing two or more access licences in its place, or may consolidate two or more access licences that relate to the same water management area or water source and of the same category, again by cancelling and issuing a single licence in their place.

The new licences created by subdivision or consolidation will contain the same combined share components and combined extractions components, and will be subject to the same conditions as those applicable to the cancelled licences.

Assignment of Rights under an Access Licence

The holders of two or more access licences of the same category and the same water management area may apply to the Minister to reduce the share or extraction component (or both) of one or some of the access licences and increase, by a corresponding amount, the share or extraction component (or both) of the others.

Such a procedure will not, of course, effect a reduction or an increase in the total of the share or extraction component of all licences involved. Note that in the case of a water access with multiple holders, where one holder wishes to assign part of his or her interest, the consent of all other holders is required under section 71Q. Such consent must be lodged with the application.

Assignment of Water Allocation between Access Licences

This provision replaces the temporary transfer provisions under the *Water Act 1912*. Application may only be made with respect to water allocations currently credited to the access licence from which the water allocation is being assigned and the assignment takes effect when details are entered in the relevant water allocation accounts.

Term transfers

Water access licences may be transferred on a temporary or term basis in accordance with section 71N of the *Water Management Act 2000*. A transfer form (section 71N) is executed and lodged at LPI for registration. This is

registered similarly to a Real Property Act lease. The ownership of the water access licence will revert back to the actual owner at the expiration of the term expressed on the transfer form.

Term transfers are akin to a lease, the difference being that during the period of the term transfer or any extension thereof the term transferee is deemed to be the holder of the licence and responsible for payment of all charges and conditions of the licence. Term transfer is not liable for stamp duty.

10.5 Joint Water Authorities

Unless specifically requested by all holders, certificate of title for an access licence will not issue but will be recorded on the register. It should be noted that:

- mortgagees will be noted as regards the interest of the particular holder from whom the mortgage is held;
- the proportion of each holder will vary whenever there is an alteration in the water allocation, either between the various holders or a holder acquires an access licence which is to be consolidated with the licence issued for the previous authority;
- sale by holder of his or her property including interest in the access licence and works approval does not require consent provided the purchaser will continue to use the works approval and use approval. Security interest is discharged as with land, and if applicable, fresh security interest taken by the purchaser's financier;
- section 74 of the *Water Management Act 2000* provides the mechanism for one or more of the co-holders of an access licence to exit from that licence whereby the interest in that access licence in extinguished and a new access licence granted for the entitlement previously held. Application may be by either all other co-holders or of the co-holders holding a majority of the share of the holdings in the licence;
- if either consent cannot be obtained then it be a matter for Supreme Court if it considers it just and equitable to order that the consent of the other co-holders need not be obtained, and
- section 74 should be carefully considered and particularly note the provision of Schedule 1B.

The works approval will be held by the authority holders proportionate to their interest in the authority and the land use approval will, of course, be held by the individual holders as regards their own land.

10.6 Security Interests

The *Water Management Act 2000* provides that security interests, such as mortgages and company charges that apply to a water licence issued under the *Water Act 1912* shall apply to the replacement access licence and those existing interests must be registered on the access licence register. Holders of security interests will have 24 months from the date of transition to the replacement access licence in which to register such an interest. Some interim arrangements will apply to protect potential security interest holders; for example, if Land Titles records show that the land linked to the original *Water Act 1912* licence was subject to a security interest. In such a case, a notice will be kept on the access licence register to state that a security interest may apply to the licence.

Individual lenders or licence holders may need to determine whether a pre-existing security interest does, in fact, apply to the previous licence under the *Water Act 1912.* This will depend on the circumstances of each case, including the provisions of the original security instrument.

10.7 Stamp Duty and Taxation Aspects

This information was obtained from the Office of State Revenue and parts reproduced from Ruling DUT 23.

Duty implications of water access licence transfers

The broad definitions of ‘property’ and ‘conveyance’ under the *Stamp Duties Act 1920* meant that all such transactions were subject to ad valorem duty calculated on the higher of the market value or consideration of the property the subject of the transaction.

The *Duties Act 1997* introduced finite lists of ‘dutiable property’ and ‘dutiable transaction’ and to trigger a liability under Chapter 2 of that Act, there must be a dutiable transaction in respect of dutiable property.

Under section 8 the list of dutiable transactions includes an agreement for sale and a transfer.

Under section 11 the list of dutiable property includes land in NSW, a statutory licence or permission under a NSW law, and shares in a NSW company. Hence both a water access licence and shares (with the right nexus) in irrigation companies are dutiable property for the purposes of the *Duties Act 1997*.

Under section 27(1) of the *Duties Act 1997,* if a dutiable transaction relates to both dutiable and non-dutiable property, it is chargeable with duty under Chapter 2 only to the extent that it relates to the dutiable property.

Also, under section 27(2) of the *Duties Act 1997*, if a dutiable transaction relates to different types of dutiable property for which different rates apply, the transaction is to be charged as if a separate transaction had occurred in relation to each such type of dutiable property.

Typical transactions include:

- a contract for the sale of water allocation only;
- a contract for the sale of a share component of a water access licence;
- a contract for the sale of a water access licence only;
- a transfer of a water access licence, and
- an agreement for sale of land, a water access licence and an associated water allocation.

If the transaction involves the sale of a licence, including the share component and water allocation, the share component and water allocation are capable of being transferred independent of the licence, duty is payable on the value of the licence only. This would generally apply to continuing or supplementary licences. However, for specific purpose licences the value of the licence includes the value of the associated share component as it cannot be transferred separately.

If a transaction involves the sale of land, a licence, share component, and water allocation and the share component and water allocation are capable of being transferred independent of the licence, it is considered the transaction is the sale of separate items of property and is dutiable in accordance with section 27(1). That is duty is payable on the dutiable value of the land (including improvements) and the licence only. However duty will be payable on the value of the stock and domestic share component as it cannot be transferred separately from the land and would be part of the value of the land.

