

## DISCLAIMER

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The purpose of this Seminar is to make Solicitors aware of how the Local Government Act, the Environmental Planning and Assessment Act and various other Local Government or Planning considerations affect their practices as Conveyancers.

This paper is not intended to be a comprehensive study of the Local Government Act or the Environmental Planning and Assessment Act or indeed any other Act, but is merely intended to be a reminder to Solicitors of some of the matters that they need to consider in conveyancing matters.

### PLANNING CERTIFICATES

Every one in this room will be aware of and familiar with the Planning Certificate that is normally attached to the Contract. I do, however, question whether anybody has recently gone back to the Act to see what is suppose to be contained in a Planning Certificate or to consider the ramification of information that is contained in the Planning Certificate.

Most Conveyancers believe that there are in fact two Planning Certificates, namely a 149(2) Certificate and a 149(5) Certificate. This is in fact not correct. The Act provides for one Planning Certificate under Section 149.

Section 149 of the Environmental Planning and Assessment Act is in the following terms:

#### ***Planning certificates***

*(1) A person may, on payment of the prescribed fee, apply to a council for a certificate under this section (a "planning certificate") with respect to any land within the area of the council.*

*(2) On application made to it under subsection (1), the council shall, as soon as practicable, issue a planning certificate specifying such matters relating to the land to which the certificate relates as may be prescribed (whether arising under or connected with this or any other Act or otherwise).*

*(4) The regulations may provide that information to be furnished in a planning certificate shall be set out in the prescribed form and manner.*

*(5) A council may, in a planning certificate, include advice on such other relevant matters affecting the land of which it may be aware.*

*(6) A council shall not incur any liability in respect of any advice provided in good faith pursuant to subsection (5). However, this subsection does not apply to advice provided in relation to contaminated land (including the likelihood of land being contaminated land) or to the nature or extent of contamination of land within the meaning of Part 7A.*

*(7) For the purpose of any proceedings for an offence against this Act or the regulations which may be taken against a person who has obtained a planning certificate or who might reasonably be expected to rely on that certificate, that certificate shall, in favour of that per-*

*son, be conclusively presumed to be true and correct.*

Section 149(1) makes it clear that any person may on payment of the prescribed fee apply for a 149 Certificate called a "Planning Certificate".

Section 149(2) makes it clear that Council must provide such a Certificate and must specify such matters relating to the land to which the Certificate relates as are prescribed.

Regulation 279 of the Environmental Planning and Assessment Regulations (and Schedule 4 of the Regulations) prescribes the matters that must be specified in a Certificate. Those matters are enumerated in Schedule 4 of the Environmental Planning and Assessment Regulations and are summarised as follows.

**The Planning Certificate must specify the names of relevant State Environmental Planning Policies (SEPPs), Regional Environmental Plans (REPs), Local Environmental Plans (LEPs) and Development Control Plans (DCPs) that apply to the land.**

In my experience many Solicitors skip over this information and go to the information relating to the zoning of the land, being the information required to be provided in paragraph 2 of Schedule 4.

I believe that this a very dangerous course, as paragraph 2 of Schedule 4 only requires Council to provide certain information relating to the LEPs and does not require Council to flag or warn in relation to the affects of the REPs or SEPPs that might apply to the land.

There is a hierarchy of Planning instruments that apply to any land in New South Wales.

At the top of the hierarchy is usually the State Environmental Planning Policy. It normally overrides any provisions in the Regional Environmental Plans or the Local Environmental Plans that conflict with its provisions.

The next instrument in the hierarchy is the Regional Environmental Plans. In the Hunter, for example, there are two Regional Environmental Plans being the Hunter Regional Environmental Plan and the Hunter Regional Environmental Plan (Heritage).

The Regional Environmental Plans again usually provide that their provisions override any contradictory provisions in the LEP and accordingly, you will readily see that simply relying on the information as to what can or cannot be done pursuant to the LEP will not give you a full picture of the restrictions or constraints that might apply to the land and its use.

The next instrument in the hierarchy is the Local Environmental Plan however it mainly specifies the general planning frame work and restrictions and does not specify the details.

Many of you will be aware of the fact that very often the devil is in the detail.

Development Control Plans are where the detail is contained. Yet most Conveyancers go on happily advising their clients in relation to a Contract, without being aware of the provisions of any

SEPP, the REP or the DCPs that might apply to the land. In my view this a dangerous practise, especially if Conveyancers do not warn their clients of the necessity of their clients making their own independent enquiries as to the effect of those other instruments on their plans.

In relation to the Development Control Plans for instance, I have known of some provisions in Development Control Plans that specify the shape and colour of the building that can go up. Some Development Control Plans in Sydney are so restrictive that it would be fool hardy for anybody to purchase land in a Sydney suburb without looking at the Development Control Plans as they apply to that land where they intend to develop the land.

I would think that as a first step a prudent Conveyancer would advise his or her clients that they should obtain from the Council the relevant Planning instruments and read them themselves to satisfy themselves that they are aware of the restrictions that may apply to their plans for the land.

I am not suggesting for a minute that Conveyancers themselves should obtain every instrument and read it, as the cost of conveyancing would then be prohibitive, however, I do suggest that a prudent Conveyancer, to protect himself or herself and his client, should advise the client that the client should become familiar and be aware of the provisions of the Planning Instruments that apply to the land before signing any Contract, as to do otherwise would potentially put the Solicitor at the risk of the client claiming that the whole purpose of the 149 Planning Certificate containing the names of the relevant Planning instruments was to alert them to the instruments that apply to the land and as the Solicitor did not advise them to look at these instruments they were completely unaware of the restraints or restrictions the instruments imposed on the land they intend to purchase.

**The next group of information that is prescribed under Schedule 4 is certain information relating to each Local Environmental Plan, Deemed Environmental Planning instrument and Draft Local Environmental Plan applying to the land.**

In my experience most Solicitors simply look at the 149 Certificate to establish the identity of the zone; to find out what activity can be carried out within the zone with or without Development Consent and what activity is prohibited. Some Solicitors also look to find out whether a development standard applies to the land, but I think that most would not be aware of the consequence of a statement that the land includes or comprises a critical habitat, that the land is in a conservation area or that an item of environmental heritage is situated on the land.

The term "critical habitat" is described in the Environmental Planning and Assessment Act as having the same meaning as in Threatened Species Conservation Management Act 1995 or (subject to Section 5C) Part 7A of the Fisheries Management Act 1994. A critical habitat is defined in the Threatened Species Conservation Management Act as being a habitat declared to be critical habitat under Part 3 of that Act and in regard to fish and marine vegetation the term has the same meaning as in Part 7A of the Fisheries Management Act.

The immediate consequence of land being a critical habitat is that any development on that land, no matter how small, cannot be a complying development and hence all development requires consent, even erecting a fence or a TV Aerial will require consent.

If the 149 Certificate specifies that land is within a critical habitat, your client should be advised to proceed cautiously. Your client will likely have to incur substantial expense each time he plans

a development on the land or intends to carry out a development on the land in attempting to satisfy the eight point test contained in Section 5A of the Threatened Species Conservation Management Act. The result will be that your client will be put to the expense of having to employ expensive Ecologists to try and satisfy the Council that a development does not have a significant effect on threatened species population or ecological communities and the chances are that your client will spend a large amount of money and at the end of the day will not succeed in persuading the relevant Planning Authority, be it the Court or otherwise, that there will be no significant effect on threatened species population or ecological communities or their habitats.

The Planning Authority, as a minimum, consult the National Parks and Wildlife Services before they will give the green light to a development and they almost always require extensive, lengthy and expensive ecological research to be done on the land.

