



EDO-NQ FACTSHEET SERIES

LEGAL MECHANISMS FOR CONSERVATION ON PRIVATELY OWNED LAND

Private Conservation Mechanisms Factsheet #3: *Statutory Covenants*

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Legal Mechanisms for Conservation on Privately Held Land

Statutory Covenants

This factsheet is intended as a plain English guide to a particular area of law. It is not legal advice and is not intended as a comprehensive examination of the legislation. Whilst all care has been taken in its preparation, it is not a substitute for legal advice as legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your particular circumstances you should contact the EDO or your solicitor.

1. What are statutory covenants?

A statutory covenant is a voluntary written agreement entered into by two or more parties registered over the land title in the land registry. Statutory covenants are governed under the *Land Titles Act 1994* (Qld) (“LT Act”) in the case of freehold land, and the *Land Act 1994* (Qld) (“Land Act”) in the case of non-freehold land (i.e. leasehold land). They are registered over land titles by the Department of Natural Resources and Water (“DNRW”). One of their strongest aspects is that they bind to the land title, so the obligations they impose will also bind any subsequent purchaser of the land.

The parties to a statutory covenant are:

1. **Covenantee**: a statutory body representing the State or a local government. The covenantee is responsible for ensuring that the conditions of the statutory covenant are observed and enforced.
2. **Covenantor**: the individual landholder offering the statutory covenant for a specific reason. Their obligations are usually to abide by the conditions of the statutory covenant. This may include not clearing the land, ensuring that noxious weeds are managed and/or restrictions on the activities that may be performed on the land.

This factsheet will describe some of the more important considerations a landowner should bear in mind when deciding if a statutory covenant is an option for them. However, covenants are a complex area of law, so in all cases a landowner should obtain independent legal advice at each stage of the process.

2. How are statutory covenants made?

Statutory covenants are made in a four-step process:

1. Finding a willing covenantee
2. Negotiating and drafting the terms of the covenant
3. Execution by both parties
4. Registration on the land title

3. Who should a landowner covenant with?

Which government body is most suitable to act as a covenantee comes down to two factors:

- First, which government bodies are willing to act as a covenantee.
- Second, which government bodies are most appropriate to covenant with.

To find which government bodies are willing to enter a covenant, the landowner should contact the relevant state government departments and local councils directly. The two most likely government bodies will be the Queensland Department of Natural Resources and Water (“DNRW”) and the landowner’s local council.

At the time of drafting this factsheet (April 2009), the Queensland Environmental Protection Agency (“EPA”) does not enter into statutory covenants. The EPA’s resources are currently focused on achieving private conservation outcomes through nature refuges. Details of these nature refuges are contained in the second factsheet in this series – “*Nature Refuges and Coordinated Conservation Areas*”. DNRW may also be in a similar position. They provide the option of voluntary declarations under the *Vegetation Management Act 1999* and may prefer to enter into these rather than enter into individual covenants. Details of voluntary declarations are contained in the fourth factsheet in this series – “*Voluntary Declarations under the Vegetation Management Act 1999*”.

Whether a particular government body will be an appropriate covenantee depends on their ability and willingness to enforce the covenant. Statutory covenants are only as good as the covenantee’s ability and willingness to monitor and enforce them.

These enforcement concerns may make local councils the most appropriate covenantee. Due to their role as assessment manager for development applications, local councils are the first government body which will be notified of proposed development and land clearing which may be in breach of the covenant. In these cases, the first step to enforcing the covenant would be to refuse approval for development applications which are in conflict with the covenant. Therefore, local councils may be in the best position to monitor and enforce the covenant.

However, it is important to note and bear in mind that local councils have the power to release the covenant *without* the consent of the initial covenantor (the landowner who set up the covenant), and therefore allow development which the covenant may not have permitted.

4. How should a landowner draft a statutory covenant?

Some government departments such as the DNRW or EPA may have example covenants to refer to. However, it is highly recommended for each party to the covenant to obtain independent legal advice and assistance (e.g. from a private solicitor) to draft the specific terms of the covenant. Considering the expense, long term impact, and need to tailor the covenant to their specific circumstances, a landowner should not rely on precedent covenants or examples provided by a government department without first obtaining independent legal advice.