Apportionment

Where a dutiable transaction between parties at arm's length includes dutiable and non-dutiable property or different types of dutiable property, it has been the Office of State Revenue's assessing practice to accept at the face value the parties' apportionment of the consideration between the various items of property. When apportioning the value of the water allocation it is advisable to adopt the current going rate in the particular valley as these rates vary from one valley to another. For example the going rate in the Macquarie is $1,250.00 per mega litre approx whilst the Namoi and Gwyder areas are much higher and the Lachlan is lower. However, if there is any reason to suspect that the apportionment does not reflect the market value of any item, the Chief Commissioner can request a valuation of any or all of the items of property being sold. This general practice will continue to apply to transactions relating to water licences, water allocations and shares in irrigation corporations.

The value of a water allocation associated with a sale of land is not necessarily the same as the value of a water allocation being transferred independently in the open market. In general the sale of a water allocation as part of a sale of land will be at a discounted rate compared to a sale of the same volumetric water allocation separate from land.

Therefore, where a transaction is between parties at arm's length, it is proposed to assess duty in accordance with one of the following methods, provided that the apportionment adequately reflects the discounted value of the water allocation.

Method 1: *Apportionment of the purchase price as determined by the parties*

Where the parties apportion the purchase price between the items of property and express the apportionment within the contract for sale and transfer, duty will be assessed on the basis of that apportionment at the appropriate rates.

Consistent with general assessing practice, the Chief Commissioner will require a valuation of the dutiable property (Method 2) in instances where the apportionment appears to result in an inadequate dutiable value for the land and improvements. For example, any apportionment determined by simply deducting from the total purchase price the "going rate" for water allocations on a per mega litre basis is not considered appropriate, as the resulting figure for the value of the land and improvements component may not reflect its true value, taking into account its accessibility to water and any existing irrigation infrastructure.

Method 2: *Valuation of the land and improvements*

Where a registered valuer has determined the value of the irrigable land and improvements, duty will be assessed at the general rate on that value provided the valuation takes into account the accessibility of water to the land and any existing irrigation infrastructure. A valuation will not be accepted if it has been determined solely by deducting from the total purchase price the value that would be attributed to the water allocation if transferred on the open market as a separate transaction.

Method 3: *Apportionment of the purchase price as determined by the Office of State Revenue*

Where the parties choose not to apportion the purchase price within the document, and wish to avoid the added cost of obtaining a valuation, duty will be assessed on the dutiable value of the land and improvements by applying a base value for water allocations and deducting this amount from the total purchase price.

The amounts used for calculating the value of water allocations under Method 3 are currently $300 per mega litre of general security water and $450 per mega litre of high security water.

Bore licences

These licences relate to underground aquifers or sub-surface water basins. They operate similar to a surface water licence. The licence itself identifies a volumetric water allocation (now referred to as a share component).

Similar to the surface water licences, if the share component can be traded independent of the licence then the share component is property but not dutiable property. Apportionment of the purchase price would apply and duty would not be payable on the value of the share component.

Irrigation Corporations

The current irrigation companies were originally established as State Owned Corporation (SOCs) under the *Irrigation Corporations Act 1994*. These SOCs were eventually converted to private companies.

Each company holds water access licences with each licence expressing both a share component and an extraction component. The companies also hold the appropriate works approvals and use approvals for the purpose of pumping the water.

These companies are non-profit and are established primarily for supplying water to their members.

Similar to other companies, membership is defined by a person's shareholding within the company. In general a member of an irrigation corporation, in addition to holding shares, will also hold corresponding water entitlements – for every one share, the member will also hold one water entitlement. One water entitlement generally equates to one mega litre of water.

It should be noted the difference between the water rights associated with a water access licence (share component) and those stemming from the ownership of shares in an irrigation corporation (corresponding water entitlements).

In the case of a water access licence, section 71Q of the *Water Management Act 2000* provides for the transfer of the water rights (the share component) independent of the licence.

However, in the case of the corresponding water entitlements stemming from the ownership of shares in an irrigation corporation, these water entitlements are stapled to the share. To acquire the water entitlements one must acquire the shares. In this case the water entitlement itself is not property, but simply a right which stems from the ownership of the share. This is treated the same as any other right associated with the ownership of the shares, for example the right to vote, the right to receive dividends, the right to surplus assets on a wind-up. All of these rights are taken into account when determining the value of the share.

When a person acquires shares in an irrigation corporation, the only property being acquired is the share. The value of the share will be determined by taking into account the value of all associated rights (the right to receive water).

Typical transactions include:

- an agreement for sale or transfer of shares in an irrigation corporation, and

- an agreement for sale of land and shares in an irrigation corporation.

On an agreement for sale or transfer of shares in an irrigation corporation, duty is currently payable at the rate of 60 cents per $100 on the dutiable value of the shares, including the value of the water entitlements. Where the sale or transfer of shares is part of a transaction involving land, the transaction will be assessed in accordance with section 27(2) of the *Duties Act 1997*. That is, the marketable security rate will apply to the value of the shares and the general transfer rate will apply to the value of the land and improvements. The purchase price can be apportioned using one of the methods described for transfers of water access licences with land.

Bodies Corporate, Co-operatives and Trusts

Where a person attains their water entitlements through their membership of a body corporate, co-op, or trust, the issue of whether a transfer of the water entitlements is dutiable depends on the rules governing the particular body in its administration of the entitlements.

If the rules of the body corporate, co-op or trust allow for the transfer of a water entitlement independent of any landholding, share or unit, then the entitlement is regarded as property in its own right. In this case, any transfer of the entitlement would not be liable to duty as the entitlement is not dutiable property under section 11 of the *Duties Act 1997.*

However if the rules of the organisation provide that the entitlements can only be acquired on acquisition of the landholding, share or unit, then ad valorem duty is payable on the dutiable value of the dutiable property, including the value of the water entitlement.

Capital Gains Tax

Licences are an asset for the purpose of capital gains tax, so the persons dealing in access licences should be fully aware of capital gains tax implications.

The granting of an access licence to replace a former *Water Act* licence should be subject to rollover relief and should not be deemed a disposal or acquisition within the meaning of the legislation.

10.8 Caveats

Section 71E and 71F of the *Water Management Act 2000* set out the provisions for registration of caveats.

Section 71E only permits recording of a caveat on an access licence (or a holding in an access licence) by what it describes as “an affected person” which is defined in section 71E(3)as:

a. The holder or co holder of the licence;

b. The holder of a security over the licence or holding (whether ornot registered);

c. A party to a dealing or perspective dealing in the licence or holding;

d. A person entitled or claimed to be entitled to be registered as a holder or co holder by devolution under section 72 (pursuant to death);

e. Any other person of a class proscribed by the regulations.

