The mines I am going to expose are not going to be dealt with by me in any particular order but any of them could lead to a calamity for your client and importantly, also for you.

Is your client relying on a restrictive covenant to protect water views of a property he or she proposes to purchase?

Restrictive covenants and planning controls are not directly related. A restrictive covenant is a restriction on title generally privately imposed, whereas planning controls are imposed by legislation which regulates development defined in s 4 of the Environmental Planning and Assessment Act 1979 (“the EPA Act”) as:

* the use of land;
* the subdivision of land;
* the erection of a building;
* the carrying out of a work;
* the demolition of a building or work; and
* anything controlled by an EPI.

A restrictive covenant is not a relevant matter for consideration by a consent authority under s 79C(i) of the EPA Act for the purposes of the assessment of a development application. So, a council, in dealing with a DA, is not required to take account of a restrictive covenant which controls such matters as the type of building materials, the height or location of any proposed building, or the purpose for which any building may be used EXCEPT to the extent to which the subject matter of the covenant concerns a matter which is otherwise a relevant matter for consideration under section 79C(i): see Challister v Blacktown CC (1992) 76 LGRA 10.
To make matters more complicated, as pointed out by Diane Shapinker and I quote:

“The status of restrictive covenants has been undermined by s. 28(2) of the Environmental Planning and Assessment Act 1979. That section enables an environmental planning instrument to override a specified "regulatory instrument", which is defined in s. 28(1) to mean "any...agreement, covenant or instrument...". This allows local councils to give consent to the development of the burdened land even though that development might breach the terms of a validly created covenant recorded on the title of the land burdened (Ludwig v Coshott (1994) 83 LGERA 22).” She referred to an article by Peter Butt: “Restrictive covenants on the wane”, (1995) 69 ALJ 482: see LSJ Vol 34 March 1996 at p 33.

The only protection an owner who has the benefit of a restrictive covenant has is to bring injunction proceedings in the Supreme Court to restrain the prospective breach of the covenant and get in before the Council deals with the DA seeking a consent which would override the covenant.

If you have a client who is proposing to purchase a property which has the benefit of a height covenant it is vital that you check the Council’s LEP to see whether it contains a provision authorised by s 28 which needs the prior approval of the Governor. Even if there isn’t such a provision the Council could subsequently go down the track of going through the process of having its LEP amended to include one. To my knowledge the Department of Planning would not oppose such a course.

**Section 149 certificates**

Schedule 4 to the Environmental Planning and Assessment Regulation 2000 (“the EPA Reg”) specifies what must be contained in s 149(2) certificates.

Clause 7 deals with restrictions to development “because of the likelihood of land slip, bushfire, tidal inundation, subsidence, acid sulphate soils or any other risk (other than flooding)”. Unfortunately, what has to be disclosed is just whether the land is affected by a policy adopted by the council or adopted by any other public authority and notified to the council for the express purpose of its adoption by that authority for inclusion in its planning certificates. The s 149 certificate needs to be up to date otherwise there is a risk of a breach of the Prescribed Warranty under clause 1(c) of Schedule 3 to the Conveyancing (Sale of Land) Regulation 2005 (“the Sale of Land Reg”).

If a council has knowledge of any affectation listed in clause 7 of Schedule 4 to the EPA Reg to which your client’s property is subject but doesn’t have a relevant policy the
affectation is not required to be disclosed in the s 149(2) certificate. This is where a s 149(5) certificate (which is not required to be attached to contracts) comes in.

The High Court decision of *Pyrenees SC v Day* (1998) 192 CLR 330 established that where a Council has a discretion to act or provide information there may be circumstances where it is incumbent upon a council to exercise its discretionary power to act or to provide information by reason of its control over the safety of a person or property even though there is no express requirement otherwise to do so.

As you will be aware, by virtue of s 149(6), a council does not incur any liability in respect of any advice provided “in good faith” pursuant to s 149(5). However, in *Mid Density Development Pty Ltd v Rockdale MC* (1993) 81 LGERA 104 it was held that the concept of good faith in s 149(6) “calls for more than honest ineptitude”. In order to obtain the benefit of the immunity there must be a real attempt by the council to answer the request for information at least by recourse to the materials available to it.

It will be evident from what I have to say this evening that I believe that solicitors for vendors need to make it easy for prospective purchasers to satisfy themselves with advice from their solicitors about the property they are interested in.