Similarly if the land is in a conservation area, you should proceed with caution. There are many types of conservation areas specified. A conservation area can be scenic conservation area, a heritage conservation area, an aboriginal heritage conservation area or one of a numerous types of conservations areas. If land is shown to be within a conservation area it would be prudent to advise your client to seek town planning advice as to the impact that has on your client's intentions for future land use.

Similarly if you find that there is a suggestion that an item of environmental heritage is situated on the land, this should again be a warning sign for you to advise your client to tread carefully. There are many types of environmental heritage constraints. There could be an item of environmental heritage situated on the land. Alternately the land might fall within the precinct of an environmental heritage area and further enquiries as to the effect of these restrictions should be made before your client proceeds. Do not assume that simply because your client knows that the he or she buying is an item of heritage significance means that your client is fully aware of the constraints that apply.

I will deal with the problems in relation to heritage items later in this paper, however, suffice to say that I have been consulted in the last five years by at least three Solicitors whose staff have not properly read or interpreted the provisions of the 149 Certificate so far as it applies to environmental heritage. It is a complex area and if there is any suggestion that an item of environmental heritage is present, you should warn your client and suggest that they obtain expert advice.

The next part of the Schedule relates to State Significant Development. Unless you are acting for a large developer who develops a state significant type development, this item should not really concern you in, for example, the case of a normal dwelling house. Similarly most Conveyancers will be aware of the provisions in the 149 Certificate relating to coastal protection and mine subsidence.

**The question in relation to road widening is again something that I expect most Conveyancers would not understand.**

Division 2 of Part 3 of the Roads Act 1993 relates to actions by a Road Authority for the widening of a public road. The information that is required to be disclosed only applies when the Road Authority has decided to widened the road by, for instance, publishing its intention in the local newspaper and taking the other steps prescribed in the Roads Act. There is no obligation by

Council to disclosure plans that might be on the "drawing board" in relation to road widening, unless the road widening activity is sufficiently advanced as to fall within Division 2 of part 3 of the Roads Act, or such road widening is specified in environmental planning instruments (rarely) or where Council has adopted a resolution. It should also be remembered that the information that is required to be provided is only in relation to road widening and road realignment and not the construction of new roads. In an appropriate case it would be prudent to make relevant enquiries from other Authorities other than the Council.

**The next item that has to be in the 149(2) Certificate is, of course, information as to whether or not the land is effected by a policy adopted by Council or another public authority and notified to Council that restricts development for various specified risks.**

You should be aware that Council is only required to notify where the land is affected by a policy adopted by the Council or other public authorities and notified to Council. Very often Councils will commission various types of studies, including flooding studies, and those studies might contain information that would restrict any consent that Council would grant in respect of the land, but as Council has not adopted a policy it is not obliged to reveal the contents of any such study to anyone. I know of numerous cases where flood studies have been done but have not been adopted by Council as a policy, but when an applicant lodges a Development Application Council applies the contents of that policy in refusing the application or imposing onerous conditions. Once again I would think it wise for prudent Conveyancers to advise their client that they cannot solely rely on the information contained in the 149 Certificate as to flooding and other risks and that they should make their own enquiry from neighbours and others.

Councils can, of course, include information under Section 149(5) relating to studies, but for reasons canvassed elsewhere in this paper they very often do not do so.

**The next most frequently overlooked matter is a question of whether a Contribution Plan applies to the land.**

Section 94 of the Environmental Planning and Assessment Act provides that before a consent authority can impose a contribution on a development, there must be a Contribution Plan in place. If a Contribution Plan is in place it is likely that any development falling within the ambit of that Plan will attract a significant contribution to the embellishment of community resources. If there is a Contribution Plan in place and your client is intending to do any works on the land, it would be prudent for you to advise your client to attend the Council's Chambers and inspect the Contribution Plan (which should be available for inspection without charge) and decide for themselves the financial cost of carrying out that development.

#### ADDITIONAL INFORMATION IN A PLANNING CERTIFICATE

Section 149(5) provides that a Council may in a Planning Certificate include advice on such other relevant matter affecting the land of which it may be aware.

149(6) of the EPA Act limits Council's liability in respect of any advice provided in good faith under sub-section 5 and for this reason I understand that many Conveyancers take the view that they should not apply for a Section 149(5) Certificate, as the information that is often provided is useless and in any case, Council is not liable for any information provided and hence it is of no

benefit.

With respect, I think this is very short sighted and imprudent.

As I have previously indicated Section 149(2) only requires the Council to include in the Certificate "whether or not the Council has by resolution adopted a policy to restrict the development of the land because of the likelihood of land slip, bushfire, flooding, tidal inundation and subsidence or any other risks". As I have mentioned before many Councils use other information, such as flooding studies and other studies, to control development without "by resolution adopting a policy to restrict the development of the land" because of those risks.

If the Councils use the information in studies etc to control development on the land, some Councils will disclose this information in a Section 149(5) Certificate and some will not. However, without a Section 149(5) Certificate the purchaser will be completely unaware of the contents of a relevant study or other information that Council has which could restrict future activities on the land, but where Council has not adopted a resolution to restrict the development but merely applies the information to control development in appropriate cases.

If you read Section 149(5) you will note that Council can choose to include advice on such other relevant matters affecting the land of which it may be aware. There is one school of thought (including me) which holds that if Council decides to provide some information under Section 149(5) of the Act, it must provide all information it has on anything that affects the land that it may be aware of. Thus if Council, for instance, provides information on its outdoor lighting policy so far as it effects the land and Council has information of which it is aware relating to flooding, it must provide all such information.

There is, however, the other school of thought (which most Council adhere to) which says that this is too wide an interpretation and reads down the clause to allow Council to pick and choose what information it will give. Unfortunately this issue remains unresolved at this stage owing to the absence of decided cases on this point.

Most Councils that I know of take the view that they can pick and choose what information they will provide in a Section 149(5) Certificate and seem to take a cavalier attitude towards the provision of such information on the basis that even if the information is inaccurate they are immune from suit pursuant to Section 149(6) of the EPA Act.

However, it should be remembered that the immunity from suit provided in Section 149(6) only applies if Council provides the information in good faith.

Section 733 of the Local Government Act similarly provides that Council obtains immunity from suit when it provides certain flooding information in good faith.

In *Mid Density Developments Pty Ltd –v- Rockdale Municipal Council* the Full Court of the Federal Court of Australia found the Rockdale Council liable for negligence for information provided under Section 149(5) of the EPA Act in relation to the potential flooding of land despite a disclaimer of liability contained in the Certificate and despite the provisions of Section 149(6) of the EPA Act.

The Court held that where Council has information in its possession indicating that land was

flood liable, Council does not act in good faith when the person providing that information did not check Council's records to verify the flooding status of the land. In other words, good faith was not merely a lack of mala fides but even "honest ineptitude" amounted to a lack of good faith.

The Certificate in question had the following question "Has the Council information which would indicate that the land is subject to the risk of flooding or tidal inundation?". The answer that was provided by Council was "No". The Certificate had a disclaimer to the following effect:

*"The above information has been taken from Council's records, but Council cannot accept any responsibility for any omission or inadequacy".*

At the hearing the Council Officer (who completed the 149 Certificate) admitted that he had completed the Certificate without familiarising himself with details of a number of the flood studies. The person was a qualified Civil Engineer and the Judge said:

*"For such a person not to read and give close attention to the two flood studies, was, in my opinion, negligent, and negligence ultimately lead to the appellant's loss".*

The Court concluded:

*"The statutory concept of 'good faith' with which the legislation on this case is concerned, calls for more than honest ineptitude. There must be a real attempt by the authority to answer the question for information at least by recourse to the material available to the authority. In this case there was a failure to meet that standard".*

It can therefore be readily seen that an application for a 149(5) Certificate might give a prospective purchaser greater protection than most Solicitors think.