This means that any other person claiming to have an interest in the licence cannot record a caveat.

Clauses 6 and 7 of Part 1 Schedule 1A set out provisions concerning duration of a caveat and its removal.

NB: Practitioners should be aware that it is expected that the Commonwealth will legislate as to water entitlements and associated water trading, which may override the NSW legislation. If so, the Rural Issues Committee will draft a supplementary article.

10.9 Estate Planning

Wills

It is recommended that persons immediately review their wills to ensure that an access licence will pass as originally intended. Otherwise, one beneficiary could be left with the land, including works and land use approval, whilst another person could be left with the access licence.

Estate planning

The fact that the access licence will be separate from land, and probably of some considerable value, should be taken into consideration in estate planning e.g.determining the beneficiary of the residuary estate.

10.10 Family Law Act

As with estate planning, the fact that a licence is separate from land and its potential value should be a matter for consideration in property settlements.

10.11 Farm Debt Mediation

It could be argued that once an access licence is issued (i.e. the water is separated from the land) the water will not come within a “farm mortgage” under that Act and a mortgagee might have the ability to sell the access licence without being bound by the provisions of the *Farm Debt Mediation Act 1994* (see Appendix D).

10.12 General Considerations

What is stated above is, of course, subject to any further legislative amendment. However it should be borne in mind that any transactions involving water licences such as property sales, mortgages and leases should not only reflect the current position of water licences as held under the *Water Act 1912* but will also take into consideration the effect of the *Water Management Act 2000* on those licences as well as the regulations in the applicable Water Sharing Plan. The *Water Management Act* provides for security interests that existed in the previous water licence/s (for example, interests affecting land, such as mortgages, that also affected all rights attached to the land) to be preserved and affect the new water access licence/s to the same extent. Mortgagees are now applying to have their existing interests in mortgages registered on the access licence register against the mortgagor’s interest in the water access licence/s. The mortgage or charge over the land remains in place and continues to secure that land.

11. Finance

It goes without saying, as with any conveyancing undertaken on behalf of the purchaser, that the finance should be checked. Quite often the requirements for farming lands by a mortgagee or mortgagee's solicitor can be more exhaustive than for an ordinary residential conveyance. It would be prudent to check with the mortgagee's solicitors as soon as possible as to their client's basic requirements i.e.:

- Searches;
- Insurance;
- Security to be provided over other lands – is there a mortgage over such lands – is there a stamp duty exemption to apply in relation to the mortgage debt or part of the debt, and
- The time frame required for the financier/legal section.

The purchaser should be aware of the following:

- Application fees;
- Broker's fees;
- Additional yearly fees, such as account keeping fees;
- Whether the loan is fixed or variable or a combination of both, and
- Margin and how the margin will be reviewed.

It is prudent for the purchaser's solicitor to obtain contact details of the financier from the client.

Practitioners should also note that the provisions of the mortgage document relating to farming lands can be quite extensive (as referred to earlier in mortgages prepared by most financiers) that the water rights or water entitlements are part of the mortgaged property.

12. Minister's Consent

Until an Application for Conversion of a Perpetual Lease reaches the status of "Incomplete Purchase", an application for Minister's Consent will be required. However, it has been the practice of the Crown Lands Department to process the Application for Conversion prior to settlement if an Application for Conversion has been lodged and it is advised that exchange of contracts has taken place.

Should the requirement for the Minister's consent apply, the protocol is as follows (except for Western Lands):

- The vendor to attach an application for the Minister's consent when submitting a contract. The contract will be subject to the Minister's consent form being signed by the purchaser and returned within seven (7) days of exchange.

- The vendor will be responsible for lodging the Minister's consent and paying the Minister's consent fee, which is currently $151.00 (incl. GST). The standard Minister's consent form only has to be signed by the purchaser.

For Western Lands, both the vendor and purchaser have to sign the Minister's consent form. The application for consent is lodged with the LPI, PO BOX 1840, Dubbo, NSW, 2830, (telephone 02 6883 5400, fax 02 6884 2967). The current fee is $186.00 (including GST).

A financial search (Crown Purchase Statement of Account) should also be carried out. Practitioners should refer to clause 26 of the printed conditions of the current 2005 edition of the Contract for Sale of Land relating to consent to transfer and also clauses 26 and 27 of the printed conditions of the Contract for Sale of Land.

Please note that in the past "companies" could not apply for Minister's consent to purchase, but now a company can apply.

13. Native Title

Native title is an issue relevant to certain Crown licences, leases and leasehold for grazing purposes. Native title is the recognition by Australian law that some Indigenous people have rights and interests to their land that come from their traditional laws and customs.

The native title rights and interests held by particular Indigenous people will depend on both their traditional laws and customs and what interests are held by others in the area concerned. Generally speaking, native title must give way to the rights held by others. The capacity of Australian law to recognise the rights and interests held under traditional law and custom will also be a factor.

Native title rights and interests may include rights to:

- live on the area;
- access the area for traditional purposes, such as camping or to perform ceremonies;
- visit and protect important places and sites;
- hunt, fish and gather food or traditional resources such as water, wood and ochre, and
- teach law and custom on country.

In some cases, native title includes the right to possess and occupy an area to the exclusion of all others (often called 'exclusive possession'). This includes the right to control access to, and use of, the area concerned. However, this right can only be recognised over certain parts of Australia, such as unallocated or vacant Crown land and some areas already held by, or for, Indigenous Australians.

Native title rights and interests differ from Indigenous land rights in that the source of land rights is a grant of title from the government. The source of native title rights and interests is the system of traditional laws and customs of the native titleholders themselves.

Practitioners can make enquiries of the National Native Tribunal on 1800 640 501 or carry out a search of Crown land, which can be obtained from the Tribunal to find out whether an area of land or water either is, is not, or may be affected by a native title determination, application or Indigenous land use agreement (ILUA). A search can be made of the public registers maintained by the Tribunal. A charge may be associated with this service.

To request a search download a search request form available from www.nntt.gov.au or alternatively make enquiries from your searching agent.

14. Native Vegetation

In 2003, the NSW Government introduced the *Native Vegetation Act 2003* to end broad scale land clearing across the state.

