COV-01 Covenants

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Contents:

1. General

2. Types of Restrictive Covenants
   2.1 Estate Covenants
   2.2 Restraint of Business or Trade Covenants
   2.3 Protected View or Outlook Covenants
   2.4 Covenants with the National Trust

3. Restrictive Covenants created by Deed

4. Restrictive Covenants in Gross

5. Restrictive Covenants created by Transfer

6. Creation of Restrictive Covenants on Plans of Subdivision under Part IVA (s136D) TLA
   6.1 What is specified on the plan
   6.2 Details contained in the instrument lodged with the application
   6.3 Consents required
   6.4 When restrictive covenants created on plans have effect
   6.5 Restrictive covenants created on plans for a specific term
   6.6 General comments

7. Creation of Covenants under the Land Administration Act 1997

8. Also see
1 General

Documents creating restrictive covenants may be registered against freehold or Crown land under the Act. Generally, restrictive covenants must:

- directly control the use of the land of the covenanter
- benefit the land of the covenantee
- be negative in their content
- be intended by the parties creating them to run with the land

and

- not contain personal covenants with third parties such as the original land developer or the Local Government.

Section 15 of the LAA also allows for positive covenants to be created over Crown land or agreement land (see section 7 of this guide).

No covenant may be registered over land encumbered by a mortgage or annuity, unless the consent of the encumbrancer is endorsed on the document.

2 Types of Restrictive Covenants

2.1 Estate Covenants

These covenants are normally applied to subdivisions of broad acres where the developer considers it necessary to establish a standard for the erection of dwellings or the use of the land. As each lot is sold, the purchaser, as proprietor of the lot sold, covenants with the vendor to restrict the use of the land in the manner set out in the transfer, for the benefit of all other unsold lots on the plan.

A memorandum of such covenant is endorsed as an encumbrance on the title for the lot being transferred. No endorsement is made on the title(s) for the unsold land.

2.2 Restraint of Business or Trade Covenants

Where a vendor requires a purchaser to enter into a covenant not to conduct a particular business or trade such a covenant will be accepted as part of a transfer provided that it can be shown that the vendor is the proprietor of land, in the vicinity of the land sold, which can benefit from the covenant.

2.3 Protected View or Outlook Covenants

This type of covenant usually arises where one lot is subdivided and covenants are required from the purchaser not to build out or obscure the view of the vendor. The covenants are related to the
height to which the purchaser may erect a dwelling or grow shrubs, etc.

When setting the height for such a covenant, reference should be made to the Australian Height Datum (see section 3 of this guide.)

The benefit of such a restrictive covenant will be shown in the Second Schedule of the relevant title being created or benefitted in the normal course of registration. Production of the relevant duplicate certificates of title (if any) is required.

2.4 Covenants with the National Trust

The National Trust of Australia (WA) Act 1964 (in this paragraph called the Act) established as a body corporate with perpetual succession known as the National Trust of Australia (WA). The Trust has a common seal and the power (among other things) to acquire, hold and dispose of real property. The Trust is managed by a committee known as the Council of the National Trust of Australia (WA).

The Common Seal of the Trust may only be used by order of the Council and may be affixed to a document in the presence of the President or the Vice President, and the Secretary. The Council may appoint officers and delegate any of its powers (except the power of delegation) to any committee.

The Trust has the role of encouraging public interest in places and things of national or local importance by reason of historic, legendary, artistic or other interest, and of places of national beauty and flora and fauna.

The proprietor of any land may create restrictive covenants, either permanently or for a specified period, in favour of the National Trust of Australia (WA). In accepting the benefit of the covenants, the Trust need not be the owner of adjacent land but the covenant takes effect as if it were (s.21A of the Act).

Such covenants are registered, discharged or modified in the same manner as any other covenant under the TLA. Similar covenants in favour of the Heritage Commission may be registered by a Memorial (see policy and procedure guide MEM-01 Memorials).

3 Restrictive Covenants created by Deed

A restrictive covenant may be drawn in the form of a Deed using a Blank Instrument form. Section 129A of the TLA calls for a prescribed form but no such form has been prescribed. In practice each covenant is treated on its merits and is generally acceptable provided that:

- it takes the form of a Deed
- the parties to the document (being the owners of two pieces of land in close proximity) are properly described
- the land to be burdened and the land receiving the benefit are accurately defined;
- the covenant is negative in its nature
- it does not contain personal covenants with third parties such as the original developer or the Local Government

and

- it is properly signed and attested.

If the land is subject to a mortgage or charge, written consent from the Mortgagee or annuitant is required.

