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Voluntary Conservation on Private Land Part 2: Statutory Covenants

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Overview

This fact sheet is Part 2 in the 4-part series of fact sheets on voluntary conservation on private land. It outlines general information on registering a statutory covenant under the *Land Title Act 1994* (Qld) (“LTA”) and the *Land Act 1994* (Qld) (“Land Act”). Statutory covenants allow a government entity to enforce environmental covenants protected by registration on title.

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 Titles Registry. Statutory covenants are governed under the LTA in the case of freehold land, and the 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, Mines, and Energy (“DNRME”). Covenants may be of a positive nature in that they require the performance of an action. They may also be negative or restrictive, that is one of the parties is forbidden from undertaking or performing a specified action.¹ One of their strongest aspects is that the obligations they impose will also bind any subsequent purchaser of the land.²

- A Covenant for freehold land environmental purposes under the LTA must 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.³
- A Covenant for a Lease must also be aimed directly at preserving a native animal or plant; or a natural or physical feature of the land that is of cultural or scientific significance.

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.

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

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.

Considering that DNRME currently has private conservation programs through voluntary declarations, and the Department of Environment and Science (DES) have their Nature Refuges and Special Wildlife Reserves programs, it is unlikely they will act as covenantee.

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 the 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?

Government departments 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.

However, there are also other requirements imposed by legislation which may make an improperly drafted covenant invalid. The LTA (Part 6, Division 4A) and the Land Act (Chapter 6, 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.

A covenant cannot be valid if it is contrary to other legislation.

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.⁵ To properly identify the location of 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. Survey plans can be expensive, especially for large properties.

How is a statutory covenant executed?

Once the covenant is drafted, it must then be validly executed by both parties.⁶ 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 people:

- a notary public;
- a justice of the peace;
- a commissioner for declarations;
- a lawyer;
- a conveyancer; or
- another person prescribed by regulation.⁷

If the landowner is a corporation, then the company seal will need to be applied to the covenant in order to execute it.⁸

If a local council is the covenantee, they will need to execute it in accordance with the *Local Government Act 2009*.

How is a statutory covenant registered?

After the covenant has been executed, it must then be registered in the Queensland Titles Registry. This is done by submitting Form 31 'Covenant' to the registry, available from DNRME [here](#).

The form will need to be signed by each party to the covenant and witnessed by any of the persons listed above.

The statutory covenant takes effect once registered with the Queensland Titles Registry.

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 titles 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 relies on the will and available resources of the government body covenantee.

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 a Form 13 with the titles registry for both leasehold and freehold land.

However, amendments cannot increase or decrease the area of land subject to the covenant or add or remove a party to the covenant.⁹ To do those things, a new covenant would have to be negotiated, executed and registered.

How does a statutory covenant end?

A statutory covenant will end if an instrument¹⁰ or document¹¹ is registered which releases the covenant. 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

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 on title.
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 be 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 DNRME.

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 over only part of a lot incurs costs. 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. 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.

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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.

¹ LTA s97A(4).

² Land Title Practice Manual DNRME Part 31 Covenants.

³ Section 97A (3)(b) Land Title Act 1994

⁴ Land Act s 373D & LTA s 97D.

⁵ Land Act s 373B (1)(b) & LTA s 97B (1)(b).

⁶ Land Act s 373B (1)(a) & LTA s 97B (1)(a).

⁷ Land Act s 310 (2) & LTA s 161 (2).

⁸ Land Act s 310 (1) & LTA s 161 (1).

⁹ Land Act s 373C (3) & LTA s 97C (3).

¹⁰ For freehold land – LTA s 97D.

¹¹ For leasehold land – Land Act s 373D.

¹² *Property Law Act 1974* s 181.

¹³ *Ibid.*