



Factsheet

14. Conservation covenants

There are a number of legal mechanisms available to land owners who wish to permanently protect native vegetation and other environmental values on their land. The main mechanism is by a conservation covenant entered into by the landowner and registered against the title of the land.

This Fact Sheet examines the different conservation covenant schemes available in Western Australia together with a discussion on the incentives available to landowners entering into a covenant.



What is a covenant?

A covenant is a voluntary agreement between two or more persons to do, or to refrain from doing, an act.

In legal usage, the word has the slightly more specialised meaning of being an agreement contained in a deed. The term "restrictive covenant" has an even more specialised meaning of being an agreement contained in a deed which restricts one person's use of their land and their successors in title for the benefit of others.

In relation to land, there are two types of covenants: private restrictive covenants and statutory covenants.



What are private restrictive covenants?

Private restrictive covenants are agreements that are entered into between neighbouring landowners to prohibit the carrying out of an activity or specific use of the land subject to the covenant. Examples of a private restrictive covenant include a covenant prohibiting:

- building on land other than inside an agreed building envelope, so as to preserve surrounding trees for the benefit of a neighbour; or
- the use of reflective roofing to benefit surrounding landowners.

Not all covenants are entered into for the purposes of conservation. They may also be used for a range of other purposes and are most commonly associated with agreements to regulate the character of residential subdivisions. Such covenants include those created to regulate paint colour or roofing materials. Covenants may also be used to restrict uses such as building height or the type of business that may be operated on the land. The provisions of the Transfer of Land Act 1893 are commonly used to create such covenants.

Important disclaimer:

This Fact Sheet is for general information purposes. Important legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your specific circumstances you should contact the Environmental Defender's Office WA (Inc) or your solicitor. The EDO takes no responsibility for any loss or damage resulting from any error in this Fact Sheet.



What are statutory covenants?

A statutory covenant is an agreement that is entered into by a landowner and a statutory body for some public purpose. There are a number of different types of statutory covenants available in Western Australia. Those which are most commonly used for the purposes of protecting remnant vegetation are established under the following Acts:

- Soil and Land Conservation Act 1945
- National Trust of Australia (WA) Act 1964
- Transfer of Land Act 1893

This Fact Sheet will be examining statutory covenants that protect an environmental value, such as native vegetation, and are referred to as “conservation covenants”. These are the covenants used by two of the conservation covenant programs operating in Western Australia, run by the National Trust of Australia (WA) and the Department of Environment and Conservation (DEC). The covenants offered by these programs are restrictive in nature. They are used specifically for the purposes of protecting nature conservation values on private (sometimes leasehold) land, by restricting any activities that could harm these values. The National Trust can also enter into restrictive covenants to protect land with cultural or natural heritage values.

Section 129BA of the Transfer of Land Act 1893 may also be used by a local government authority to enter into restrictive covenants, and these could be for the purpose of protecting nature conservation values of private lands. However, no Shire has to date established a program specifically to support the placement of these covenants.

Also worthy of mention, if only for the purposes of comparison, are covenants made under the Heritage of Western Australia Act 1990. These covenants are used to protect land which has natural or cultural heritage value. It is also possible to enter into covenants under section 15 of the Land Administration Act 1997, for certain situations where Crown land is alienated. These may be of a positive or restrictive nature and protect any natural, historical, heritage, cultural, scientific, architectural, environmental, wildlife or plant life value relating to the land that is subject to the relevant covenant.



What can conservation covenants require?

A conservation covenant can be either positive or restrictive in character.

A “restrictive” covenant is one that requires a land owner or occupier to refrain from undertaking an activity which may damage an environmental value – for example, preventing an activity that will result in the destruction or removal of native vegetation. Restrictive covenants are the most common form of covenant used for this purpose.

A “positive” covenant is an agreement which requires a land owner or occupier to take positive steps to improve or protect an environmental value – for example, fencing native vegetation and requiring it to be maintained. In Western Australia, only covenants under the Soil and Land Conservation Act 1945 contain positive elements.



What restrictions are contained in a conservation covenant?

Any activities that could potentially affect the natural values of the land are restricted by a conservation covenant. Such activities include subdivision of the land, (as this can result in fragmentation of the bushland through clearing for building envelopes, fire protection, access, walking trails, etc), building, removal or clearing of native vegetation, keeping domestic pets (particularly cats), mining, erection of transmission lines, hunting, trapping and poisoning of native fauna, storage of rubbish, and grazing. However, each covenant is negotiated individually with the landowner, and can be flexible. It is possible to have exemptions to the covenant which allow people to harvest timber, collect seed and wildflowers, keep dogs, and build on their properties, and these are negotiated individually with each landowner.



Who is bound by a conservation covenant?