The question that really needs to be asked is whether for \$60.00 should prudent purchasers take the risk of not obtaining information that could be very relevant to the land being purchased by them.

There is one odd case that I think I should mention and that is especially where you are acting for a Vendor. Councils very often will seek to disclose in a Section 149(5) Certificate information that does not affect the land but they believe potential purchasers should be aware of.

A classic example of this was in the case of *LLD Precinct 2 Pty Ltd & Ors –v- Auburn City Council*. In this matter the Court was faced with the Council inserting under Section 149(5) of the EPA Act a notice to the effect that Council is unable to subsidise certain facilities and, that as future residents in the area, the purchaser should be aware that they will not have access to services and facilities they might normally expect.

The Court granted an injunction preventing the Council from inserting such a clause in the Planning Certificate on the basis that Council can only insert information under Section 149(5) in relation to matters "effecting the land" and Council could not include in that advice matters relating to external considerations which might effect the quality of life of persons who might choose to live on the land. The Court concluded that as the proposed advice did not effect the use to which the land could be put, neither did it effect the land in any physical sense, it was outside the ambit of Section 149(5) of the EPA Act.

This decision would be a handy decision to have in your armory if you are ever found in the position where Council is threatening to or is in fact inserting in 149(5) Certificates this type of information where the Certificates relate to land owned by your client which your client is trying to sell.

## SECTION 149 BUILDING CERTIFICATES

All of you would be well aware of the existence of Building Certificates under Section 149B to 149G of the Environmental Planning and Assessment Act.

I will not therefore go into the details as to how to apply for a Certificate etc, but I will amplify on some aspects of 149 Building Certificates that you may not be aware of:

- 1 There is no requirement for the owner's consent to an Application for a 149 Building Certificate if the applicant is a purchaser under a Contract for the sale of property.

Accordingly, even if the vendor does not consent you can still apply for a Building Certificate, although there will of course be the practical problem of gaining entry for the Council Officer to inspect the premises. Provided you can get around this problem, there is nothing that can stop the purchaser under a Contract from applying for a Building Certificate.

- 2 The Council cannot require a Survey if the Applicant is able to provide evidence that there has been no material change in relation to the building since the date of another Survey. The Act (149C(2)) provides that the Council cannot require the Applicant to supply a more recent Survey.
- 3 The rights of the Council to refuse to issue a Building Certificate are very limited.

Section 149D of the EPA Act provides as follows:

### ***Obligations of council to issue building certificate***

*(1) The council must issue a building certificate if it appears that:*

*(a) there is no matter discernible by the exercise of reasonable care and skill that would entitle the council, under this Act or the Local Government Act 1993 :*

*(i) to order the building to be demolished, altered, added to or rebuilt, or*

*(ii) to take proceedings for an order or injunction requiring the building to be demolished, altered, added to or rebuilt, or*

*(iii) to take proceedings in relation to any encroachment by the building onto land vested in or under the control of the council, or*

*(b) there is such a matter but, in the circumstances, the*

*council does not propose to make any such order or take any such proceedings.*

*(2) If the council refuses to issue a building certificate, it must inform the applicant, by notice, of its decision and of the reasons for it.*

*(3) The reasons must be sufficiently detailed to inform the applicant of the work that needs to be done to enable the council to issue a building certificate.*

*(4) The council must not refuse to issue or delay the issue of a building certificate by virtue of the existence of a matter that would not entitle the council to make any order or take any proceedings of the kind referred to in subsection (1) (a).*

*(5) Nothing in this section prevents the council from informing the applicant of the work that would need to be done before the council could issue a building certificate or from deferring its determination of the application until the applicant has had an opportunity to do that work.*

One would think that the terms of this Section were perfectly clear and that in the event where the Land and Environment Court has ordered the demolition of a building, built without Council's consent, a Building Certificate cannot be issued. If you were to think this you are wrong. In the case of *Ireland -v- Cessnock City Council (1999) NSWLEC 153* Bignold J upheld an appeal against Council's refusal to grant a Building Certificate where the facts were that the Applicant had built a building without Council's consent. The Council Officer had told him to cease building and in defiance of this request he continued to build. The Council was required to commence injunction proceedings in the Land and Environment Court to stop him. The Class 4 proceedings (which preceded this appeal) were determined by Sheehan J and in that Judgment his Honour made an order requiring the demolition of the unauthorised building.

Sheehan J granted a stay of execution to allow the Applicant to try and regularise the building.

It is settled law that Council cannot grant consent to a building that has already been partially built or completed, as the requirement for a Building Consent is prospective and hence consent cannot be granted retrospectively. The only option that was available to the Applicant was to apply for a Section 149 Building Certificate in the hope that it would prevent Council from proceeding to enforce the demolition made by the Land and Environment Court.

The Council argued that there was "*a matter discernible by the exercise of reasonable care and skill that would entitle the Council under the Act to order the building to be demolished, altered, added to or rebuilt*" and in fact, proceedings had been taken for an order requiring the building to be demolished and such an order had been made and accordingly Council was entitled to refuse to issue a Building Certificate.

The Council argued that the relevant Sections of 149 of the EPA Act are to the effect that since the obligation imposed upon Council to issue a Building Certificate is predicated upon the ab-

sence of entitlement of the Council "to order the building to be demolished etc" or "to take proceedings for an injunction requiring the building to be demolished etc" the entitlement not only exists, but it in fact had been exercised and accordingly the legislature must be taken as not having intended to impose upon the Council the obligation to issue a Building Certificate preventing it from taking action which it had already taken.

The Court took the view that there was a discretion to issue a Building Certificate, even in circumstances where Council was not obliged to issue a Certificate and accordingly the Council (and on appeal the Court) had a right to issue a Building Certificate even in circumstances where it was not bound to issue such a Certificate under the Act.

The Council further argued that the issue of a Building Certificate in relation to a building that already exists would serve no useful purpose because of the limitations created by Section 149E of the EPA Act on Council's powers to take remedial action against the existing building would be entirely unavailing in relation to the action that Council had already taken in obtaining the mandatory injunction requiring the demolition of the offending building. The Council argued that the Legislator could not have intended to confer on Council a discretion to issue a Building Certificate in circumstances where it would serve no useful purpose.

The Court took the view that it was not convinced that the issue of a Building Certificate in the current circumstances would serve no purpose. The effect of the issue of the Building Certificate in the Court's view was expressly declared by Section 149E and the statutory effect was not neutralised or diminished by the fact that there was already in existence a mandatory injunction requiring the demolition of the building.

The effect of this decision is to greatly widen the effect of a Section 149 Building Certificate. It is clear that a Section 149 Building Certificate can be obtained even where Council would be entitled to order the demolition of the building or to take proceedings for the building to be demolished etc and is still available even where such proceedings have been taken and have been successful.

Accordingly a Building Certificate can be a very powerful weapon in the armoury of any Solicitor seeking to regularise unlawfully constructed buildings or buildings containing additions which have been unlawfully constructed.

It should, however, be remembered that Section 149E only operates to prevent the Council from seeking a demolition or rectification order, it does not stop third parties (such as next door neighbours) from seeking such an order. This is something that a lot of Solicitors are not aware of and I believe there is a potential, especially in unlawfully constructed buildings or parts of buildings, for an officious next door neighbour or in fact an officious stranger to commence proceedings requiring demolition or rectification of the building so that it is no longer unlawful and there is a good chance that the Courts will grant such an injunction.

