



Issue 48
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LIT Alert

Land Title Practice Manual Update

Statutory Covenants

Land Title Act 1994 Part 6 Div 4A
Land Act 1994 Chapter 6 Part 4 Div 8A

A statutory covenant is a written agreement between two parties that may be registered over freehold or leasehold land by authority of the above provisions and, when registered, binds all persons with an interest in the land. A covenant may be positive or negative in nature.

LIT Alert Issue 45 advised of amendments to section 97A of the *Land Title Act 1994* and the insertion of a new section 97AA, and similar amendments to section 373A of the *Land Act 1994* and the insertion of a new section 373AA. These amendments commenced on 6 February 2006 and were introduced to further clarify the provisions relating to registration of covenants. The amendments made no substantive changes to the purposes for which covenants may be used nor to registration requirements.

This Alert provides guidance for the preparation of covenants to be registered under the *Land Title Act 1994* and/or the *Land Act 1994* taking into account the recent legislative changes. References are to provisions of the *Land Title Act 1994*, but similar considerations apply to covenants under the provisions of the *Land Act 1994*. The information in this Alert will be included in the next update of the Land Title Practice Manual (Queensland).

In cases of complexity, the Registrar of Titles can be approached to preview a covenant. This course is recommended to covenantees and practitioners, especially before any expenses are incurred or plans are developed on the premise that the covenant will be registered.

Completion of the prescribed form – form 31

The Guide to Land Registry forms (available on the departmental website) provides general information about the completion of the prescribed Form 31.

Item 1

The full name of the covenantor must be inserted.

Item 2

Details of the lot subject to the covenant must be inserted. If the covenant applies to only part of the lot, 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.



Item 3

The full name of the covenantee must be inserted. The covenantee must be one of the following - **the State, another entity representing the State or a local government.**

Item 4

This item must contain **a description of the covenant and the relevant statutory provision.** Section 97A(3) provides for three types of covenants. A covenant must be pursuant to **either (a) or (b) or (c).** A covenant cannot be pursuant to more than one of these paragraphs, although more than one covenant may be registered over the same lot for different purposes.

Examples of the type of wording to be inserted into Item 4 of form 31:

- (A) "Pursuant to section 97A(3)(a)(ii) of the *Land Title Act 1994* any building on the lot may only be used for residential purposes."
- (B) "Pursuant to section 97A(3)(b)(i) of the *Land Title Act 1994* and the terms of the attached Schedule."
- (C) "Pursuant to section 97A(3)(a)(i) of the *Land Title Act 1994* relating to the use of the lot in terms of the attached Schedule."
- (D) "Pursuant to section 97A(3)(c) of the *Land Title Act 1994* relating to the future transfer of lots to a single ownership."

The covenant instrument must include a statement of its **purpose.** In example (A) 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

Both the covenantor (the registered owner) and the covenantee (the State, another entity representing the State or a local government) must execute the covenant instrument.

The covenantor and the covenantee must be different entities, as it is not possible for a person to covenant with himself or herself at common law.

NOTE: For land leased from the State under the *Land Act 1994*, there is an additional requirement that Ministerial consent be obtained.

Types of Covenant

There are only three types of covenants capable of registration:

1. Covenants relating to the use of land or a building (covenants to achieve a purpose)

97A

(3) *The covenant must—*

(a) relate to the use of—

(i) the lot or part of the lot; or

(ii) a building, or building proposed to be built, on the lot; or

Examples of the type of wording used in Item 4 or the Schedule to state the purpose of a Covenant under section 97A(3)(a):

- (E) The Covenant is for the purpose of ensuring that the lot is not used for residential purposes.



- (F) This Covenant is entered into between the Covenantor and the Covenantee to provide that the lot 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.)
- (G) This Covenant is entered into between the Covenantor and the Covenantee pursuant to section 97A(3)(a) of the *Land Title Act 1994* for the purpose of ensuring that the land be used for the construction of water-sensitive residential housing. (A definition of “water-sensitive residential housing” should be included.)

As stated by Williams J of the Queensland Court of Appeal in *Townsville Port Authority- v- Max Locke, Registrar of Titles* [2004] QCA 294:

“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**”.

The new subsection (7) inserted into section 97A makes further provision as to what relates to the “use” of a lot or a building:

(7) *For subsection (3)(a), the covenant relates to the use of the lot, a part of the lot, a building on the lot or a building proposed to be built on the lot, only if it provides for—*

(a) *a purpose for which the lot, the part or the building must be used; or*

Examples of covenants for paragraph (a)—

- *that a building on the lot must be used for educational purposes*
- *that the lot must be used for noise attenuation purposes*

(b) *a purpose that is the only purpose for which the lot, the part or the building may be used; or*

Examples of covenants for paragraph (b)—

- *that a building on the lot may be used only for residential purposes*
- *that the lot may be used only for organic farming*

(c) *a purpose for which the lot, the part or the building must not be used.*

Examples of covenants for paragraph (c)—

- *that a building on the lot must not be used for a stated commercial purpose*
- *that the lot must not be used for industrial purposes*

A covenant pursuant to section 97A(3)(a) **cannot** impose obligations on the covenantor which do not **directly** relate to the use of the land, such as an obligation to install a rain-water tank to a residence erected on the land.