The Registrar was not required to show a memorandum of a covenant on the paper title to the land receiving the benefit of that covenant (with the exception of protected view or outlook covenants - see section 2.3 of this guide). However, with the introduction of digital titles, the benefit is now shown in the second schedule of the relevant title.

4 Restrictive Covenants in Gross

Section 129BA of the TLA permits the creation of restrictive covenants for the benefit of a Public Authority or the Local Government in whose district the land is situated.

A restrictive covenant under this section shall be prepared in the form of a Deed using a blank instrument Blank Instrument form. The instrument must contain the following:

- the name of the Local Government or Public Authority
- a description of the land to be burdened
- the name and address of the registered proprietor of the burdened land
- covenants that are negative in nature
- the date of the agreement
- signed by all parties and witnessed
- any encumbrances over the land burdened by the restrictive covenant; and,
- the written consent of each person who has a registered interest in any land that would be burdened by the restrictive covenant.

The duplicate certificate(s) of title (if any) for the land burdened by the restrictive covenant must be produced.

If the restrictive covenant is being created as a condition of subdivision the spatial extent of the land affected is described in the associated deposited plan.

5 Restrictive Covenants created by Transfer

Where it is desired to create a restrictive covenant at the same time as the sale of a parcel of land, a Transfer of Land (Double Sheet) form should be selected. The necessary words creating the
covenant should be set out on page 2 of the form, following the operative words of the transfer. All the parties to the Transfer of Land document should initial immediately beneath the wording of the restrictive covenant conditions to acknowledge that the restrictive covenant was created at the time of execution.

Restrictive covenants may be accepted in transfers where the covenants are stated to expire on a given date. In the past, an expiry date was noted on the endorsement on the title to the burdened land. However, since the 13th May 1996 expiry dates have not been endorsed.

Where a title that has been endorsed with an expiry date, is cancelled to a new title, the expiry date will be deleted from the endorsement when the Restrictive Covenant is brought forward onto the new title.

It is the responsibility of conveyancers to obtain a copy of restrictive covenants to determine the condition of covenants. If a restrictive covenant that is endorsed on a title has in fact expired, it should be ignored as an encumbrance.

Where the first transfer on a subdivision contains covenants and is accompanied by an appropriate statement by a solicitor, then that transfer (or similar transfers for the other lots) will not be rejected for the reason that the Registrar considers the listed covenants are not restrictive covenants.

The statement by a solicitor:

- may be endorsed on the transfer, or included in a separate letter that clearly identifies the transfer and the covenants

- is to state, without qualifications, that in that solicitor’s opinion, each covenant in the transfer is a restrictive covenant

and

- will only be relevant to the land specified in the transfer as being benefited and/or burdened by the covenants.

Subsequent transfers on the subdivision containing the same covenants are to be endorsed with the dealing number of the transfer containing the solicitor’s letter.

Any restrictive covenants created in a document lodged without a letter, or reference, will be subject to the normal examination process.

6 Creation of Restrictive Covenants on Plans of Subdivision under Part IVA (s136D) TLA¹

The use of the word Plan is this section means a plan, deposited plan or diagram referred to in s.166 of the TLA or a strata / survey-strata plan within the meaning of the STA as amended.

A proprietor of land that is the subject of a Plan may have noted on the Plan the location of a restrictive covenant to which the land will be subject. The restrictive covenant will have effect even though any land burdened by the restrictive covenant has the same proprietor as any land benefited by restrictive covenant.

An instrument setting out all the relevant information in regard to the restrictive covenant must be
lodged with the application to create and register the new titles the subject of the Plan.

1[Guide updated on 06/09/2018 to replace 'Part IVA of the Transfer of Land Amendment Act 1996' with 'Part IVA (s136D) TLA']

6.1 What is specified on the plan

The following information about the restrictive covenant shall be specified on the Plan:

- The heading:
  “Restrictive Covenant under Sec 136D of the TLA.”
- A reference to the document number of the instrument lodged in relation to the Plan.
- The land to be burdened by the restrictive covenant.
- The land to be benefited by the restrictive covenant.
- The term of the restrictive covenant (if applicable).

Note: An expiry date rather than a term should be shown. An expiry date should not be shown if some of the covenants are not to expire.

6.2 Details contained in the instrument lodged with the application

The complete details of the restrictive covenant are to be contained in an instrument lodged with the application to create and register the new titles the subject of the Plan. This instrument must be in the form of a Deed, prepared on a Blank Instrument form and be capable of registration.