A perfect example of this is the case of *Tynan –v- Meharg (1998) 101 LGERA 255* where the Court of Appeal confirmed a demolition order made by the Land and Environment Court for a building which was constructed too close to the boundary and not in accordance with a Consent granted by the Newcastle City Council. During argument before the Court of Appeal, Stein JA indicated that he did not believe that it was possible to retrospectively rectify a building which has not been built in compliance with an approval and in fact, in an subsequent Application for

stay before Handley JA (sitting singularly in the Court of Appeal) his Honour refused an application by the home owner to extend the period of time stipulated in the injunction made by the Court of Appeal for demolition of the building to enable him to "*obtain from Newcastle City Council a Development Consent and a Building Consent*" by holding that the process was "*fatally flawed*" and was an "*attempt to re-litigate a question finally decided by Sheehan J, subject to appeal to the Court and now finally decided by this Court*".

It is clear by the terms of Section 149E that while a Building Certificate can be used as a shield to protect the building owner from proceedings for demolition or rectification being brought by the Council, it cannot act as a shield for similar proceedings being brought by strangers or neighbours, although it could perhaps be argued that as a mandatory injunction is a discretionary remedy that the Court should refuse such a remedy when a Building Certificate has been granted, however, this is a question that will be left for future decisions, but I do feel that I should caution you so that you know that a Section 149 Building Certificate is not an absolute bar against proceedings being brought for a rectification or a demolition of an illegally constructed building.

### HERITAGE ASPECTS

Buildings, places and chattels all have a heritage value of some sort. Those that are considered of importance are listed either in statutory registers or non statutory registers.

Statutory registers provide legal protection for heritage items under the Heritage Act and the Environmental Planning and Assessment Act.

Non statutory registers do not provide statutory protection, however, are often used by Councils and other consent authorities as a reason for imposing onerous conditions or refusing Development Applications.

The State Heritage Inventory consist of:

- historical archaeological sites
- maritime archaeological sites including shipwrecks
- industrial sites
- urban landscapes, parks and gardens, and building surrounds
- private and civic buildings
- heritage items owned by State Government agencies
- natural heritage items, such as forests, wetlands and mountains which may include rare or endangered native birds, plants and animals
- moveable heritage items, such as industrial machinery, transport vehicles, furniture, art and items that are part of heritage collections
- aboriginal heritage sites, including sites in the Aboriginal Sites Register maintained by the National Parks and Wildlife Service.

Statutory listings fall into the following broad groups:

- Items of State significance.

These items are normally protected under the Heritage Act and are listed in the State Heritage Register. Listing in the Register means that substantial restraints are put on what can be done in relation to the building or site or curtilage.

The Heritage Act provides in Section 57 that certain activities, including the demolition of a building, are controlled activities and prohibits any work being done on such sites or buildings without the specific approval of the Heritage Office.

Division 3 of the Heritage Act sets out what matters the Heritage Commission must consider prior to granting approval. Section 62 states the matters that the Heritage Office must take into consideration and significantly Section 63(2) provides that the Heritage Office must refuse an Application to demolish a building unless basically it is of the view that the building or work constitutes a danger to the users or occupiers of the building or works or the public.

The Heritage Commission takes the view that it is not sufficient to show that the building is simply dangerous if trespassers etc enter the property, as they believe that the fencing off of the building will ameliorate the danger.

There is no right to appeal to a Court against the refusal of the Heritage Commission to grant approval for a demolition, although there is a right to appeal to the Minister, however, this is very much the process of appealing from Caesar to Caesar.

Recent amendments to the Heritage Act means that it is much more onerous to own a heritage building, as there are certain positive requirements on an owner of a heritage building to maintain and repair a building that is listed in the State Heritage Register. These requirements are prescribed in the Heritage Regulations 1999 and include the provision of security fencing, weather protection and other relevant matters, including where the building is unoccupied the requirement for installation of security monitoring measures, fire alarms and the boarding up or enclosing of all openings in the building and for security fencing to be erected.

If your client is purchasing a derelict heritage building with a view that he will allow it to simply fall down over a passage of time, you should warn him that this may not be prudent, as he could find himself being required to do work and expend a substantial amount of money without any perceived benefit.

Of course having a building or land listed in the State Heritage Register is not always bad. There are provisions both in the Heritage Act and in most Local Environment Plans and Regional Environmental Plans to allow for compensatory provisions in relation to heritage buildings and heritage sites.

Basically these provisions take the form of allowing a person to conduct a non conforming use if it can be shown that that use does not affect the amenity of the neighbourhood and it is necessary for the preservation of the heritage building or site. This means that a

house in a residential area can be converted to a commercial premises in certain circumstances, even where the commercial premises is a prohibited use in the zoning.

Section 125 of the Heritage Act require the Valuer General to issue a Heritage Valuation (for rating and land tax purposes) on land listed on the Heritage Register. As such a listing can be severely restricting the value is often less than market value, which can result in substantial savings. Very often such a Valuation is not done. To show your worth to your client, make sure you advise them of the concession so they can take advantage of it.

- Items of Regional significance.

They are normally specified in the REP and in the Hunter Valley and Newcastle this means that items of Regional heritage significance are specified and controlled under the auspices of the Hunter Regional Environmental Plan (Heritage).

Clause 7 of that Plan places severe restrictions on the demolition or altering of buildings, the subdivision of land, the erection of buildings and in the fact the damaging of any tree on any land which is listed as an item of Regional significance without the consent of the Council and also requires that Council to be satisfied of various matters before it can grant such consent.

Clause 8 provides that if the item falls within Schedule 1 the Council cannot grant consent unless the concurrence of the Director of Planning is obtained. It again provides that before the Director of Planning (Planning NSW) can grant consent he has to take into consideration the views of the Heritage Council, the heritage significance of the item to the State and various other matters.

Clause 9 requires that if the item is of Regional significance specified in Schedule 2 of the REP, the Council cannot grant consent unless the proposal has been referred to the Director of Planning and it has considered the Director of Planning's response or a period 28 working days has elapsed.

The REP provides (in Clause 12) for a conservation incentive which I have already referred to, which does give some latitude for the Council to grant consent to a non conforming use.

Significantly Clause 13 of the REP requires Council not to grant consent to an Application to carry out development in the vicinity of a heritage item unless it has made an assessment of the affect the carrying out of that development will have on the heritage significance of the item. You should note that no where in your 149 Planning Certificate will you be told whether the land is within the vicinity of a heritage item. A heritage item includes items of State, Local and Regional Significance.

You can readily see that even if the land your client is purchasing is not a heritage item in itself, it can get caught under the provisions of the REP by being in the vicinity of a heritage item.

- Local Environmental Plans

The next level of statutory protection is the level provided by Local Environmental Plans.

Most Local Environmental Plans contain similar provisions as the Regional Environmental Plans. A close study of a Local Environmental Plan will show that most Local Environmental Plans list heritage items as follows:

1. Individual heritage items;
2. Street scapes;
3. Precincts;
4. Conservation areas.

Accordingly it is important that you read the Section 149 Certificate very carefully and if there is any mention of a heritage item or a heritage control pursuant to the LEP it would be prudent for you to ensure that your client seeks competent advice and has a look at the necessary LEP prior to proceeding further, as there are many traps.

- Aboriginal Sites Register

There are other statutory controls in relation to aboriginal sites. There is an Aboriginal Sites Register at the National Parks Wildlife Services and enquiries can be made in appropriate cases.

- Shipwrecks

Shipwrecks in or adjacent to New South Wales may be protected under the Commonwealth Historic Shipwrecks Act 1976 or under the NSW Heritage Act 1977.

- Register of National Estates

The Australian Heritage Commission has a Register of National Estates listing heritage items across Australia. I will not go into details of the listings in this Register. It is sufficient for you to know that the Commission's decision to enter an item in the Register of National Estates is subject to a statutory review process which does not apply in relation to entries of items in the NSW Heritage Register, Regional Environmental Plans or Local Environmental Plans.