Clearing is defined in section 7 as cutting down, felling, thinning, logging, removing, killing, destroying, poisoning, ring barking, uprooting or burning native vegetation.

Clearing therefore includes, for example:

- any type of ploughing that kills native groundcover;
- the under-scrubbing of native forests;
- herbicide spray drift that kills or destroys native vegetation, or
- thinning of native woodlands.

Under the *Native Vegetation Act 2003*, all clearing requires approval through either a Property Vegetation Plan (PVP) or a Development Consent, unless it is:

- on land that is excluded from the *Native Vegetation Act 2003*;
- categorised as excluded clearing, or
- a permitted clearing activity.

Activities such as pruning, lopping, or slashing of native groundcover, that do not kill the native vegetation, are not considered clearing. Burning that does not kill native vegetation or substantially reduce the composition and proportion of native species may not be considered as clearing but it is advisable to check with the local Catchment Management Authority (CMA).

Except for the commercial collection of firewood, the removal of dead timber is not considered clearing under the *Native Vegetation Act*.

It is suggested that practitioners check the website www.nativevegetation.nsw.gov.au as to maximum areas that can be cleared in a particular location without consent. Practitioners may also wish to read the booklet titled “Rural Landholder’s Guide to Environmental Law in NSW” from the Environmental Defender’s Office website www.edo.org.au/edonsw.

15. Check Lists

As a matter of practice, many conveyancers engaged in rural practice use a checklist for efficiency. The solicitor runs through the check list and ticks the boxes in the client's presence and if their instructions are to do something or not to do something then it can be marked. The solicitor then confirms in writing what the client and the solicitor need to do, or not do. It is important to ensure that the retainer is quite clear. However, employing experts to advise on the prospective purchase should be arranged by the client and not by the practitioner in order to avoid advising a client on an expert's report. It should always be left up to the client to make that decision.

A checklist for farming client purchasers (Appendix A) is attached for your information and can be adapted for vendor clients. The list is a guide only. It is not mandatory and practitioners should exercise their own judgment if it is used.

Also attached are suggested Special Conditions (Appendix B) for annexing to a farming contract.

16. Taxation Issues

16.1 Apportionment of Price

The vendor's depreciation schedule should be checked prior to exchange. The vendor's and purchaser's accountants should discuss the apportionment of purchase price between improvements, land and crops etc. prior to exchange of contracts.

16.2 Capital Gains Tax Issues

Practitioners should consider:

- Who should purchase;
- What value should be placed on a principal place of residence;
- Cost base;
- Planning now to minimise CGT liability in the future; and
- How apportioning of price between improvements, land and water entitlements can impact on CGT in the future.

16.3 Capital Gains Tax on Sale of Farmlands or Small Business Assets as at 1 July 2009

There have been many changes to the law in this area over recent years, which have resulted in more changes to the CGT status of small business assets on sale, including farmlands. It is therefore worthwhile considering all the options and getting advice in this very complex area before making any decision.

Some of the key elements that have to be satisfied to qualify for the Small Business Rollover concessions include:

- The farmer or any affiliates must have assets less than $6 million. The assets do not include the principal place of residence or superannuation. Specialist advice needs to be obtained concerning “what is an affiliate?”

- Some debts may be taken into account when considering whether the assets exceed or fall below the $6 million threshold.

- Where assets of a farmer and/or affiliates is greater than $6 million, a new test has been introduced to provide that where a business has a turnover of less than $2 million, small business concessions may be available.

If the farmer satisfies the CGT small business test, the following small business concession/discounts may be available:

- A 50% discount of any capital gain in relation to any asset providing it has been held for 12 months.

- Small businesses selling active assets may be entitled to a further 50% active asset discount leaving a gain of 25%. If the owner is involved in the farming business or actively involved in a share farming arrangement, the farm will be classed as an active asset. However, if the property is leased for a long period, this can lead to the seller being disqualified from CGT Small Business Rollover concessions. Advice should be obtained as to

  how to satisfy this criteria, but remember that if the owner was actively involved in farming the property for the lesser of 7 ½ years, or one half of the period of time, the person was the owner of the property.

- Your client could then take advantage of the business rollover concession, the retirement concession or the 15 year concession. Depending on age and circumstances, the 25% gain can be rolled over into another active asset or paid into superannuation and for over 55s there are certain other concessions.

- Where a company or trust disposes of an asset, an individual seeking to qualify for concessions must satisfy the requirement of holding 20% of the control of a company.

The CGT Small Business Rollover concessions are very complex and these comments are designed to highlight certain issues that need to be considered. It is not meant to be a detailed summary**.**

16.4 Stamp Duty Issues

Stamp duty liability depends upon the following:

- The value of the growing crop can be exempt from stamp duty. The value of the crop will be a tax deduction for the purchaser and taxable income for the vendor. For example, if the value of the property was $400,000.00 and the growing crop was valued at $50,000.00 then stamp duty would be payable on $350,000.00

- First Home Plus and First Home Grant eligibility

First Home Plus -this will depend on the purchase price and whether or not the home is situated on one parcel of land. Notwithstanding the purchase money, the purchaser(s) may also qualify for the First Home Owners Grant (providing neither have owned a residential property).The Grant may also apply to an intergenerational transfer providing there has been a consideration paid.

Practitioners should be made aware that there is no stamp duty on farming intergenerational transfers. This means providing the property has been used for farming and is to be transferred to a sibling or descendant (who is a natural person) and the property will continue to be used for farming, the transfer will be exempt from duty. (Refer DUT 024 and section 274 of the *Duties Act*). Practitioners should check the ruling in relation to a transfer from a company/trust to a natural person who is a descendant, which may be exempt from duty. This is an enormous boon for farmers and an avenue for succession planning.

Practitioners should be aware of the Aggregation Rules whereby if there is the same vendor or related vendors, and the same purchaser or related purchasers, then those transactions can be treated as one transaction, if they take place within the same 12 month period.

17. Rural Requisitions on Title

Standard rural requisitions are available from the Law Society. A requisition is defined in the Contract as “an objection, question or requisition”. Attached is the current NSW Law Society’s standard Rural Requisitions (Appendix C). The requisitions are in the process of being reviewed.

18. Farm Debt Mediation

Refer Appendix D.