A covenant under either the LT Act or the Land Act must:

- relate to the use of a lot or part of a lot; or
- relate to the use of a building built or proposed to be built on a lot; or
- be aimed directly at preserving a native animal or plant; or a natural or physical feature of the lot that is of cultural or scientific significance; or
- be for ensuring that a lot subject to the covenant is only transferred to another person if *all lots* subject to the covenant are also transferred to that other person (transfer to single ownership).¹

Most environmentalists would most likely be interested in covenants which relate to the preservation of a native animal, plant or physical feature of the land; they could include covenants imposing obligations::

- not to remove native vegetation;
- not disturb an area of cultural significance; and/or
- to preserve vegetation in accordance with an environmental management plan.

However, there are also other requirements imposed by legislation which may make an improperly drafted covenant invalid. For example, covenants must not conflict with the local government planning scheme². The LT Act (particularly Part 6, Division 4A) and the Land Act (particularly Part 4, Division 8A) also contain some restrictions on what covenants may and may not include. Therefore, a landowner should obtain independent legal advice to ensure their covenant is valid, and to identify what specific options for conservation covenants may be available to them.

5. Survey requirements when drafting a covenant

Where a covenant relates to only part of a lot, including the preservation of a specific feature of the land or native animal or plant, the location of these features must be identified in the covenant.³ DNRW have indicated that to properly identify the location of

¹ s.97A(3): *LT Act*; s.373A: *Land Act*

² s.2.1.25: *Integrated Planning Act 1997* (Qld)

³ s.97B(1)(b): *LT Act*; s.373B(1)(b): *Land Act*

these features, a survey plan may be required (which the landowner will usually have to pay for), although the registrar of titles may be satisfied merely with an explanatory plan.⁴

Survey plans can be expensive, especially for large properties, so that is something that should be considered. However, your solicitor may be able to offer advice on ways to draft the covenant in such a way to minimise these costs.

6. How is a statutory covenant executed?

Once the covenant is drafted, it must then be validly executed by both parties.⁵ How a covenant can be executed depends on the identity of the parties to it.

An individual landowner can execute a covenant if they sign it, and have their signature witnessed by one of the following people⁶:

- a notary public
- a justice of the peace
- a commissioner for declarations or for taking affidavits
- a lawyer
- a barrister
- a solicitor
- a barrister and solicitor
- a legal practitioner
- a conveyancer
- another person approved by the register

If the landowner is a corporation, then the company seal will need to be applied to the covenant in order to execute it.⁷

If a local council is the covenantee, they will need to execute it in accordance with section 38 of the *Local Government Act 1993* (generally by the mayor or a councillor that is authorised to sign and execute the covenant on behalf of the local council).

Your solicitor should be able to advise in more detail on the specific execution requirements of each party.

⁴ *Statutory Covenants* (DNRW factsheet available online at <http://www.nrw.qld.gov.au/factsheets/pdf/land/l98.pdf>)

⁵ s.97B(1)(a): *LT Act*; s.373B(1)(a): *Land Act*

⁶ s.161(2): *LT Act*; s.310(2): *Land Act*

⁷ s.161(1): *LT Act*; s.310(1): *Land Act*

7. How is a statutory covenant registered?

After the covenant has been executed, it must then be registered in the Queensland Land Registry. This is done by submitting Form 31 'Covenant' to the registry, available from DNRW.

The form will need to be signed by each party to the covenant and witnessed by any of the persons listed under section 6 of this factsheet, above.

The statutory covenant takes effect once registered.

8. What effect does a statutory covenant have?

A statutory covenant will impose restrictions on what the landowner can do with the land, or the native animal, plant or physical feature on the land as identified by the covenant.

Once registered in the land registry, the covenant will bind with the land title. This means that the restrictions imposed by the covenant will apply to anyone who subsequently purchases or acquires an interest in the land. Prudent property purchasers will conduct a search of the relevant land title before they purchase a property. As a statutory covenant must be registered to be effective, it will show up in these searches. Therefore, all prudent future purchasers will be aware of the existence of the covenant and the restrictions it imposes before they purchase the land.

Enforcement of the terms of the covenant can only be taken by the government body which is the covenantee to the covenant so its effectiveness depends, at least to a certain degree, on the will and available resources of the government body covenantee.

9. Can the terms of a statutory covenant be amended?

A statutory covenant can be amended if both parties agree.

Generally, a covenant can be amended by registering the following with the land registry:

1. a validly executed "instrument of amendment" (for freehold land under the LTA); or
2. a validly executed "document" amending the covenant (for leasehold land under the Land Act).

However, amendments cannot increase or decrease the area of land subject to the covenant or add or remove a party to the covenant.⁸ To do those things, a new covenant would have to be negotiated, executed and registered.