My recommendations in relation to s 149 certificates are:

* when acting for a vendor always attach a s 149(2) and (5) certificate to the contract. This is supported by Residential Conveyancing Protocol adopted by the The Law Society and the Real Estate Institute;

* when acting for a purchaser, obtain a s 149(2) and (5) certificate, particularly when only a s 149(2) certificate is attached to the contract. The s149(5) certificate may provide information which would enable your client to rescind or terminate the contract.

If after settlement your purchaser client finds that a risk listed in clause 7 to Schedule 4 of the EPA Reg, clearly known to the council, affects the land and was not disclosed in the s 149 (2) and (5) certificate attached to the contract or the one obtained on behalf of the client, he or she would be able to make a claim for damages against the council with reasonable prospects of success. Some practitioners actually seek particular information under s 149(5) when applying for the s 149 certificate which could certainly assist them in making a claim against the council if it has failed to provide information which is available to it.
You should note that by virtue of clause 7A to Schedule 4, flood related development controls are now required to be disclosed in a s 149(2) certificate.

**Surveys, building certificates and a prescribed term and prescribed warranty**

In my view it is highly desirable in the vendor’s interest to attach a survey certificate to the contract for sale to show the:

* the position and size of land
* the position of house in relation to its boundaries
* whether there are there any encroachments by buildings on the land upon adjoining land or by buildings on adjoining land upon the subject land.

The *Conveyancing (Sale of Land) Regulation* 2005 by clause 1 of Schedule 2 prescribes a term in contracts for sale of land enabling a purchaser to make an objection, requisition or claim in relation to any encroachment by or upon the subject land unless the encroachment is disclosed and clearly described in the contract. A survey is clearly needed for this purpose.

This leads me to building certificates and the council will require a recent survey before issuing the certificate unless assurance that no changes to the improvements shown in an old survey.

By virtue of s 149E of the EPA Act a building certificate has 2 effects.

Firstly, without any time limitation, it prevents the council, in relation to matters existing or occurring before the issue of the certificate, from making any order (or taking proceedings for the making of an order or injunction) under the EPA Act or the LG Act requiring the building to be repaired, demolished, altered, added to or rebuilt, and from taking proceedings in relation to any encroachment by the building onto council land.

Secondly, it prevents the council, in relation to matters arising only from the deterioration of the building as a result solely of fair wear and tear, for a period of 7 years from the date of issue of the certificate:

* from making an order (or taking proceedings for the making of an order or injunction) under the EPA Act or the LG Act requiring the building to be repaired, demolished, altered, added to or rebuilt;
Section 149E(3) provides that a council is not prevented by a building certificate from making a fire safety order under s 121B or from criminal prosecution for the offences of failing to obtain consent for erection or use of the building or failure to comply with conditions of consent.

It must be noted that a building certificate also does not prevent any person (probably a neighbour) from bringing proceedings under s 123 of the EPA Act for civil enforcement in relation to unlawful building work.

This leads me to the prescribed warranty under clause 1(d) of Schedule 3 of the Sale of Land Reg that there is no matter in relation to any building or structure on the land that would justify the making of various orders under s 121B of the EPA Act including for demolition. But if there is such a matter a building certificate has been issued - the building certificate saves the contract from rescission.

**Implications of the High Court decision in Hillpalm Pty Ltd v Heavens Door Pty Ltd (2004) 137 LGERA 57**

As a result of the Court of Appeal decision in Hillpalm v Heavens Door, legal practitioners became obliged when acting for purchasers in conveyancing transactions to search the relevant Council’s records to ensure that there are no conditions of consent relating to subdivisions which had not yet been complied with affecting the property being purchased. Unless the purchaser has specific details of the particular consents, this searching exercise is difficult if not impossible.

The majority in the High Court, although overturning the Court of Appeal decision, did not remove the need for these searches to be made. This has resulted in conveyancing practitioners being in an invidious position and their client purchasers without adequate protection.

I would make the following points:

- It is currently very difficult, and in the case of some councils impossible, to ascertain what, if any conditions were imposed on development consent for subdivision and whether any of these conditions remain unfulfilled. Subdivision consent conditions must be readily ascertainable by search.

- If subdivision consent conditions cannot be readily ascertained, legislative reform should ensure that any unfulfilled conditions cannot be enforced against subsequent owners of the land.
All subdivision consent conditions, whether readily ascertainable by search or otherwise, should remain enforceable.