There are, of course, other non statutory registers and you should be careful of these. The National Trust maintains a Register, however, it has no statutory force but it does have persuasive force. You will find that the Royal Australian Institute of Architects also has a Register of 20<sup>th</sup> Century Buildings; the Art Deco Society has a Register of interwar buildings between 1918 and 1939; the Geological Society Register lists geological sites; the Australian Institute of Engineers Register listed sites or objects of engineering significance and the Professional Historians Association (NSW) Register has a register of historical sites and objects of historical significance.

Councils also have numerous studies, which they refer to when it suits them.

The problem with non statutory registers or non statutory listings of heritage items is that Councils very often still take into account these listings when considering a Development Application

and sometimes applicants are surprised to find that a item for which they have a clear 149 Certificate is still constrained by heritage considerations when the 149 Certificate never mentions it.

A classic example of this was when I acting for a client in Newcastle. Newcastle Council conducted a heritage study some years ago. The Heritage Study consisted of 4 volumes. It identified certain items that required heritage protection and identified close to 1,000 items which required further investigations.

My client purchased a certain building with a clear 149 Certificate completely unaware that this building had been mentioned in the 4<sup>th</sup> Volume as being an item worthy of further investigation.

Council's Heritage Officer took the view that when my client (who was a Developer) purchased the property he could pay for the investigation.

Accordingly when my client lodged an Application to demolish the building and develop the site (he had an Engineer's Certificate to show that the building was dangerous and in fact no Insurance Company would grant an insurance over the building) Council refused to grant consent to demolish the building on the basis that the building was mentioned in the 4<sup>th</sup> Volume as an item requiring further investigation and that our client would have to conduct (at its cost) an extensive heritage study and prove to the Council that the building had no heritage value.

In the meanwhile, unknown to my client, while my client was dealing with Council's procrastination Council had approached the Minister to rush through an urgent heritage interim preservation order under the Heritage Act for this building.

While the outcome of this was of some satisfaction to the client, ultimately it did put him through a deal of stress and anxiety and included his Company being prosecuted and facing a fine of \$1.1 million. While the client was ultimately acquitted, it was still a salutary lesson of the type of problems people can have with old buildings.

I do not have a simple solution for this problem, other than to suggest that a wise Solicitor, when dealing with an item that may have some heritage value or significance or in fact when dealing with an item that may be old or with an item that is situated in an old area of town the person should obtain a 149(5) Certificate, although this will not necessarily always disclose (and it did not disclose in the case I have referred to above) whether a Study exists or there is some other heritage significance of it might. The client should also preferably attend at the Council Chambers and speak to somebody to see whether there is any heritage constraints in any Study or otherwise that might apply to the land.

Some prudent Solicitors obtain a Certificate under Section 167 of the Heritage Act to protect their clients. They should remember that a Section 167 merely protects your client from criminal prosecutions and does not act as an aid to prove that an item is not listed on the Heritage Register.

I currently have a case where we have obtained a Certificate from the Central Register of Restrictions at the LPI indicating that the land is not subject to a Heritage Conservation Order or any other interest by the Heritage Council, however, the Heritage Council insists now that the land is in fact covered by a permanent Conservation Order.

Most LEPs have provisions requiring Council's consent for demolishing any building and accord-

ingly even if you could rely on Section 167 as excusing a demolition of the building, it would not protect you from a prosecution for a breach of the LEP provisions prohibiting demolition without consent.

This might be something that the Law Society needs to take on and make representations to the Government, as I would think it would be reasonable to expect that a Certificate issued by the Heritage Council should be binding as to the status of the land and in any subsequent Land and Environment Court appeal it should be conclusive proof of the matter stated in that Certificate. In other words, I think it only fair that where you have a Certificate saying that land is not listed in the State Heritage Register you should be able to rely on it for all purposes and not just as a defence against criminal prosecutions.

All I can say in relation to heritage listings is I hope that what I have said today will help alert you to the problems and pitfalls that heritage buildings or land might present.

### LOCAL GOVERNMENT ACT, EPA ACT & NOXIOUS WEEDS ACT ORDERS

Most Conveyancers are aware of the necessity of obtaining a search from the Council as to outstanding orders. As most orders use to be under the old Local Government Act one search normally sufficed.

Until my letter to the Law Society Journal a few years ago, most Solicitors continued (after 1998) to apply for a Certificate from Council as to outstanding orders under the Local Government Act.

Most Solicitors were unaware that in 1998 the Local Government Act and the Environmental Planning and Assessment Act were substantially amended. The result of this was that most of the orders that were formally made under the Local Government Act were transferred to the Environmental Planning and Assessment Act.

A Certificate under Section 735A of the Local Government Act does not disclose the full story, as many orders are now being made under the Environmental Planning and Assessment Act and since Section 735A is expressed only to relate to orders under the Local Government Act, it had no effect under the Environmental Planning and Assessment Act.

The type of orders that can be made under the Local Government Act include the following orders:

to demolish a building where the building is erected in a catchment district or is likely to cause water pollution or pollution of a water supply and to also repair or make structural alterations to such a building. To require camping grounds, moveable dwellings, buildings used for public entertainment, a place of shared accommodation, a hair dressing shop or a mortuary or a water supply meter or more importantly a sewerage system to be brought up to the relevant standard. To fence land in certain circumstances. To identify land or fill in a hole or a water hole or an order to stack or remove articles.

The more important provisions in relation to Notices are now contained in the Environmental Planning and Assessment Act.

Division 2A of Part 6 of the EPA Act empowers Council to give some 17 different types of Notices, including to cease using premises; to demolish or remove a building; not to demolish or to cease demolishing a building; to repair or make structural alterations to a building; to alter, obliterate, demolish or remove any advertising sign or structure; to refrain from doing certain things in order promote fire safety; to erect or install fences around building structures or appliances to protect persons or property; not to conduct or cease conducting an activity; to cease the use of a building; to cease the use of a premises or to evacuate the premises, to leave the premises or not to enter the premises, to do such things as are specified in the order to restore the premises to a condition they were before the building was unlawfully erected or altered, to do such things as are necessary to bring the building into compliance with development standards, to repair or remove a building, to comply with a Development Consent, to complete development within a certain time frame and to carry out work in association with a subdivision.

Section 121ZP is a provision entitling a person to obtain from Council a Certificate as to any outstanding Notices or orders under the Division. It will be obvious that the Certificate only applies to Notices or Orders made under the EPA Act and accordingly if one was only to obtain this Certificate one would be unaware of what Notices might have been issued under the Local Government Act or as I refer to hereafter, under the Noxious Weeds Act.

Lawpoint, for example, in its searches only makes for provision for one of the searches. If you were to apply via Lawpoint for a search, for example, in Cessnock you would only get a Certificate under Section 735A of the Local Government Act. Since the majority of the notices and orders that can be made by a Local Government authority are now contained in the Environmental Planning and Assessment Act, this Certificate is of very little protection.

My enquiries reveal that various Councils are taking various views on an application for Certificate. Some Councils will grant for the one fee all three Certificates under the Noxious Weeds Act, the Local Government Act and the EPA Act. Some Council will grant them only in relation to the EPA Act and the LGA Act and some Councils, such as Cessnock, require a separate application and a separate fee for each types of the three Certificate.