⁸ s.97C(3): *LT Act*; s.373C(3): *Land Act*

10. How does a statutory covenant end?

A statutory covenant will end if an instrument⁹ or document¹⁰ is registered which releases the covenant.¹¹ A covenantee can do this without the landowner's permission, but a landowner cannot do this without the covenantee's permission.

If a landowner wants a covenant removed and the covenantee will not agree, the landowner will need to apply to the court for the covenant to be removed.¹²

In brief, if a landowner request that the court remove a covenant then the Court may do so if it is satisfied the covenant has become obsolete, unjustifiably impedes a user of the land, is against the public interest, or that actions of the covenantee (e.g. the local government) have indicated that the covenant should be removed.¹³

11. What are the advantages of a statutory covenant?

Statutory covenants come with both strong advantages and disadvantages, so must be considered carefully for their suitability in each individual situation.

The following are the strong advantages of statutory covenants:

1. They are binding on all future landowners. The covenant is registered on the land's title by DNRW and stored in the Queensland Land Registry. All prudent potential purchasers of land will do a title search and so will be aware of the obligations imposed by the covenant.
2. They can only be terminated or amended with the approval of the government covenantee. This can prevent the covenant being removed on the whim of a future landowner and provide the covenant with long-term stability.
3. The terms of the statutory covenant can be negotiated with the government covenantee. This gives covenants some degree of flexibility, and they can be tailored to the specific requirements of each landowner.
4. Some government bodies may willing to consider rewards or incentives for entering into a covenant, including rates refunds or reductions, environmental management support or taxation benefits. To find out whether these benefits may be available in their specific situation, a landowner should contact their local council and the DNRW.

⁹ for freehold land - s.97D: *LT Act*

¹⁰ for leasehold land - s.373D: *Land Act*

¹¹ s.97D: *LT Act*; s.373D: *Land Act*

¹² s.181: *Property Law Act 1974* (Qld)

¹³ s.181: *Property Law Act 1974* (Qld)

12. What are the disadvantages of a statutory covenant?

There are also some strong disadvantages that should be considered:

1. Survey costs associated with the statutory covenant can be a large expense, especially for large properties. In some cases a landowner may be able to negotiate the payment of this cost with the government covenantee, or be provided with some other incentive to offset it. A solicitor may also be able to draft the covenant in such a way to minimise these costs. However, this is not guaranteed and the landowner must be prepared for the possibility of having to foot the entirety of the survey costs themselves.
2. The long term strength of the covenant depends on how diligently the relevant covenantee checks on later purchasers' compliance with the covenant in later years. Only the covenantee is entitled to enforce the covenant. Therefore, ensuring compliance with the covenant will be an ongoing responsibility for the government body which enters into the covenant.
3. The landowner will need the consent of any person whose rights will be affected by the covenant. This may make covenants more difficult to enter into where more than one person has an interest in the land.
4. Unlike nature refuges, there is no guarantee of support or compensation by the covenantee (e.g. local government) to assist with managing or maintaining the land. Some local councils have schemes such as rate offsets to reward a landowner for entering into a covenant, but this is solely dependent on the policies of each local council and is not provided for by legislation.
5. In some cases a covenant *may* reduce the value of the land by imposing additional restrictions on the use of the land. Whether this does actually reduce the value of the land will depend on whether potential buyers are supportive of the covenant. Buyers who wish to continue to conserve the land may view the covenant as a benefit.

Despite these disadvantages, a covenant can still be an effective mechanism for protecting the environment on private property. A statutory covenant will not be appropriate in all circumstances, but it is one of the few mechanisms which can provide long term environmental protection on private land.

13. Further information

If you have any further questions or concerns about any of these matters, then please contact us on the details below.

While we have limited resources, often we can give you quick advice over the phone or direct you to someone who may help on a free or reduced rate basis.

Stay in contact with your local Environmental Defenders Office. We try to run as many community workshops on as many useful legal issues as we can.

14. Useful Contacts

EDO-NQ Suite 1, Level 1 96-98 Lake Street CAIRNS QLD 4870 Ph : 07 4031 4766; Fax: 07 4041 4535 Email: edong@edo.org.au	EDO (Qld) 30 Hardgrave Road, WEST END QLD 4101 Ph: 07 3211-4466; Fax: 07 3211-4655 Email: edoqld@edo.org.au
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To become a member of the Environmental Defenders' Office of Northern Queensland, or for more information about factsheets and legal advice, please contact us at edong@edo.org.au or on 07 4031 4766. Our web address is www.edo.org.au/edong