



EDO-NQ FACTSHEET SERIES

LEGAL MECHANISMS FOR CONSERVATION ON PRIVATELY OWNED LAND

Private Conservation Mechanisms Factsheet #5:
Conservation Agreements
and
Profit à Prendre Agreements

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Legal Mechanisms for Conservation on Privately Held Land

Conservation Agreements

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 conservation agreements?

There are a number of agreement-based options which may be used to promote conservation activities on privately owned land. In contrast to the previous four mechanisms (nature refuges, coordinated conservation areas, statutory covenants and voluntary declarations), ‘conservation agreements’ are more flexible, but may not be as widespread in their use or provide the same level of protection for the environment. However, they may be attractive for landowners who wish to promote conservation on their land, but do not wish to use a mechanism that will be binding for a long term.

In this factsheet we discuss the following conservation agreements:

1. Commonwealth conservation agreements
2. Cooperative management agreements
3. Deeds of agreement

We will also briefly touch on profit á prendre agreements.

2. What are Commonwealth conservation agreements?

Under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (“EPBC Act”), the Commonwealth and a person may enter into a conservation agreement regarding the protection and conservation of biodiversity.¹

¹ s.305(1): EPBC Act

The conservation agreement may specifically relate to activities that promote the protection of:

- Biodiversity
- The World Heritage values of declared World Heritage properties
- The National Heritage values of National Heritage properties
- The Commonwealth Heritage values of Commonwealth Heritage places
- The ecological character of a declared Ramsar wetland
- The environment, in respect of a nuclear action (such as uranium mining)
- The environment in a Commonwealth marine area (but not all or part of a Commonwealth reserve²).
- The environment on Commonwealth land

Under the EPBC Act, these agreements must also result in a net gain to biodiversity conservation, and must not conflict with an existing recovery plan, threat abatement plan or wildlife conservation plan.³

However, in practice these agreements are not often used to promote conservation as the sole purpose. The Commonwealth has so far used these to primarily manage property development, by giving it a means to directly negotiate environmental conditions with the property developer. These have only been used for pure conservation purpose in unique environments such as Norfolk Island. It may also be relevant that Norfolk Island is a Commonwealth territory and so has no option for assistance from a state government.

Therefore, it is unclear whether or not these will be available to Queensland landowners for pure conservation purposes. It is more likely that Commonwealth conservation agreements may be available in situations where a landowner wishes to conduct development which would trigger the approvals process under the EPBC Act.

3. How does a landowner apply for a Commonwealth conservation agreement?

Conservation agreements are negotiated directly between the Commonwealth and the landowner, so an interested landowner needs to contact the Department of the Environment, Water, Heritage and the Arts (“DEWHA”) directly. DEWHA can be reached by phone on (02) 6274 1111, or by email at incentives@environment.gov.au. There is no set application process used.

² s.305(4): EPBC Act

³ s.305(2): EPBC Act

Commonwealth conservation agreements bind each person who is a successor in title to the interest in the land (e.g. future owners), so will continue to apply even if the land is sold.⁴

4. What are the advantages of Commonwealth conservation agreements?

There are two advantages to Commonwealth conservation agreements:

1. Commonwealth conservation agreements can bind with the land title and may only be removed with the agreement of the Commonwealth Minister for the Environment, or in some other way as provided for in the agreement itself.⁵ Therefore, they can provide long term protection which may be difficult to remove.
2. The EPBC Act allows the Commonwealth to provide the landowner with incentives to enter conservation agreements, including financial assistance and environmental management advice.⁶

5. What are the disadvantages of Commonwealth conservation agreements?

The main disadvantage which comes with Commonwealth conservation agreements is that the Commonwealth may be unlikely to grant them in many situations. The agreements which have been already granted suggest that they are more likely to be used to offset development with environmental conditions and will only be used for pure conservation purposes in unique areas with high environmental significance.

Therefore, unless the landowner is conducting development which would trigger the EPBC Act, or owns land with a very high environmental significance, it is unlikely Commonwealth conservation agreements will be an available option.

6. What are cooperative management agreements?

Cooperative management agreements (“CMAs”) are provided by the Wet Tropics Management Authority (“WTMA”) under the *Wet Tropics Management Plan 1998* (Qld) (“WTMP”). The WTMP allows WTMA to enter into a CMA with any person but only if it overall achieves what is called the “primary goal” of the Wet Tropics World Heritage Area.⁷ That “primary goal” is to “provide for the implementation of Australia’s international duty for the protection, conservation, presentation, rehabilitation and transmission to future generations of” the Wet Tropics World Heritage Area⁸.

⁴ s.307: EPBC Act

⁵ s.308(3): EPBC Act

⁶ s.306(1)(e): EPBC Act

⁷ s.41(1): WTMP

⁸ Schedule 1: *Wet Tropics World Heritage Protection and Management Act 1993* (Qld)

Under these CMAs:

1. The relevant landowner must agree to contribute to achieving that primary goal (usually agreeing not to carry out certain activities on the land, such as vegetation clearing; and
2. In return WTMA must agree to compensate the landowner or otherwise allow them to perform other activities which would not be allowed under the WTMP⁹.

