



COPYRIGHT NOTICE

Please note:

The material contained in this document can be used **ONLY** for **personal** study/research and therefore can be copied but only for **personal** use.

Any form of copying for distribution purposes requires copyright permission from author/university.

BIODIVERSITY CONSERVATION ON PRIVATE LAND

AN INTERNATIONAL PERSPECTIVE AND
LESSONS FOR SOUTH AFRICA

CATHERINE BRITT VAN NIEKERK

January 2008

**BIODIVERSITY CONSERVATION ON PRIVATE LAND: AN INTERNATIONAL
PERSPECTIVE AND LESSONS FOR SOUTH AFRICA**

Catherine Britt van Niekerk

Submitted as the dissertation component (which accounts for 50% of the degree) in partial fulfilment of the requirements for the degree of Master of Laws, in the School of Law, University of KwaZulu-Natal, 2008

Pietermaritzburg, 2008

ABSTRACT

Conservation agreements have been used successfully around the globe for the conservation of biodiversity on private land. In South Africa however, their use to this end has largely been overlooked. Conservation mechanisms in the country have focussed primarily on traditional methods; establishing and managing protected areas identified as having some form of conservation significance. At present only 5.8% of land in South Africa is conserved in statutory protected areas, however government has committed itself to increasing this percentage to 8%. Furthermore, many of the country's biodiversity-rich areas are situated on private land and are currently afforded little or no protection. The cost of purchasing the land is not only financially prohibitive but also socially unacceptable and consequently alternative conservations mechanisms need to be explored.

This study provides a comparative analysis of the legislation governing conservation agreements in the United States, Canada, Australia and New Zealand and highlights several common key provisions which have contributed to the success of these agreements. It also provides recommendations on possible changes to the South African legislation to allow for a more effective contribution by private landowners to biodiversity objectives and targets within the country.

Although the study establishes that conservation agreements can be accommodated within South Africa's legal system it acknowledges that the success of these agreements is largely dependent on complex interactions between effective policy, supporting institutional arrangements, and attractive incentives. It cautions that if these agreements are to work in South Africa, then careful consideration needs to be given not only to tailor-making the legislation to the South African environment but also to establishing incentives which facilitate "buy-in" from landowners.

ACKNOWLEDGMENTS

I acknowledge, with thanks and appreciation, the following:

My supervisor, Professor Michael Kidd, whose advice and constructive criticism contributed to the successful completion of this study.

Ian Rushworth (Ezemvelo KZN Wildlife), for his continued encouragement, insight and useful suggestions.

My parents, Alvin and Rona, and my brother, Ryan, for their invaluable support and understanding throughout my years of study. Rona deserves considerable thanks not only for tirelessly editing draft chapters but also for providing a layman's input which helped to make the discussions and analysis more understandable.

And last but not least, my husband, Grant. Thank you for your patience, love and support. Without you, this study would never have been completed.

DECLARATION

This dissertation represents original work by the author and has not previously been submitted in any form for any degree or diploma to any other tertiary institution. Where use has been made of the work of others it is duly acknowledged in the text.

Catherine Britt van Niekerk

CONTENTS

Abstract	ii
Acknowledgments	iii
Declaration	iv
Chapter One: General Background	1
1.1 Introduction	1
1.2 Aims and objectives of the study	1
1.3 Developments in biodiversity conservation	2
1.4 Biodiversity conservation mechanisms	3
1.4.1 <i>Regulatory methods</i>	4
1.4.2 <i>Voluntary methods</i>	4
1.5 Institutional arrangements and incentives	9
1.6 Limitations of conservation agreements	11
Chapter Two: The United States	13
2.1 Background	13
2.2 History.....	13
2.2.1 <i>Conservation Easement Legislation</i>	14
2.2.2 <i>The Uniform Conservation Easement Act</i>	15
2.3 Tax Incentives	17
2.3.1 <i>Charitable Gifts</i>	17
2.3.2 <i>Property Taxes</i>	18
2.3.3 <i>Estate taxes</i>	18
2.4 Georgia.....	19
Chapter Three: Canada	20
3.1 Background	20
3.2 History.....	20
3.3 Federal Legislation.....	20
3.4 British Columbia	21
3.5 Alberta.....	22
3.6 Saskatchewan	24
3.7 Manitoba.....	25
3.8 Ontario.....	27
3.9 Quebec.....	29
3.10 New Brunswick.....	30
3.11 Nova Scotia	31
3.12 Prince Edward Island	33
3.13 Newfoundland and Labrador.....	35
3.14 Yukon.....	36
3.15 Northwest Territories	36
3.16 Nunavut	37
Chapter Four: Australia	38
4.1 Background	38
4.2 History.....	39
4.3 New South Wales	40
4.4 Queensland.....	42
4.5 Victoria.....	43

4.6	South Australia.....	45
4.7	Western Australia.....	47
4.8	Tasmania	49
4.9	Australian Capital Territory (ACT).....	51
4.10	Northern Territory	51
Chapter Five: New Zealand		53
5.1	Background	53
5.2	History.....	54
5.3	Queen Elizabeth the Second National Trust Act 1977.....	55
5.4	The Reserves Act 1977	56
5.5	The Resource Management Act 1991	58
5.6	Conservation Act 1987.....	58
5.7	Property Law Act 1952	59
Chapter Six: Lessons Learned		60
6.1	Introduction	60
6.2	Permissible Purpose	60
6.3	Grantors.....	61
6.4	Holders	62
6.5	Registration	63
6.6	Monitoring.....	63
6.7	Enforcement	64
6.8	Assignment, Modification and Termination	65
Chapter Seven: South Africa		67
7.1	Introduction	67
7.2	Pre-1994 legislation.....	68
7.2.1	<i>Conservation of Agricultural Resources Act 1967</i>	68
7.2.2	<i>The Mountain Catchment Areas Act No. 63 of 1970</i>	69
7.2.3	<i>Environment Conservation Act No 73 of 1989</i>	69
7.2.4	<i>The National Parks Act No 57 of 1976</i>	70
7.3	Post 1994 legislation	70
7.3.1	<i>South African Constitution 108 of 1996</i>	70
7.3.2	<i>The National Environmental Management Act 107 of 1998</i>	71
7.3.3	<i>National Environmental Management: Protected Areas Act, No 57 of 2003</i>	73
7.3.4	<i>The National Environmental Management: Biodiversity Act No 10 of 2004</i>	77
7.4	Servitudes.....	79
7.5	Tax Legislation.....	80
7.5.1	<i>The Non-Profit Organisations Act 71 of 1997</i>	80
7.5.2	<i>Companies Act No 61 of 1973</i>	81
7.5.3	<i>Income Tax Act No 36 of 1996</i>	81
7.6	Property Tax.....	83
7.6.1	<i>Property Rates Act No 6 of 2004</i>	83
Chapter Eight: Conclusion.....		84
7.1	Introduction	84
7.2	The inclusion of key provisions in current and future legislation.....	85
7.2.1	<i>Permissible purpose</i>	85
7.2.2	<i> Holders</i>	87
7.2.3	<i>Grantors</i>	89

7.2.4	<i>Registration</i>	89
7.2.5	<i>Monitoring</i>	90
7.2.6	<i>Enforcement</i>	90
7.2.7	<i>Assignment, Modification and Termination</i>	91
7.3	Institutional arrangements	92
7.4	Incentives	93
7.5	Concluding remarks	94
LIST OF STATUTES		97
	Australia	97
	Canada.....	97
	New Zealand	99
	South Africa	99
	United States	99
BIBLIOGRAPHY		100
APPENDICES		108
	Appendix A. Summary of Canadian conservation instruments and legislation.....	108
	Appendix B. Summary of Australian conservation instruments and legislation.	110

LIST OF TABLES

Table 1. List of permissible purposes detailed for Special Nature Reserves, Nature Reserves and Protected Environments under the <i>Protected Areas Act 57 of 2003</i>	86
Table 2. Non-government involvement in securing on the ground biodiversity conservation (Taken from Binning & Young, 2000).....	93
Table 3. Review of specific tax provisions to incentivise conservation activities (Taken from National Treasury (2006) Draft Policy Paper: A framework for considering market based instruments to support fiscal reform in South Africa).	95
Table 4. Summary of recommended amendments to the <i>Protected Areas Act</i>	96

LIST OF FIGURES

Figure 1. Interaction between categories necessary for biodiversity conservation (Taken from Binning & Young, 2000).....	10
Figure 2. Non-government involvement in securing on the ground biodiversity conservation (Taken from Binning & Young, 2000).....	93

CHAPTER ONE

GENERAL BACKGROUND

“Some scientists believe that we are now witnessing the sixth mass extinction, the only mass extinction to be caused by a single species – humans”¹

1.1 Introduction

Conservation agreements are a fundamental tool for the management of biodiversity on private land in many countries throughout the world. In South Africa, however, their use to this end has largely been overlooked. This study investigates the use of conservation agreements to protect biodiversity on private land on the international stage with a view to implementing these concepts in South Africa.

The present chapter covers introductory matters, defines the scope of the report and provides the context within which conservation agreements will be examined. It considers developments in biodiversity conservation and briefly outlines the various tools used to this end. Chapters 2, 3, 4 and 5 discuss the legislation enabling conservation agreements in the United States, Canada, Australia and New Zealand respectively. The aim of Chapter 6 is to identify the common key provisions which contribute to the effectiveness of the legislation reviewed in the previous chapters, followed by a summary of the applicable South Africa legislation in Chapter 7. Limitations to implementation and recommendations for future legislation are discussed in the concluding chapter.

The research methodology used to pursue the aims and objectives of this study are, for the most part, based on documentary research. Through a review of the available literature, the research draws on the lessons and experience of private land conservation strategies currently in place elsewhere in the world. No empirical studies have been conducted.

1.2 Aims and objectives of the study

At present only 5.8% of land in South Africa is conserved in statutory protected areas, however government has committed itself to increasing this percentage to 8%.² The cost of purchasing

¹ Australia Museum ‘What’s happening to our biodiversity?’ at <http://www.amonline.net.au/biodiversity/happening/extinction.htm> (accessed 8 November 2006).

the land outright is not only financially prohibitive but also socially unacceptable and does not allow the cost of conserving biodiversity to be shared.³ The recognition of the significant impact that private sector managers may have on land use decisions, coupled with concern over the effectiveness of public sector protected areas and regulatory authorities to conserve biodiversity, provides a well founded argument for exploring the role of the private sector and or public/private partnerships in providing *in situ* biodiversity conservation.

The primary objective of this study then is to provide recommendations on possible changes to the South African legislation to allow for a more effective contribution by private landowners to biodiversity objectives and targets within South Africa. This study aims to provide insight into the workings of conservation agreements within a variety of foreign countries and to highlight the key provisions which have contributed to the success of these agreements. Based on this understanding, insight into the inclusion of these provisions within selected South African legislation is discussed.

1.3 Developments in biodiversity conservation

The United Nations Convention on Biological Diversity describes biodiversity as *the variability among living organisms from all sources including terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part, this includes diversity within species, between species and of ecosystems.*⁴ Biodiversity is therefore comprised of three fundamental components: genetic, species and ecosystem diversity. The genetic diversity encompasses variation within a species whereas the species diversity refers to the variety of species within a region. The ecosystem diversity relates to the spatial scale and pattern of habitat and species combinations.⁵

² Department of Environmental Affairs and Tourism *A bioregional approach to South Africa's protected areas*. (2001).

³ M Botha 'Ecosystem conservation for the next decade' (2001) 87 *Veld & Flora* 160 at 159.

⁴ Article 2 of the United Nations Convention on Biological Diversity. The Convention opened for signature on June 5, 1992. It was adopted at Nairobi and signed by 158 countries at the Rio Summit. It entered into force on December 29, 1993 upon ratification by the requisite thirty countries. Though the United States is a signatory to the convention, it has not yet ratified it. South Africa ratified the convention on November 2, 1995.

⁵ JA Richardson 'Wildlife utilization and biodiversity conservation in Namibia: Conflicting or complementary objectives?' (1998) 7 *Biodiversity and Conservation* 549 at 549 and J Glazewski *Environmental law in South Africa* (2000) at 300. The genetic and species levels encompass the ranges of species and variations within them, more specifically genetic diversity refers to the variation of genes within a species whilst species diversity refers to the variety of species within a region. The ecosystem level relates to the spatial scale and pattern of habitat and species combinations and also includes the interactions between them, which form processes on which life depends. Occasionally a fourth level of diversity is included namely landscape diversity. This incorporates the knowledge and practices of indigenous communities.

The concern for biodiversity, and its critical value to agriculture, local communities and their livelihoods, to human rights, political agendas and global trade issues, was reflected by governments and the international community at the 1992 Convention on Biological Diversity.⁶

The Convention addresses a variety of issues – from the conservation of endangered species, to protecting indigenous knowledge, to the commercial access of genetic resources. In addition, the convention commits signatory nations, *as far as possible and appropriate*:

- to [r]egulate or manage biological resources (including genetic resources and populations) important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use;⁷
- to identify types of activities likely to have significant adverse impacts on the conservation of biodiversity, monitor the effects of these activities⁸ and *regulate or manage* them;⁹
- to adopt *economically and socially sound measures that act as incentives* for the conservation of biodiversity.¹⁰

In an effort to address the issues raised by the Convention, a variety of land protection strategies have developed or have been remodelled from existing strategies and are used with varying degrees of success throughout the world.

1.4 Biodiversity conservation mechanisms

The legal tools employed to promote biodiversity conservation on private lands can be broadly divided into two categories: voluntary and regulatory methods. Each tool displays different characteristics and advantages; however a full suite of tools is necessary to accommodate a range of landowners and conditions¹¹ and cater for varied tenure relationships.¹²

⁶ Negotiated under UNEP and signed later that year at the Rio Summit by over 158 nations with the notable exception of the USA. The convention came into force on 29 December 1993 after the requisite number of 30 ratifications. See Glazewski (n5) at 4 and D Farrier 'Conserving biodiversity on private land: Incentives for management or compensation for lost expectations?' (1995) 19 *Harvard Environmental Law Review* 303 at 305.

⁷ Articles 8(c) of the United Nations Convention on Biological Diversity.

⁸ Article 7(c) of the United Nations Convention on Biological Diversity.

⁹ Article 8(1) of the United Nations Convention on Biological Diversity.

¹⁰ Article 11 of the United Nations Convention on Biological Diversity.

¹¹ B Swift *Legal tools and incentives for private land conservation in Latin America: building models for success* (2003) at 14.

¹² M Botha 'So you want to conserve your land' (2001) 87 *Veld & Flora* 6 at 6.

1.4.1 Regulatory methods

Regulatory conservation measures are generally created through direct government regulation. This approach is used in various forms under protected areas and land use management legislation and includes general restrictions placed on landowners to protect fauna, flora and natural resources.¹³

1.4.2 Voluntary methods

A brief description of some of the most frequently used voluntary measures is provided below.

- Fee simple land acquisition

Fee simple land acquisition is the simplest method of securing land for conservation, cultural purposes or open space.¹⁴ This form of ownership can potentially provide long-term conservation of biodiversity as properties are often purchased by NGO's or government organizations dedicated to land conservation.¹⁵ The most obvious limitation to this approach is the exceptionally high cost of acquisition and subsequent costs of management.¹⁶ Furthermore, government purchases are unlikely to induce landowners to respond favorably particularly those landowners who wish to retain title to their property or make productive use of their land.¹⁷

- Formal private reserves

Many countries rely on the proclamation private reserves as a formal legal device to protect private land. In many instances, this reserve status is limited to strict conservation of lands which are considered to be of biological significance to the government. This method of private land conservation has been used very successfully in several countries including Costa Rica where there are estimated to be some 250 private reserves conserving approximately 63,832 ha, or 1.2% of the national territory.¹⁸ In South Africa, the *Protected*

¹³ Swift (n11) at 31.

¹⁴ JB Wright 'Designing and applying conservation easements' (1994) 60 *Journal of the American Planning Association* 380 at 382.

¹⁵ There are numerous examples of the use of fee simple land acquisition including the master plan for the Sonoran desert in Phoenix. This plan considered the use of fee simple land acquisition to set aside significant areas of the Sonoran Desert for recreation, open space, environmental education, and preservation of native flora and fauna. See J Burke and J Ewan *Sonoran preserve master plan - An open space plan for the Phoenix Sonoran Desert* (1998).

¹⁶ Wright (n14) at 382.

¹⁷ Swift (n11) at 16.

¹⁸ J Langholz and J Lassoie 'Combining conservation and development on private lands: Lessons from Costa Rica' (2001) 3 *Environment, Development & Sustainability* 309 at 309.

Areas Act (No 57 of 2003) enables the Minister to declare an area to be a special nature reserve, nature reserve or protected environment. This has facilitated the establishment of successful conservation stewardship pilot projects in various parts of the country.

- Informal private protected areas and programmes

Many private landowners informally protect their land solely through their personal commitment to conservation. Although this commitment creates a useful network through which formal procedures could potentially be implemented, the current lack of legal designation does not guarantee the conservation of the land should the current owner die, sell or if economic conditions change.¹⁹

Previously, in South Africa, the Department of Environmental Affairs and Tourism ran the National Heritage Programme which recognized sites of natural significance based on specific criteria.²⁰ Owners were issued with a plaque and a certificate of thanks from the President.²¹ No directive on the most suitable management for the area was issued however if a landowner failed to manage the property correctly then the site was delisted and the plaque removed.²²

Some sites, although worthy of recognition, did not qualify as sites for national heritage status. Consequently, the Sites of Conservation Significance Programme was established. However, relatively few sites have been listed under this programme.²³

Conservancies have also been used successfully in South Africa, particularly for co-operative management of alien vegetation, wildfires and block burns, game management and catchment management.²⁴ Essentially, conservancies function as forums through which farmers, private landowners and formal conservation bodies can interact.²⁵ In addition, they

¹⁹ Swift (n11) at 25.

²⁰ Botha (n12) at 7.

²¹ Ibid.

²² Botha (n12) at 7.

²³ Ibid.

²⁴ Botha (n12) at 7.

²⁵ Ibid.

provide a platform for farmers to effectively negotiate with the State and for the State to designate certain responsibilities to private groups.²⁶

A number of Community Conservation Areas (CCAs) also exist within South Africa, primarily in KwaZulu-Natal. These are essentially an informal arrangement where communities have employed alternative land uses such as a nature or game reserve on communal rather than private land. Although the primary objective is an economic one, biodiversity conservation may also be achieved. In KwaZulu-Natal, Ezemvelo KZN Wildlife may assist the community in raising funds for fencing and provide advice.²⁷

- TDRs and PDRs

Transfer of development rights (TDR) is a device by which the rights to develop are severed from the land title and made available for transfer to another area.²⁸ The landowner retains ownership of the property but relinquishes the rights to develop. TDR's are similar to the more commonly used purchase of development rights (PDRs). Ownership of land is generally regarded as possession of a bundle of rights which include the right to use, modify, lease, sell or develop the land.²⁹ Purchase of development rights entails the sale of the right to develop a piece of land while leaving all the remaining rights as before.³⁰ The difference between a TDR and PDR is that the TDR is conducted in a more controlled environment where areas are predetermined as "sending" or "receiving" areas.³¹ The main advantage of these approaches is the direct financial compensation to the landowners. However this also poses problems as many regions cannot afford the significant cost of this compensation. Their use is also restricted because of their complexity and high administrative costs.³²

²⁶ Botha (n12) at 7.

²⁷ I Rushworth (Ezemvelo KZN Wildlife) *Personal communication* on 9 January 2008.

²⁸ Smart communities network 'Land use planning strategies - Transfer of development rights' at <http://www.smartcommunities.ncat.org/landuse/transfer.shtml> (accessed 1 December 2007).