Another Act which empowers Local Government authorities to make onerous orders is the Noxious Weeds Act. A few years ago I was consulted by a farm owner in the outer west of New South Wales who had purchased a few hundred hectares of land. Some years after he purchased the land he found that there was an outstanding order given by Council for the eradication of noxious weeds. The cost of complying with the order well exceeded the value of the land. The Solicitor had prudently obtained a search from the local Lands Board, however, unknown to him an order had been made not by the Lands Board but by the Council. I am told by experts that even the cost of an order requiring eradication of pampas grass can amount to some thousands of dollars. Clearly an order under the Noxious Weeds Act can have costly consequences.

Most Solicitors of normal urban or suburban property will not do a Noxious Weeds search, however, I am aware of two recent matters in my area where Noxious Weed orders were made on residential properties and the cost of compliance ran into many hundreds, if not a few thousand dollars. The Certificate you obtain is under Section 64 of Noxious Weeds Act.

Once again the mismatch of attitudes by different Councils needs addressing and again I suggest that this is something the Law Society should take up with the Government. Councils should be

required to give one Certificate in relation to all Notices issued by them, regardless of which Act it might have been given under. A simple amendment to the Acts will cure this defect without a great deal of money being spent by Councils. They have all of this information on the one data base and instead of granting one Certificate, some Councils are using it as a method of extracting money from purchasers and I think if the Law Society is to be any use it should be making representations to the Government to rectify this situation immediately.

In the meanwhile Solicitors should be careful to read the Certificates they get to ensure that it covers all Notices issued under the various Acts and if it does not, they should obtain instructions from their clients to apply for individual Certificates, as it would be most imprudent to proceed to completion without at least Certificates under the Local Government Act and the Environmental Planning and Assessment Act and perhaps even under the Noxious Weeds Act.

### OCCUPATION CERTIFICATES

Most Solicitors will not pay a great deal of attention to the requirements of the Environmental Planning and Assessment Act for an Occupation Certificate to use a new building.

Section 109M of the EPA Act makes it an offence for a person to occupy the whole or part of a building unless an Occupation Certificate has been issued in respect of the building or part.

Section 109N makes it an offence for a person to change a building's use (in whole or in part) unless a Occupation Certificate has been issued in relation to that building or part.

You should note that an Occupation Certificate does not take the place of a Section 149 Building Certificate, but it does have the effect of prohibiting the occupation of a new building or the change of use of a building without such an Occupation Certificate.

I would suggest that Solicitors should be aware of this requirement and in an appropriate case, such as where their client is purchasing a new building a clause should be inserted in the contract requiring the Vendor to provide the Purchaser with an Occupation Certificate in relation to the building on or prior to settlement.

I have not seen many Contracts that has this provisions and perhaps wiser minds in the audience might give some consideration to this suggestion.

In addition, appropriate requisitions should perhaps be raised as to the issue of an Occupation Certificate, as once again I have not seen many requisitions enquiring as to the issue of an Occupation Certificate in relation to buildings.

### EXISTING USES

Existing uses are perhaps the most valuable concession granted to landowners under the Environmental Planning and Assessment Act.

Section 106 of the Act defines an existing use. Section 107 provides that nothing in the EPA Act or any Environmental Planning instruments prevents the continuation of an existing use. Section 108 allows for regulations to be made in respect of alterations, extensions and changes to an existing use. Section 109 allows a use which was commenced lawfully without consent to continue even if provisions in a EPI subsequently required Council's consent to be obtained.

For the purpose of this talk I will be mainly considering the existing use rights envisaged in Section 106 of the Environmental Planning and Assessment Act.

To constitute an existing use the building or work or use of land must be lawful immediately prior to the coming into force of an Environmental Planning instrument prohibiting that use.

Accordingly the actual use of the land immediately before coming into effect of the relevant Planning instrument prohibiting the use is important. It is necessary to establish, for example, that the actual use was lawful and it is now prohibited.

This gives rise to the problem of determining which part of the land obtains the protection under the existing use rights provisions. This is particularly of concern where the land is subsequently subdivided. It has been held (*Steadman –v- Baulkham Hills Shire Council (No. 2) 1993 31 NSWLR 562*) that where land was used at the relevant date for the purpose of mining or quarrying and part of the land was kept in reserve, which reserve land was later subdivided then and unless the mining and quarrying use has later been abandoned the existing use right continued on the newly subdivided lot.

You should, however, remember that for a use to have the protection as an existing use it must be used for that lawful purpose prior to the coming into effect of the Environmental Planning instrument prohibiting that type of use. It is not sufficient in other words for someone to acquire land with a view to using it for that purpose, but in fact it must be used for that purpose.

The High Court has held that the existing use rights provisions of the EPA Act should be liberally interpreted.

You should be aware that if an existing use is abandoned for in excess of 12 months then there is a prima facie presumption that the use has ceased. For the use to cease there must be a termination or abandonment of the use and not merely some temporary interruption.

The onus of establishing the abandonment of an existing use lies on the person alleging that it is has been abandoned. The onus of proving that an existing use right exists lies on the person who claims that existing use right exists.

If your client is purchasing a property, to which it is alleged an existing use right exists it is incumbent on you to advise your client that at some future date it might be necessary for him to prove that the existing use right exists. There is no provisions in the Local Government Act or the Environmental Planning and Assessment Act for a certificate as to existing use rights to issue and accordingly every Solicitor dealing with existing use rights has to face the impossible task of trying to establish that such rights exists.

I believe that there is no safe method of ensuring that your client is protected when such existing use rights are claimed to exist and you should advise your client that at some future date it is possible that someone disputes that any such existing use right exists.

Many Solicitors take the view that if they can get a letter from Council confirming that existing use right exists, this protects their clients. There is no protection afforded to a purchaser even if he obtains such a letter, as a matter of public policy the Council is not estopped from denying the existence of an existing use right even where a letter has been given *Trimboli –v- Penrith City*

*Council (1981 48 LGRA 323)*. The best a Solicitor can hope for is that such a letter might found a claim for damages against the Council, however, it does not give protection nor is it an endorsement that such existing use right exists.

In the event you can get such a letter from Council you should certainly obtain it, however, you should advise your client that it is of limited utility.

The next step that perhaps you should do is obtain from the Vendor and from any other predecessors in title, Statutory Declarations setting out facts to establish that the existing use right exists. In some circumstances such documents can be used as evidence under the Evidence Act.

I know of at least one Solicitor who was sued successfully by his client for acting on their behalf on the purchase of a restaurant, which had been operating for some 10 years (as it turned out, unlawfully). The purchaser believed that as the restaurant had been operating for 10 years existing use rights attached to it, however, this was found not to be the case and the restaurant was finally forced to close down.

In relation to existing use rights, you should be aware that there are some significant advantages in having an existing use right and they are as follows:

1. A non-conforming use can be changed to another non-conforming use. This is very useful, as it effectively nullifies the effect of any Planning instrument that might prohibit the non-conforming use. It widens the uses to which the land can be put and accordingly if land has attached to it an existing use right it is necessary to have the information as to the history of the land to support the claim for existing use.
2. Regulation 41 allows an existing use to be enlarged, expanded or intensified or to be altered or extended or to be rebuilt or to be changed to another use, including a use that would otherwise be prohibited.
3. Regulation 42 requires Development Consent for any enlargement, expansion or intensification of an existing use and for rebuilding of buildings or for alterations or extensions of buildings and work or for changes to existing use.
4. Once an existing use has changed to another non-conforming use it still retains the existing use features and can again be changed to another non-conforming use.

#### THE LOCAL GOVERNMENT CONSENT REGISTER AND WHAT IT MIGHT IS DISCLOSE AS TO PREVIOUS CONSENTS

Most Solicitors will be unaware of the fact that Consent Authorities are required to have a Consent Register. The Consent Register must be available for inspection by any person without charge. Persons may take copies of the Consent Register (on payment of the fee).

