

¹Part 31 – Covenants

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¹Part 31 – Covenants

General Law

[31-0000]

A covenant is a voluntary agreement that creates an obligation by a deed entered into by the parties. 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.

Chapter 6 Part 4 Division 8A of the *Land Act 1994* and Part 6 Division 4A of the *Land Title Act 1994* allow covenants to be registered in favour of the State, another entity representing the State, or a local government for the purposes specified in the legislation.

A covenant must be validly executed and include a description sufficient to positively identify the subject lots or land. It must also fully set out the agreed terms and conditions.

Both the covenantor (the owner of freehold land or holder of State owned land) and the covenantee (the State, an entity representing the State or a local government) must execute the covenant. If the land is leased from the State, under the Land Act the chief executive must give written approval to a covenant affecting that land.

Section 97A(2A) of the Land Title Act and s. 373A(4) of the Land Act provide that a covenant may be registered even if the covenantor and the covenantee are the same entity.

On registration, a covenant complying with the legislation attaches to the land and binds the owner or holder and all successors in title until it is released.

A registered covenant is taken not to be registered under the Land Act or the Land Title Act to the extent that it is inconsistent with the legislation.

Practice

[31-2000]

A covenant must be prepared in a Form 31 – Covenant.

²A document creating a covenant may only be registered if the written approval of the chief executive is obtained and lodged with the document (s. 373B(1)(d) of the *Land Act 1994*).

Types of covenants

[31-2020]

A covenant under the Land Title 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 all lots that are subject to the covenant are transferred together to another person (the lots subject to the covenant may be freehold, non-freehold or a combination of freehold and non-freehold); or
- be for ensuring that a lot and a registered lease for another freehold lot or part of a lot that are subject to the covenant are transferred together to another person.

A covenant under the Land Act must:

- be for ensuring that all other land that is subject to the covenant is transferred together to another person (the lots subject to the covenant may be freehold, non-freehold or a combination of freehold and non-freehold); or

if non-freehold land is the subject of a lease, other than a trustee lease, or is land over which a person holds a road licence, a covenant to which the land is subject may:

- relate to the use of the land or part of the land; or
- relate to the use of a building built or proposed to be built on a land; or
- 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.

‘Use’ covenants under s. 97A(3)(a) of the Land Title Act or s. 373A(5)(a) of the Land Act may be used to achieve a local government planning objective, provided they are consistent with the local government’s planning scheme and any conditions of development approval, as well as complying with the Land Title Act and/or the Land Act.

Examples of ‘use’ covenants that are in compliance with the legislation include:

- that a building on the lot/land must be used for educational purposes
- that the covenant area must be used for noise attenuation purposes
- that a building on the lot/land is not to be used for residential purposes
- that the lot/land may be used only for organic farming
- that a building on the lot/land must not be used for a stated commercial purpose
- that the lot/land is to be used only for the purpose of construction of buildings used for the development of technology (a definition of ‘buildings used for the development of technology’ should be included)
- that the lot/land is to be used only for the purpose of construction of water-sensitive residential housing (a definition of ‘water-sensitive residential housing’ should be included).

A subsection is included in the legislation to identify ‘use’ covenants which are *not* allowed by the legislation. These include:

- the requiring of adherence to an architectural, construction or landscaping standard
- a statement, acknowledgement or obligation relating to the use of other lots or land
- a condition precedent to using a lot or land for a stated purpose or any purpose
- regulation of the conduct of the owner of a lot or land that is unrelated to, or is ancillary to, use of the lot or land.

For further clarification and explanation, covenants imposing the following conditions do not comply with the legislation:

- an obligation to ensure that vehicular access to a lot or land is gained from a named street (regulating conduct ancillary to use of the lot or land)
- an obligation to keep a fence painted blue (imposing a landscaping standard)
- an obligation to construct any house on the lot or land within a stated height limit, facing a particular direction, or using split level or elevated construction techniques (a construction or architectural standard and/or regulating conduct ancillary to the use of the lot or land)
- an obligation not to use a lot or land for residential purposes until it is connected to water services (a condition precedent).