19. Conclusion

Rural conveyancing can be a rewarding area of work for solicitors. The buying and selling of farming properties should be seen as the buying or selling of a business plus the real estate and deserves your full attention. It can be made easier if practitioners are prepared to share knowledge and, in particular, contact local practitioners who are experienced in rural conveyancing.

In many circumstances, rural conveyancing also involves estate planning and intergenerational transfers.

May 2011

APPENDIX A

CONVEYANCING CHECK LIST

RE:

1. Description of Property:

2. Purchase Price
   For rural lands how was the price calculated e.g. on a per acre or hectare basis

3. Deposit Paid □ Yes □ No Type of Deposit

4. Taking as □ Joint Tenants □ Tenants in Common

5. Terms of sale exactly

6. Date of Completion
   Interest payable if not settled on due date

7. Time not of essence

8. (a) Check title search

   (b) Plan of the land, area and access

   (c) Details of items in the Second Schedule

9. List of Improvements, inclusions and exclusions

10. Minister's Consent required □ Yes □ No

11. Remedies of Vendor and purchaser in default

12. Time for adjustment of rates etc

13. Freehold/Old System/Present Title

14. (a) Further notices to be the responsibility of the Purchaser whilst Vendor is to comply with notices to date

    (b) Is vendor aware of any outstanding charges- PP Board/Council/Other

15. Zoning - residential, rural, other
    Proposed use to which property is to be put
    Building a house □ Yes □ No
    Develop □ Yes □ No – as to what type of developments and if applicable, purchaser to check with Council □ Yes □ No

16. Continued use of the property

17. Purchasers are buying the property as is and in its present condition and state of repair

18. Insurance - remind purchaser - risk passes on exchange of Contracts except for the house

19. (a) Taking as fenced and note the position if the vendor owns other adjoining land

(b) Any give and take fences?

(c) Is the vendor aware of fencing dispute?

20.	Survey Certificate	□ Yes	□ No
	Section 172 Certificate	□ Yes	□ No
	Electricity Inspection Report	□ Yes	□ No
	Property Inspection Report by a Builder	□ Yes	□ No
	Soil Tests as to suitability to grow crops etc.	□ Yes	□ No
	Chemical Residue	□ Yes	□ No
	Warranty as to chemical residues	□ Yes	□ No
	Pre Contractual enquiries		
	Re Ovine/Bovine Johnes disease etc.	□ Yes	□ No
	Other	□ Yes	□ No
21.	Client Service Agreement signed and handed to client	□ Yes	□ No
22.	Apportionment of land house and buildings	□ Yes	□ No
23.	Depreciation Schedule of Plant and Equipment	□ Yes	□ No

24. GST Information – check second page of Contract

25. Stamp Duty payable on Contract

APPENDIX B

SPECIAL CONDITIONS

VENDOR:

PURCHASER:

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1. The purchaser acknowledges that the purchaser has not been induced to enter into this Contract by any statement made or given on behalf of the vendor and this Contract is not subject to any warranties, conditions or representations other than expressed in writing in this Contract.

2. The purchaser warrants that no real estate agent other than the agent, if any, shown as the vendor's agent hereon has on behalf of the vendor shown the property to the purchaser or introduced the vendor to the purchaser or in any other manner been the real and effective cause of the vendor entering into this agreement. In the event of any claim being brought against the vendor by any person claiming commission or damages against the vendor as a result of any matter which would amount to a breach of the warranties herein contained the purchaser shall indemnify the vendor against such claim including all legal costs both on a party and party and solicitor and client basis incurred by the vendor in resisting such claim and the indemnities and warranties herein contained shall not merge on completion.

3. The purchaser acknowledges that he is purchasing the property and all improvements thereon in their present condition and state of repair and subject to all defects, latent or patent (if any), contained therein and further that he shall make no objection, requisition or claim for compensation in relation thereto.

4.

   4.1 It is expressly agreed by both parties that fourteen (14) days shall be a reasonable and adequate time for the insertion in any notice served by one party upon the other requiring completion of and making time the essence of this contract.

   4.2 If completion does not take place on or before the date specified by this Contract otherwise than as a result of any default by the vendors, the purchasers shall pay interest at the rate of 7% per annum accruing daily on the balance of the monies and any other monies owing pursuant to this Contract from the due date for completion until the actual date of completion (but without prejudice to all and any other rights of the vendor pursuant to this Contract) and it is an essential term of this Contract that such interest be paid on completion. The purchaser hereby acknowledges that interest at the rate of 7% per annum represents a genuine pre-estimate of the liquidated damages likely to be suffered by the vendor as a result of completion not taking place within the time specified by this Contract.

5. No requisition or objection or claim for compensation shall be made by the purchaser:

5.1 In the event of any adjoining lands or roadways being encroached upon by or fenced in with the subject land or in the event of there being any encroachment upon the subject land or in respect of any insufficiency of fencing on the subject land.

5.2 In respect of any telephone line or lines whether the property of Telstra or not or any electric power line or lines and posts and fitting erected on or passing over or through the subject land or any rights or easements in respect of same or the want of any easement.

5.3 In respect of any mining leases, authorities to enter, exploration licences, and any application for any leases, authorities to enter, or licences affecting the subject property. The vendor warrants that he has no notice of such mining leases, authorities to enter or exploration licences.

5.4 In the event that any dam has been constructed on any creek or watercourse passing through the property without authority or that there are any other contraventions of the Water Act or regulations, the Vendor warrants that he is not aware of such contraventions. The Vendor will not be responsible for the absence of any licence, permit or authority for bores, pumps, dam's levee banks and other works to which the Water Act extends.

6.

6.1 It is agreed that the consideration receivable for any plant (as defined by the Income Tax Assessment Act) which passes with the property sold shall for the purposes of that Act be the written down value as ascertained in accordance with the Act provided that the consideration for any item of plant having no residual value shall be $1.00.

6.2 Any improvements on the property constructed after 20 September 1985 (or before that date if the property was acquired by the vendor on or after that date) on which the vendor has not claimed depreciation are deemed sold at the vendor's indexed cost base at the date of this Contract.

7. All enclosure permits, if any, held in connection with the property are given-in and the Vendor shall do all things and sign all documents reasonably requested to enable the same to be transferred to the purchaser on completion and the rent thereof shall be apportioned between the parties in accordance with Clause 14 hereof. The purchaser shall pay the transfer fee to the appropriate Department.