²⁹ Ohio State University 'Purchase of development rights' at <http://ohioline.osu.edu/cd-fact/1263.html> (accessed 1 December 2007).

³⁰ Ibid.

³¹ Ohio State University 'Transfer of development rights' at <http://ohioline.osu.edu/cd-fact/1264.html> (accessed 1 December 2007).

³² SJ Eagle *Conservation easements and private land stewardship* (1998) at 6.

- Conservation covenants and easements

A conservation covenant is a legally binding agreement between two or more parties in which a burden is placed on the landowner's property.³³ A covenant usually takes the form of a written agreement and may be registered against the title deeds of the property thereby binding both current and successive owners.³⁴ A landowner enters into the agreement voluntarily with the primary incentive to participate being the tax relief or conservation subsidies which they may receive.³⁵

Edwards and Sharp (1990) identify four types of covenants namely contractual, covenants between a landlord and tenant, private covenants on freehold land, and statutory covenants.³⁶ Restrictive covenants can be created at common law to protect an area for a fixed period of time or in perpetuity. However they were not developed as a means of conserving natural features or biodiversity and are therefore limited by the common law which governs them.³⁷

Restrictive covenants were received into South African law from English law during the second half of the nineteenth century and were only used to regulate the use and density of erven in newly established towns and not for conservation purposes.³⁸ The nature of restrictive covenants within the South African context has remained unclear since their introduction. Generally, they are regarded as servitudes, *praedial* if in favour of other erven, and personal if in favour of a specific person.³⁹

Statutory covenants provide a similar mechanism to that of common law covenants but differ in that they are derived from statute as opposed to common law.⁴⁰ This type of

³³ S Patterson and T Winstanley *Improving the legislative approach to biodiversity conservation and sustainable management of natural resources in South Africa* (2003) at 16.

³⁴ *Ibid.*

³⁵ C Saunders 'Conservation covenants in New Zealand' (1996) 13 *Land Use Policy* 325 at 325.

³⁶ VM Edwards and BMH Sharp 'Institutional arrangements for conservation on private land in New Zealand' (1990) 31 *Journal of Environmental Management* 313 at 318.

³⁷ Edwards and Sharp (n36) at 318.

³⁸ J van wyk 'The nature and classification of restrictive covenants and conditions of title' (1992) 25 *De Jure* 270 at 276.

³⁹ *Ibid.*

⁴⁰ Edwards and Sharp (n36) at 318.

covenant is used in a number of countries; for example under the Queen Elizabeth National Trust in New Zealand, and conservation easements in the United States.⁴¹

In the United States and Canada, common law easements are regarded as the 'right to use the land of another for a specific purpose that is not inconsistent with the general use of the property owner.'⁴² However, common law easements did not provide an adequate foundation for the modern conservation easement⁴³ and some common law rules have therefore been eliminated with respect to the conservation easements created under statutes in many jurisdictions.⁴⁴ Easements in these countries, are therefore the result of statutory modifications to the common law but perform the same function as that of conservation covenants.⁴⁵

A number of these conservation mechanisms have been used to some extent within South Africa. However the suite of options available for land conservation, were not developed systematically and have tended to focus primarily on the establishment of protected areas.⁴⁶ This was highlighted again in 2006, when the Department of Environmental Affairs and Tourism spent over R48 million to acquire more than 24 000 hectares of land for the Namaqua, Tankwa-Karoo, Addo Elephant, West Coast, Mapungubwe, Camdeboo and Bontebok National Parks.⁴⁷ In contrast, the mechanisms available for the conservation of private land in the country have largely been underutilized. This is attributed to the fact they have often been difficult to understand and have been nearly identical in their approach.⁴⁸ From a biodiversity perspective, they have offered very little protection as landowners were able to withdraw at any stage.⁴⁹ Given the apparent success of the use of conservation agreements to protect biodiversity on private land elsewhere, it is logical that the possibility of employing this conservation tool within South Africa is explored.

⁴¹ Saunders (n35) at 325.

⁴² Eagle (n32) at 2.

⁴³ Eagle (n32) at 2.

⁴⁴ J Atkins, A Hillyer and A Kwasniak *Conservation easements, covenants and servitudes in Canada: A legal review* (2004) at 5.

⁴⁵ D Farrier 'Conserving biodiversity on private land: Incentives for management or compensation for lost expectations?' (1995) 19 *Harvard Environmental Law Review* 303 at 343.

⁴⁶ Botha (n12) at 6.

⁴⁷ Speech by Marthinus van Schalkwyk, Minister of Environmental Affairs and Tourism, at the National Council of Provinces Debate on the Budget Vote of the Department of Environmental Affairs and Tourism, 7 June 2007.

⁴⁸ Botha (n12) at 6.

⁴⁹ Botha (n12) at 6.

South Africa is unique in that a number of varied tenure systems exist within the country. These range from freehold tenure at one end of the spectrum to a variety of tenure arrangements which operate in the former homelands and other rural parts of the sub-continent. These systems are commonly referred to as customary tenure.⁵⁰ Although this study has not specifically excluded the potential use of conservation agreements on land under customary tenure, the tenure arrangements in the countries reviewed is mainly freehold. However, where it exists, the study has attempted to highlight conservation agreements and associated legislation which has been directed at land owned by indigenous people. The concluding chapter also considers agreements within the context of customary tenure and many of the recommendations could potentially be applied to communal areas.

1.5 Institutional arrangements and incentives

The implementation of programs which address the issue of private land conservation, are severely hampered by the traditional notion of land ownership and property rights.⁵¹ Rabie poses the question: “What degree of financial sacrifice should a landowner be called upon to make in the public interest?”⁵² With national interest at stake it would be necessary, at least in part, to compensate private landowners for economic losses incurred as a result of conservation endeavors.⁵³ If voluntary conservation mechanisms are to be effective, it is vital that government creates a suite of incentives which would encourage private landowners to participate in biodiversity conservation and to accept certain restrictions on their liberties - for example by the implementation of conservation easements.

From a broad perspective, the success of these agreements is dependent on complex interactions between effective policy, supporting institutional arrangements, and other instruments. Binning and Young (2001) provide an overview of the range of instruments and associated interactions which can be used for the conservation of native vegetation however similar interactions are

⁵⁰ J Glazewski *Environmental law in South Africa* (2000) at 210.

⁵¹ Farrier (n45) at 307. Farrier specifically outlines the problem in the United States although given the land conflicts in South Africa the principle may be extrapolated to the South African situation. For a detailed analysis of the impact of conservation on land ownership in South Africa, see MA Rabie 'The impact of environmental conservation on land ownership' (1985) *Acta Juridica* 289 at 289.

⁵² MA Rabie 'The influence of environmental legislation on private landownership' in AJ van der Walt (ed) *Land reform and the future of land ownership in South Africa* (1991) at 97.

⁵³ C McDowell 'Legal Strategies to optimize conservation of natural ecosystems by private landowners - Economic incentives' (1986) *XIX CILSA* 460 at 461.

likely with the conservation of biodiversity (See Figure 1).⁵⁴ Three broad categories are identified namely

- people – the tools that can be used to motivate and retain landholders interest in conservation programs;
- finance – the incentives that can be provided to share the costs of managing biodiversity;
- security – the regulatory, legal and voluntary property rights instruments that can be used to secure management of biodiversity.⁵⁵

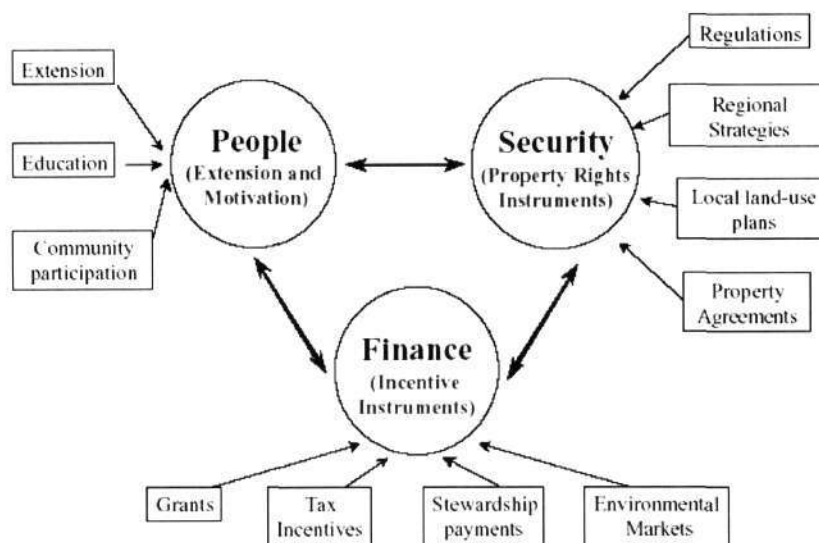


Figure 1. Interaction between categories necessary for biodiversity conservation (Taken from Binning & Young, 2000).

Although conservation agreements are one potential tool for biodiversity conservation, they do not operate in a vacuum and are dependent to a large extent on the interest of landowners and financial assistance or incentive instruments. Binning and Young (2001) note that policies that harness the synergies between educational (people), regulatory (security) and economic incentives (finance) are likely to be more effective both in terms of costs and environmental outcome.⁵⁶

The current study provides an analysis of the policy governing conservation agreements. However in the South African context the associated institutional arrangements and financial

⁵⁴ C Binning and M Young *Native vegetation institutions, policies and incentives* (2000) at 7.

⁵⁵ Ibid.

⁵⁶ Binning and Young (n54) at 7.

incentives are largely absent. These aspects are essential to the effective functioning of these agreements and it is vital that careful attention is afforded to both appropriate institutional arrangements and practical incentives, should the implementation of these agreements be considered.

1.6 Limitations of conservation agreements

Although conservation agreements are often viewed as the solution to biodiversity conservation on private land they cannot be considered in isolation of their associated constraints and challenges. However, conservation agreements are difficult to appraise given the varied number and nature of the properties currently under restriction and the different types and terms of the agreements.⁵⁷

The voluntary nature of entering into the agreements raises issues of their relative effectiveness as those landowners most likely to practice poor management (which impacts negatively on biodiversity) are least likely to volunteer. In addition, it should be emphasized that without an accompanying toolbox of incentives, conservation agreements themselves are likely to be relatively ineffective. Incentives often include tax benefits and less frequently paying landowners to restrict the use of their land⁵⁸, however there is often no adverse effect imposed on the value of the property. On the contrary, the value of the property may often increase which raises social equity concerns.⁵⁹ Echeverria (2004) argues that the voluntary nature of the agreement also privatises important decisions regarding land use which should arguably be taken through a democratic process. Furthermore, approaches which place the onus of biodiversity conservation on private landowners invariably affect rural populations although much of the support for such considerations has come from urban dwellers.

Perhaps the two most important issues concerning conservation agreements are their expense and duration. Firstly, the cost of implementing and maintaining such agreements is significant and although payments can be made through the tax system, the fiscal burden becomes less visible but is not eliminated.⁶⁰ In addition, the extent to which private sector should incur the cost for societal benefit is debatable.

⁵⁷ JD Echeverria *Top ten reasons to be sceptical about voluntary conservation easements* (2004) at 1.

⁵⁸ JD Mahoney *Perpetual restrictions on land and the problem of the future* (2001) at 4.

⁵⁹ Echeverria (n57) at 1.

⁶⁰ Ibid.

Secondly, although “protection in perpetuity” is viewed as the primary asserted benefit of these agreements such permanence may be problematic given changing social, economic and ecological conditions. Some critics argue that future generations may be bound by choices made by their forbearers that do not reflect current values and advances made in ecological science.⁶¹

⁶¹ Mahoney (n58) at 6.

CHAPTER TWO

THE UNITED STATES

2.1 Background

The United States is the third largest country in the world, after Russia and Canada in size, and China and India by population. Currently, the USA supports almost 295 million Americans.⁶² Since the country was first colonized in the sixteenth and seventeenth centuries, more than 90% of the tallgrass prairies, 55% of the wetlands, 26% of all forests and 75% of the old growth forests have been destroyed and over 500 species and subspecies of native plants have become extinct.⁶³ The causes of species loss are numerous and include the impact of exotic species, over-exploitation of fauna and flora and the degradation and fragmentation of habitat. Although Federal and State agencies manage billions of hectares of public land, much of this land is biologically and genetically poorly represented. For the most part, habitat conservation has centred on the management of public land. However, with the realisation that almost 60 per cent of land in the United States is under private ownership, this paradigm has undergone a shift to that of private land conservation.⁶⁴

2.2 History

The term “conservation easement” was coined by William H. Whyte during the late 1950’s⁶⁵ and is used to define a recent technique of protecting and preserving the land surface. Although easements have been used to protect historical and ecological characteristics of particular buildings and landscapes throughout the United States, it was only in the late 1880’s that the first American conservation easement was written.⁶⁶ This easement was employed to protect parkways, designed by Frederick Law Olmstead, in and around Boston.⁶⁷ During the 1930’s, the US Fish and Wildlife Service and the National Park Services used easements extensively to preserve scenic views along the Blue Ridge Parkway in Virginia and protect wildlife refuges in

⁶² Central Intelligence Agency ‘The World Factbook’ at <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (accessed 10 April 2005).

⁶³ VM Edwards *Dealing in diversity: America's market for nature conservation* (1995) at 3.

⁶⁴ Ibid.

⁶⁵ M Thornburg *Conservation Easement Overview* (n.d) at 1.

⁶⁶ JA Gustanski and RH Squires (eds) *Protecting the land: Conservation easements past, present and future* (2000) at 9.

⁶⁷ WJ Andrews and D Loukidelis *Leaving a living legacy: Using conservation covenants in BC* (1996) at 1.

Minnesota and the Dakotas.⁶⁸ Today, the conservation easement is the most widely used and fastest growing private land conservation tool in the United States.⁶⁹

Conservation easements involve the participation of a non-profit organisation or a government agency that is charged with the responsibility of monitoring and enforcing the easement specifications.⁷⁰ Non-profit organizations include land trusts, conservation organizations and philanthropic foundations. The Land Trust Alliance (LTA) defines a “land trust” as “a non-profit organization that actively works to conserve land by undertaking or assisting in land or conservation easement acquisition, or by its stewardship of such land or easements”.⁷¹ Each land trust has its own mission statement dependent on its setting or region.⁷²

In recent years, the “Land Trust movement” has shown considerable growth, with over half of all US Land Trusts formed in the last decade.⁷³ The first of these land trusts, the Trustees of Reservations in Massachusetts, was formed in 1891.⁷⁴ By the mid-1950’s, just over 50 land trusts were in existence and by the late 1980’s more than 700 land trusts had been formed across the United States and Canada.⁷⁵ The land trust movement is the fastest growing sector of the environmental movement and today more than 1200 land trusts, supported by 900 000 members, exist across the country.⁷⁶

2.2.1 Conservation Easement Legislation

Conservation easements are the product of a variety of both federal and state legislation. The *Uniform Conservation Easement Act* (UCEA) is a model act which many states have either adopted or upon which they have based their own conservation easement legislation. As of 2003, 23 states had enacted legislation based on the Act and 26 had drafted and enacted their

⁶⁸ Eagle (n32) at 6.

⁶⁹ Gustanski and Squires (n66) at 14.

⁷⁰ Thornburg (n65) at 1.

⁷¹ The Land Trust Alliance ‘Frequently asked questions: What is a land trust?’ at www.lta.org (accessed 29 May 2005).

⁷² AM Merenlender, L Huntsinger, G Guthey and SK Fairfax ‘Land trusts and conservation easements: Who is conserving what for whom?’ (2004) 18 *Conservation Biology* 65 at 68.

⁷³ JB Wright ‘Land trusts in the USA’ (1992) 9 *Land Use Policy* 83 at 84.

⁷⁴ JB Wright and R Skaggs *Purchase of development rights and conservation easements: frequently asked questions* (2002) at 2.

⁷⁵ Wright (n73) at 84.

⁷⁶ Gustanski and Squires (n66) at 17.

own laws.⁷⁷ Although a detailed assessment of these state laws is beyond the scope of this study, an overview of the UCEA and an analysis of the legislation from one state, Georgia, is outlined. Georgia was selected largely because a number of working examples of easements could be found in various Georgian Counties including Dekalb County, Floyd County, Fulton County, Habersham County, Taylor County, Thomas County and White County demonstrating the success of the agreements in this State.

2.2.2 *The Uniform Conservation Easement Act*

The UCEA was approved and adopted by the National Conference of Commissioners on Uniform State Laws⁷⁸ in 1981. The Act defines “conservation easement” as “a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property”.⁷⁹ The primary objective of the Act is to enable private parties to enter into consensual arrangements with easement “holders” to protect natural and historic resources without the encumbrance of certain potential common law impediments.⁸⁰

Common law has always favoured easements or restrictions that serve a dominant estate or land holding. Atkins *et al.* (2004) provide an example of an easement over a piece of land A, which provides access to a road for a second piece of land B. A is the servient estate and B is the dominant estate. The owner of A cannot convey it and terminate the easement over A in B’s favour, as the easement runs with the land.⁸¹ The Act does not itself impose restrictions or affirmative duties but maximises the freedom for consenting parties to do so, as long as the conditions of the Act are met.⁸²

⁷⁷ P Mitchell *Protecting the future forever; why perpetual conservation easements outperform term easements* (2006) at 4.

⁷⁸ A non-profit governmental body which drafts various forms of uniform laws for use by both state and local governments. See The Uniform Law Commissioners ‘Introduction to the organisation’ at <http://www.nccusl.org/Update/> (accessed 10 May 2005).

⁷⁹ Section 1(1) of the UCEA.

⁸⁰ Section 4 of the UCEA.

⁸¹ Atkins *et al* (n44) at 82.

⁸² Commissioner’s prefatory note of the UCEA.

The conditions of the UCEA ensure that the transactions serve a specific protection purpose and that the resulting obligations are placed with the owner of an interest in the property burdened by the easement or with the “holder”. The UCEA permits two kinds of “holders” – charitable organizations or government bodies empowered to hold an interest in real property.⁸³

An interesting feature of the UCEA is the third-party right to enforcement, which is an important tool in ensuring the long-term vitality of a conservation easement.⁸⁴ Third-party right of enforcement enables a conservation easement to empower another organization, which is eligible to be the holder, but is not the holder, to enforce the terms.⁸⁵ This means that one organization may hold the conservation easement but by the terms of the transaction, delegate enforcement to another.⁸⁶

Section 2 of the UCEA states that “a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated or otherwise altered in the same manner as other easements”.⁸⁷ Easements may be created for unlimited duration unless the easement document specifies otherwise.⁸⁸ The Act does, however, stipulate that the court retains the power to modify or terminate a conservation easement in accordance with the principles of law and equity.⁸⁹ This enables the easement to conform to federal tax law requirements that the interest be “in perpetuity” and in so doing, allows the donor to take advantage of federal tax provisions and benefits.⁹⁰

Unforeseen circumstances may result in a failure of restrictions burdening real property in perpetuity or extended periods. To address this, two doctrines, the doctrine of changed conditions and the doctrine of *cy pres* have evolved through the judicial system.⁹¹ The doctrine of changed conditions stipulates that privately created restrictions on land use may be terminated or altered if they no longer achieve their intended purpose due to changed conditions. Similarly,

⁸³ Section 1(2)(i,ii) of the UCEA.

⁸⁴ Gustanski and Squires (n66) at 48.

⁸⁵ Section 1(3) of the UCEA.

⁸⁶ Section 3(a)(3) of the UCEA.

⁸⁷ Section 2(a) of the UCEA.

⁸⁸ Section 2(c) of the UCEA.

⁸⁹ Section 3(b) of the UCEA In adopting states whose case or statute law accords their courts power in the case of an easement.