‘Preservation’ covenants under s. 97A(3)(b) of the Land Title Act or s. 373A(5)(b) of the Land Act may be used as a tool to assist in the preservation of native animals and plants, and natural or physical features of cultural or scientific significance.

Examples of preservation covenants include:

- a covenant for the purpose of preserving native vegetation (imposing an obligation not to remove such vegetation)
- a covenant for the purpose of preserving a bora ring (imposing an obligation not to disturb the area containing the bora ring)
- a covenant for preserving the natural and physical features of the lot or land being the natural slope of the land in the covenant area
- a covenant for the purpose of preserving native plants and preserving the natural features of the lot or land, including the water and soil in accordance with a management plan (the management plan should be identified, but not included as part of the covenant).

An example of a covenant that does not comply with the legislation would be a covenant providing that earthworks on a lot shall not exceed a maximum height of 2.0 metres.

Covenants ‘tying parcels of land’ may be registered under s. 97A(3)(c) of the Land Title Act or s. 373A(5)(c) of the Land Act. An example is a covenant ensuring that the lots described in Item 2 of the Covenant are to be transferred to the same person.

Purposes for which covenants may not be used

[31-2040]

Restrictions on other dealings

Apart from a covenant under s. 97A(3)(c) of the Land Title Act or s. 373A(5)(c) of the Land Act, which impose restrictions on transferring land, a covenant cannot prevent the registered owner/covenantor or any other person from registering an interest in the subject lot or land.

For example, a covenant cannot prohibit the registered owner from granting a lease over the covenant area, nor from granting a lease except on specified terms. The following provisions would be unacceptable and unenforceable in a covenant:

- The Covenantor must not enter into any agreement for lease in respect of any part of the Covenant Area unless the lease is for a term not less than five years.
- The Covenantor must not grant any easement over the covenant area.

Matters to be dealt with by easements

Covenants may not provide for anything capable of being the subject of an easement.

Example –

- a covenant acknowledging that a lot or land may be used for temporary parking.

Securing payment of money

Covenants may not secure the payment of money or money's worth under a condition of a development approval or an infrastructure agreement under the *Integrated Planning Act 1997* or the *Sustainable Planning Act 2009* or the *Planning Act 2016*. Example –

- an obligation to pay to the local authority agreed infrastructure contributions.

Planning schemes and development approval conditions

A covenant may not be inconsistent with a planning scheme under the *Planning Act 2016* unless it was entered into as a condition of a development approval or an infrastructure agreement. Section 97A (6A) of the *Land Title Act 1994* refers.

Under s. 107 of the *Planning Act*, a covenant entered into in connection with a development application is of no effect unless it is required under a development condition or an infrastructure agreement.

Earlier planning legislation included provisions to similar effect, for example, the *Sustainable Planning Act 1997* sections 87 and 349.

A covenant may not impose an obligation that is contrary to other legislation. For example, under section 66 of the *Planning Act*, a local authority must not require an access restriction strip as a condition of a development approval. Therefore a covenant such as the following would not be acceptable:

- The covenantor shall use the Covenant area to restrict access to lot 3 from Brown Street.

Compliance with Legislation

[31-2060]

A registered covenant is taken not to be registered under the *Land Title Act 1994* or the *Land Act 1994* to the extent that it is inconsistent with the legislation. Under s. 97AA of the *Land Title Act* and s. 373AB of the *Land Act*, the registration of covenants which are contrary to the legislation (e.g. pertaining to ancillary matters, landscaping and construction standards etc) would have no effect. Obligations described in such covenants may be conditions of development approval or contained in a local government's building code, but these are matters which depend on the *Integrated Planning Act* or the *Sustainable Planning Act* or the *Planning Act*, and are outside the scope of the *Land Act* and the *Land Title Act*. Under the *Integrated Planning Act* or the *Sustainable Planning Act*, development approvals and infrastructure agreements statutorily run with the land, and are binding on successors in title.

Requirements for a Covenant

[31-2100]

A covenant must contain the full particulars of all lots or land that are subject to it. The covenant must describe the undertaking given by the covenantor. To clarify the intent of a covenant, inclusion of reference to the relevant legislation is required (e.g. 'Pursuant to s. 97A(3)(a)(i) of the *Land Title Act*' or 'Pursuant to s. 373A(5)(a)(i) of the *Land Act*').