8. Included in the purchase price at no further consideration are all water rights attached to the property under the *Water Act 1912* or water rights arising under any other legislation or private agreements. Further, the vendor agrees he will sign all documents notifying any Government Departments of the change of ownership of the property, attached water rights, and do all things necessary to give effect to this clause. The burdens and benefits of this clause shall not merge on completion.

9. The vendor will not departure upon the subject land any more stock than are presently thereon together with any progeny.

10. Following exchange of Contracts the purchaser shall have the right to enter the property together with his workmen for the purposes of cultivating an area up to……..hectares such area as pointed out to them by the vendors or their agent according to the usual methods of farming practice in the district subject to the following:

    10.1 Any such farming activities carried out on the property by the purchaser shall be carried out entirely at the purchaser's own risk and the purchaser shall indemnify and keep indemnified the vendor in respect of any damage to the property or injury to person arising from or incidental to the purchaser's farming activities referred to in this Clause.

    10.2 The purchaser shall, at his own expense, effect and keep effected in respect of the property an adequate Public Risk Insurance Policy until completion and same shall be produced to the vendor on demand for inspection.

11. The purchase price shall be apportioned as follows:

    Farming Lands & Improvements $

    House and immediate curtilage $

    Water License (Entitlements) $

APPENDIX C

RURAL LAND REQUISITIONS ON TITLE

Vendor:
Purchaser:
Property:
Dated:

Note: *If the answer to any of these questions is 'yes', please supply full details and a copy of all relevant documentation.*

1. Capacity

a. Is the vendor under any legal incapacity?

Such as:

i. Minority.

ii. An order or declaration under the *Protected Estates Act 1983* or the *Inebriates Act 1912*.

iii. Bankruptcy or entering a part X arrangement under the *Bankruptcy Act 1966*.

b. If the vendor is a company, any notice, an application or order received by the vendor or made at Court for its winding up, or for the appointment of a receiver, an administrator or a controller*).*

2. Notices and orders

a. Is the vendor aware of any notice or order or requirement of any authority or any adjoining owner affecting the property? Such as:

i. notices from the Livestock Health and Pest Authority about noxious animals or insects

ii. notices from a county council about noxious weeds

iii. notices requiring bushfire fire breaks).

b. Has any work been done by any authority which might give rise to a notice, order or liability? (Such as road works done by local council).

c. Has the vendor received any verbal notices from any local council, Livestock Health and Pest Authority or government authority concerning any proposed action that could affect the property in any way? Please provide particulars

3. Agricultural tenancies, etc

a. Vacant possession of the property must be given on completion unless the Contract provides otherwise.

b. Are there any agreements or arrangements, which would create a 'tenancy' within the meaning of the definition of 'tenancy' as contained in Section 4 of the *Agricultural Tenancies Act 1990*? (such as farming, grazing, share farming or agistment agreements).

c. If yes:

i The nature of the tenancy;

ii The date of termination of the tenancy;

iii Particulars of any written agreement; (please supply a copy)particulars of any oral agreement.

d. If there is an agreement or arrangement as mentioned in sub clause.

e. Has the tenant carried out any improvements on the property, with or without the vendor's consent, for which the tenant is entitled to compensation from the vendor?

f. Has the vendor carried out any improvement on the property for which the tenant is liable to compensate the vendor?

g. Are there any unresolved disputes between the owner and a tenant pursuant to an agreement, which creates an interest in the land?

h. Are there any fixtures on the property to which the tenant may have right to access or removal?

i. Are there any details/documents that record the condition of the property at the commencement of the tenancy? If yes, please provide copies.

4. Buildings

a. Are there any structures on the property that have not been approved by the local council or which are used for a purpose that has not been so approved?

b. Have the provisions of the *Local Government Act*, the *Environmental Planning and Assessment Act* and their regulations been complied with?

c. Is there any matter that could justify the making of an upgrading or demolition order in respect of any building or structure?

d. Has the vendor a Building Certificate which relates to all current buildings or structures? If so, it should be handed over on completion. Please provide a copy in advance.

e. In respect of any residential building work carried out in the last 7 years: please identify the building work carried out; when was the building work completed?

f. Please state the builder's name and licence number; please provide details of insurance under the *Home Building Act 1989*.

g. Does any building on the property comprise a kit home? If any building on the property comprises a kit home, have the provisions of Section 93 of the Home Building Act been complied with? A copy of the relevant insurance certificate should be provided.

h. Has there been any complaint or insurance claim made, or any circumstance known to the vendor which may warrant a complaint or insurance claim due to the non-completion, defective work or otherwise from a breach of the statutory warranties under the *home Building Act* related to residential building work carried out on the property? If so, full details should be provided.

5. Swimming pools

If there is a swimming pool:

a. Has the pool been approved by the local council?

b. Does it comply with all the requirements of the *Swimming Pools Act 1992*?

c. Has a fence been erected around the swimming pool?

6. Rates

a. What government, local government or statutory authorities levy rates on the property? (Such as shire council, Livestock Health and Pest Authority or a Catchment Management Trust).

b. Has the property been declared 'farmland' for rating purposes under the *Local Government Act 1993*?

c. Are there any deferred rates attaching to the property? Please provide particulars.

7. Boundary fences

a. Are there any give and take fences on the property?

b. Are there any boundaries along watercourses and, if so, how are they fenced?

c. Are there any notices from neighbours about the erection or repair of any boundary fence?

d. Is there any agreement written or oral with any neighbour about the erection or repair of a boundary fence?

8 Soil conservation

a. Are there any agreements about soil conservation affecting the property? Please provide copies of any licences or agreements.

b. Are there any monies outstanding under any licence or agreement?

c. Is the land or any part of it within an area of erosion hazard under the *Soil Conservation Act 1938*?

d. Is there any charge affecting the land under section 22(5) the *Soil Conservation Act 1938*?

e. Are there any circumstances known to the vendor that could give rise to soil conservation liabilities in the future?