⁹⁰ Eagle (n32) at 9.

⁹¹ UCEA Comment.

if a charitable organization can no longer carry out its purposes as a result of a change in circumstances, then the doctrine of *cy pres* allows courts to impose terms and conditions which may result in an attainment of the general objective while altering specific provisions of the trust.⁹²

2.3 Tax Incentives

The success of conservation easements in the United States is underpinned by a comprehensive system of tax incentives. A complete analysis of Federal US Tax Law is beyond the scope of this study, but a summary of the main tax tools used to provide incentives to landholders, is given.

2.3.1 Charitable Gifts

Tax benefits for conservation easements were enabled under a 1964 Internal Revenue service Ruling.⁹³ A more general deduction for the value of conservation easements was added in 1976 when Congress enacted the *Tax Reform Act* which allowed landowners of certain types of land to donate a portion of their real property as a gift, to a charitable (non-profit) organization or government agency and in doing claim a deduction on federal income tax.⁹⁴ This was followed by the passing of the *Tax Reduction and Simplification Act* in 1977 and the *Tax Treatment Extension Act* (creating section 170(h)) of the *Internal Revenue Code* (IRC)) in 1980.⁹⁵ The present structure was established in 1997 when Congress enacted the Taxpayer Relief Act thereby enabling a new estate tax benefit (IRC section 2031(c)) for landowners who donate conservation easements.⁹⁶

In order to qualify for the tax reduction, the conservation easement must satisfy the requirements for a “qualified conservation contribution”⁹⁷ under section 170(h) of the *Internal Revenue Code*.

⁹² Ibid.

⁹³ Rev Rul 64-205; 1964-2 C.B. 62.

⁹⁴ Eagle (n32) at 8.

⁹⁵ The Nature Conservancy ‘How we work: conservation methods’ at <http://www.nature.org/aboutus/howwework/conservationmethods/privatelands/conservationeasements/about/tncand easements.html> (accessed 12 May 2005).

⁹⁶ Ibid.

⁹⁷ The Code defines ‘qualified conservation contribution’ as a contribution – (A) of a qualified real property interest, (B) to a qualified organisation; and (C) exclusively for conservation purposes. Conservation purposes include the preservation of land areas for outdoor recreation by, or the education of, the general public; the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem; the preservation of open space (including farmland and forest land) for the scenic enjoyment of the general public, or pursuant to a clearly

The charitable income tax deduction is calculated on the difference in value of the property before the easement was granted compared to the value of the property after the granting of the easement.⁹⁸ The exact amount of tax savings will be dependent on several other factors including how long the donor has owned and used the property, the income of the donor and the value of the property.⁹⁹

Currently the limit for gifts is 30% of gross income. Should the value of the easement exceed this, then the balance may be carried forward for income tax purposes over a period of six successive years.¹⁰⁰ Similarly, if a property is donated, then the value of the property at the time of purchasing or inheriting may be deducted, up to 50% of gross income over five years.¹⁰¹

2.3.2 *Property Taxes*

The burden on landholders may be substantially reduced as a result of the calculation of property taxes otherwise known as “rates”. This is because rates are calculated on the value of the property less the easement value.

2.3.3 *Estate taxes*

A conservation easement generally lowers the full market value of the land and consequently the value of the taxable estate. Furthermore, section 2031(c) of the *Internal Revenue Code* provides that an additional 40% of the value of the land (over and above the reduction in value already attributable to the easement) may be deducted under certain circumstances. A reduction in estate taxes may also be considered in the case of post mortem easement donations where a conservation easement is placed on the land by the heirs of the estate. This may occur even though the deceased had never placed a conservation easement over the property during his or her lifetime.

delineated Federal, State, or local governmental conservation policy or; the preservation of a historically important land area or a certified historic structure.

⁹⁸ J Jay *Conservation easements and tax credits* (2002) at 2.

⁹⁹ The private landowners network ‘Tax benefits of donating conservation land’ at <http://www.privatelandownernetwork.org/library/> (accessed 22 July 2005).

¹⁰⁰ JL Crompton ‘Tax incentives for making donations to park and recreation agencies.’ (1996) 14 *Journal of Park and Recreation Administration* 65 at 68.

¹⁰¹ Jay (n98) at 2.

2.4 Georgia

In 1992, the Georgia Legislature passed the *Georgia Uniform Conservation Easement Act*, OCGA §§ 44-10-1 to 8, thereby enabling the use of conservation easements in Georgia. The Act's objectives include "retaining or protecting natural, scenic or open-space values or real property, assuring its availability for agriculture, forest, recreational or open-space use, protecting natural resources, maintaining or enhancing air or water quality; or preserving the historical, architectural; archaeological or cultural aspects of real property".¹⁰²

The Act enables a landowner to enter into an agreement with a governmental body empowered to hold an interest in real property or a charitable corporation, association or trust¹⁰³ for a specified number of years or in perpetuity.¹⁰⁴ However, maximum tax benefits will only be granted to easements registered in perpetuity.¹⁰⁵ The agreement may be registered as a Deed of Conservation Easement with the Superior Court.¹⁰⁶ The agreement is binding on both current and future landowners and the responsibility of monitoring the property to ensure compliance with the terms of the agreement, lies with the easement holder.¹⁰⁷ The Act also provides for "third party right of enforcement".¹⁰⁸ Although the Act adopts the same principles as most other easements in creating, conveying, assigning, modifying and terminating easements it includes a particular provision which states that easements may not be "created or expanded by the exercise of the power of eminent domain".¹⁰⁹

There are about 50 private land trusts capable of holding and monitoring conservation easements operating in Georgia. As of 2007, these private land trusts together with the State held approximately 500 conservation easements in Georgia.¹¹⁰

¹⁰² Section 44-10-2(1) of the Georgia Uniform Conservation Easement Act.

¹⁰³ Section 44-10-2(1) of the Georgia Uniform Conservation Easement Act.

¹⁰⁴ Section 44-10-3(c) of the Georgia Uniform Conservation Easement Act.

¹⁰⁵ Section 170(h) of the Internal Revenue Code.

¹⁰⁶ Section 44-10-8 of the Georgia Uniform Conservation Easement Act.

¹⁰⁷ Section 44-10-4(b) of the Georgia Uniform Conservation Easement Act.

¹⁰⁸ Section 44-10-2(3) of the Georgia Uniform Conservation Easement Act.

¹⁰⁹ Section 44-10-2(2) Georgia Uniform Conservation Easement Act.

¹¹⁰ The Conservation Fund 'Governor Perdue announces major conservation easement from famed musician Chuck Leavell' at <http://www.conservationfund.org/node/320> (accessed 19 May 2005).

CHAPTER THREE

CANADA

3.1 Background

Canada is the second largest country in the world, after the USSR, and lies north of the United States bordering the North Atlantic Ocean on the east, the North Pacific Ocean on the west and the Arctic Ocean on the north.¹¹¹ There are approximately 71 500 known species of wild plants, animals and other organisms in Canada and it is estimated that there are a further 66 000 species yet to be discovered.¹¹² Furthermore, the country is the steward for many globally significant ecosystems including 25% of the world's wetlands and boreal forests.¹¹³ These ecosystems are spread between 10 provinces and three territories.

3.2 History

Traditionally, Canada's conservation efforts have focused on public land areas and large tracts of wilderness resulting in the protection of 61 million hectares in 2001. However, only 113 of 194 terrestrial eco-regions in Canada benefit from protected area status with the remaining 81 have little or no protection.¹¹⁴ Furthermore, government control does not necessarily ensure the long term conservation of the land. It is only in the past decade that habitats on private land in southern Canada have received widespread recognition and effort has been made to permanently safeguard specific areas. A detailed assessment of the Federal legislation and various individual provincial laws enabling the use of covenants is outlined below and summarized in Appendix A.

3.3 Federal Legislation

The Canadian Constitution empowers provincial jurisdictions to establish laws in respect of privately owned property and public lands. As a result, no specific federal legislation enabling the use of conservation easements and servitudes in relation to private land exists.¹¹⁵ However, under various provincial statutes, the Federal Crown may be empowered to hold conservation easements or covenants.¹¹⁶ The federal *Species at Risk Act*, S.C., 2002, c.29 authorizes the

¹¹¹ Central Intelligence Agency 'The World Factbook' at <https://www.cia.gov/library/publications/the-world-factbook/geos/ca.html> (accessed 22 May 2005).

¹¹² Environment Canada *Environmental signals: Canada's national environmental indicator series* (2003) at 2.

¹¹³ Ibid.

¹¹⁴ Environment Canada (n112) at 3.

¹¹⁵ Atkins et al (n44) at 68.

¹¹⁶ Ibid.

Minister of Environment to establish a stewardship action plan that creates incentives and other measures to support voluntary stewardship actions.¹¹⁷ The action plan must include commitments to provide information with respect to programmes related to stewardship agreements, conservation easements and other such agreements.¹¹⁸ However, the Act does not specifically enable the formation of conservation easements.¹¹⁹

3.4 British Columbia

British Columbia has 877 protected areas comprised of natural and provincial parks, ecological reserves and other designations. By the end of 2001, the percentage land base in protected areas in British Columbia was 12.5% though the majority of these areas are located in Crown lands.¹²⁰ Many of the ecologically important areas in British Columbia are found in estuaries and valley bottoms which are held in private ownership.¹²¹ The enactment of the *Land Title Act* R.S.B.C., 1996, c250 and subsequent *Amendment Act (Bill 28)* in 1994 has facilitated the protection of ecosystems on private land.¹²²

Section 219 of the *Land Title Act* enables the granting and registration of covenants for conservation purposes. Under this section, the Crown or a Crown Corporation or agency or a local government may hold a conservation covenant. In 1994, the section was amended to allow non-government organizations to hold conservation covenants.¹²³ A covenant, which can be registered under subsection (1), may be of a positive or negative nature and various provisions, set out in section 219, may be included in the agreement.¹²⁴ These include provisions relating to the use of land or the use of a building on the land, the subdivision of land and requirements regarding the development of the land.¹²⁵ In addition, section 219(4) states “that land or a specified amenity¹²⁶ in relation to it be protected, preserved, conserved, maintained, enhanced,

¹¹⁷ Section 10(1) of the Species at Risk Act.

¹¹⁸ Section 10(2) of the Species at Risk Act.

¹¹⁹ Atkins et al (n44) at 68.

¹²⁰ Ministry of Water Land and Air Protection *Environmental trends in British Columbia 2002* (2002) at 46.

¹²¹ Andrews and Loukidelis (n67) at 1.

¹²² Ibid.

¹²³ A Hillyer and J Atkins *Greening your title: A guide to best practices for conservation covenants* (2000) at 8.

¹²⁴ Atkins et al (n44) at 13.

¹²⁵ Section 219(2) of the Land Title Act.

¹²⁶ Amenity includes any natural, historical, heritage, cultural, scientific, architectural, environmental, wildlife or plant life value relating to the land.

restored or kept in its natural or existing state in accordance with the covenant and to the extent provided in the covenant”.

The covenant document is filed in the appropriate Land Title Office and is then registered against the title to the land.¹²⁷ The covenant is binding on the current landowner and any successors in title.¹²⁸ Once the original landowner has sold or given his or her interest in the land away, he or she is no longer liable for a breach of the covenant.¹²⁹

The covenant may only be modified by written agreement between the covenant holder and the landowner and the modification agreement must be registered in the appropriate Land Title Office.¹³⁰ In addition, the *Property Law Act*, R.S.B.C., 1996, c. 377 enables any person with an interest in land to apply to the court for an order to modify or cancel the covenant. The court may grant such an order providing that specific criteria have been satisfied.¹³¹

Agreements on title for conservation purposes are also available under other statutes. Heritage property in British Columbia may be conserved through the use of Heritage Revitalization Agreements. These are voluntary written agreements, enabled under the *Local Government Act*, R.S.B.C., 1996, c. 323 between a landowner and a local government¹³² and are registered on the title of the land.¹³³ Although Section 948 of the Act stipulates that with certain exceptions, Heritage Revitalization Agreements must not be used to conserve natural landscapes or undeveloped land, they may still be useful in some circumstances.¹³⁴

3.5 Alberta

The *Historical Resources Act*, R.S.A., 2000, c. H-9, enables a landowner to enter into a “condition or covenant” with the Minister, the council of the municipality in which the land is located, the Alberta Historical Resources Foundation or an historical organization that is

¹²⁷ Atkins et al (n44) at 13.

¹²⁸ Section 219 (7) of the Land Title Act.

¹²⁹ Section 219 (8) of the Land Title Act.

¹³⁰ Section 219 (9) of the Land Title Act.

¹³¹ Section 35 of the Property Law Act.

¹³² Section 966 (1) of the Local Government Act.

¹³³ Section 966 (9)(a) of the Local Government Act.

¹³⁴ Section 948 of the Local Government Act.

approved by the Minister.¹³⁵ Under Section 29 of the Act, the covenant must relate to the protection or restoration of any land or building.¹³⁶ A condition or covenant registered under subsection (2) runs with the land, however the legislation is silent as to whether this may be for a fixed term or granted in perpetuity.¹³⁷

The concept of conservation easements was introduced in Alberta in 1996. Easements improved on the previous restrictive covenants, which were legally cumbersome and not necessarily effective in guaranteeing the conservation of environmentally significant areas.¹³⁸ The *Environmental Protection and Enhancement Act*, R.S.A., 2000, c. E-12 enables a landowner to enter into a legal agreement¹³⁹ and grant certain rights to a conservation organization, municipality or other eligible grantee¹⁴⁰ for any purpose stipulated under section 22 of the Act. These include the protection, conservation and enhancement of the environment, biological diversity or natural scenic and aesthetic values.¹⁴¹ In this way, the land's natural attributes are protected for a specified period of time or indefinitely and even if the land is passed on to a new owner, the conditions of the easement remain as outlined by the original grantor.¹⁴² The easement may only be modified or terminated by agreement between the grantor and the grantee or by order of the Minister of Environment.¹⁴³

In return for entering into a conservation easement, the landowner may receive a cash settlement, a tax credit or a combination of the two. In addition, properties are inspected by Environment Canada and those deemed to be environmentally sensitive or ecologically significant may qualify for the Eco-gifts program. This program grants landowners 100 per cent tax deductible receipts for the value of the conservation easements they use to protect their land.¹⁴⁴

¹³⁵ Section 29(1) of the Historical Resources Act.

¹³⁶ Section 29(1) of the Historical Resources Act.

¹³⁷ Atkins et al (n44) at 21.

¹³⁸ A Murphy 'Conservation easements help preserve little pieces of heaven' (2005) *Agri-News* at 1.

¹³⁹ Section 21(1) of the *Environmental Protection and Enhancement Act*.

¹⁴⁰ Various organizations may create conservation easements with private landowners including Alberta Conservation Association, the Nature Conservancy Canada, the southern Alberta Land Trust Society, Ducks Unlimited Canada and the Alberta Fish and Game Association.

¹⁴¹ Section 22(C) of the *Environmental Protection and Enhancement Act*.

¹⁴² Section 21(1) of the *Environmental Protection and Enhancement Act*.

¹⁴³ Section 22(7) the *Environmental Protection and Enhancement Act*.

¹⁴⁴ Murphy (n138) at 2.

As of 1 January 2003, 37 conservation easements covering approximately 20 000 acres of land had been donated and a further 15 easements protecting an additional 15 800 acres had been purchased.¹⁴⁵

3.6 Saskatchewan

In 1997, in an effort to represent the province's 11 distinct eco-regions, Saskatchewan began its Representative Areas Network (*RAN*) initiative.¹⁴⁶ Almost three million hectares of lands were considered, to constitute the start of the network, and Crown lands administered by Saskatchewan Environment and Resource Management (*SERM*) were legally designated.¹⁴⁷ However, over 1.2 million hectares of private land and lands not administered by *SERM* have also been recognized within the Representative Areas Network through co-operative partnership agreements and conservation easements.¹⁴⁸

The *Conservation Easements Act*, R.S.S., 1996, c. C-27.01 enables conservation easements in Saskatchewan. Under the Act, any landowner who holds absolute title to property, including the provincial or federal government or a municipality, may grant a conservation easement.¹⁴⁹ A conservation easement may be granted for any purpose listed in Section 4 including "the protection, enhancement or restoration of natural ecosystems, the retention of significant botanical, zoological, geological, morphological, historical, archaeological or paleontological features respecting land or the conservation of soil, air and water quality".¹⁵⁰ Conservation easements may be granted to the federal or provincial Crown, a municipality or one of 12 agencies qualified as conservation holders.¹⁵¹ In return for signing a conservation easement, landowners may receive income tax deductions.¹⁵² Conservation easements must be registered

¹⁴⁵ Ibid.

¹⁴⁶ Canadian Parks Ministers' Council *Working together: Parks and protected areas in Canada* (2000) at 33.

¹⁴⁷ Ibid.

¹⁴⁸ Canadian Parks Ministers' Council (n146) at 34.

¹⁴⁹ Section 5 of the Conservation Easements Act.

¹⁵⁰ Section 4 of the Conservation Easements Act.

¹⁵¹ Section 6 of the Conservation Easement Act. The agencies referred to are non-profit conservation organizations and include Canadian Nature Federation; Ducks Unlimited Canada; Meewasin Valley Authority; Nature Conservancy of Canada; Nature Saskatchewan; Rocky Mountain Elk Foundation; Saskatchewan Agriculture, Food and Rural Revitalization; Saskatchewan Archaeological Society; Saskatchewan Environment; Saskatchewan Parks and Recreation Association; Saskatchewan Watershed Authority; Saskatchewan Wildlife Federation; Wakamow Valley Authority; Wascana Centre Authority.

¹⁵² Government of Saskatchewan 'Update on Conservation Easements' at <http://www.se.gov.sk.ca/exchange/winter99/easements.htm> (accessed 15 May 2005).

on title and exist either for a specified term or in perpetuity.¹⁵³ They may only be terminated by a written agreement between the holder and the registered owner of the land title against which the easement is registered or by application to the Court of the Queen's Bench.¹⁵⁴

Since the first conservation easement (365 hectares of land near Pangman) was signed in December 1997, 78 agreements involving 9 199 hectares had been signed by February 2007.¹⁵⁵

Conservation easements or covenants are also provided for under the *Heritage Property Act*, S.S., 1979-80, c. H-2.2. Under the Act, a landowner may enter into an "easement or covenant" for the protection of "heritage property".¹⁵⁶ Under the Act, only the Minister, the municipality in which the land is located or an organization approved by the Minister may hold a conservation easement or covenant.¹⁵⁷ No express provision is made for the duration of an easement or covenant in the legislation however perpetual agreements should be possible.¹⁵⁸

3.7 Manitoba

More than 90 per cent of southern Manitoba is privately owned and farmed.¹⁵⁹ Prior to the enactment of the *Conservation Agreements Act*, C.C.S.M., 1997, c. C173, conservation agencies were restricted to purchase or lease options for the conservation of these areas. These options were not satisfactory as outright purchase of land is very expensive and lease agreements do not afford long-term protection.¹⁶⁰

The Conservation Agreements Act provides a mechanism whereby landowners and conservation agencies can enter into an agreement for the protection and enhancement of natural ecosystems, wildlife or fisheries habitat, and plant and animal species while enabling the continued use and

¹⁵³ Section 3(2) of the Conservation Easement Act.

¹⁵⁴ Section 10 of the Conservation Easement Act.

¹⁵⁵ Saskatchewan Association of Rural Municipalities 'Conservation easements' at <http://www.sarm.ca/resolutionsdisp.php?viewby=resno&resno=35-02A> (accessed 1 December 2007).

¹⁵⁶ Section 59 of the Heritage Property Act. The Act defines 'heritage property' as "archaeological objects; palaeontological objects; or any property that is of interest for its architectural, historical, cultural, environmental, archaeological, palaeontological, aesthetic or scientific value".