Survey requirements of a covenant over part of a lot or land

[31-2150]

A plan of survey or explanatory format plan is required to precede a covenant if the interest affects part of the lot or land. Building envelope sketches, diagrams, sketches and similar are not acceptable alternatives. If the covenant is for the whole of the lot or land, no plan is required.

Plans for a covenant must comply with directions 4.8.2 and 21 of the Registrar of Titles Directions for the Preparation of Plans. A plan must not describe a covenant as a 'Proposed Covenant' and there is no requirement for a covenant to be lodged immediately after the plan (see also part 21 – Plans and Associated Documents, esp. [21-2110]).

A covenant may be included with a survey of lots or land on a plan of subdivision.

Release of Covenant

[31-2200]

A covenant may be wholly or partly released by registering a Form 33 – Release of Covenant.

A partial release of covenant must clearly specify the extent to which the covenant is released.

A partial release of part of the area affected by a covenant must be defined on a survey plan (see the Registrar of Titles Directions for the Preparation of Plans for covenants).

A covenant that is for ensuring that lots or land remains in the same ownership can only be partially released if at least two lots or parcels of land remain subject to the covenant after the partial release.

The release of covenant must be signed by the covenantee (see also [33-2100]).

Amendment of Covenant

[31-2300]

Covenants may be amended by a Form 13 – Amendment. However, an amendment may not increase or decrease the area of land affected or add or remove a party. If non-freehold is involved, written approval of the amendment by the chief executive is required (see [13-2110]).

Forms

General Guide to Completion of Forms

[31-4000]

For general requirements for completion of forms see part 59 – Forms.

Dealing Number



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1. Covenantor

JOHN DAVID BROWN

2. Description of Covenant / Lot on Plan

LOT 4 ON RP800006
LOT 5 ON RP800006

Title Reference

22331100
22331101

3. Covenantee

SMITHSON CITY COUNCIL

4. Description of Covenant (include reference to relevant section of legislation)

PURSUANT TO SECTION 97A(3)(c) OF THE LAND TITLE ACT 1994

5. Execution

The Covenantor being the registered owner of the lot described in item 2 covenants with the Covenantee in respect of the covenant described in item 4 and:- *the attached schedule; ~~*the attached schedule and document no.~~; document no.

* delete if not applicable

Witnessing officer must be aware of his/her obligations under section 162 of the Land Title Act 1994

A D Lein

.....signature

ARNOLD DOUGLAS LEIN

.....full name

JUSTICE OF THE PEACE (C.DEC) 89339

.....qualification

Witnessing Officer

(Witnessing officer must be in accordance with Schedule 1 of Land Title Act 1994 eg Legal Practitioner, JP, C Dec)

.....signature

.....full name

.....qualification

Witnessing Officer

(Witnessing officer must be in accordance with Schedule 1 of Land Title Act 1994 eg Legal Practitioner, JP, C Dec)

13/9/2007

Execution Date

J D Brown

Covenantor's Signature

I L Hope

Appointed Officer
IAN LEO HOPE

15/9/2007

Execution Date

Covenantee's Signature



Dealing Number

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490

1. Covenantor

JOHN DAVID BROWN

2. Description of Covenant / Lot on Plan

COVENANT A ON SP800106

Title Reference

22331100

3. Covenantee

SMITHSON CITY COUNCIL

4. Description of Covenant (include reference to relevant section of legislation)

PURSUANT TO SECTION 97A(3)(a) OF THE LAND TITLE ACT 1994

5. Execution

The Covenantor being the registered owner of the lot described in item 2 covenants with the Covenantee in respect of the covenant described in item 4 and:- *the attached schedule; ~~*the attached schedule and document no.;~~
~~document no.~~

* delete if not applicable

Witnessing officer must be aware of his/her obligations under section 162 of the Land Title Act 1994

A D Lein

.....signature

ARNOLD DOUGLAS LEIN

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.....signature

.....full name

.....qualification

Witnessing Officer

(Witnessing officer must be in accordance with Schedule 1 of Land Title Act 1994 eg Legal Practitioner, JP, C Dec)

13/9/2007

Execution Date

J D Brown

Covenantor's Signature

I L Hope

Appointed Officer
IAN LEO HOPE

15/9/2007

Execution Date

Covenantee's Signature

Guide to Completion of Form 31

Item 1

[31-4010]

Insert full name(s) of the covenantor, [registered owner(s) of freehold or holder(s) of non-freehold].