When a conservation covenant is registered on the property title, it is generally binding on the current owner and all future owners and occupiers of the land. Thus, it is permanent and made ‘in perpetuity’.

It is possible to limit the duration of a covenant, and covenants made under the Soil and Land Conservation Act 1945 in particular, can be negotiated for specified periods. However, covenants negotiated for the protection of nature conservation values are usually in perpetuity because the landowner sees the need to make a long-term contribution to conservation. In assessing the land for a covenant, the covenant body must be sure that the restrictions contained in the covenant will be sufficient to protect the land forever. If the threats to the land are such that management is required outside of the land affected by the covenant, then it may not be appropriate to use a covenant. This is because restrictive covenants (other than those under the soil conservation legislation) cannot require landowners to undertake management measures, nor can any covenant require management on land not covered by the covenant.



How are conservation covenants created?

There are three elements required to establish a conservation covenant:

- there must be an agreement between the owner of the land and another person or body to protect an environmental value on the land;
- the agreement must be of a kind that can be subject to a conservation covenant; and
- the conservation covenant must be registered on the property title.

Statutory mechanisms for Establishing Conservation Covenants

There are three main statutes that govern the area of conservation covenants.

Transfer of Land Act 1893

The Transfer of Land Act 1893 provides for the creation of both private restrictive covenants and those made for the benefit of any local government or public authorities. The provisions of this Act are also used by Department of Environment and Conservation (DEC) to implement its Nature Conservation Covenant Program. The Department is responsible under the Conservation and Land Management Act 1984 for the conservation and protection of flora and fauna throughout the State (section 33, 1d). DEC also has responsibilities for carrying this out by administering the Wildlife Conservation Act 1950.

Soil and Land Conservation Act 1945

Under the Soil and Land Conservation Act 1945 a landowner may establish a “Conservation Covenant” or an “Agreement to Reserve” with the Soil and Land Commissioner. Conservation covenants are irrevocable while Agreements to Reserve can be removed from the title. Such covenants or agreements bind the person who consented to the instrument so long as that person remains as the owner or occupier of the land as well as any subsequent owners or occupiers so long as the Covenant or Agreement remains in effect. Under the Soil and Land Conservation Act 1945 covenants and agreements may be both restrictive and positive in nature.

National Trust of Australia (WA) Act 1964

The National Trust of Australia (WA) Act 1964 establishes a body corporate of perpetual succession with which landowners may enter into conservation covenants. Such agreements may be permanent or made for a specified period of time.

Heritage of Western Australia Act 1990

The Heritage of Western Australia Act 1990 is used to create covenants designed to protect areas of cultural significance. Thus, although it may incidentally protect flora or fauna, and allows for the conservation of natural features, its purpose relates only to heritage areas.



Modification of Covenants

Each Act sets forth requirements necessary to allow for the modification or discharge of a conservation covenant. Generally this can be done with the agreement of both parties, or without agreement, on application to a court of law.

Transfer of Land Act 1893

The Transfer of Land Act 1893 enables the appropriate registrar to discharge or modify a covenant so long as all parties interested in the affected land or the covenant consent to the discharge or modification.

In addition to allowing discharge and modification to be granted by the Registrar, a Judge may also vary any restriction where it would impede a reasonable user with no benefit to the other parties.

Soil and Land Conservation Act 1945

Under the Soil and Land Conservation Act 1945 the Commissioner may discharge an agreement to reserve if deemed no longer necessary or if any other just cause for discharge exists. Any person bound by an agreement to reserve may apply in writing to the Commissioner for such discharge.

National Trust of Australia (WA) Act 1964, and Heritage of Western Australia Act 1990

The National Trust of Australia (WA) Act 1964 and the Heritage of Western Australia Act 1990 apply the discharge and modification provisions of the Transfer of Land Act 1893 to their land agreements.



What are the penalties?

Generally the violation of a conservation covenant falls under common law and would be enforced in the same way as any contract. That is, it is up to the parties affected by the covenant to require adherence to it. However, under the Soil and Land Conservation Act 1945 it can be an offence to violate a covenant or agreement to reserve, with fines of up to \$3000. The Commissioner can also seek recompense for court costs and the costs of repairing any damage to the land that the breach of the covenant has caused.



How are potential breaches of the covenant dealt with by the conservation covenant programs?

The National Trust and Department of Environment and Conservation (DEC) covenant programs do not have monetary penalties that they can impose for breaches of their covenants and would have to take a landowner to court to recover costs of repair. It is likely that any breaches of the covenant would be unintentional and both programs would seek to work with the landowner to resolve the problem and repair the damage. However, the covenant programs must be prepared to seek enforcement of their covenants to maintain the integrity that attracts people to their covenants.



Incentives that may be available with a conservation covenant

There are a number of incentives that are available for landowners entering into conservation covenants.