¹⁵⁷ Section 59(1) of the Heritage Property Act.

¹⁵⁸ Atkins et al (n44) at 28.

¹⁵⁹ Manitoba Government 'New habitat conservation tool available to Manitobans: Conservation agreements provide new habitat protection opportunities on private land' (7 May 1999) at <http://www.gov.mb.ca/chc/press/top/1999/05/1999-05-07-04.html> (accessed 6 June 2005).

¹⁶⁰ Ibid.

development of the land by the landowner.¹⁶¹ The Act defines a conservation agreement as a written agreement between a landowner and a holder that creates a conservation interest in land.¹⁶² A holder refers to an eligible conservation agency that holds a conservation agreement and includes the Crown in right of Canada, the Crown in right of Manitoba, a federal provincial Crown corporation or agency, a municipality, a local government district, a conservation district established under the *Conservation Districts Act*, C.C.S.M., 1989-90, c. C175, a not-for-profit corporation that is incorporated under an Act of Parliament and a corporation without share capital that is incorporated under Part XXII of *Corporations Act*, C.C.S.M., 1987, c. C225.¹⁶³ The agreement is voluntary and the length of agreement is negotiable but does allow for long-term or perpetual protection of land.¹⁶⁴ The easement is registered against the title of the land¹⁶⁵ and unless removed at a later date by consent of the holder, remains on the title for the term specified in the agreement.¹⁶⁶

Manitoba's first conservation agreement was signed in May 1999 and covered an area of 35 acres of wetland and aspen parkland habitat.¹⁶⁷

In addition, *Heritage Resources Act*, C.C.S.M., 1985, c. H39.1, facilitates the protection and conservation of Manitoba's heritage resources through the use of heritage agreements. Under the Act, an owner of land believed to contain heritage resources or human remains may enter into an agreement with the Minister responsible for the administration of the Act, a municipality or any interested person, group, society, organization or agency.¹⁶⁸ Heritage resources may be either sites or objects or a combination of both.¹⁶⁹ Heritage agreements run with the land and bind all successive landowners.¹⁷⁰ The agreement may only be modified or provisions cancelled by a further heritage agreement which is then filed with the appropriate land titles or registry

¹⁶¹ Manitoba Conservation: Wildlife and Ecosystem Protection Branch 'The Conservation Agreements Act' at http://www.gov.mb.ca/conservation/wildlife/legislation/cons_act.html (accessed 29 May 2005).

¹⁶² Section 29(1) of the Conservation Agreements Act.

¹⁶³ Section 5 of the Conservation Agreements Act.

¹⁶⁴ Section 2(3) of the Conservation Agreements Act.

¹⁶⁵ Section 7(1) of the Conservation Agreements Act.

¹⁶⁶ Section 2(3) of the Conservation Agreements Act.

¹⁶⁷ Manitoba Government (n159).

¹⁶⁸ Section 21(1) of the Heritage Resources Act.

¹⁶⁹ Section 1 of the Heritage Resources Act. The Act defines 'heritage resource' as 'palaeontological, pre-historic, historic, cultural, natural, scientific or aesthetic features, and may be in the form of sites or objects or a combination thereof.'

¹⁷⁰ Section 21(1) of the Heritage Resources Act.

office.¹⁷¹ In addition, the Minister may effect modification or cancellation where he deems it advisable and the parties are unable to agree to modify or cancel provisions of the agreement.¹⁷²

More than 300 provincial and municipal sites have been designated under the legislation.¹⁷³

3.8 Ontario

The use of conservation easements in Ontario is currently enabled under the *Conservation Land Act*, R.S.O., 1990, c. C.28. The Act provides that an owner of land may grant an easement to or enter into a covenant with a “conservation body” for the conservation, maintenance, restoration or enhancement of all or a portion of land or wildlife on the land for the provision of access to land for the foregoing purposes.¹⁷⁴

By definition, a “conservation body” includes the Crown in right of Canada or in right of Ontario; an agency, board or commission of the Crown in right of Canada or in right of Ontario, a band as defined in the *Indian Act*, R.S.C., 1985, c. R-5 (Canada); the council of a municipality; a conservation authority; a corporation incorporated under Part III of the *Corporations Act*, C.C.S.M., 1987, c. C225, or Part II of the *Corporations Act* that is a charity registered under the *Income Tax Act (Canada)*, R.S.C., 1985, c. 1; a trustee of a charitable foundation that is a charity registered under the *Income Tax Act (Canada)*; or any person or body prescribed by the regulations.¹⁷⁵

No express provision is made on the duration of the easement or covenant however it is assumed that an interest may be granted either for a fixed term or in perpetuity.¹⁷⁶ The *Land Titles Act*, R.S.O., 1990, c. L.5., stipulates that where no time period is fixed for the restriction or covenant, the interest is deemed to expire 40 years after registration. It has been debated as to whether stating that an easement or covenant is granted “in perpetuity” is sufficient to prevent the

¹⁷¹ Section 21(2) of the Heritage Resources Act.

¹⁷² Section 21(3) of the Heritage Resources Act.

¹⁷³ Manitoba Government ‘Heritage sites and the Heritage Resources Act’ at <http://www.gov.mb.ca> (accessed 18 May 2005).

¹⁷⁴ Section 3(2) of the Conservation Land Act.

¹⁷⁵ Section 3(1) of the Conservation Land Act.

¹⁷⁶ Atkins et al (n44) at 36.

interest from expiring in 40 years and as a result some conservation lawyers specifically state that an easement is granted for a fixed term of X years, for example, 999 years.¹⁷⁷

The easement is registered against title to the affected land thereby binding all subsequent owners of the property to the conditions of the easement.¹⁷⁸ Termination of a conservation easement is provided for under the *Land Titles Act* which enables the holder of a conservation easement to file a release and discharge of interest.¹⁷⁹

The Ontario Heritage Act came into force in 1975 and has subsequently undergone several amendments.¹⁸⁰ The *Ontario Heritage Act*, R.S.O., 1990, c. O.18 aims to protect heritage buildings and archeological sites by empowering municipalities and provincial governments.¹⁸¹ Under the Act, the Ontario Heritage Foundation, the Minister of Culture or the municipality in which the land is located may enter into agreements, easements or covenants for the purpose of protecting heritage.¹⁸² The agreements are registered on the title to the property and although the legislation is silent on the duration of the agreement, perpetual agreements should be valid.¹⁸³ It should be noted though, that to bind subsequent owners of the land to the terms of the easement, the interest must be registered at the appropriate land titles office.¹⁸⁴ The Act does not address the modification or termination of the agreement. However as with easements and covenants registered under the *Conservation Land Act* in Ontario, statutory provisions of the *Land Titles Act* will most likely apply.¹⁸⁵

The Act also enables the establishment of the Ontario Heritage Foundation¹⁸⁶, a not-for-profit Crown agency of the Government of Ontario, which holds 22 built heritage sites and 130 natural heritage properties.¹⁸⁷

¹⁷⁷ Atkins et al (n44) at 39.

¹⁷⁸ Section 3(5) of the Conservation Land Act.

¹⁷⁹ Atkins et al (n44) at 40.

¹⁸⁰ Ontario Ministry of Culture 'Ontario Heritage Act, R.S.O. 1990, C. 0.18' at <http://www.culture.gov.on.ca/english/heritage/act.htm> (accessed 30 May 2005).

¹⁸¹ Ontario Heritage Trust 'What is the Ontario Heritage Act and how does it work?' at <http://www.heritagefdn.on.ca> (accessed 25 May 2005).

¹⁸² Section 10(b) of the Ontario Heritage Act.

¹⁸³ Atkins et al (n44) at 40.

¹⁸⁴ Section 22(1) and 37(2) of the Ontario Heritage Act.

¹⁸⁵ Atkins et al (n44) at 42.

¹⁸⁶ Section 5 of the Ontario Heritage Act.

¹⁸⁷ Ontario Heritage Trust (n181).

The *Agricultural Research Institute of Ontario Act*, R.S.O., 1990, c. A.13, enables the Agricultural Research Institute of Ontario to hold easements or covenants for the conservation, protection or preservation of agricultural lands.¹⁸⁸ The easement or covenant is registered against the title to the land thereby binding the owner and subsequent owners of the land to the terms of the easement.¹⁸⁹ Under the Act, the easement or covenant may only be modified or terminated by written agreement between the landowner and the Director of Research of the Agricultural Research Institute.¹⁹⁰

3.9 Quebec

In 1992, the Quebec government formally endorsed the Convention on Biological Diversity and began to draft a provincial biodiversity strategy.¹⁹¹ Various Acts, already in place, promoted the protection of biodiversity including the *Parks Act*, R.S.Q., 1978, c. P-9 and the *Ecological Reserves Act*, R.S.Q., 1974, c.R-26. The use of conservation easements, however, is enabled under the *Natural Heritage Conservation Act*, L.R.Q., 2002, c-61.01.

The Act aims to safeguard “the character, diversity and integrity of Québec's natural heritage through measures to protect its biological diversity and the life-sustaining elements of natural settings”.¹⁹² The Act provides that “any private property having significant biological, ecological, wildlife, floristic, geological, geomorphic or landscape features that warrant preservation may be recognized as a nature reserve on the application of the owner as provided in the Act”.¹⁹³ However, prior to recognizing the property as a nature reserve,¹⁹⁴ the landowner is required to enter into an agreement with the Minister of Environment or a non-profit conservation organization approved by the Minister.¹⁹⁵ The agreement includes, among other provisions, management agreements and conservation measures that will be applied to the

¹⁸⁸ Section 3(f)(i) of the *Agricultural Research Institute of Ontario Act*.

¹⁸⁹ Section 4.1(1) of the *Agricultural Research Institute of Ontario Act*.

¹⁹⁰ Section 4.1(5) of the *Agricultural Research Institute of Ontario Act*.

¹⁹¹ Quebec Biodiversity ‘Biodiversity conservation in Quebec’ at <http://redpath-museum.mcgill.ca/> (accessed 6 March 2005).

¹⁹² Section 1 of the *Natural Heritage Conservation Act*.

¹⁹³ Section 54 of the *Natural Heritage Conservation Act*.

¹⁹⁴ The *Natural Heritage Conservation Act* defines a ‘Nature Reserve’ as ‘land under private ownership recognized as a nature reserve because it has significant biological, ecological, wildlife, floristic, geological, geomorphic or landscape features that warrant preservation’.

¹⁹⁵ Section 57 of the *Natural Heritage Conservation Act*.

property.¹⁹⁶ The agreement must be registered with the land register¹⁹⁷ and runs with the land in perpetuity or for a specified period of at least 25 years¹⁹⁸ thereby binding both current and subsequent owners of the land to the terms of the agreement.¹⁹⁹ Although the Act specifies that the agreement may only be amended with the consent of all the parties²⁰⁰, it is silent with respect to the termination of the agreement.

3.10 New Brunswick

New Brunswick has an extensive conservation network with approximately 738 000 hectares of Crown Land and 56 000 hectares of privately owned land currently managed for the purpose of conservation.²⁰¹ A variety of mechanisms, including conservation easements and covenants, are used to secure relatively intact ecosystems which may be restored or rehabilitated if practical and necessary.²⁰² The province also supports two private land trusts: The Community Land Trust and the Nature Trust of New Brunswick.²⁰³ In 1998 the New Brunswick Government enacted the *Conservation Easement Act*, R.S.N.B., 1998, c. C-16.3, which provided a legal framework for these organizations to hold conservation easements.

The *Conservation Easement Act* defines a conservation easement as “a voluntary agreement entered into between the grantor of the conservation easement and the holder of the conservation easement” that grants rights and privileges to the holder of the conservation easement but may also impose obligations on the holder, grantor or subsequent owner of the land.²⁰⁴ The holder of the conservation easement includes the Crown in right of the Province or any agency of the Crown in right of the Province; the Crown in right of Canada or any agency of the Crown in right of Canada; a municipality or any agency of a municipality; a non-profit corporation that has as one of its primary purposes a purpose mentioned in the Act; any person, body or group or

¹⁹⁶ Section 57 of the Natural Heritage Conservation Act.

¹⁹⁷ Section 59 of the Natural Heritage Conservation Act.

¹⁹⁸ Section 57 and 54 of the Natural Heritage Conservation Act.

¹⁹⁹ Section 59 of the Natural Heritage Conservation Act.

²⁰⁰ Section 61 of the Natural Heritage Conservation Act.

²⁰¹ Canadian Parks Ministers' Council (n146) at 49.

²⁰² Department of Natural Resources *The Canadian biodiversity strategy and New Brunswick progress: Conservation and sustainable use* (n.d.).

²⁰³ Community Land Trust 'What we do' at <http://www.nbclt.org/whatwedo.htm> (accessed 2 June 2005) and Nature Trust of New Brunswick 'Welcome' at <http://www.naturetrust.nb.ca/main.php> (accessed 2 June 2005).

²⁰⁴ Section 2 of the Conservation Easement Act.

class of persons, bodies or groups eligible to hold an interest in land and prescribed by regulation.²⁰⁵

A landowner may enter into a conservation easement for any purpose specified in Section 3. These include, amongst others, the conservation of ecologically sensitive land; the protection, enhancement or restoration of natural ecosystems; the protection or restoration of wildlife habitat or wildlife and the conservation of habitat of rare or endangered plant or animal species.²⁰⁶ The easement is registered with the property deed²⁰⁷ and has effect for a fixed term or in perpetuity.²⁰⁸ The interest may only be amended or terminated by written agreement between the landowner and easement holder, by order of the court, or by any person that the court determines has sufficient interest where the easement holder has died or ceased to exist.²⁰⁹

Easements and covenants are also enabled under the *Historic Sites Protection Act*, R.S.N.B., 1973, c. H-6., however these agreements may only be entered into for sites that are designated historic sites. Under the Act, the Minister or any other individual, may enter into an easement or covenant with respect to an historic site with the owner of the land on which the site is located.²¹⁰ The easement or covenant is registered against the title of the property and is binding on future owners of the site.²¹¹ Thus far, only a few owners of Provincial Historic Sites have entered into such agreements.²¹²

3.11 Nova Scotia

Almost 70 percent on Nova Scotia is privately owned, but less than 0.1 percent of the province has been formally protected on private land.²¹³ Several provincial statutes enable private land protection including the *Special Places Protection Act R.S.N.S., 1989, c.438, s. 1.*, the *Provincial Parks Act R.S.N.S. 1989, c. 367*, the *Wilderness Areas Protection Act*, S.N.S., 1998, c. 27, the

²⁰⁵ Section 5 of the Conservation Easement Act.

²⁰⁶ Section 3 of the Conservation Easement Act.

²⁰⁷ Section 6 of the Conservation Easement Act.

²⁰⁸ Section 2(2) of the Conservation Easement Act.

²⁰⁹ Section 8 and 10 of the Conservation Easement Act.

²¹⁰ Section 2.1(1) of the Historic Sites Protection Act.

²¹¹ Section 2.1(2) of the Historic Sites Protection Act.

²¹² Government of New Brunswick 'Heritage places: What about easements or covenants?' at http://www.gnb.ca/0007/Heritage/Programs/heritage_places/recognb-e.asp (accessed 2 June 2005).

²¹³ Voluntary Planning Heritage Strategy Task Force *Our heritage future - a shared responsibility: Recommendations for Nova Scotia's heritage strategy* (2006) at 30.

Conservation Easements Act, S.N.S., 2001, c.28²¹⁴, c. 28, the *Beaches Act*, R.S., 1989, c. 32, s.1, and the *Trails Act R.S.N.S. 1989, c. 476*.

Under the *Conservation Easements Act*, a landowner may enter into a conservation easement with an easement holder for the purpose of protecting, restoring or enhancing land that meets any criteria specified in section 4 of the Act.²¹⁵ The 2001 Act improved on the existing legislation insofar as the Act was extended to include municipalities, the federal government and other organizations named in the regulations as eligible easement holders.²¹⁶ In addition, the 2001 Act eliminated the need for conservation organizations to obtain provincial designation of properties as “natural areas” before entering into a conservation easement.

The easement is registered with the property deed and binds all successive owners of the land to the restrictions of the agreement for a fixed term or in perpetuity.²¹⁷ The agreement may be enforced by an action in the Supreme Court of Nova Scotia by either the holder or the grantor of the conservation easement.²¹⁸ The interest may only be terminated or amended by written agreement between the easement holder and the owner.²¹⁹

The *Conservation Easements Act* has, however, a number of unresolved issues including a lack of clarity on the tax benefits for donors and the fact that properties protected by conservation easements may still be subject to mineral exploration and development.

The *Heritage Property Act*, R.S.N.S., 1989, c. 199 provides for “the identification, designation, preservation, conservation, protection and rehabilitation of buildings, structures, streetscapes, areas and districts of historic, architectural or cultural value, in both urban and rural areas, and to encourage their continued use”.²²⁰ Under the Act, the Minister may enter into an agreement with

²¹⁴ The Conservation Easements Act S.N.S. 2001 replaced the Conservation Easements Act S.N.S. 1992, c. 2.

²¹⁵ Section 4 of the Conservation Easement Act. Permissible purposes include protecting, restoring or enhancing land that (i) contains natural ecosystems or constitutes the habitat of rare, threatened or endangered plant or animal species, (ii) contains outstanding botanical, zoological, geological, morphological or palaeontological features, (iii) exhibits exceptional and diversified scenery, (iv) provides a haven for concentrations of birds and animals, (v) provides opportunities for scientific or educational programs in aspects of the natural environment, (vi) is representative of the ecosystems, landforms or landscapes of the Province, or (vii) meets any other purpose prescribed by the regulations.

²¹⁶ Section 8 of the Conservation Easements Act 2001.

²¹⁷ Section 5(1) of the Conservation Easements Act 2001.

²¹⁸ Section 15(1) of the Conservation Easements Act 2001.

²¹⁹ Section 9 of the Conservation Easements Act 2001.

²²⁰ Section 2 of the Heritage Property Act.

an owner of “provincial heritage property”, and a municipal council may enter into an agreement with the owner of “municipal heritage property” for the preservation and protection of the property.²²¹ These Heritage Properties may include some lands with conservation values. The agreements run with the land and registration involves a considerable process.²²² The legislation is silent on whether an easement or covenant may be granted for a fixed term or in perpetuity although presumably agreements may be granted for either.

There are currently 266 provincially designated Heritage Properties in Nova Scotia.²²³

3.12 Prince Edward Island

Prince Edward Island (PEI) is unique in Canada in that approximately ninety percent of the land is privately owned with the remaining ten per cent owned by either the Federal or Provincial government.²²⁴ The remaining natural areas on the island are also largely in private hands and as a result a variety of private stewardship programs have been established.²²⁵

The *Natural Areas Protection Act*, R.S.P.E.I. 1988, c. N-2 aims to preserve natural areas in the province. The Act allows the responsible Minister to designate private land (with the landowners consent) as a “natural area”²²⁶ once long-term or permanent protection (in the form of a lease, landowner agreement or restrictive covenant) has been voluntarily put in place by the landowner.²²⁷ Under the Act, a landowner may impose a restrictive covenant on his or her land by entering into an agreement with the Minister or any other person designated to hold a restrictive covenant under the Act.²²⁸ The restrictive covenant may be registered as a deed under

²²¹ Section 20(1) of the Heritage Property Act.

²²² Sections 20(2) and (3) of the Heritage Property Act.

²²³ ML Haritgan (Nova Scotia Government) Personal communication on 12 November 2007.

²²⁴ Prospectors and Development Association of Canada ‘Land description’ at <http://www.pdac.ca/pdac/advocacy/land-use/pa-pei.html> (accessed 5 June 2005).