9. Timber

a. Are there any agreements with any authority or anyone else about the felling or removal of timber from the property? Please provide copies of any licences or agreements.

b. Are there any monies outstanding under any licence or agreement?

c. Is the vendor aware of any of the following being granted to or held by the vendor or any other person under the *Forestry Act 1916* in respect of the property:

i timber lease or licence;

ii products licence;

iii clearing licence;

iv profit-a-prendre; or any other lease, licence, permit, right or interest?

d. Is any part of the property in a Catchment Protection Area?

10. Water

a. Is the vendor entitled to have water supplied to the property by any authority?

b. Is any water available to the property:

i from any well, bore or any dam that is not wholly on the property; or

ii under any private water agreement?

iii Is the land in a water sharing plan area under the *Water Management Act 2000*?

c. Has the vendor any water rights or any licence, permit or authority under the *Water Management Act 2000*, or the benefit of any applications for those things that have not been dealt with?

d. Is the vendor liable to any authority or to any other person to pay for water or for water rights?

e. Have any dams or other earthworks been constructed on any watercourse on the property?

f. If so, was any permission for the construction sought or given by any relevant authority?

g. Are there any bore trusts that affect the property?

h. Is there a dam on the property with a capacity in excess of 7 mega litres or which is used for irrigation or which is used for watering a commercial crop or an intensive livestock industry, and if so, has the dam been registered with the Department of Infrastructure Planning and Natural Resources and a licence issued for the dam? (Requirement which commenced 1 January 1999). If so, please provide a copy of the licence.

11. Electricity

a. Which electricity authority supplies electricity to the property?

b. Is there any money owing to that authority for capital works?

12. Access, roads and enclosure permits

a. Is access to the property at any point over any land other than a main or public road?(Such as a right of way or access over Livestock Health and Pest Authority property).

b. Are there any rights of way or other easements over the property?

c. Is the vendor aware of any proposal or any application or pending applications to close or to purchase any road adjacent to the property?

d. Is the vendor aware of any proposed realignment of any road adjacent to the property?

e. Is there any main road, public road or Crown road through the property at any point?

f. Is there any enclosure permit that attaches to the property?

13. Rural workers accommodation

Is there any building situated on the land for the accommodation of rural workers?

If so:

i Has the *Rural Workers Accommodation Act 1969* been complied with;

ii Has a certificate of compliance been issued under Section 9 of that Act;

iii Is there an exemption from compliance under Section 12 of that Act?; and

iv Is the vendor aware of any notice, prosecution or proceeding under that Act that has been instituted or threatened against the vendor or any previous owner of the property?

14. Stock diseases

a. Are there any quarantine or other notices or orders or undertakings relating to stock on the property including stock on agistment or stock not owned by the vendor?(Such as notices or orders made about anthrax, lice, brucellosis or footrot, Ovine Johnes Disease (OJD) or Bovine Johnes Disease (BJD)).

b. Is the property or adjoining lands suspect or under surveillance (including property separated by a road or laneway) infected, suspect or under surveillance by the National OJD Control and Evaluation Programme?

c. Is the property in a protected zone?

15. Pollution

a. Are there any sheep or other stock dips, whether used or disused, on the property?

b. Are there any outstanding notices or orders under the *Environmentally Hazardous Chemicals Act 1985?*

c. Has the vendor or any tenant, share farmer or previous owner used any chemicals on the property that could give rise to any problems with chemical residues under the *Stock (Chemical Residues) Act 1975?*

d. Has any Investigation Order been made under Section 17(1) or a Remediation Order been made under Section 23(1) of the *Contaminated Land Management Act 1997* (commenced on 1 September 1998)?

e. Is there, or has there ever been, any underground fuel tank on the property? If so, please supply full information about where it is, or was, situated, and if it is still in use or not, and if not, has it been emptied of fuel and filled with water. Also, has there been any above ground fuel tank which may have leaked, causing soil pollution?

16. Effluent Disposal Systems

a. Is there a septic sewage disposal system on the property? If so, please supply evidence of registration of it with the local council.

b. If there is no septic sewage disposal system and there is a house on the property, please supply details of the effluent disposal system used and evidence of registration with the local council.

17. Resumptions

Is the vendor aware of any resumption, proposed resumption or proposed purchase of the property by any public authority? (Such as *National Parks and Wildlife Act).*

18. Fixtures

Are there any fixtures or inclusions in the sale that are not owned by the vendor free of any encumbrances?

19. Agreements or disagreements affecting the property

a. Is the vendor aware of any agreements with anyone else affecting the property? (Such as share farming, timber getting, trail bike riding.)

c. Are there any legal proceedings pending or not concluded that involve the property in any way?

20. Crown land

a. Are there any amounts owing to the Crown for rent or for balance of purchase moneys? If so, please supply full details.

b. Is there any application or pending application to the Crown for conversion or purchase from the Crown? If so, please advise the status of the application or pending application.

21. Pipelines

Is the vendor aware of any licence, permit or easement for any pipeline over the property, either under the *Pipelines Act 1967* or otherwise?

22. National Parks and Wildlife

a. Is there any interim protection order in force over any part of the property under Section 91B of the *National Parks and Wildlife Act 1974?*

b. Is there a conservation agreement affecting the property, or any part of it, under Section 69B of the *National* Parks and *Wildlife Act 1974?*

23. Native Vegetation

a. Is the land subject to a Native Vegetation Agreement?

Has the vendor carried out, or caused to be carried out, on the property any clearing of native vegetation as defined in the *Native Vegetation Conservation Act 1997 (the Act)?*

b. If so:

i was clearing carried out pursuant to a development consent or a Regional Vegetation Management Plan approved under the Act?

ii was clearing carried out in accordance with the terms and conditions of that consent or plan?

iii has clearing allowed by the consent or the plan been completed?

c. Has the vendor, or any previous owner, ever made any application to clear native vegetation under the Act or under State Environmental Planning Policy (S.E.P.P.) 46 in force from 10 August 1995? Is so, what was the result of that application?

d. Has the Director General of the Department of Land and Water Conservation made any 'stop work' order under Section 46 or given directions for remedial work under Section 47?

e. Has the vendor, or any previous owner, ever been prosecuted for clearing native vegetation illegally?

f. Is there a Regional Vegetation Management Plan in force?