The covenant itself is offered free of charge and in that respect is voluntary, (unless the covenant is a condition of, or 'offset' to, subdivision or development approval; or where the covenant relates to only part of a property then further documentation may be required by the Department of Land Information - assistance with the costs of these documents may be available [refer contacts on page 6 of this fact sheet]).

The landowner benefits from entering into an agreement with an agency that may act as a powerful advocate for the land should it ever be threatened by development, mining, etc. A covenant also provides peace of mind that there is another party that will take an interest in their land, especially once it changes hands. Management advice and technical assistance is also available to the landowner to assist them.

Tax concessions are available through the Income Tax Assessment Act (Cth) 1997. Two types of tax concession are available, these being an income tax deduction and special treatment of capital gains. Certain criteria must be met to obtain these deductions and landowners should seek advice from the Australian Taxation Office and their tax agent. Covenants with the National Trust and DEC programs are eligible for these concessions. Land tax exemptions are also available under the Land Tax Assessment Act (WA) 2002 for land that is used “solely or principally for the conservation of native vegetation”.

Rate reductions on covenanted land may also be available if the land value decreases as a result of the covenant. However, it should be noted that in the majority of cases there is no decrease in land value. Some local government authorities specifically encourage conservation through re-zoning or other incentive schemes, such as rate rebates. Landowners should contact their local government authority for more information on these incentives.

Financial assistance may also be available to landowners entering into conservation covenants, either through the covenant program itself or through other funding bodies such as Envirofund, Natural Heritage Trust, or the Gordon Reid Foundation. The DEC covenant program offers \$1,500 per kilometre for assistance with fencing, and \$500 towards the cost of obtaining independent legal advice.



Conservation covenants and the planning process

Conservation covenants may be required as conditions of subdivision or other development application to protect the conservation values of the land post-development. Covenants are accepted at the discretion of the covenant program, and are only used where there are significant conservation values that can be protected by the covenant. All costs associated with placing the covenant are usually recovered from the developer in these circumstances. Additional to this, the National Trust also charges a ‘stewardship fee’ to ensure that sufficient funding is available for the long-term stewardship of the covenant site.



How can legislation affect a conservation covenant?

A covenant can be more restrictive than Federal, State or Local Government legislation, but not more permissive. For example, if a local government statute allows two dogs to be kept per property, then a covenant can further restrict the number to one, or disallow them altogether. It cannot allow three dogs to be kept, and if there is a conflict between the covenant and the local government law, then the law will override the covenant.

Additionally, there is other legislation that affects the covenant, such as the Mining Act 1978 and Bush Fires Act 1954. While the covenant may restrict the clearing of vegetation, the landowner is not exempt from clearing for fire protection where required by this Act or other local government statutes or regulations. Likewise, the covenant can prevent the landowner from giving permission to mine but this does not affect the issuance of a mining or exploration licence. However, the covenant program manager may act as an advocate for the land in these instances if it feels that the conservation values of the land are paramount and alternatives to clearing or mining on the subject land can be found.

Planning Schemes, under the Planning and Development Act 2005, can extinguish or vary restrictive covenants where there are legitimate planning grounds. The covenant program may act as an advocate on behalf of the landowner if such decisions are disputed.



Contacts and further information

Further information on the covenanting programmes available in Western Australia may be obtained from:

The National Trust, WA	Tel: (08) 9321 6088 http://www.ntwa.com.au/
Department of Agriculture and Food	Tel: (08) 9368 3282 http://www.agric.wa.gov.au/
Department of Environment and Conservation	Tel: (08) 9423 2477 covenant@dec.wa.gov.au http://www.dec.wa.gov.au/

For copies of the legislation considered in this fact sheet visit:

State Law Publisher (WA legislation)	Tel: (08) 9321 7688 http://www.slp.wa.gov.au/index.html
Australian Legal Information Institute (Commonwealth legislation)	http://www.austlii.edu.au/

The Environmental Defender's Office WA (Inc)

The Environmental Defender's Office WA (EDO) is a community legal centre specialising in public interest environmental law.

The objects of the EDO include:

- to provide community groups and individuals with legal advice and representation to help protect the environment;
- to promote law reform that improves environmental protection; and
- to provide community education about environmental law.

The EDO is a non-profit, non-government organisation. The EDO receives its principal funding from the Federal Attorney-General's Department. However, these funds are limited and donations from the public provide a vital source of funds for many of our activities. Donations over \$2 are fully tax deductible. The EDO also welcomes people with a commitment to the environment to join as members.

If you require legal advice on an environmental issue or wish to find out more about the EDO, please contact us at the following address:

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This fact sheet was produced with the assistance of:

The Law Society
OF WESTERN AUSTRALIA

Public Purposes Trust