²²⁵ Island Nature Trust ‘Private stewardship’ at <http://www.islandnaturetrust.ca/steward.html> (accessed 7 June 2005).

²²⁶ Under Section 1 of The Natural Areas Protection Act, ‘natural area’ is defined as a ‘parcel of land designated as such under natural area section 3 that (i) contains natural ecosystems or constitutes the habitat of rare, endangered or uncommon plant or animal species,(ii) contains unusual botanical, zoological, geological, morphological or palaeontological features, (iii) exhibits exceptional and diversified scenery, (iv) provides haven for seasonal concentrations of birds and animals, or (v) provides opportunities for scientific and educational programs in aspects of the natural environment.

²²⁷ Section 3(1)(c) of the Natural Areas Protection Act.

²²⁸ Sections 4 and 5 of the Natural Areas Protection Act.

the *Registry Act*, R.S.P.E.I., 1988, c. R-10²²⁹ and runs with the land, binding current and subsequent owners to the conditions of the covenant.²³⁰ The Act authorises Cabinet to make regulations which dictate the activities which are prohibited in natural areas and establishes penalties for the violation of the regulations.²³¹ The legislation is silent with respect to the termination or modification of the restrictive covenant.

The *Wildlife Conservation Act*, R.S.P.E.I., 1988, c. W-4 prohibits the killing or possessing of listed endangered or threatened species, their trade and the destruction of their habitat.²³² The Act enables the responsible Minister to enter into an agreement with a private landowner for the purpose of protecting wildlife habitat.²³³ Under Section 18(2) of the Act, the agreement may impose a conservation covenant or easement in respect of the land owned by the private landowner.²³⁴ The agreement is registered as a deed under the *Registry Act*, R.S.P.E.I., 1988, c. R-10²³⁵ and runs with the land thereby binding both the current landowner and his or her successors in title²³⁶ either for a specified period of time or in perpetuity.²³⁷ The Act is silent with respect to the termination or modification of a conservation easement or covenant.

The *Museum Act*, R.S.P.E.I. 1988, c. M-1.4 enables any landowner in Prince Edward Island, who wishes to impose limitations or restrictions on the use of his or her land and the structures thereon, to enter into an agreement with the Prince Edward Island Museum or the Heritage Foundation.²³⁸ The agreements take the form of covenants or easements and must be worded in a manner prescribed by the Board of Governors of the Museum.²³⁹ Covenants and easements established under the *Museum Act* must be registered in the registry of deeds for the county in which the land is located.²⁴⁰ The agreement runs with the land and is enforceable against both

²²⁹ Section 5(2)(c) of the Natural Areas Protection Act.

²³⁰ Section 5(2)(c)(i) of the Natural Areas Protection Act.

²³¹ Section 7 of the Natural Areas Protection Act.

²³² Section 7(4) of the Wildlife Conservation Act.

²³³ Section 18(1) of the Wildlife Conservation Act.

²³⁴ Section 18(2) of the Wildlife Conservation Act.

²³⁵ Section 18 (4)(f) of the Wildlife Conservation Act.

²³⁶ Section 18 (4)(a) of the Wildlife Conservation Act.

²³⁷ Section 18 (4)(e) of the Wildlife Conservation Act.

²³⁸ Section 11(1) of the Museum Act.

²³⁹ Section 11(3) of the Museum Act.

²⁴⁰ Section 11(4) of the Museum Act.

current and subsequent owners of the land.²⁴¹ The Museum²⁴² may, with or without, the consent of the landowner, cancel the agreements, but only under circumstances prescribed by law made by the Board of Governors of the Museum.²⁴³

The *Heritage Places Protection Act*, R.S.P.E.I., 1988, c. H-3.1 promotes the understanding and appreciation of heritage places²⁴⁴ and enables the creation and use of mechanisms to ensure that public views in respect of heritage conservation are secured and public participation is enhanced.²⁴⁵ The Act empowers the Lieutenant Governor in Council to establish regulations for heritage and encourage the conservation of heritage places.²⁴⁶ To this end, the Act enables an owner of property of heritage significance to enter into an easement or restrictive covenant with a conservation or heritage organization approved by the Minister.²⁴⁷ The provisions of subsections 11(3) to (7) of the *Museum Act* discussed above apply to easements and restrictive covenants entered into under the *Heritage Places Protection Act*.²⁴⁸

3.13 Newfoundland and Labrador

Newfoundland and Labrador has no specific conservation easement legislation, but covenants and easements for the protection of historic resources are enabled under the *Historic Resources Act*, R.S.N.L., 1990, c. H-4. The Act defines “historic resources” as “a work of nature or of humans that is primarily of value for its archaeological, prehistoric, historic, cultural, natural, scientific or aesthetic interest, including an archaeological, prehistoric, historic or natural site, structure or object.”²⁴⁹ The definition is thus broad enough to include lands which may have some conservation value.

Under the Act the Minister, a municipal authority in the area in which the property is situated, a heritage or historical organization approved by the Minister or the foundation that has as its

²⁴¹ Section 11(1) of the Museum Act.

²⁴² The Museum Act defines “Museum” as Prince Edward Island Museum and Heritage Foundation.

²⁴³ Section 11(7) of the Museum Act.

²⁴⁴ The *Heritage Places Protection Act* defines ‘Heritage place’ as a place in the province which is comprised of an historic resource of an immovable nature. ‘Historic Resource’ means any work of nature or of man that is primarily of value for its palaeontological, archaeological, prehistoric, historic, cultural, natural, scientific or aesthetic interest.

²⁴⁵ Sections 3(2)(d) and (e) of the *Heritage Places Protection Act*.

²⁴⁶ Section 6 of the *Heritage Places Protection Act*.

²⁴⁷ Section 10(1) of the *Heritage Places Protection Act*.

²⁴⁸ Section 10(2) of the *Heritage Places Protection Act*.

²⁴⁹ Section 2(e) of the *Historic Resources Act*.

purpose the protection of an historic resource or architectural characteristic, is eligible to hold an easement or covenant.²⁵⁰ The agreement is registered against the title of the property²⁵¹ however the legislation is silent on the duration of the interest although perpetual agreements should be possible. The legislation does not state how an easement or covenant may be terminated and only briefly addresses enforcement insofar as saying that the holder of an easement may enforce it.²⁵²

3.14 Yukon

Although approximately 80% of Yukon is classified as wilderness, only 9% of the territory has some form of protected status.²⁵³ Yukon's *Environment Act*, R.S.Y., 2002, c. 76 is a comprehensive statute which regulates environmental planning and assessment. Conservation easements are enabled under sections 76 to 80 of this Act. "Conservation easement" is defined as an interest in real property which imposes restrictions or positive obligations for any purpose specified in the Act.²⁵⁴ Under the Act, a landowner may grant a conservation easement to a holder²⁵⁵ which includes any government body empowered to hold an interest in real property under the laws of Yukon or the Parliament of Canada, a charitable corporation, association or trust, the purposes or powers of which are included in the definition of "conservation easement".²⁵⁶ Under the *Land Titles Act*, S.Y., 1991, c. 5, the interest must be registered and runs with the land.²⁵⁷ The Act is silent on the modification or termination of the interest.

3.15 Northwest Territories

At present, there is no legislation enabling conservation easements in the Northwest Territories. The *Historic Resources Act*, R.S.N.W.T., 1988, c. H-3, however, aims to protect and conserve culturally and historically significant sites and artefacts. To this end, the Act authorises the Commissioner of the Northwest Territories to enter into an agreement with any person respecting the establishment of museums or for making or commemorating historic places under

²⁵⁰ Section 30(1) of the Historic Resources Act.

²⁵¹ Section 30(2) of the Historic Resources Act.

²⁵² Section 30(2) of the Historic Resources Act.

²⁵³ Environment Canada and Yukon Department of Renewable Resources *Yukon State of Environment Report 1995* (1996) at 4.

²⁵⁴ Section 2 (Definitions) of the Environment Act.

²⁵⁵ Section 77(1) of the Environment Act.

²⁵⁶ Section 2 (Definitions) of the Environment Act.

²⁵⁷ Section 77(2) of the Environment Act.

the Act for their care and preservation.²⁵⁸ The Act fails to define the terms “historic place” or “historic resource” and no designation or acquisition process is detailed.

3.16 Nunavut

Currently, there is no legislation authorising conservation easements in Nunavut. However, the ordinances of the Northwest Territories, as of April 1 1999, including the *Historic Resources Act*, R.S.N.W.T., 1988, c. H-3, outlined above, can apply in relation to Nunavut.²⁵⁹

²⁵⁸ Section 2(c) of the Historical Resources Act.

²⁵⁹ Atkins et al (n44) at 67.

CHAPTER FOUR

AUSTRALIA

4.1 Background

Australia, one of the largest countries in the world,²⁶⁰ lies in the Indian Ocean, South East of Asia.²⁶¹ Many of the species which inhabit this land mass have evolved in relative isolation since the separation of the continent of Australia from Gondwanaland approximately 40 million years ago.²⁶² The landmass itself has a number of unique characteristics: the lowest rainfall, the fewest rivers and the most runoff of any inhabited continent.²⁶³ Much of the fauna and flora of Australia have adapted and developed in response to this distinctive geological and climatic environment, resulting in numerous endemic species including 85% of their flowering plants, 84% of their mammals, 45% of their birds, 89% of their reptiles and 93% of their frogs.²⁶⁴ In total Australia is home to 20 000 flowering plants, 268 mammals and 777 birds²⁶⁵ rendering it one of 11 biologically mega-diverse countries of the world.²⁶⁶

Australia's plant and animal species are among the world's most threatened, predominantly because of land clearance and consequent habitat loss, degradation and fragmentation fuelled by rapid population growth.²⁶⁷ Calculations depict the continent's plant species as comprising 20 percent of the world's total of presumed extinct species and 15 percent of the world's threatened species²⁶⁸ whilst more than one hundred mammal species are considered endangered, vulnerable or potentially vulnerable.²⁶⁹ In addition, 70 percent of ecosystems have been substantially

²⁶⁰ L Sealey (ed) *The MacMillan Childrens Encyclopedia* (1986) at 730.

²⁶¹ P Burgess (ed) *The World Almanac and book of facts 1993* (1993) at 426.

²⁶² D Yencken and D Wilkinson *Resetting the Compass - Australia's Journey towards sustainability* (2000) at 4.

²⁶³ *Ibid.*

²⁶⁴ State of Environment Advisory Council *Australia State of the Environment 1996* (1996) at 4-4.

²⁶⁵ State of Environment Advisory Council (n264) at 4-34.

²⁶⁶ L Thomas *New tools for old: Mechanisms for protection of natural heritage value on private land in WA* (2001) at 1.

²⁶⁷ State of Environment Advisory Council (n264) at 4-49.

²⁶⁸ Yencken and Wilkinson (n262) at 4.

²⁶⁹ The International Union for the Conservation of Nature and Natural Resources (IUCN) uses eight categories to describe the conservation status of the world's species and subspecies. These include extinct, extinct in the wild, critically endangered, endangered, vulnerable (the latter three categories cumulatively fall into the broader 'threatened' category) lower risk, data deficient and not evaluated.

altered and 20 percent almost totally modified²⁷⁰ leading Australian conservation authorities to declare that “the state of species diversity in Australia...is cause for national concern”.²⁷¹

4.2 History

The value of ecosystems is increasingly recognized and many landowners have a deep sense of commitment to conserving and protecting their bushland. This is significant, as almost 63 percent (4.8 million hectares) of all land in Australia is privately owned, whilst only 23 percent is publicly owned and the remainder owned by Aboriginal and Torres Straight Islanders.²⁷² Until the last decade, few organizations existed which were able to assist landowners in protecting the conservation values of their properties leaving landowners dependent on their own resources and ingenuity.²⁷³

The use of covenants to protect land in Australia is a relatively new concept, which originated in South Australia in the early 1970's. During this period, clearance of native vegetation throughout Australia was encouraged by the State Governments and it was only in 1977 that a committee was established to investigate the extent of the clearance and discovered that over 75% of native vegetation had been eradicated.²⁷⁴ In 1980, in an effort to combat the problem, the South Australian Government attempted to foster an interest in on-property biological conservation through the introduction of Voluntary Heritage Agreements.²⁷⁵ Under these agreements landholders who conserved areas of native vegetation could be considered for a variety of incentives including rate rebates and subsidies for fencing costs. Between 1980 and 1982, incentive payments totalling \$450 000 were made for 170 agreements covering approximately 15 000 hectares.²⁷⁶ In 1985, after much contention with the farming community, the Government introduced the *Native Vegetation Management Act 1985* which provided for a landholder to receive financial assistance because he or she had been refused clearance in return for signing a Heritage Agreement and meeting specific conditions.²⁷⁷ During 1985 to 1991 these

²⁷⁰ Yencken and Wilkinson (n262) at 184.

²⁷¹ State of Environment Advisory Council (n264) at 4-30.

²⁷² Australian Natural Resource Atlas 'Australians and natural resource management' at <http://www.anra.gov.au/topics/economics/pubs/national/anrm-report/scene.html> (accessed 18 December 2007).

²⁷³ Thomas (n266) at 1.

²⁷⁴ Binning and Young (n54) at 38.

²⁷⁵ Denys Slee and Associates *Remnant native vegetation – perceptions and policies: A review of legislation and incentive programs* (1998) at 24.

²⁷⁶ *Ibid.*

²⁷⁷ Binning and Young (n54) at 38.

conditions were modified and in 1991 the *Native Vegetation Act 1991* replaced the *Native Vegetation Management Act 1985*.²⁷⁸ Each State and Territory followed a national trend to control land clearing, and legislation, which enabled the protection of flora through the use of conservation agreements, was introduced in Victoria in 1989, Western Australia in 1995, New South Wales in 1997 and Queensland in 2000.²⁷⁹ Since then, various land management objectives in the majority of Australian States have been attained as a result of government agencies and landholders registering statutory covenants on land title.

4.3 New South Wales

New South Wales has the second highest proportion of land in Australia under private ownership, with 89 per cent of the state comprising either private freehold or leasehold (Crown) land.²⁸⁰ Until recently, conservation covenants were an underexploited conservation tool in New South Wales. Initially, covenants were only available as Voluntary Conservation Agreements under Section 69 of the *National Parks and Wildlife Act 1974*. This Act enables local councils, lessees of Crown land and owners of freehold land to enter into a voluntary conservation agreement with the Minister of Environment.²⁸¹ The agreement is a statutory covenant, which is voluntary on both parties but once entered into is registered on land title, legally enforceable and binds all future landholders.²⁸² It may run in perpetuity or for a specified period of time and may only be terminated by consent of all parties.²⁸³ Landowners entering into such an agreement are encouraged to establish a management plan for the area covered by the covenant which is reviewed every five years, and there is an annual site visit.²⁸⁴ The National Parks and Wildlife Service co-ordinates the establishment of these agreements and the terms of the contract are enforceable in the Land and Environment Court. There is no automatic compensation under the Act, however landowners may receive limited financial support for costs associated with

²⁷⁸ Denys Slee and Associates (n275) at 24.

²⁷⁹ Queensland Statutory Covenants Working Group *Statutory covenants: Guidelines for their use in Queensland* (2003) at 1.

²⁸⁰ N Byron, P Holland and M Scheule *Constraints on private conservation: Some challenges in managing Australia's tropical rainforests* (2001) at 5.

²⁸¹ Section 69B of the National Parks and Wildlife Act.

²⁸² Section 69E of the National Parks and Wildlife Act.

²⁸³ Section 69D of the National Parks and Wildlife Act.

²⁸⁴ Environmental Defender's Office New South Wales 'Fact Sheet 5.3: Conservation on private land' at <http://www.edo.org.au/edonsw/site/default.php> (accessed 2 February 2006).

entering into an agreement²⁸⁵ as well as on-ground assistance with management activities.²⁸⁶ Under the *Local Government Amendment Act 1997*, land subject to a conservation agreement under the *National Parks and Wildlife Act 1974* is exempt from all rates and charges.²⁸⁷

On 1 January 1998, the *Native Vegetation Conservation Act 1997* came into force and enabled landowners to enter into a Registered Property Agreement: a covenant between the landholder and the Department of Land and Water Conservation.²⁸⁸ The agreement provides for the conservation of specific areas and may assist the landowners with financial services for that purpose.²⁸⁹ The agreement is registered on title and is binding on current and future titleholders.²⁹⁰

Although the broader community shared the benefits of the conservation outcomes from much of the legislation, the enormous economic implications and costs rested almost entirely on the New South Wales farmers. This resulted in the formation of the New South Wales Nature Conservation Trust, which aims at shifting the focus of conservation towards voluntary activities and providing economic incentives to farmers who participate in conservation initiatives.²⁹¹ The Nature Conservation Trust was established under the *Nature Conservation Trust Act 2001* and functions independently of government with funding provided predominantly through philanthropy and industry investment.²⁹²

²⁸⁵ Section 69C(3) of the National Parks and Wildlife Act. Funding is sourced from allocated funds at the discretion of the NSW NPWS. See C Binning and M Young *Motivating people: Using management agreements to conserve remnant vegetation* (1997) at 9.

²⁸⁶ These include fencing, vegetation and fauna surveys, rehabilitation of remnant vegetation, aerial photos, signs, weed and feral animal control. See Denys Slee and Associates (n275) at 22.

²⁸⁷ E Cripps, C Binning and M Young *Opportunity denied: Review of the legislative ability of local governments to conserve native vegetation* (1999) at 54.

²⁸⁸ Section 40 of the Native Vegetation Conservation Act.

²⁸⁹ Section 41-42 of the Native Vegetation Conservation Act.

²⁹⁰ Sections 44 of the Native Vegetation Conservation Act.

²⁹¹ Nature Conservation Trust of New South Wales at <http://www.naturetrust.org.au/> (accessed 12 February 2006).

²⁹² NSW Nature Conservation Trust was established after more than twelve months of co-operation between the NSW Farmers' Association, World Wide Fund for Nature, Nature Conservation Council, National Parks and Wildlife Service and the Department of Land and Water Conservation. See New South Wales National Parks and Wildlife Service 'Nominations called for new Nature Conservation Trust' at <http://www.nationalparks.nsw.gov.au/npws.nsf/Content/Nominations+called+for+new+Nature+Conservation+Trust> (accessed 12 February 2006).

The Trust's primary function is to establish a revolving fund, which facilitates the purchase of land for conservation.²⁹³ A covenant is registered on title to offer permanent protection after which the property is on-sold. The proceeds of the sale are then used to revolve the fund.²⁹⁴ The trust may also enter into agreements with landholders,²⁹⁵ which are voluntary but are attached to the title of the land thereby binding subsequent owners.²⁹⁶ The agreements may provide for technical and financial support.²⁹⁷

Covenants, for the specific purpose of biodiversity conservation, may also be negotiated under the *Environment Protection and Biodiversity Act 1999*. The Minister may enter into conservation agreements with indigenous peoples, corporations wholly owned by indigenous persons and corporations and trustees holding land for the benefit of indigenous peoples.²⁹⁸ The agreement is voluntary but once signed is binding on all successors in title.²⁹⁹

4.4 Queensland

The significance of private sector control over land is particularly prominent in Queensland, where 91 per cent of land is either private freehold or leasehold (Crown) land.³⁰⁰ The *Nature Conservation Act 1992* provides the legislative basis for establishing nature refuges in areas of freehold, leasehold and state land.³⁰¹ Under this Act, formal conservation agreements are administered by the Queensland Parks and Wildlife Services and may be negotiated between the Minister and the landowner.³⁰² The management needs of the area determine the complexity of the agreement: they may be directed at protecting a particular species or they may be comprehensive³⁰³ and consequently a management plan will generally be incorporated into the

²⁹³ Section 7 of the Nature Conservation Trust Act.