Existing Uses

Section 106 of the EPA Act defines “existing use” as the use of a building, work or land for a lawful purpose immediately before the coming into force of an environmental planning instrument (“EPI”) which prohibits that use. Establishing an existing use might mean going right back to 12 July 1946 when Local Government Ordinance No 105 came into force.

Section 108 of the Act enables the making of regulations dealing with “existing use”.

Section 107(1) protects the continuance of an “existing use” subject to the limitations in sub-section (2).

The case of Kyriacou v Kogarah MC & Anor (1995) 88 LGERA 110 is a telling example of the fate which can befall a solicitor acting for a purchaser who buys a property at auction the value of which depends upon a purported existing use right.

Section 109(1) protects uses for purposes which commenced lawfully without the requirement for consent, or had a consent, and an EPI was enacted which required consent to be obtained. However, although s 109 appears in Division 10 of Part 4 of the EPA Act which has the heading “Existing Uses” the uses which it protects are not “existing uses”. Section 109(2) contains similar limitations to those in s 107(2).

Section 109B, which also appears in Division 10 of Part 4, provides that if a development is carried out in accordance with a development consent then it is not affected by a subsequent EPI which prohibits or requires a further consent.

Part 5 of the Environmental Planning and Assessment Regulation 2000 ("the EPA Reg") permits various changes to be made to “existing uses”, including rebuilding of a building or a work, with development consent.

In Caltex Australia Petroleum Pty Ltd v Manly Council [2007] NSWLEC 105 (14 March 2007] Pain J made the following relevant finding at para 106 of her judgment:

“I therefore make the finding that the Applicant’s 1953 development consent for a service station continues in force. As the Applicant does not have existing use rights it cannot rely on the change of use provisions in cl 41(d) of the 2000 Regulation (as then in force)....”

It appears to me from Justice Pain’s decision that a building erected lawfully for the purpose of, say a residential flat building, without consent, before the coming into force of an EPI which requires the obtaining of a consent (the s 109 situation) or is erected with consent before the coming into force of an EPI which prohibits or requires consent for that purpose (the s 109B situation), the owner cannot rely upon the change of use or the rebuilding provisions contained in Part 5 of the EPA Reg, which deal only with “existing uses”. This would be of great concern to an owner with a building in either of those situations, which is destroyed by fire.
Urgent amendments to s 108 are needed to make it clear that the section also applies to the uses and consents referred to in ss 109 and 109B. Part 5 of the EPA Reg should also be appropriately amended.

**Occupation Certificates**

By virtue of s 109C(1)(c) of the EPA Act, an occupation certificate authorises the occupation and use of a new building and a change of use of a new building. Occupation certificates can be issued on an interim or final basis. An interim certificate authorises the occupation of a partially completed building or a new use of part of an existing building. All preconditions specified in a development consent or complying development certificate must have been met. An occupation certificate for a new building must be issued by the principal certifying authority appointed by the person having the benefit of the development consent or the complying development certificate.

Occupation of a new building without an occupation certificate is a breach of s 109M of the EPA Act which incurs a maximum penalty of $110,000 in relation to a residential flat building containing 2 or more dwellings.

After several instances of major residential flat buildings with serious building defects, occupied without an occupation certificate, the Government acted. In the cases of strata units bought off the plan and land and house packages the Sale of Land Reg, by Schedule 2, clause 2, now requires vendors to serve occupation certificates or copies on their purchasers at least 14 days before completion.

Clause 151(2) of the EPA Reg requires a certifying authority to notify a consent authority and the council of a determination to approve or refuse an application for an occupation certificate. This must be done within 2 days after the date of determination.

The certifying authority is to do this by forwarding relevant documents, including a copy of the occupation certificate (if relevant), to the consent authority and council.

Clause 266(1)(k) of the EPA Reg requires council to keep a copy of a notification of a determination of an application for an occupation certificate.

My recommendation in relation to the purchase of a strata unit or property where the dwelling or an addition or the residential flat building were built after 1 July 1998 that you insist that vendor provides an occupation certificate prior to exchange of contracts. If all else fails, a copy of the certificate can be obtained from the council.
A few practical matters

I believe it is desirable for a purchaser to make some enquiries in the local area with a view to finding out whether there are any local problems which could affect the property he or she is buying. These could relate to storm water drainage, flooding history, aircraft noise or other intrusive or annoying noise or a prospective nearby development which could adversely affect residential amenity.

..ooOoo..