Item 2

[31-4020]

Insert the ‘Lot on Plan’ descriptions for all lots or land affected by the covenant.

If the covenant applies to only part of the lot or land, then the covenant must be described in a manner similar to the following:

‘Covenant A on SP 123567’.

In such cases, a plan will be required to be lodged in the land registry. The plan may be a survey plan or, if the registrar approves, an explanatory plan may be used to graphically represent the area affected by the covenant (see Survey Requirements [31-2150]).

Item 3

[31-4030]

Insert the full name of the covenantee (i.e. the State, another entity representing the State or a local government).

Item 4

[31-4040]

Include a description of the covenant and the relevant statutory provision. A covenant must be pursuant to either (a) or (b) or (c) in s. 97A(3) of the *Land Title Act 1994* and/or 5(a) or 5(b) or 5(c) in s. 373A of the *Land Act 1994*. A covenant cannot be pursuant to more than one of these paragraphs, although more than one covenant may be registered over the same lot or land for different purposes. Examples –

- ‘Pursuant to s. 97A(3)(a)(ii) of the Land Title Act any building on the lot may only be used for residential purposes.’
- ‘Pursuant to s. 97A(3)(b)(i) of the Land Title Act and the terms of the attached Schedule.’
- ‘Pursuant to s. 97A(3)(a)(i) of the Land Title Act relating to the use of the lot in terms of the attached Schedule.’
- ‘Pursuant to s. 373A(5)(c)(ii) of the Land Act and/or s. 97A(3)(c) of the Land Title Act relating to the future transfer of lots to a single ownership.’ In instances where a covenant binds multiple tenure types (e.g. Road Licence and freehold land) reference to both Acts must be shown.

If space in item 4 is insufficient the description of the covenant may be set out in a Form 20 – Schedule attached to the Form 31, in which case the panel should refer to the Schedule.

The covenant must include a statement of its purpose. In the first example above, the purpose is stated in item 4. If the statement of purpose is not in item 4, then it must be included in the Schedule.

Item 5**[31-4050]**

Covenants must be validly executed by the covenantor and covenantee (the State, another entity representing the State or a local government).

For execution by a local government see [61-3200]. Execution on behalf of the State or an entity representing the State must be in accordance with relevant legislation.

A covenant that involves non-freehold land must have the written approval of the chief executive. Such requirement is in addition to it being executed for and on behalf of the State of Queensland.

Duty**[31-4060]**

There is no duty notation required on a Form 31 – Covenant.

[31-6000] deleted

Case Law**[31-7000]**

Townsville Port Authority v Max Locke, Registrar of Titles [2004] QCA 294

In this case the Queensland Court of Appeal considered the meaning of ‘relate to the use of’ a lot, part of a lot or a building in s. 97A(3)(a). Williams J stated:

‘to be registrable the covenant must relate to a purpose for which a building proposed to be built on the lot can be used or otherwise be related to a use to be made or not to be made of that land.’

Fees**[31-8000]**

Fees payable to the Titles Registry are subject to an annual review. Refer to the Titles Fee Calculator available online or see the current:

- ^{1,3}Land Title Regulation; or
- ^{1,2}Land Regulation.

Cross References and Further Reading**[31-9000]**

Part 13 – Amendment of Lease, Easement, Mortgage, Covenant, Profit a prendre or Building Management Statement

Part 33 – Release of Covenant/Profit a prendre

Notes in text**[31-9050]**

Note ¹ – This part does not apply to water allocations.

Note ² – This numbered section, paragraph or statement does not apply to freehold land.

Note ³ – This numbered section, paragraph or statement does not apply to State land.