²⁹⁴ The National Trust of Western Australia '*The Revolving Fund Concept - keys to a successful operation*' at <http://www.ntwa.com.au/> (accessed 26 January 2005).

²⁹⁵ Section 30(1) of the Nature Conservation Trust Act.

²⁹⁶ Section 37 of the Nature Conservation Trust Act.

²⁹⁷ Section 33(g) of the Nature Conservation Trust Act.

²⁹⁸ Section 305(5) of the Environment Protection and Biodiversity Act.

²⁹⁹ Section 307 of the Environment Protection and Biodiversity Act.

³⁰⁰ This is the highest proportion of privately owned land of any state in Australia. See Byron et al (n280) at 4.

³⁰¹ Queensland Government Environmental Protection Agency/Queensland Parks and Wildlife Service 'Nature refuge information sheet' at http://www.epa.qld.gov.au/nature_conservation/nature_refuges/information_sheets/nature_refuge_information_sheet/ (accessed 15 February 2006).

³⁰² Section 45(1) of the Nature Conservation Act.

³⁰³ Denys Slee and Associates (n275) at 43.

agreement.³⁰⁴ The agreements may either be for a fixed duration or permanent and registered on the land title.³⁰⁵ They are binding on the landholder and all successive purchasers.³⁰⁶ There are no express financial benefits resulting from establishing a Nature Refuge³⁰⁷, however, under the *Local Government Act 1993*, local councils have provided various incentives including rate relief.³⁰⁸ In 2002, there were 73 nature refuges in place protecting an area of 35,000 hectares.³⁰⁹ Byron *et. al.* note that although this programme has distinct benefits, it would be useful for Queensland to establish an organisation similar to that of Victoria's Trust for Nature.³¹⁰ Queensland is currently in the process of establishing such an organization.³¹¹

Covenants may also be registered on the land title or lease of freehold or leasehold land under the *Land Titles Act 1994*³¹² and the *Land Act 1994*.³¹³ These common law covenants however, are restricted to tying two or more parcels of land together and cannot be used as a mechanism to protect vegetation in Queensland.³¹⁴

4.5 Victoria

The Victorian Department of Sustainability and Environment,³¹⁵ together with the Trust for Nature are responsible for the administration of programmes encouraging conservation on private land. Conservation covenants, termed Land Management Cooperative Agreements, are negotiated by the Department of Sustainability and Environment under the *Planning and Environment Act 1987* as amended by *The Planning and Environment (Restrictive Covenants)*

³⁰⁴ Section 45(6)(l) of the Nature Conservation Act.

³⁰⁵ Section 47 of the Nature Conservation Act. The duration of the agreement for land that is held under a term lease can only be for the term of the lease or shorter, whereas in the case of freehold land or land subject to a perpetual lease, the agreement may be in perpetuity.

³⁰⁶ Section 51 of the Nature Conservation Act.

³⁰⁷ Providing certain conditions are met the land purchaser may be eligible for reimbursement of the transfer duty paid on the purchase of the land and reimbursement of land tax. See Queensland Government: Office of State Revenue 'Conservation agreements – transfer duty and land tax' (2004) 18 *Revenue Queensland* 1 at 7.

³⁰⁸ Rate relief is provided at the discretion of the local councils. See J Robinson and S Ryan *A review of economic instruments for environmental management in Queensland* (2002) at 19.

³⁰⁹ Robinson and Ryan (n308) at 21.

³¹⁰ Byron et al (n280) at 8.

³¹¹ Binning and Young (n54) at 26.

³¹² Section 97(a) of the Land Titles Act.

³¹³ Section 373(a) of the Land Act.

³¹⁴ Cripps et al (n287) at 43.

³¹⁵ Formerly known as the Victorian Department of Natural Resources and Environment.

Act 2000.³¹⁶ The agreement is registered on title and can “prohibit, restrict or regulate the use or development of land”.³¹⁷ A copy of the agreement is lodged with the Minister³¹⁸ and binds all successive landholders.³¹⁹ The Act also enables local councils to purchase and sell land.³²⁰

Land Management Cooperative Agreements may also be negotiated under the *Conservation, Forests and Lands Act 1987*. These agreements relate to the management, use, development and conservation of the land in question and can contain terms, which require the landowner or Director-General to engage in particular management practises promoting the conservation of vegetation.³²¹ The covenant is registered on title, is binding in perpetuity³²² and may only be revoked by an order of the Supreme Court.³²³ Financial assistance and rate relief may be payable to a landowner in return for entering into the agreement.³²⁴

Conservation covenants are actively promoted by the Trust for Nature³²⁵ and may be negotiated under the *Victorian Conservation Trust Act 1972*. The Trust for Nature was originally established as the Body Corporate under Section 2 of the Act and received funding from both the government and public donation which allowed for the purchase of Victoria’s threatened privately owned bush. Amendment of the Act in 1978 allowed significant areas of natural bushland to be permanently protected by enabling landowners to voluntarily place conservation covenants on their land.³²⁶

³¹⁶ Department of Planning and Community Development ‘Restrictive covenants’ at <http://www.dse.vic.gov.au/DSE/nrenpl.nsf/LinkView/2BF3571C1C8563DFCA256D480003CF45BEA6C84AE71808E0CA25730600829CDF> (accessed 6 March 2006).

³¹⁷ Section 174 of the Planning and Environment Act.

³¹⁸ Section 179 of the Planning and Environment Act.

³¹⁹ Section 182 of the Planning and Environment Act.

³²⁰ Section 171 of the Planning and Environment Act.

³²¹ Section 69 of the Forest and Land Act.

³²² Section 71 of the Forest and Land Act.

³²³ Section 72 of the Forest and Land Act.

³²⁴ Section 75 of the Forest and Land Act.

³²⁵ Formerly known as The Victorian Conservation Trust, the TFN is a non-profit organization, which aims to protect remnant bushland and promote nature conservation on private land.

³²⁶ Trust for Nature ‘Private policy’ at <http://www.trustfornature.org.au/content.asp?PageId=77> (accessed 8 March 2006).

A covenant may be entered into only with the Minister's approval,³²⁷ is registered on the title of the property and is binding on subsequent landholders.³²⁸ All legal costs associated with entering into a covenant are covered by the Trust, however a once-off donation, of \$3000 per property is required to fund continuous monitoring and management of the covenant by the Trust.³²⁹ By 2006-07 the Trust held more than 800 covenants covering more than 35 000ha of land across Victoria.³³⁰

In addition to having the power to enter a binding covenant on private land through conservation agreements, the Trust also has the power to hold, buy and sell real property. In 1989, the Revolving Fund was established which facilitated the purchase of conservation significant land.³³¹ A covenant is then placed on the property, which stipulates allowable and prohibited activities, thereafter the property is sold to a private owner who is bound by the covenant. The capital obtained from the sale of the property is used to purchase further lands and the process is repeated.³³² Between 1992 and 2002 the Fund was successful in purchasing, covenanting and re-selling over 500 hectares of land with a government grant of only \$250 000³³³ and by 2003 had a total of 34 properties covering 2638 hectares.³³⁴

4.6 South Australia

The *Native Vegetation Act 1991* retains the Heritage Agreement scheme, initiated under the *Native Vegetation Management Act 1985*, but removes the guaranteed right to financial assistance.³³⁵ The aims of the Act are detailed in Section 6 and include the provision of incentives and assistance to landowners in relation to the preservation, enhancement and management of native vegetation.³³⁶ This is achieved, in part, through the establishment of a

³²⁷ Section 3A(1) of the Victorian Conservation Trust Act.

³²⁸ Section 3A(11) of the Victorian Conservation Trust Act.

³²⁹ C Binning and M Young *Motivating people: Using management agreements to conserve remnant vegetation* (1997) at 10.

³³⁰ P Figgis *Conservation on private lands: The Australian experience* (2004) at 19.

³³¹ Trust for Nature 'Covenanting Program' at <http://www.trustfornature.org.au/content.asp?PageId=29> (accessed 19 December 2007).

³³² M Carter *A revolving fund for biodiversity conservation in Australia* (2002) at 3.

³³³ Carter (n332) at 25.

³³⁴ Figgis (n330) at 19.

³³⁵ Cripps et al (n287) at 111.

³³⁶ Section 6(a) of the Native Vegetation Act

Native Vegetation Fund, which provides financial assistance³³⁷ and pays the fencing costs of Heritage Agreements in full. A landowner may enter into a Heritage Agreement with the Minister: a statutory covenant, which is attached to the land title and is binding on all current and successive landowners.³³⁸ The agreement may only be amended or terminated with the consent of the Native Vegetation Council.³³⁹ The Heritage Agreement can contain “any provision for the preservation and enhancement of native vegetation”³⁴⁰ which may include restriction of the use of land and preparation of a management plan agreed upon by both the landowner and the Minister.³⁴¹ The Native Vegetation Council keeps all Heritage Agreements, and any alterations or terminations of the agreements, on a register.³⁴² By 2002 there were over 1266 agreements, involving 1000 landholders and protecting 561 802 hectares of bushland.³⁴³

Heritage agreements may also be established under the *Heritage Act 1993*.³⁴⁴ The Act is administered by a State Heritage Authority³⁴⁵ and enables a landowner of a registered place or State heritage area³⁴⁶ to enter into a Heritage Agreement with the Minister.³⁴⁷ The agreement is registered on the title of land³⁴⁸ and is binding on the current landowner.³⁴⁹ The agreement details provisions which ‘promote the conservation of registered places and State Heritage Areas

³³⁷ Section 21 of the Native Vegetation Act.

³³⁸ Section 23 of the Native Vegetation Act.

³³⁹ Section 23(5) of the Native Vegetation Act. The Native Vegetation Council consists of seven members appointed by the Governor. The role of the Council is partly to consider applications for consent to clear native vegetation, to encourage the re-establishment, preservation and management of native vegetation and to administer the Native Vegetation Fund (Section 14).

³⁴⁰ Section 23A(1) of the Native Vegetation Act.

³⁴¹ Section 23A(2) of the Native Vegetation Act.

³⁴² Section 23B(1) of the Native Vegetation Act.

³⁴³ Figgis (n330) at 17.

³⁴⁴ The Heritage Agreements under the Heritage Act 1993 are not the same as those under the Native Vegetation Act 1991 although they achieve the same purpose.

³⁴⁵ Section 4 of the Heritage Act. The State Heritage Authority is comprised of seven members nominated by the Local Government Association.

³⁴⁶ If a place is considered to be of heritage value, it may be nominated, and if nomination is successful, may be placed on the Heritage Register. Section 50 defines a place of heritage value “if it satisfies one or more of the following criteria: (a) it demonstrates important aspects of the evolution or pattern of the States history; (b) it has rare, uncommon or endangered qualities that are of cultural significance; or (c) it may yield information that will contribute to an understanding of the State’s history; or (d) it is an outstanding representative of a particular class of places of cultural significance; or (e) it demonstrates a high degree of creative, aesthetic or technical accomplishment or is an outstanding representative of particular constructive techniques or design characteristics; or (f) it has strong cultural or spiritual associations for the community or a group within it; or (g) it has a special association with the life work of a person or organization or an event of historical importance.”

³⁴⁷ Section 32 of the Heritage Act.

³⁴⁸ Section 34(2) of the Heritage Act.

³⁴⁹ Section 32 of the Heritage Act.

and public appreciation of the importance to South Australia's cultural heritage".³⁵⁰ These may include a restriction of land use and a reduction in rates and taxes.³⁵¹

In addition to Heritage Agreements, the *Soil Conservation and Land Care Act 1989* enables the Minister to enter into agreements with a landholder which may be noted on title and will then bind successive titleholders. These agreements may stipulate conservation or rehabilitation works and provide financial assistance.³⁵²

4.7 Western Australia

Western Australia is recognized as one of the world's 25 "hotspots for biodiversity conservation" where "exceptional concentrations of endemic species are undergoing exceptional loss of habitat..."³⁵³ in an effort to protect this biodiversity, the Department of Conservation and Land Management (CALM) had the ability to negotiate conservation covenants and agreements, as early as the mid eighties.³⁵⁴ Under Section 16 of the *Conservation and Land Management Act 1984*, the Department can enter into a conservation covenant or agreement with a landowner.³⁵⁵

Conservation covenants are also addressed under Part IVA of the *Soil and Land Conservation Act 1945* and are administered by the Soil and Land Conservation Council (SLCC).³⁵⁶ A landowner may enter into a covenant with the Commissioner and in this way set aside land for the protection and management of vegetation.³⁵⁷ The covenant or agreement can be registered on the land title and is binding on both current and subsequent landholders.³⁵⁸ A landholder who wishes to sell land which is subject to a conservation covenant or agreement, and fails to notify the prospective buyer in writing of the covenant or agreement, may be subject to a fine of \$2000.³⁵⁹ The difference between an agreement and a covenant is that the Commissioner may

³⁵⁰ Section 33(1) of the Heritage Act.

³⁵¹ Section 33 of the Heritage Act.

³⁵² Section 13 of the Soil Conservation and Land Care Act.

³⁵³ N Myers, RA Mittermeier, CG Mittermeier, GAB da Fonseca and J Kent 'Biodiversity hotspots for conservation priorities' (2000) 403 *Nature* 853 at 853.

³⁵⁴ Thomas (n266) at 1.

³⁵⁵ Section 16(1) of the Conservation and Land Management Act.

³⁵⁶ Cripps et al (n287) at 103.

³⁵⁷ Section 30B of the Soil and Land Conservation Act.

³⁵⁸ Section 30C of the Soil and Land Conservation Act.

³⁵⁹ Section 30D of the Soil and Land Conservation Act.

discharge an agreement when he agrees to an application by the landholder or where he deems the agreement no longer necessary, whereas a covenant cannot be discharged without consent from all parties.³⁶⁰ SLCC covenants were promoted in the late 1980's with the launch of the Remnant Vegetation Protection Scheme and provided fencing grants to landowners who entered into a covenant. The scheme was successful in protecting approximately 75 400 hectares of land.³⁶¹

The *Heritage of Western Australia Act 1990* details provisions for the conservation of places which are of cultural significance. Although it does not specifically address the conservation of vegetation, it does provide for the establishment of conservation covenants between a landowner and a local government with the approval of the Minister.³⁶² This agreement may be in perpetuity or for a specific period of time and can restrict the use of the land by current and successive owners.³⁶³ The Heritage Council can provide financial and technical assistance, as well as a recommendation for the remission of rates.³⁶⁴

During the 1990's various programmes and initiatives which encouraged private land conservation were developed. In April 1999, the National Trust launched its Conservation Covenanting Program, which was followed by the initiation of the CALM Covenanting Programme.³⁶⁵ The Bush Forever Policy was also promoted and encouraged the use of conservation covenants.³⁶⁶ In 2001, the National Trust (WA), the WA Landcare Trust, the World Wide Fund for Nature and the Department of Conservation and Land Management established a revolving fund known as Bush Bank.³⁶⁷ Bush Bank's primary functions include the purchase of bushland and the promotion of conservation covenanting through existing covenanting schemes.³⁶⁸ Bush Bank is financially administered and managed by the National Trust on behalf of all partners.³⁶⁹

³⁶⁰ Section 30B of the Soil and Land Conservation Act.

³⁶¹ Thomas (n266) at 1.

³⁶² Section 29(10) of the Heritage of Western Australia Act.

³⁶³ Section 29 of the Heritage of Western Australia Act.

³⁶⁴ Section 33 of the Heritage of Western Australia Act.

³⁶⁵ Thomas (n266) at 2.

³⁶⁶ Ibid.

³⁶⁷ K Bradby *Opening our hearts and our wallets to the needs of bushland* (2001) at 7.

³⁶⁸ Ibid.

³⁶⁹ Bradby (n367) at 7.

4.8 Tasmania

Approximately one third of all land in Tasmania is privately owned.³⁷⁰ Voluntary programmes to improve nature conservation on private land have been available in Tasmania for some years and many private landowners have already contributed significantly to the conservation of biodiversity through their participation in these schemes.³⁷¹ Conservation covenants were initially available under the *National Parks and Wildlife Act 1970*³⁷² however this act has subsequently been replaced by the *Nature Conservation Act 2002* and the *National Parks and Reserve Management Act 2002*. The *Nature Conservation Act 2002* enables landowners to voluntarily enter into a covenant with the State Government³⁷³ and is negotiated either through the RFA Private Forest Reserves Program (PFRP)³⁷⁴ or the Protected Areas on Private Land Programme (PAPL).³⁷⁵ In addition to providing for conservation covenants the PAPL also facilitates the negotiation of management agreements and private reserves.

Management agreements are made between the landowners and the State government but are not registered on the land title.³⁷⁶ These agreements stipulate the management practices required to protect the nature conservation values of the land and will generally accompany a conservation covenant.³⁷⁷

Covenants are registered on the title of the land and are binding on both current and future landowners.³⁷⁸ A covenant may only be revoked with consent from the landowner and the

³⁷⁰ State Biodiversity Committee *Tasmania's Nature Conservation Strategy 2002-2006* (2002) at 19.

³⁷¹ State Biodiversity Committee (n370) at 20.

³⁷² Part VA SS 37A-37H of the National Parks and Wildlife Act.

³⁷³ Section 34 of the Nature Conservation Act.

³⁷⁴ The aim of this program is to protect conservation values through the establishment of conservation covenants and management agreements with private landowners. Financial assistance may be provided to landowners who enter into these agreements. If a property is considered to have extremely high conservation value, then it may be formally reserved through purchase by the program. See Tasmania Department of Primary Industries, Water and Environment *Nature Conservation on Private Land in Tasmania: A guide to programs and incentives* (2003).

³⁷⁵ The PAPL Program is a joint initiative between the Natural Heritage Trust's National Reserve System, the Department of Primary Industries, Water and Environment, the Conservation of Freshwater Ecosystem Value Project, the Tasmanian Farmers and Graziers Association and the Tasmanian Land Conservancy. This program aims to "promote and facilitate voluntary conservation agreements between the Tasmanian government and private landowners with important natural values on their properties". In addition the program aims to protect under-reserved vegetation communities and threatened species. See Department of Primary Industries and Water 'About the Protected Areas on Private Land Program (PAPL)' at <http://www.dpiw.tas.gov.au/inter.nsf/WebPages/SSKA-6B56K5?open> (accessed 22 March 2006).

³⁷⁶ Section 25 of the Nature Conservation Act.

³⁷⁷ Section 25(5) of the Nature Conservation Act.

³⁷⁸ Section 34-35 of the Nature Conservation Act.

relevant Commonwealth and State Ministers.³⁷⁹ Aside from the legal costs of landholders who choose to consult their own solicitors, the government bears all costs associated with registering the covenant.³⁸⁰ Landowners who enter into a conservation covenant may be eligible for a variety of benefits³⁸¹ including exemption from paying state land tax, funding for fencing and weed control, up-front payments or ongoing stewardship payments and management assistance and guidance.³⁸² Funding is obtained from the National Heritage Trust under the National Reserve System with additional funding provided by the Water Development Plan for Tasmania.³⁸³

With the landowner's consent, the State Government may proclaim a private reserve over private freehold land or land vested in authorities such as Local Government.³⁸⁴ Private reserves may incorporate part or all of the property and are registered on the land title thereby binding current and future landholders.³⁸⁵ The declaration of a private reserve does not itself restrict management activities however these areas may also be subject to a conservation covenant or management agreement.³⁸⁶ Under the *Nature Conservation Act 2002*, two types of reserves may be established: private sanctuaries and private nature reserves. Private sanctuaries are usually declared over land that has significant natural and/or cultural values.³⁸⁷ In addition to allowing some flexibility in land use they may also be revoked at the owner's request. Private Nature Reserves however, may be declared for areas of similar importance but which also contribute significantly to the natural biological and/or geological diversity of the area.³⁸⁸ They may only be revoked with the approval of both Houses of Parliament.³⁸⁹

³⁷⁹ Section 35 of the Nature Conservation Act.