The new section 97A(8) provides as follows:

(8) *For subsection (3)(a), the covenant **does not relate** to the use of the lot, a part of the lot, a building on the lot or a building proposed to be built on the lot, to the extent it provides for—*

(a) *for a building or proposed building—an architectural, construction or landscaping standard for the building; or*

(b) *a statement, acknowledgement or obligation relating to the use of land other than the lot; or*

Examples—

- *an acknowledgement that the lot is in the vicinity of other land and that the other land is used for industrial purposes*
- *a statement that the occupier of other land can not be made the subject of any proceedings relating to the occupier's use of that land*



- (c) *a condition that must be complied with before the lot can be used for a stated purpose or any purpose; or*

Example—

a condition that a residence can not be built on the lot until stated utility services are connected

- (d) *regulation of the conduct of the owner of the lot, if the conduct is unrelated to, or is ancillary to, use of the lot.*

Examples for paragraph (d)—

- *an obligation not to start proceedings in relation to activities happening on land other than the lot*
- *an obligation not to use the lot for residential purposes unless a rainwater tank is installed*

Following are further examples of obligations which **do not relate** to the use of land or a building and **could not** be the subject of statutory covenants:

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

2. Environmental covenants - covenants for preservation

Amendments to the *Land Title Act 1994* which commenced on 6 February 2006 have replaced the former section 97A(3)(b) with a new provision. A covenant must be expressed to be for a purpose within this provision or it will not be registrable.

(3) The covenant must—

.....

(b) be aimed directly at preserving—

(i) a native animal or plant; or

(ii) a natural or physical feature of the lot that is of cultural or scientific significance; or

Examples of the type of wording used in Item 4 or the Schedule to state the purpose of a Covenant under section 97A(3)(b):

- (H) The purpose of this Covenant is to preserve the native plants and animals in the Covenant Area described in Item 2 (covenant pursuant to section 97A(3)(b)(i)).
- (I) The Covenant is for the purpose of preserving and maintaining a natural and physical feature of the lot, being the natural slope of the land in the Covenant Area (covenant pursuant to section 97A(3)(b)(ii)).
- (J) The Covenant is for the purpose of preserving the natural fauna (covenant pursuant to section 97A(3)(b)(i)).
- (K) The Covenant is for the purpose of preserving native plants and preserving the natural features of the lot, including the water and soil in accordance with the management plan entered by the parties identified by number MP432 and available at the Smithson Shire Council (covenant pursuant to section 97A(3)(b)(i) and (ii)).



3. Linking separate land titles

(3) The covenant must—

.....

- (c) be for ensuring that the lot may be transferred to a person only if there is also transferred to the person—*
- (i) another lot that is also the subject of the covenant; or*
 - (ii) non-freehold land that, under the Land Act 1994, is the subject of the covenant; or*
 - (iii) a lot mentioned in subparagraph (i) together with non-freehold land mentioned in subparagraph (ii).*

Example of the type of wording used in Item 4 or the Schedule to state the purpose of a Covenant under section 97A(3)(c):

- (L)** The Covenant is for the purpose of ensuring that the lots described in Item 2 of the Covenant (form 31) are to be transferred to the same person.

Other Requirements

Restrictions on other dealings

Apart from a covenant under section 97A(3)(c), a covenant cannot prevent the registered owner/covenantor or any other person from registering an interest in the subject lot.

Section 97A(5) provides:

- (5) The covenant must not prevent a person from—*
- (a) registering an interest under this Act; or*
 - (b) exercising the person's rights under a registered interest; or*
 - (c) releasing or surrendering a registered interest.*

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** 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 5 years.
- The Covenantor must not grant any easement over the covenant area.

Securing payment of money/ matters to be dealt with by easements

Section 97A(6) provides:

- (6) The covenant must not—*
- (a) secure the payment of money or money's worth payable under a condition of a development approval or an infrastructure agreement under the Integrated Planning Act 1997; or*
 - (b) provide for anything capable of being the subject of an instrument of easement.*

Following are examples of matters which must not be included in a covenant:

- An obligation to pay to the local authority agreed infrastructure contributions
- An acknowledgement that the lot will be used for temporary parking



Integrated Planning Act 1997

Under section 2.1.25 and section 3.5.37 of the *Integrated Planning Act 1997* respectively, a covenant may not be inconsistent with a planning scheme or with development approvals.

A covenant may not impose an obligation that is contrary to the *Integrated Planning Act 1997*. For example, under section 3.5.32 of the *Integrated Planning Act 1997*, a local authority must not require an access restriction strip as a condition of development approval. Therefore it is not possible to register a covenant such as the following:

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

The following would be acceptable:

- The covenantor shall not use nor permit the use of the Covenant area for the purpose of driving any vehicles or machinery thereon. (In this case the Covenant area would need to be described by a survey plan.)

Registered covenants

Section 184 of the *Land Title Act 1994* applies to ensure that every registered proprietor of an interest in a lot is subject to other registered interests. Therefore a registered covenant binds mortgagees, lessees or the holders of other registered interests.

The new section 97AA provides:

97AA Compliance with s 97A

- (1) A registered instrument of covenant is taken not to be registered under this Act to the extent it is inconsistent with section 97A.*
- (2) Subsection (1) has effect only in relation to instruments of covenant registered after the commencement of this section.*
- (3) The registrar may refuse to register an instrument purporting to be an instrument of covenant if the registrar is satisfied it is to any extent inconsistent with section 97A.*

Example of a provision in a Covenant which the relevant party will be asked by requisition to remove because of its inconsistency with section 97A:

- The covenantor must not grant an interest (e.g. a mortgage) in the lot to another party unless that party undertakes by deed to comply with the terms of the covenant.

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