Most Solicitors therefore have at their finger tips the ability to be able to establish the Consent history of land, however, I know of no Solicitor who inspects the Consent Register (for the obvious reasons of costs), but I also know of no Solicitor who urges their client to inspect the Consent

Register.

In my view a prudent Solicitor should tell the client to inspect the Consent Register in relation to the land, so that they can be aware of what previous Consents were given and conditions attached to those Consents.

This is particularly important when you are dealing with a development that has characteristics of various developments, some of which may be prohibited, others of which may be permitted. For example, you could be acting for a client who is purchasing what he believes to be flat in Sydney. It is possible that the Planning Scheme at the relevant time the consent was given prohibited flats being built, however, permitted holiday accommodation buildings. Holiday accommodation for instance could be described as accommodation used by a person or family for no more than 4 weeks in a year.

I know of instances where persons have purchased units in these buildings (which to all intents and purposes appear to be residential flat buildings) only to find that they are only allowed, pursuant to the consent to live in it for a 4 week period in any 12 months.

The Councils (to their credit) have tried to warn prospective purchasers by requiring restrictive covenants to be inserted on title to endeavour to warn prospective purchasers of these restrictions, however, the Land and Environment Court has recently taken the view that such restrictive covenants are unlawful and in fact has gone so far as to order costs against Councils that insisted in inserting conditions relating to restrictive covenants, ie restrictive covenants to the effect that a unit shall not be used for more 4 weeks in any 12 month period by the same person or persons. The Land and Environment Court, inter alia, has taken the view that people are presumed to know the terms of a consent and the Planning laws stand on their own and do not require the assistance of restrictive covenants as an aid to enforcement.

Accordingly I query whether Solicitors should, now as a matter of course, begin advising their clients to check the Consent Register for themselves prior to entering into a Contract for the purchase of any land.

I realise that this will cause delay and confusion, however, I suggest it is better to do this than risk your client suing you at a future date because you did not advise them to check the Development Consent Register and establish restrictions on the Consent prior to entering into Contracts for the sale of land.

#### ACCESS TO NEIGHBOURING LAND

Until relatively recently there were two problems relating to land ownership that could not be easily solved.

One of the problems was where the Solicitor was acting in relation to land which was either land locked without any access or which had some other problems requiring the grant of easements before the land could be fully developed. Section 88K of the Conveyancing Act has substantially alleviated this difficulty.

The other problem has been when a landowner had difficulties getting temporary access to neighbouring land to enable a development to be done on his land. This problem has been allevi-

ated by the Access to Neighbouring Lands Act 2000, which allows the Local Court to grant access to neighbouring land to enable a building or some development to proceed by making a neighbouring land access order but you should note it only allows access to adjoining or adjacent land.

Accordingly now, if your client is in the position where he has to have temporary access over adjoining or adjacent land, such as for the purpose of erecting scaffolding to allow him to complete a building on own land, an order for such access be obtained relatively simply through the Local Court. I did not intend to spend a lot of time on the Access to Neighbouring Lands Act, as it is a relatively straight forward Act, which most Solicitors should be aware of. The only reason I mention it is that until the passage of this Act it was difficult to obtain access over your neighbour's land when work was required to be done on your land and this Act now alleviates this problem. The Court can order compensation (Section 26) for damage , injury etc but not for inconvenience, loss of privacy etc.

Section 88K of the Conveyancing Act is a wonderful section that enables landowners to obtain easements and rights-of-carriageway over their neighbour's land, despite the protestations or opposition of the neighbour.

Section 88K of the Conveyancing Act came into operation in 1996 and since that time there have been a number of reported cases that are guide to Solicitors on the width of the Section.

In order to come within the ambit of the Act the Plaintiff must prove the following:

1. that the easement is reasonably necessary for the effective use or development of the Plaintiff's land;
2. that the use of the Plaintiff's land would not be inconsistent with the public interest;
3. that it is possible to give the servient tenement adequate compensation; and
4. that all reasonable attempts have been made by the Plaintiff to obtain an easement and these have been unsuccessful.

The Section also provides (Section 88K(5)) that the costs of the proceedings are payable by the Plaintiff, subject to any order of the Court to the contrary. The Court has shown as reluctance to order costs against the Defendant unless there is clear and cogent evidence that the Defendant has been totally unreasonable.

In *Blulock Pty Ltd –v- Majic unreported (2001) NSWSC 1063* Winderer J was called upon to decide whether a 6 metre easement for light and air over Defendant's property was "reasonably necessary" for the use and enjoyment of the Plaintiff's land and "whether the owner of the servient tenement could be adequately compensated".

The brief facts are that the Plaintiff was the owner of certain property in Surrey Hills. The Defendant was an owner of land which partly adjoined the Plaintiff's property on the western side. The Plaintiff proposed to convert a 10 storey warehouse building with a blank wall on its western side into 60 residential strata units and 22 car spaces. It was proposed that some of the units would have windows and balconies facing the Defendant's land.

The Council granted a Consent to the development, subject to the Plaintiff obtaining an easement for light and air variable width over the Defendant's property.

The effect of the condition, so far as the Defendant's property was concerned, was that all land within a 6 metre line not built upon would be burdened by the proposed easement from ground level up to where the land was currently built upon and thereafter, there would be a restriction on the height of any further building on the land.

The proposed easement for light and air was unlimited in height.

The Court held that it was incumbent upon the Plaintiff to lead evidence "*that the proposed development is a sensible and reasonable development as compared with some other development which would involve a setback on the western side or some development where Council would not require the easement the subject of the present condition*". The Court said that "*where an existing building is to be completely gutted and transformed the Court should not be ready to assume the easement ought to be reasonably necessary for effective development*".

The next question that the Court was required to consider was whether the owner of the proposed servient tenement could be adequately compensated for any loss or disadvantages arising from the imposition of the easement.

The Court held that the easement sought was so restrictive of the future development of the subservient land that it should be refused.

The Court said:

*"It is necessary to bear in mind that, as a general rule, a developer is required to have enough land to enable a proposed development to be satisfactorily brought to fruition, albeit that some temporary right might be required over additional land to enable a particular development to be completed. Yet while it may be perfectly reasonable for a property owner to wish to maintain that property unencumbered rather than to be paid compensation for the encumbrance, the purpose of Section 88K is to enable that wish to be overborne in the appropriate case in the interest of enabling land to be used to its fullest extent ..... the fact is, however, that the imposition of the easement sought would have the effect of precluding almost any future change to the present structures on that land ..... I am therefore of the view that as a matter of discretion, this is a case where it would not be proper for the Court to exercise its undoubted power to impose the easement. The disadvantage to the Defendant and the impact of the title to his property by the easement as is proposed would, in my view, be such that it would not be a proper exercise of discretion to burden the Defendant's land with the easement sought".*

It will readily be seen that it will be easier to obtain some types of easements than others. One would expect that you would have very difficulty obtaining easements for drainage over neighbouring land by way of underground pipes etc, however, easements which severely restrict the subservient tenement's use would probably be rejected on the basis that the use cannot be adequately compensated for.

Different Judges of the Supreme Court have delivered different decisions. I have heard of cases where a Section 88K Application has been successful to allow a widening of a right-of-

carriageway so that someone can drive their 4 wheel drive vehicle into their garage where the evidence has shown that the carriageway width was sufficient for a normal vehicle (albeit not for a 4 wheel drive vehicle).

The purpose of pointing out these provisions out to you is simply so that you may be aware that there is a remedy for landlocked block and a remedy for land which might require the use of other land to be properly developed and that in the event an adjoining owner refuses access to the land to enable the development to take place where such access is only used for a temporary purpose the Access to Neighbouring Lands Act can be used and where the access is required for a more permanent purpose, Section 88K can be used.