³⁸⁰ Tasmania Department of Primary Industries, Water and Environment *Nature Conservation on Private Land in Tasmania: A guide to programs and incentives* (2003) at 4.

³⁸¹ Section 34 of the Nature Conservation Act.

³⁸² Tasmania Department of Primary Industries, Water and Environment (n380) at 5.

³⁸³ Tasmania Department of Primary Industries, Water and Environment (n380) at 4.

³⁸⁴ Section 12 of the Nature Conservation Act.

³⁸⁵ Section 19(5) of the Nature Conservation Act.

³⁸⁶ Tasmania Department of Primary Industries, Water and Environment (n380) at 7.

³⁸⁷ Section 16 Schedule 1(9) of the Nature Conservation Act.

³⁸⁸ Section 16 Schedule 1(10) of the Nature Conservation Act.

³⁸⁹ Section 21(5) of the Nature Conservation Act.

By January 2003, the Protected Areas on Private Land Program had registered and signed 45 covenants and had a further 3 awaiting signing. An additional 38 requests for covenants had been received.³⁹⁰

The Resource Management and Conservation Division of the Department of Primary Industries, Water and Environment (DPIWE) and The Tasmanian Land Conservancy (TLC), are each able to operate a revolving fund for the purchase, covenanting and re-selling of suitable high conservation properties.³⁹¹

4.9 Australian Capital Territory (ACT)

No statutory covenants exist in ACT as all land is leasehold³⁹² and is protected through provisions and controls stipulated in lease agreements. All lessees purchasing or renewing their lease are required to develop a Property Management Agreement³⁹³ however if areas are identified as having a high conservation value then they may be permanently protected under the *Nature Conservation Act 1980* or the *Land (Planning and Environment) Act 1991*.³⁹⁴

4.10 Northern Territory

The *Territory Parks and Wildlife Act 1993* provides the basis for establishing conservation covenants which “relate to the preservation, maintenance or care of land”.³⁹⁵ Under section 74 a landowner may enter into an agreement with the Minister, which is registered on the land title and is binding on subsequent owners.³⁹⁶ Various incentives may be paid in return for entering into the covenant. The Parks and Wildlife Commission administer the agreements; however there are few examples of their application in the Northern Territory. By 1997, two agreements covering 11 000ha had been signed.³⁹⁷

³⁹⁰ Tasmania’s Resource Development and Planning Commission ‘The state of the environment in Tasmania: Protected Areas on Private Land Program’ at <http://soer.justice.tas.gov.au/2003/copy/43/index.php> (accessed 27 March 2006).

³⁹¹ Tasmania Department of Primary Industries, Water and Environment (n380) at 9.

³⁹² The Seat of Government (Administration) Act 1910 states that ‘No Crown lands in the territory shall be sold or disposed of for any estate of freehold’. In 1989, the ACT became self-governing and Section 29 of The Australian Capital Territory (Planning and Land Management) Act 1988 distinguishes between ‘natural’ land or ‘territory’ land, the management of which is the responsibility of the ACT Executive, on behalf of the Commonwealth.

³⁹³ Figgis (n330) at 17.

³⁹⁴ Binning and Young (n329) at 8.

³⁹⁵ Section 74A(2) of the Territory Parks and Wildlife Act.

³⁹⁶ Section 74A (1-2) of the Territory Parks and Wildlife Act.

³⁹⁷ Binning and Young (n329) at 13.

Restrictive covenants are also available under the *Heritage Conservation Act 2000*. The Act facilitates the conservation of native vegetation through provisions enabling the establishment of conservation covenants, known as Heritage Agreements.³⁹⁸ Heritage Agreements may be negotiated between a landowner and the Minister and are registered on the title of the land.³⁹⁹ The Minister has the power to enforce the covenant against both the current and future titleholders.⁴⁰⁰ A management plan is generally included with the agreement.⁴⁰¹

³⁹⁸ The act aims to ‘provide a system for the identification, assessment, recording, conservation and protection of places and objects of prehistoric, protohistoric, historic, social, aesthetic or scientific value, including geological structures, fossils, archaeological sites, ruins, buildings, gardens, landscapes, coastlines and plant and animal communities or the ecosystems of the Territory’.

³⁹⁹ Section 37(2) of the Heritage Conservation Act.

⁴⁰⁰ Section 37(2) of the Heritage Conservation Act.

⁴⁰¹ Section 37(1) of the Heritage Conservation Act.

CHAPTER FIVE

NEW ZEALAND

5.1 Background

New Zealand is situated to the east of Australia in the South Pacific Ocean and consists of a cluster of mountainous islands, the two largest being North Island and South Island.⁴⁰² After the landmass broke away from the other continents 80 million years ago, many unique species of fauna and flora evolved through a long period of isolation.⁴⁰³ This coupled with the submergence of the landmass between 30 and 60 million years ago and the ice ages of the past 2 million years have resulted in reduced habitat and consequently a relatively small number of flowering plants and vertebrate animals in contrast to many tropical areas.⁴⁰⁴ Plants and large mammals account for only 5 000 native species: approximately 190 land and fresh water vertebrates, about 1 200 marine fishes, about 40 marine mammals, approximately 60 seabirds, about 2 300 vascular plants and the balance comprising mosses and liverworts.⁴⁰⁵

Although New Zealand was one of the last major land areas on earth to be colonized by humans its unique biodiversity has been in retreat since the first Maori settlers arrived in the 11 century.⁴⁰⁶ Prior to their arrival approximately 80 per cent of New Zealand's 27 million hectares were covered with indigenous forest, but by the mid 1840's, European settlement had begun to intensify and forest cover had fallen to 53 per cent.⁴⁰⁷ Much of the deforestation was a result of the development of New Zealand's strong agriculture-based economy.⁴⁰⁸ Deforestation and habitat destruction have continued into the 21st century and, together with human predation and alien species, remain the most important threats to biodiversity.⁴⁰⁹ At present, approximately 1000 species are classified as threatened leading the State of New Zealand's Environment

⁴⁰² Sealey (n260) at 731.

⁴⁰³ Department of Conservation and Ministry for the Environment *The New Zealand Biodiversity Strategy* (2000) at 1.

⁴⁰⁴ R Taylor and I Smith *The State of New Zealand's Environment* (1997) at 9-26.

⁴⁰⁵ Ibid.

⁴⁰⁶ Department of Conservation and Ministry for the Environment (n403) at 2.

⁴⁰⁷ Ministry of Agriculture and Forestry *National Report to the Fifth Session of the United Nations Forum on Forests* (2004) at 5.

⁴⁰⁸ Ibid.

⁴⁰⁹ Taylor and Smith (n404) at 9-28.

Report to suggest that “biodiversity decline is our most extensive and multi-faceted environmental issue”.⁴¹⁰

5.2 History

Historically, conservation in New Zealand has focused primarily on the retention and management of Crown lands and consequently the legal framework provides protection of indigenous species in these areas. Approximately, one third of New Zealand is protected as Crown-owned National Parks and Reserves, many of which are concentrated in the mountainous regions of the country.⁴¹¹ A variety of habitats supporting a diverse array of species and assemblages, are represented in lowland and coastal areas found only on private land. These may therefore be subject to permanent destruction.⁴¹²

Since 1977, statutory covenants have been the principal instrument used to protect conservation values on private land in New Zealand.⁴¹³ The introduction of statutory covenants provided landowners with an alternative for protection of their land other than donating it to the Crown or local authority for reserve purposes.⁴¹⁴ Powers to enter conservation covenants were given to the Queen Elizabeth National Trust (QEII) under the Queen *Elizabeth the Second National Trust Act* in 1977 and to the Department of Conservation under the *Reserves Act 1977* and the *Conservation Act 1987*.⁴¹⁵

The *Reserves Act 1977* makes provision for the development of a general policy for the implementation of the Act.⁴¹⁶ A general reserves policy was published in 1978 by the Department of Lands and Survey and is still in operation today.⁴¹⁷ The policy focuses on the preparation and implementation of management plans for reserves and, although it promotes public participation in reserve planning, it contains no explicit reference to Maori interests and values.⁴¹⁸ Similarly, requests for the inclusion of Maori interests and values in the draft

⁴¹⁰ Taylor and Smith (n404) at 10-5.

⁴¹¹ Edwards and Sharp (n36) at 313.

⁴¹² Ibid.

⁴¹³ Edwards and Sharp (n36) at 317.

⁴¹⁴ Ibid.

⁴¹⁵ Saunders (n35) at 325.

⁴¹⁶ Section 15(A) of the Reserves Act.

⁴¹⁷ R McClean and T Smith *The Crown and flora and fauna: legislation, policies and practices 1983-1998* (2001) at 293.

⁴¹⁸ Ibid.

Conservation Bill and consequently the *Conservation Act 1987* were ignored.⁴¹⁹ Although both Acts make provision for the establishment of agreements known as, *Nga Whenua Rahui kawenta*, many Maori landowners failed to be attracted to the covenanting programme as they perceived no benefits. This was evident in the analysis of the 718 QEII covenant applications received by September 1987 which revealed that only 13 were on land in Maori ownership.⁴²⁰ However, in 1991, *Nga Whenua Rahui*, a ministerial fund was established which finances the protection of indigenous ecosystems on Maori land by providing incentives for voluntary conservation.⁴²¹ The fund is administered by the *Nga Whenua Rahui* Committee and receives an annual grant from the government.⁴²² Since its inception *Nga Whenua Rahui* has had more than 95 proposals approved by the Minister which involve 112 000 hectares of indigenous ecosystems.⁴²³

5.3 Queen Elizabeth the Second National Trust Act 1977

The Queen Elizabeth the Second National Trust (Trust) was established under Section 3 of the *Queen Elizabeth the Second National Trust Act 1977* (National Trust Act).⁴²⁴ The Trust aims “to encourage and promote the provision, protection and enhancement of open space for the benefit and enjoyment of the people of New Zealand”.⁴²⁵ The primary mechanism used by the Trust towards achieving this end is to “negotiate the execution of open space covenants and the acquisition in its own name of any open space”.⁴²⁶

With the agreement of the landowner, a statutory covenant stipulating particular management practices is registered on the title and the development rights to the land are voluntarily transferred to the Trust.⁴²⁷ Covenants “may be executed to have effect in perpetuity or for a

⁴¹⁹ McClean and Smith (n417) at 326.

⁴²⁰ Edwards and Sharp (n36) at 321.

⁴²¹ Ministry of Agriculture and Forestry (n407) at 22.

⁴²² Department of Conservation ‘Nga Whenua Rahui’ at <http://www.doc.govt.nz/templates/page.aspx?id=43144> (17 March 2005).

⁴²³ Statistics New Zealand *Physical Stock Account for Forestry Resources in New Zealand 1995-2000* (2002) at 6.

⁴²⁴ Section 3 of The National Trust Act (1977) establishes the Trust as a Body Corporate consisting of its members, a chairperson and five other directors. The appointment of four of the six directors (including the chair) is made by the Minister of Conservation and the remaining two are elected by members of the Trust.

⁴²⁵ Section 20(1) of the Queen Elizabeth the Second National Trust Act. In the Act, open space is defined as ‘any area of land or body of water that serves to preserve or to facilitate the preservation of any landscape of aesthetic, cultural, recreational, scenic or social interest or value’.

⁴²⁶ Section 20(2)(i) of the Queen Elizabeth the Second National Trust Act.

⁴²⁷ Section 22 of the Queen Elizabeth the Second National Trust Act.

specified term, according to the nature of the interest in land which it applies and the terms and conditions of the agreement between the Trust and the owner”.⁴²⁸ Legislative history indicates that Section 22A was intended to permit only minor amendments to covenants and no express provision for revocation or termination of covenants is contained in the Act.⁴²⁹ The covenant agreement generally requires the undertaking of fencing and pest and weed control, the costs of which, together with legal expenses, are usually paid, in whole or in part, by the Trust.⁴³⁰ As of April 2003, 1680 open space covenants covering 62 529ha had been registered with the Trust.⁴³¹

5.4 The Reserves Act 1977

The *Reserves Act 1977* is the longest-standing statute governing the management and conservation of public lands.⁴³² It provides for the “acquisition, control, management, maintenance, preservation (including the protection of the natural environment), development, land-use, and to make provision for public access to the coastline and countryside”.⁴³³ Under Section 76 of the Act provision is made for private land to be protected as if it were a public reserve; however such protection is dependent on the willingness of the landowner. The owner must apply for the land to be declared “protected private land” and no ability for the Minister to make such an application is available.⁴³⁴ Protected private land agreements are intended to protect rare and indigenous species of fauna and flora when the “preservation of such flora and fauna is in the public interest”.⁴³⁵ The Minister, with the agreement of the landowner, can declare land as either a nature, scenic, historic or scientific reserve.⁴³⁶ The Minister’s declaration is recorded against the title and binds all successive owners, subject to any agreement to the contrary.⁴³⁷

⁴²⁸ Section 22(5) of the Queen Elizabeth the Second National Trust Act.

⁴²⁹ DL Donahue 'The law and practice of open space covenants' (2003) 7 *New Zealand Journal of Environmental Law* 119 at 129.

⁴³⁰ QEII National Trust 'How to covenant your special area' at <http://www.openspace.org.nz/Site/Covenants/Protect.aspx> (accessed 22 April 2005).

⁴³¹ Donahue (n429) at 130.

⁴³² B Mason 'Private management of 'the public interest'?' (1994) 7 *PANZ Monograph Series* 1 at 14.

⁴³³ Section 3 of the Reserves Act.

⁴³⁴ Section 76 of the Reserves Act.

⁴³⁵ Section 76(2) of the Reserves Act.

⁴³⁶ Section 76(2) of the Reserves Act.

⁴³⁷ Section 76(4) of the Reserves Act.

Management agreements are legal agreements to manage sites according to agreed conservation criteria and allow the Minister to manage private land in the interests of conservation for a length of time.⁴³⁸ Although they are not registered on title they can be used as temporary controls until a more formal agreement can be established.⁴³⁹

Section 77 of the Act, provides for the establishment of conservation covenants to “preserve the natural environment, or landscape amenity or wildlife or freshwater-life or marine-life habitat or historical value”.⁴⁴⁰ The Minister must be satisfied that the specific purpose can be achieved without acquiring ownership of the land although there is an implied requirement for conservation covenants to be purchased by the Crown.⁴⁴¹ Conservation covenants are registered against the title of the land binding all current and future titleholders in perpetuity or for a specified lesser term.⁴⁴² The area protected by the covenant does not receive reserve status under the Act.⁴⁴³

Section 77A provides for the establishment of *Nga Whenua Rahui kawenta*. These are covenants which enable Maori to protect their indigenous ecosystems whilst remaining sensitive to their culture, values and spirituality.⁴⁴⁴ *Nga Whenua Rahui kawenta* are intended to provide long term protection with inter-generational reviews of the agreements.⁴⁴⁵ If the Minister is satisfied that any Maori land or Crown land held under a Crown lease by Maori should be managed for conservation purposes then the Minister may treat or agree with the owner or the lessees for a *Nga Whenua Rahui kawenta*.⁴⁴⁶ These agreements require that the land is managed in a manner

⁴³⁸ P Davis and C Cocklin *Protecting habitats on private land: perspectives from Northland New Zealand* (2001) at 22.

⁴³⁹ Section 38 of the Reserves Act.

⁴⁴⁰ Section 77(1) of the Reserves Act.

⁴⁴¹ Mason (n432) at 2.

⁴⁴² Section 77(2) of the Reserves Act.

⁴⁴³ Parliamentary Commissioner for the Environment *Managing change in paradise: sustainable development in peri-urban areas* (2001) at 113.

⁴⁴⁴ Ministry of Agriculture and Forestry (n407) at 22.

⁴⁴⁵ Section 77A(1)(b) of the Reserves Act. *Nga Whenua Rahui kawenata* under this section may be in perpetuity or for any specific term or may be in perpetuity subject to a condition that at agreed intervals of not less than 25 years the parties to the *Nga Whenua Rahui kawenata* shall review the objectives, conditions, and continuance of the *Nga Whenua Rahui kawenata*

⁴⁴⁶ Section 77A(1)(a) of the Reserves Act.

which sets out “to preserve the natural and historic value of the land or the spiritual and cultural values which Maori associate with the land.”⁴⁴⁷

5.5 The Resource Management Act 1991

The *Resource Management Act* (RMA) is the principal national policy tool supporting sustainable resource use in New Zealand.⁴⁴⁸ The purpose of the Act is “to promote the sustainable management⁴⁴⁹ of natural and physical resources, including land, water, air, soil and all forms of plants and animals.”⁴⁵⁰ This is achieved by assigning to the regional councils the responsibility of developing a series of national, regional and district policy statements and plans.⁴⁵¹ The development of these instruments must follow a public consultation process which includes the private sector, indigenous people and local communities.⁴⁵²

Although the Act provides for the use of these instruments, practical implementation has proved difficult primarily in relation to interpretation of Section 6. Section 6(c) addresses the “protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna” however the Act fails to provide clear guidelines on what constitutes “significant natural areas”.⁴⁵³ Section 109 provides for the establishment of covenants which are registered on title thereby binding all subsequent owners.⁴⁵⁴

5.6 Conservation Act 1987

The primary aim of the *Conservation Act 1987* is to “promote the conservation of New Zealand’s natural and historic resources and for this purpose, to establish the Department of Conservation (DOC)”.⁴⁵⁵ The DOC uses various mechanisms for the protection of habitats on

⁴⁴⁷ Section 77A(1)(a) of the Reserves Act.

⁴⁴⁸ Ministry of Agriculture and Forestry (n407) at 5.

⁴⁴⁹ Section 5(2) defines ‘Sustainable management’ as ‘managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while— (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.’

⁴⁵⁰ Section 5(1) of the Resource Management Act.

⁴⁵¹ Regional policy statements describe the policies and methods which will be used to manage these resources and district plans contain provisions to control the effects of land use.

⁴⁵² Section 48 of the Resource Management Act.

⁴⁵³ Section 6(c) of the Resource Management Act.

⁴⁵⁴ Section 109 (1b) of the Resource Management Act.

⁴⁵⁵ Short Title of the Conservation Act.

private land including conservation covenants and management agreements. Conservation covenants are created for conservation purposes which includes public recreation.⁴⁵⁶ They are registered on the title of the property and can permit some limited use of land.⁴⁵⁷ In addition, the Minister may enter into any agreement, contract or arrangement with any person where the purpose is to carry out “the conservation of any natural or historic resources”.⁴⁵⁸ These agreements are not registered on title and no public participation is required in the preparation of the agreement.

Section 27A makes similar provisions to those of the *Reserves Act 1977*, for the establishment of *Nga Whenua Rahui kawenta*. The Minister may negotiate *Nga Whenua Rahui kawenta* with the owners or lessees of Maori land or Crown land held under a Crown lease by Maori.⁴⁵⁹ The Minister must be satisfied that this land should be managed for the preservation of natural and historic values of the land or for the spiritual and cultural values which Maori associate with the land.⁴⁶⁰ The agreements run with⁴⁶¹ and bind the land in perpetuity or for a specific term.⁴⁶²

5.7 Property Law Act 1952

Under Section 127 of this Act, power is given to the court to modify or extinguish easements and covenants.⁴⁶³ On the application of the occupier of the land and provided the court is satisfied that certain criteria are met, the court may modify in whole or in part, or extinguish the easement or covenant.⁴⁶⁴

⁴⁵⁶ Section 27 of the Conservation Act.

⁴⁵⁷ Section 27(2) of the Conservation Act.