Before entering into a CMA, a landowner may be required to provide WTMA with an environmental impact assessment or other information relevant to deciding whether a CMA would be beneficial.¹⁰ However, there is no set process for negotiating a CMA, and so an interested landowner should contact WTMA directly to discuss their specific case.

WTMA's contact details are:

Address: Wet Tropics Management Authority
PO Box 2050
Cairns
Queensland 4870

Telephone: (07) 4052 0555

Internet: <http://www.wettropics.gov.au>

Once negotiated, the CMA will only have the effect given by its specific terms, and will not bind future owners of the land.

7. What are the advantages of CMAs?

CMAs have the following advantages:

1. CMAs are very flexible and can be tailored to a landowner's specific situation.
2. CMAs can come with environmental management advice and other incentives.
3. CMAs will not bind to the land and so would be suitable for landowners who do not wish to be locked into a long term mechanism.

⁹ s.41(1): WTMP

¹⁰ s.41(4): WTMP

8. What are the disadvantages of CMAs?

Conversely, CMAs have the following disadvantages:

1. CMAs do not bind with the land, so will stop being effective if the land is sold or passed on to another owner.
2. Enforcement terms and the consequences for breaking the CMA are contained entirely within the agreement rather than legislation, so they are dependent on WTMA to enforce the terms of the agreement. This may make them less secure than other mechanisms such as nature refuges or voluntary declarations which are supported by legislation.

CMAs may be useful for landowners who wish to contribute to the management of the Wet Tropics World Heritage Area, but do not wish to place a long term instrument on their land.

9. What are deeds of agreement?

A deed of agreement is a binding agreement that may be entered into between a landowner and a local council. The terms of these agreements are flexible and depend on the requirements of each local council. A typical deed of agreement may require the landowner to take conservation measures on their land, or restrain from environmentally damaging activities. The local council is not obliged to provide anything in return for this agreement, though may offer incentives to the landowner such as rates deferrals in exchange for entering into the agreement.

Deeds of agreement are not offered by all councils. Some local councils have formal programs to support these agreements, while others may enter into them on an ad hoc basis. Two local councils which offer programs for deeds of agreement are the Sunshine Coast Regional Council and Moreton Bay Regional Council. These councils offer “Voluntary Conservation Agreements”, which take the form of deeds of agreement.

A landowner should contact their local council directly to inquire as to whether this option is available and, if so, what process their local council wishes to follow.

Deeds of agreement cannot be registered in the land registry and so cannot transfer with the title. However, they may contain clauses that require the landowner to ensure that every subsequent purchaser of the land enters into an agreement with the local council in the same terms. This can work to ensure each new purchaser of the land is bound by a similar deed of agreement, though it will not guarantee it. If the person selling the land neglects to enter into a new deed with the purchaser, the purchaser will not be bound by any of the terms of the deed. The local council will only be able to pursue the former owner of the land for breach of the agreement, and will not have any action available against the new owner of the land.

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10. What are the advantages of deeds of agreement?

Deeds of agreement offer two main advantages over other options:

1. They are very flexible. As long as a landowner can find a willing local council, they can enter into an agreement on whatever terms they can negotiate with council. This means the agreements can also include incentives offered by council.
2. They can be entered into without the large expense or long application process required by other mechanisms such as a statutory covenant or nature refuge.

11. What are the disadvantages of deeds of agreement?

The main disadvantage that comes from this flexibility and relatively low cost is that they do not offer the same level of long-term protection given by other instruments. A deed does not bind to the land title, and a purchaser of the land will only be bound by the terms of the deed if they enter into a new deed on their own accord. Therefore, deeds of agreement may be more useful for short term protection where flexibility and ease of agreement is more important.

12. What is a profit á prendre agreement?

A profit á prendre agreement is an agreement between a landowner and another party granting the other party the right to take a product from the land. Historically these agreements have been used for physical products such as timber. However, recently their use has been proposed in the context of carbon credits or biodiversity offsets gained from retaining vegetation on the land.

When used for conservation purposes, the landowner would sell the right to use the vegetation to an organisation with conservation objectives. The buyer of the profit á prendre would then have an exclusive right to clear the land for as long as they held the right; the landowner could not clear the vegetation covered by the agreement without being in breach of it and being liable to pay damages. Under the *Land Title Act 1994* (Qld) (“LT Act”), a profit á prendre binds with the land and therefore this right would continue even if the land was sold to another person.¹¹ This could help obtain long-term protection of the environment if the organisation holding the profit á prendre did not exercise their right to clear the vegetation.

¹¹ s.97E: LT Act

13. What are the advantages of a profit á prendre agreement?

Profit a prendre agreements have two main advantages:

1. They can bind to the land and therefore can ensure long-term environmental protection for land.
2. They can potentially provide a financial return to the landowner for entering the agreement.

14. What are the disadvantages of a profit á prendre agreement?

Profit á prendre agreements also come with two main disadvantages:

1. They have not been widely used in Queensland for conservation purposes. Therefore, it is difficult to point to examples of where this form of conservation agreement has been used in the past, and a landowner is strongly advised to speak to a private solicitor before entering such an agreement.
2. The financial return a landowner may receive from the agreement depends largely on the economic climate and market for the particular profit á prendre. Therefore, some landowners may have trouble finding organisations to enter these agreements with.

15. 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.

16. 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