It must contain the following:²

- The proprietor(s) name and address.
- A description of the land to be burdened by the restrictive covenant.
- A description of the land to be benefited by the restrictive covenant.
- An operative clause describing the restrictive covenant and stating that the restrictions are created pursuant to s.136D of the TLA and showing any limitations associated with the restrictions.
- The term of the restrictive covenant (if applicable). Please note that an expiry date rather than a term should be shown.
- An expiry date should not be shown if some of the covenants are not to expire.
- Any encumbrances over the land burdened by the restrictive covenant (Absolute caveats must be withdrawn to allow registration of the instrument).
- The date of the agreement.
- All of the required consents (see below).
- Signed by all parties and witnessed.
The land burdened by the restrictive covenant must be contained within the plan, however any land to be benefited by the restrictive covenant can be outside the Plan.

The title(s) for the land that contains the benefit and the title(s) for the land that contains the burden of the restrictive covenant will be endorsed. All duplicate certificate(s) of title (if any) for land receiving the benefit of the restrictive covenant must be produced for endorsement.

2[Guide updated on 06/09/2018 to remove 'to be duly stamped by the Office of State Revenue']

6.3 Consents required

A restrictive covenant cannot be created under Part IVA of the TLA unless the proprietor obtains the written consent of each of the following:

- A person having a registered interest in any land that would be burdened by the restrictive covenant (ie mortgagees, chargees and lessees etc).

- A caveator in respect of any land that would be burdened by the restrictive covenant (Applicable to subject to claim caveats only, absolute caveats must be withdrawn).

- A person having a registered interest in any land that would be benefited by the restrictive covenant (ie mortgagees, chargees and lessees etc).

- A caveator in respect of any land that would be benefited by the restrictive covenant.

The consents should be produced with the instrument that is lodged in relation to the Plan.

6.4 When restrictive covenants created on plans have effect

Land becomes subject to a restrictive covenant noted on a Plan at the time the new title(s) for the land the subject of the plan is created and registered. The instrument lodged under Part IVA of the TLA in relation to the Plan shall be deemed to be registered at the time the land becomes subject to the restrictive covenant.

6.5 Restrictive covenants created on plans for a specific term

Where a restrictive covenant created under Part IVA of the TLA is for a specific term, and that term has expired, the restrictive covenant no longer has any effect. There is no need to apply for a discharge of the restrictive covenant.

6.6 General comments

When two or more lots on an Approved Plan are subsequently amalgamated or re-subdivided, any Part IVA of the TLA restrictive covenants created on the parent survey subsist and will be carried forward onto the new title.
Section 15 of the LAA provides for the registration of restrictive and positive covenants on Crown land and agreement land. Agreement land is land that is the subject of an agreement between the Minister for Lands and the freehold owner, relating to the use of the land, which was made before the Crown land was transferred to the freehold owner.

Covenants under the LAA can be created by deed over Crown land and agreement land or in transfers of Crown land to freehold land from the State of Western Australia to a transferee. A covenant that is the subject of a management order or an interest (e.g. lease, mortgage), then consent of the management body and/or interest holder must be obtained for the covenant. Consent of the caveator of any encumbering caveat is required for positive covenants being created over Crown land. Consent of the current freehold owner is required for positive covenants over agreement land where the current freehold owner is not a party to the document.

In s.15 of the LAA, covenants may be in gross or in favour of specified land (ie. a covenant with a dominant and servient tenement). The person who may have the benefit of the covenant may be the Minister for Lands, a State instrumentality, a local government body or a prescribed person (as set out in the Land Administration Regulations 1998). The Minister for Lands may be a covenantor or a covenantee.

A covenant may be limited to a leasehold interest over the Crown land. In these instances the covenant is made with the lessee and continues on any transfer of the lease but only remains valid during the term of the affected lease.

If a covenant (not being a s.15 covenant) is made between two separate Crown leasehold estates (e.g. one lease exists over the dominant tenement and a different lease exists over the servient tenement) then s.18 of the LAA consent of the Minister for Lands is required unless the Crown land is vested for purposes of another Act.

The land description in a covenant where the dominant or servient tenement is limited to a leasehold interest must additionally refer to the lease affected by the covenant. For example:

"As to Lease N123456 only"

or where the lease and covenant are lodged together,

"As to Lease . . . . . . dated 0.0.2015 made between AB as lessor and CD as lessee only".

In s.15 of the LAA, covenants created by deed over agreement land must be signed by the first freehold land owner after alienation by the Minister for Lands from the Crown estate and who is also a party to the agreement made prior to the transfer from Crown to freehold. It is not essential that the deed is signed by the Minister for Lands or other covenantee, but they may do so.

The lessee's copy of a lease is not required to be provided with any covenant where the dominant or servient tenement is limited to a lease interest.

8 Also see

- COV-02 Covenants - removal