24. Threatened Species

a. Is the vendor aware of any endangered or vulnerable species or endangered populations or endangered ecological communities as defined in the *Threatened Species Conservation Act 1995* on the property?

b. In reference to the *Threatened Species Conservation Act 1995* are there, or has there ever been, that the vendor knows of, any of the following relating to the property:

i critical habitat declared under Section 47 and notified on the Register kept by the Director General of the National Parks and Wildlife Service under Section 55?

ii any recovery plan published under Section 67?

iii any draft threat abatement plan published under Section 84?

iv any licence to harm or pick threatened species population or ecological communities or damage habitat, granted under Section 91?

v any species impact statement prepared either for the purposes of the *Threatened Species Conservation Act* in accordance with Section 110 or for the purposes of the *Environmental Planning and Assessment Act 1979*?

vi any stop work order made by the Director General under Section 114 or any interim protection order made under Part 6A of the *National Parks and Wildlife Act 1974*?

If the answer is Yes to any of these, please supply full details.

25. Native Title

a. Is the vendor aware of any Native Title claim lodged and/or sustained under either the Commonwealth or New South Wales Native Title Acts?

If so, has the vendor filed an interest to be involved in the determination of such claim under either the Commonwealth or NSW legislation?

If the land is a lease from the Crown, has the use purpose of the lease been altered since 1 January 1994 or is it in the process of being altered? If so, please provide a copy of the undertaking from the Crown not to seek from the lessee any reimbursement of compensation payable by the Crown to the Native Title holders.

26. Aboriginal Sites

a. Has the vendor or any predecessor in title entered into a voluntary or compulsory Conservation agreement concerning Aboriginal sites or relics? If so, please provide a copy of that agreement/s.

b. Is the vendor aware of any aboriginal places or relics on any part of the property?

27. Environment

Has the vendor undertaken any activity that constitutes a 'controlled action' under the *Environment Protection and Biodiversity Conservation Act*?

28. Documents to be handed over on settlement

If the vendor has or is entitled to have, possession of the title deeds the Certificate Authentication Code must be provided 7 days prior to settlement.

Please list any documents to be handed over on settlement in addition to the title deed, transfer and discharge of any mortgage.

APPENDIX D

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Farm Debt Mediation

The Mediation Process
The *Farm Debt Mediation Act 1994* aims to provide a process for the resolution of farm debt disputes. Mediation is required before a creditor can take possession of a property or take other enforcement action under a farm mortgage. This process only takes effect if there has been a default under the mortgage. It is strongly recommended that farmers seek legal advice on a number of aspects of the process particularly to see whether or not the process is required in relation to their problem and more importantly, to see whether there is a defence to the threat of action by the creditor. For example, a "farm mortgage" can include a hire purchase agreement relating to farm machinery but interestingly, does not include a stock mortgage or a crop lien.

The mediation process is regulated by the Act and is overseen by the NSW Rural Assistance Authority who can provide detailed information about what happens and when.

Before Mediation
A bank (or other creditor) is required under the Act to issue a farmer in default with a Notice, which sets out a farmer's right to mediate. The Notice is a form approved by the Authority. The Notice indicates that a farmer has **21 days** to return to the bank (or creditor) a Notice electing to go to mediation in relation to the particular debt. Each party has input into whom the mediator will be (the Authority will provide a list of names) and the Authority expects that both the farmer and the bank (or other creditor) will undertake the mediation process in good faith and within a reasonable time. By statute, the farmer is expected to complete the mediation process within **3 months**. By agreement between the parties, that 3 month period can be extended.

The Mediation
A farmer can attend the mediation with support persons (such as members of the family), financial advisors, legal advisors and any other person that they consider relevant to assist them in putting forward their arguments to the other party. The Mediator does not act as a Judge or Arbitrator. They are there to try and facilitate the parties into resolving their issues in a constructive way, so as to avoid the matter escalating into litigation. Usually mediation takes place over a period of a number of hours or sometimes they can last more than a day. It is really up to the parties and the mediator as to how long they run for. If through that process, the parties come to an agreement as to the way forward, that agreement is reduced into writing and usually referred to as a "Heads of Agreement". That document is signed by both parties and under the Act the farmer is given a 14 day cooling off period so that if the farmer decides that he or she does not want to proceed in accordance with the terms of the Agreement he must notify the Bank (or creditor) within 14 day period.

After Mediation
If the farmer fails to mediate within the 3 months or elects to withdraw from the Agreement within the **14 day** period then the Bank (or creditor) can apply to the NSW Rural Assistance Authority for what is known as a Section 11 Certificate. The Authority will issue that Certificate provided they are satisfied that a satisfactory mediation has taken place in respect of the matter or the farmer has declined to mediate or 3 months have elapsed after the notice was given by the Bank (or creditor) and the Bank (or 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).

The process of the Rural Assistance Authority issuing the Section 11 Certificate is generally one where there is no set time limit however; it would normally be issued within about **4 to 6 weeks** after an application is made for that certificate by the Bank or creditor.

Court Proceedings
If the Bank (or creditor) obtains a Section 11 Certificate, it then can take steps to enforce the farm mortgage. If that mortgage is over farmlands then they will be required to give a Notice under the *Real Property Act 1900* that warns the farmer that possession proceedings will be taken unless monies are repaid within **1 month**.

After the **1 month** has lapsed, the farmer should expect that the Bank (or creditor) will then issue appropriate proceedings for a possession order through the Supreme Court of NSW. The document that is issued by the Court on behalf of the Bank (or creditor) that commences the proceedings is called a "Statement of Claim". That document will be served on the farmer and from the date of service, the farmer will have **28 days** to file any form of defence to the claim or to make other satisfactory arrangements with the Bank (or creditor).

If the farmer fails to file a defence or cannot come to some negotiated resolution then the Bank (or creditor) can then apply for a Default Judgment and will obtain an Order for Possession. Once the order is entered with the Court, that document is then directed to the Sheriff's office where they undertake the process of gaining possession of the property. It can take from **2 to 3 months** to obtain Default Judgment, an Order and then have the Sheriff's office retake possession.

If the Statement of Claim were defended then the Court will set down a timetable for the preparation of evidence by both of the parties and the matter will ultimately be set down for a hearing, which may be, depending on the length of the hearing, some **6 to 8 months** from the issue of the Statement of Claim.

It is important that farmers respond initially to the Notice that sets out their rights to mediate. They should contact their legal advisor and seek advice.