Your client should, however, be advised that so far as Section 88K concerned he will have to pay to compensation and he will most likely have to pay the costs of any such proceedings, including the Defendant's costs and this needs to be weighed up when making the decision to commence proceedings.

Section 88K can also be used to obtain a right-of-carriageway or other easement over adjoining land, even when the identity of the owner cannot be established.

In *Kent Street –v- Sydney City Council unreported (2001) NSWSC 268* the Supreme Court made an order under Section 88K despite the fact that the Plaintiff admitted that it was unable to identify at least one or more owners of the proposed servient tenement.

The Court instead accepted an undertaking from the Plaintiff to the effect that if any person could establish an interest in the servient tenement and could establish any loss or other disadvantage from the grant of the easement, the Plaintiff would pay adequate compensation to that person with the Court reserving leave to any such person to make an application for compensation at a future time.

#### POWERS OF THE LAND & ENVIRONMENT COURT TO EXTINGUISH COVENANTS

In my view many Conveyancers, when they explain the impact of a restrictive covenant to their client during the conveyancing transaction, often ignore the effect Section 28 of the Environmental Planning and Assessment Act on restrictive covenants.

The purpose of this Section was stated in *Challister Ltd –v- Blacktown City Council (1992) 76LGRA10* as follows:

*"The purpose of Section 28 is to overcome any impediment placed on a development which is to be carried out in accordance with Part IV of the Environmental Planning and Assessment Act. It recognises that the ultimate regulatory provisions in relation to the carrying out of a development resides in Part IV of the Act. If those provisions are complied, either without consent but pursuant to an Environmental Planning instrument or in accordance with a development consent that the regime of the Environmental Planning and Assessment Act may prevail over any other Act or any rule, regulation, by-law, ordinance, proclamation, agreement, covenant, or instrument by or under whatever authority made if it is provided in a Environmental instrument with the approval of the Governor".*

Most Local Environmental Plans contain provisions to the following or like effect:

*"1 If any agreement, covenant or instrument prohibits a use permitted by this Plan, then it shall not apply to that use (to the extent necessary to permit that use).*

*2 Before this Plan was made the Governor approved of sub-clause 1 under Section 28 of the Act."*

The effect of Section 28 and a clause to the above effect in the Environmental Planning instrument is to remove any bar to an authorised development being carried out.

In *Doe –v- Cogente Pty Ltd (1997) 94 LGERA 305* the Court said:

*"Thus the powerful effect of Section 28 is starkly revealed. It means any restriction which might stand in the way of a development, even if created for the benefit of adjoining owners or other persons having an interest in the development site, may be suspended or neutralised to the extent necessary to permit a development pursuant to Part IV of the Act. This results directly from the interpretation of Section 28, the true potential effect of which is now clearly demonstrated".*

In *Alfredo Guisti –v- Kathleen Grant (1988) NSWLEC 68* Sheehan J made a declaration that a restrictive covenant limiting the height of a building was inconsistent with a planning provision contemplating that a two storey dwelling is permissible and made a declaration that on the proper construction of the relevant clause in the LEP the covenant restricting the height of the building did not apply so as to prevent the erection of a two storey building, even where such building exceeded the height limitation specified in the covenants, provided that the building was substantially in accordance with the building approval.

The effect of Section 28 of the Environmental Planning and Assessment Act is very often under-rated. I believe it is incumbent on all Solicitors to advise their client that restrictive covenants can be overridden by Council granting consent contrary to the provisions of any restrictive covenant and this applies even where the restrictive covenant has been imposed by Council itself.

The effect of this provision is that landowners can no longer take comfort from restrictive covenants restricting the height of buildings and hence preserving their views; they can no longer take comfort from a restrictive covenant that preserve their amenities. The planning laws prevail over individual private rights.

#### PROBLEMS WITH RIGHT-OF-CARRIAGEWAYS AND DEVELOPING THE DOMINANT TENEMENT

Regulation 49 of the EPA Regulations provides that a Development Application may be made only by the owner of the land to which the Development Application relates or by any other person with the consent in writing of the owner of the land.

Problems often arises in relation to land serviced by a right-of-carriageway. A problem very often arises in relation to obtaining the consent of the owner of the servient tenement to the development proposed on the dominant tenement.

In the case of *North Sydney City Council –V- Ligon 302 Pty Limited (1996) 91 LGERA 352* the High Court concluded that in the absence of evidence that it is proposed to use a right-of-footway expressed as "full and free right-of-footway" in a way not permitted by the terms of the right-of-carriageway and in the absence of a proposal to erect or carry out any work in, on, over or under a servient tenement then there is no need for a Development Application to be made over the servient tenement or to obtain the consent of the owner of the servient tenement.

This case puts paid to the argument (at least so far as a reasonable user of the right-of-carriageway is concerned) that the consent of the owner of the servient tenement is required, for instance for a residence development on the dominant tenement which proposes to use the right-of-carriageway.

In *North Sydney Council* the developer proposed a multi storey residential flat building above an existing building on the dominant tenement. The development proposed using an existing pedestrian walkway over an adjacent residential building known as Century Plaza, which was utilised by Club patrons and henceforth would be used by proprietors and visitors of the proposed development on the dominant tenement. The owners of the Century Plaza building declined to give their consent to the Development Application and the Council argued that the failure to produce the owner's consent in writing was a fatal defect to the Application.

The High Court concluded that that consent of the adjoining owner (the owner of the servient tenement) was not required, as the development proposed was over the dominant tenement and not over the servient tenement.

The High Court did, however, point out that where the use of the servient tenement constituted an intensification of the previous use then a consent for the intensification of the use of the right-of-carriageway would be required under the existing use provisions of the EPA Act and further concluded that if any works were required on the land that constituted development on the servient tenement then the consent of the owner of the servient tenement would be required.

This leads to the obvious practical problem where the owner of the dominant tenement wishes to intensify the development on his land, such as for instance by building tourist cabins where formally the land was used as a dwelling or for farming purposes.

In such circumstances the owner of the dominant tenement could find itself frustrated by having to obtain the consent of the owner of the subservient tenement to its development application in the event that an argument is mounted that the use of the right-of-carriageway is an intensification of use as contemplated by the High Court, which requires a separate development consent.

You will also be aware that it is now common practise for Councils when granting Development Consents to require the developer to construct a pavement or a road of some sort along the right-of-carriageway to give access to the development.

Since road construction works is development within the meaning of that term in the EPA Act, a development consent will be required for such road works and if a developer is unable to obtain the consent of the owner of the servient tenement he could find his development being frustrated by this lack of co-operation.

Where the servient tenement is owned by the Council, the Land and Environment Court can grant the Council's consent on behalf of the Council (provided the land is not restricted by the constraints that apply to community land) but it has no such power when the land is in private ownership. In those circumstances a developer could find himself locked out of an opportunity to develop his land and obtain maximum benefits and there is no ready remedy available at present to cure this defect.

I believe all Solicitors should be aware of this potential problem and advise their clients accordingly.

I hope that in the future, when faced with a conveyance involving land where the only means of access is by right-of-carriageway you will warn your clients of this potential problem prior to him entering into a binding Contract.

The old attitude that "there is access to the land" will not help you if your client decides to sue you for failing to advise him of this potential problem.

## CONCLUSION

I hope that this Seminar has alerted you to some potential problems in your practise as Solicitors. All of the problems that I have highlighted in this Seminar arise from my consultations with other Solicitors whose clients have been faced with similar problems. In other words, the problems I have highlighted in this Seminar are not hypothetical problems but are real live issues that will come to haunt you one day unless you bear them in mind in the day to day conduct of your practice.