⁴⁵⁸ Section 29 of the Conservation Act.

⁴⁵⁹ Section 27A of the Conservation Act.

⁴⁶⁰ Section 27A(1)(a) of the Conservation Act.

⁴⁶¹ Section 27A(1)(d) of the Conservation Act.

⁴⁶² Section 27A(1)(b) If the agreement is in perpetuity, then it is subject to a condition that allows the parties to revise the objectives, conditions and continuance of the agreement at agreed intervals of not less than 25 years.

⁴⁶³ Section 127 of the Property Law Act.

⁴⁶⁴ The criteria are detailed under Section 127(1) and include “(a) That by reason of any change in the user of any land to which the easement or the benefit of the restriction is annexed, or in the character of the neighbourhood or other circumstances of the case which the Court may deem material, the easement or restriction ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land subject to the easement or restriction without securing practical benefit to the persons entitled to the easement or to the benefit of the restriction, or would, unless modified, so impede any such user; or (b) That the persons of full age and capacity for the time being or from time to time entitled to the easement or to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the land to which the easement or the benefit of the restriction is annexed, have agreed to the easement or restriction being modified or wholly or partially extinguished, or by their acts or omissions may reasonably be considered to have abandoned the easement wholly or in part; or (c) That the proposed modification or extinguishment will not substantially injure the persons entitled to the benefit of the restriction.”

CHAPTER SIX

LESSONS LEARNED

6.1 Introduction

The review of international legislation, in the previous chapters, indicates that a variety of legislative instruments have been used to create statutory agreements aimed at protecting ecological resources and conservation values on private land. The number of statutory agreements, particularly in the United States and the rapid growth of the land trust movement, demonstrates the interest of landowners in these instruments.

It is also evident from this review that conservation agreements are underpinned by a set of key provisions. In instances where these provisions have not been adequately addressed or enforced, the agreements have failed to achieve their desired objective. Atkins *et al.* (2004) provide a useful overview of provisions which should be incorporated when drafting easement legislation. This section examines these key provisions and the potential problems associated with conservation agreements.

6.2 Permissible Purpose

A clear description of the purpose for which the legislation is intended is included in the majority of the legislation. Generally this purpose relates to the protection of the general environment including the conservation of ecosystems, biodiversity, habitat and species. However, in many cases the permissible purpose is extended to include historical, architectural, archaeological and cultural attributes as is evident in the UCEA.⁴⁶⁵ In addition the Canadian states of Alberta, British Columbia, Nova Scotia and Yukon, and the Australian State of New South Wales have included scientific and/or aesthetic purposes in their legislation.⁴⁶⁶ For the

⁴⁶⁵ The UCEA states that purposes include “retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational or open space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property”.

⁴⁶⁶ Alberta’s Environment and Protection Enhancement Act includes “the protection, conservation and enhancement of natural or aesthetic values” (Section 22(2)(b)) and “the use for research and scientific studies of natural ecosystems” (Section 22(2)(b)(iv)). British Columbia’s Land Title Act includes “any natural, historical, heritage, cultural, scientific, architectural, environmental, wildlife or plant life value relating to the land that is subject to the covenant” (Section 219(5)). Nova Scotia’s Conservation Easement Act includes that the conservation easement “provides opportunities for scientific or educational programs in aspects of the natural environment” (Section 4(c)(iv)). Yukon’s Environment Act includes assuring natural resources are available for recreational or open-space

most part, permissible purposes are more prominent in the USA and Canadian legislation and relate directly to the granting of an easement. New Zealand's *Queen Elizabeth the Second National Trust Act* and Australia's *Victorian Conservation Trust Act* assign purposes to the respective Trusts which essentially govern the granting of conservation agreements.⁴⁶⁷ The purpose of these Trusts includes the preservation of areas for ecological, scientific or aesthetic purposes.⁴⁶⁸ These purposes are implied when the Trust grants a conservation agreement.

6.3 Grantors

A conservation agreement is entered into between a “grantor” or “landowner” and a “holder”. The extent to which the terms “grantor or ‘landowner” are defined varies considerably between the legislation. Generally these terms refer simply to the person registered on title and may include both corporate owners and private individuals. Provisions may also enable federal, provincial and local government agencies to grant easements as is evident in the Saskatchewan and New South Wales legislation.⁴⁶⁹ Some definitions of “grantor” or “landowner” are also extended to include any heirs, executors, administrators, liquidators and trustees of the grantor.⁴⁷⁰

uses (Section 76(b)). The National Parks and Wildlife Act of New South Wales includes entering into a conservation agreement “in relation to areas of special scientific interest” (Section 69(1)(b)).

⁴⁶⁷ Section 22 of New Zealand's Queen Elizabeth the Second National Trust Act states that the Board must be satisfied that the private land in question must be maintained as open space. Under Section 2 “Open space” is defined as “any area of land or body of water that serves to preserve or to facilitate the preservation of any landscape of aesthetic, cultural, recreational, scenic, scientific, or social interest or value”.

⁴⁶⁸ Section 20 of the Queen Elizabeth the Second National Trust Act states that the general functions of the Trust shall be “to encourage and promote, for the benefit and enjoyment of the present and future generations of the people of New Zealand, the provision, protection, preservation, and enhancement of open space” Section 3 of the Victorian Conservation Trust Act sets out the objects of the Trust which include encouraging and assisting in (a) the preservation of areas which are— (i) ecologically significant; (ii) of natural interest or beauty; or (iii) of historical interest; (b) the conservation of wildlife and native plants; and (c) the conservation and creation of areas for scientific study relating to any of the matters referred to in paragraphs (a) and (b).

⁴⁶⁹ Section 69B 1(C) of New South Wales National Parks and Wildlife Act states that the Minister may enter into “a conservation agreement relating to land that is Crown lands or lands of the Crown with: (a) a public authority (not being a Government Department) that owns or has the control and management of the land, or (b) if the land is under the control and management of a Government Department, the responsible Minister. Saskatchewan's Conservation Easement Act states that the Crown or a municipality may grant a conservation easement (Section 5(3)).

⁴⁷⁰ Nova Scotia's Conservation Easement Act defines ‘owner’ as “any heirs, executors, administrators, successors or assigns of the grantor of the conservation easement, any person who becomes the owner or occupier of the land after the conservation easement is created and, for greater certainty, Her Majesty in right of the Province, Her Majesty in right of Canada or a municipality.”

6.4 Holders

Although conservation agreement legislation should ideally enable as wide a range of holders as possible this approach has largely been underutilized. Prince Edward Islands *Natural Areas Protection Act* fulfils this requirement in that it enables any person to hold a restrictive covenant.⁴⁷¹ It differs however from other legislation in that it does not stipulate criteria with which organisations need comply in order to qualify as an easement holder. For example, New Brunswick's *Conservation Easement Act* and Saskatchewan's *Conservation Easements Act* prescribe criteria which entities must meet before they can hold a conservation easement.⁴⁷²

Criteria are generally set out to ensure that non-governmental entities are committed to land conservation and have sufficient resources and expertise to carry out the associated monitoring and enforcement of the agreement.⁴⁷³ Consequently, requirements, by and large, stipulate that non-governmental organisations have land conservation as one of their purposes.⁴⁷⁴

Conservation agreement legislation throughout Canada, the United States, Australia and New Zealand has a commonality in that all the legislation enables a minister or government agency to hold a conservation agreement. In many instances, the legislation specifies which levels of government can hold easements.⁴⁷⁵

Many problems, particularly where insufficient resources and lack of expertise are concerned, could be overcome if easement legislation enabled more than one government or non-government agency to hold a conservation agreement. This approach has a further benefit in that

⁴⁷¹ Section 5(1) of the *Natural Areas Protection Act* states that "a private landowner may impose a restrictive covenant on his or her land by entering into an agreement with the Minister or with any other person."

⁴⁷² Section 5 of the *New Brunswick Conservation Easement Act* stipulates that the Crown, a municipality or a non-profit organisation may hold a conservation agreement. Non-profit organisations must however have any purpose detailed in Section 3 as one of their primary functions. These include, amongst others, the protection or conservation of ecologically sensitive land, habitat or wildlife and the conservation of culturally important, archaeologically important or scenically important places. Saskatchewan's *Conservation Easement Act* details similar provisions in Section 6.

⁴⁷³ Atkins et al (n44) at 89.

⁴⁷⁴ Ibid. The UCEA for example stipulates that 'a charitable organisation' may hold a conservation agreement provided that its purposes or powers include "retaining or protecting the natural, scenic, or open space values of real property."

⁴⁷⁵ For the most part, the Australian and New Zealand legislation does not make specific provision for local government to hold conservation agreements. However, as with the UCEA, some Canadian legislation does include such provisions for example the British Columbia's *Land Title Act* and Manitoba's *Conservation Agreements Act*.

it enables the use of a conservation agreement for a variety of purposes as each organisation could supply differing expertise in respect of the necessary monitoring and enforcement.⁴⁷⁶

6.5 Registration

Many conservationists view the easement paradigm as favourable primarily because the agreement has the ability to bind both current and subsequent landowners to sound management objectives stipulated in the agreement. This ability to bind successive owners is facilitated through the registration of the agreement with the appropriate deeds office. The legislation generally details a specific registration process such as the Manitoba's *Conservation Easement Act*, Ontario's *Conservation Land Act*, Tasmania's *Nature Conservation Act* and New Zealand's *Queen Elizabeth the Second National Trust Act*.⁴⁷⁷ In instances where a specific registration process is not detailed, the legislation may refer to a particular registration process outlined in other land-related legislation as is the case with the New South Wales *National Parks and Wildlife Act* and Yukon's *Environment Act*.⁴⁷⁸

6.6 Monitoring

Although monitoring is assumed to be a fundamental requirement in continued easement administration, it is seldom stipulated in the easement legislation itself. This is evident in the legislation examined for all four countries. One exception is Tasmania's *Nature Conservation*

⁴⁷⁶ Atkins et al (n44) at 90.

⁴⁷⁷ Section 7(1) of the Manitoba Conservation Easement Act states that 'the holder may give notice of the conservation agreement by filing a caveat against the certificate of title of the land or in which the land is included'. Ontario's Conservation Land Act includes a provision under section 3(5) which states that 'the easement or covenant may be registered against the land affected in the proper land registry office and, once registered, it runs with the land against which it is registered'. Tasmania's Nature Conservation Act (Section 37) states that 'as soon as practicable after entering into a conservation covenant or executing a variation of a conservation covenant, the Minister must lodge with the Recorder – (a) an executed copy of the covenant or variation; and (b) a copy of any management plan in force in relation to the servient land or any part of the servient land; and (c) particulars of title to the servient land'. Section 22(7) of The Queen Elizabeth the Second National Trust Act states that 'The District Land Registrar for the land registration district in which the land is situated shall on the application of the Board enter in the appropriate folium of the register relating to the land that is subject to the burden of the covenant a notification of the covenant'.

⁴⁷⁸ Section 69F(1) of New South Wales' National Parks and Wildlife Act states that 'in being notified by the Minister that a conservation agreement has been entered into, or that any such agreement has been varied or terminated, the Registrar-General must: (a) in the case of a conservation agreement relating to land under the Real Property Act 1900—make an entry concerning the agreement, variation or termination in any folio of the Register kept under that Act that relates to that land, or (b) in the case of a conservation agreement relating to land not under the Real Property Act 1900: (i) register the agreement, variation or termination in the General Register of Deeds kept under Division 1 of Part 23 of the Conveyancing Act 1919, and (ii) if appropriate, make an entry concerning the agreement, variation or termination in any official record relating to Crown land that relates to that land. Yukon's Environment Act (Section 77(2)) states that 'no right or duty arises under a conservation easement until the instrument creating the conservation easement is registered pursuant to the Land Titles Act'.

Act which makes provision for any person authorised by the minister to inspect land subject to a conservation covenant.⁴⁷⁹

6.7 Enforcement

The effectiveness of most legislative instruments is underpinned, in part, by the concept of enforcement. Conservation agreements are not dissimilar and provisions regarding all aspects of enforcement should be stipulated in the agreement. These include, but are not limited to, who is able to enforce the agreement, who should bear the cost of enforcement, what remedies are available for breaches of the terms of the easement and the level of court before which easements can be enforced.⁴⁸⁰ The extent to which these aspects are addressed varies considerably between the legislation. Although it is seldom that all aspects are given consideration, for the most part the question of who can enforce easements is addressed.

Ideally, all parties to the easement should be able to enforce the agreement in a simple and economical manner.⁴⁸¹ The majority of the Canadian legislation accommodates this requirement e.g. Alberta's *Environmental Protection and Enhancement Act* and Prince Edward Island's *Natural Areas Protection Act*.⁴⁸² The *Conservation Easement Acts* of Saskatchewan, Nova Scotia and New Brunswick also go so far as to prescribe which level of court may enforce the obligations of the respective easements.⁴⁸³ Similarly, New South Wales' *National Parks and Wildlife Act* stipulates that all proceedings relating to the enforcement of conservation

⁴⁷⁹ Section 45 of the Nature Conservation Act.

⁴⁸⁰ Atkins et al (n44) at 92.

⁴⁸¹ Ibid.

⁴⁸² Section 22(3) of Alberta's Environmental Protection and Enhancement Act states that 'a conservation easement may be enforced by the grantee, or a qualified organization, other than the grantee, that the grantor has designated in writing as having the power to enforce the conservation easement, or by both the grantee and the qualified organization'. Prince Edward Islands natural Areas Protection Act (Section 5(2)(c)) states that the agreement 'may be enforced, by injunction, by either party to the agreement, against a party to the covenant and his or her successors in title to the land, even where the person seeking to enforce the covenant owns no other land which would be accommodated or benefited by the covenant'.

⁴⁸³ Section 11(1) of Saskatchewan's Conservation Easement Act provides that 'the obligations in a conservation easement, whether positive or negative, of the holder, the grantor or any subsequent owner of the land may be enforced by an action in the Court of Queen's Bench'. Nova Scotia's Conservation Easement Act (Section 15(1)) states that 'the obligations in a conservation easement, whether positive or negative, may be enforced by an action in the Supreme Court of Nova Scotia'. Section 11(1) of The Conservation Easement Act of New Brunswick includes 'The obligations in a conservation easement, whether positive or negative, on the holder of the conservation easement, the grantor of the conservation easement or a subsequent owner of the land may be enforced by an action in The Court of Queen's Bench of New Brunswick by the holder of the conservation easement, the grantor of the conservation easement or a subsequent owner of the land'.

agreements be taken in the Land and Environment Court.⁴⁸⁴ This Act differs from much of the other Australian legislation in that it also includes provisions relating to costs and remedies.⁴⁸⁵ Australia's *Conservation Trust Act* also enables the respective Trust to enforce the terms of the agreements.⁴⁸⁶

Careful consideration needs to be given to whether enforcement rights can be delegated to a third party. Third party right of enforcement has been included in the UCEA and some of the Canadian legislation, e.g. New Foundland and Labradors *Historic Resources Act* however it is seldom used in the Australian and New Zealand context.⁴⁸⁷

6.8 Assignment, Modification and Termination

Conservation easements and covenants are intended to remain in existence in perpetuity or for an extended period of time. Changes are likely to occur over time and it is essential that the agreements are flexible and able to adapt to any changes that do occur. The ability to modify or terminate an agreement or to alter who the agreement is assigned to, are therefore important considerations.

At a minimum, conservation agreement legislation should provide that conservation easements can be amended by both the grantor and holder.⁴⁸⁸ The majority of the legislation for all four countries does make provision for this and by and large requires that written agreement is obtained.⁴⁸⁹ In much of the Canadian and Australian legislation, the appropriate Minister is also

⁴⁸⁴ Section 69G(2) of the National Parks and Wildlife Act.

⁴⁸⁵ Section 69G(3) of the National Parks and Wildlife Act.

⁴⁸⁶ Section 3A(11) of the Conservation Trust Act provides that 'if the Registrar of Titles has made a recording of the covenant or the variation in the Register, the burden of the covenant or the covenant as so varied runs with the land concerned and the Trust may enforce the covenant against persons deriving title from that person as if it were a restrictive covenant even though it may be positive in nature or that it is not for the benefit of land of the Trust'.

⁴⁸⁷ Section 30(3) of the Historic Resources Act.

⁴⁸⁸ Atkins et al (n44) at 94.

⁴⁸⁹ Section 219(9) of British Columbia's Land Title Act states that 'a covenant may be modified by the holder of the charge and the owner of the land charged, or discharged by the holder of the charge by an agreement or instrument in writing the execution of which is witnessed or proved in accordance with the Act'. Victoria Planning and Environment Act (Section 178) provides that 'an agreement may, with the approval of the Minister, be amended by agreement between the responsible authority and all persons who are bound by any covenant in the agreement'.

empowered to modify or terminate an agreement but generally requires consent from the respective parties.⁴⁹⁰

⁴⁹⁰ Section 35(1) of Tasmania's Nature Conservation Act provides that 'the Minister on behalf of the Crown may vary or discharge a conservation covenant at any time by agreement with the owner of the land that is subject to the covenant' Similarly Section 29(4) of Alberta's Historic Resources Act states that 'if the Minister considers it in the public interest to do so, the Minister may by order discharge or modify a condition or covenant registered under subsection (2), whether or not the Minister is a party to the condition or covenant'.

CHAPTER SEVEN

SOUTH AFRICA

7.1 Introduction

South Africa is located at the southern most tip of the African continent and is the third most biologically diverse country in the world,⁴⁹¹ encompassing seven biomes comprised of 68 different vegetation types which range from semi-desert through savanna and woodland to coastal and alpine forest.⁴⁹² South Africa is also the only country to totally contain one of the world's six Floral Kingdom's – the Cape Floral Kingdom. In total South Africa accounts for 10% of all the plant species in the world even though its land area is less than 1% of that of the globe. The country is home to an estimated 5.8% of all global mammal species, 8% of bird species, 4.6% of reptile species, 16% of marine fish species and 5.8% of the world's known insect species.⁴⁹³

Despite this wealth of biological resources, almost all of South Africa's ecosystems have been transformed or modified by human activities. Various threats have contributed to this transformation including land degradation and soil loss as a result of poor agricultural practices, rapid urban expansion and the invasive spread of alien species.⁴⁹⁴

Environmental problems have been exacerbated by past apartheid policies.⁴⁹⁵ The apartheid era shaped people's attitude towards the environment. Biodiversity conservation was equated with nature conservation which in turn equated to the management of protected areas. Protected areas were seen to serve the privileged elite, restrict access to natural resources by poor communities and disregard the urgent needs of the country for development and social justice.⁴⁹⁶

⁴⁹¹ B Groombridge (ed) *Global biodiversity: Status of the earth's living resources* (1992).

⁴⁹² AB Low and AG Robelo (eds) *Vegetation of South Africa, Lesotho and Swaziland* (1996).

⁴⁹³ Department of Environmental Affairs and Tourism (DEAT) *White Paper on the conservation and sustainable use of South Africa's biological diversity* (1997).

⁴⁹⁴ IAW MacDonald 'Man's role in changing the face of southern Africa' in BJ Huntley (ed) *Botanical diversity in southern Africa: Concepts and conservation* (1989).

⁴⁹⁵ R Wynberg 'A decade of biodiversity conservation and use in South-Africa - Tracking progress from the Rio Earth Summit to the Johannesburg World Summit on sustainable development' (2002) 98 *South African Journal of Science* 233 at 234.

⁴⁹⁶ *Ibid.*

7.2 Pre-1994 legislation

Apartheid also created a fragmented and largely uncoordinated set of institutions which had differing and sometimes contradictory laws.⁴⁹⁷ Before the 1994 election, no fewer than 17 government departments had a primary responsibility for nature conservation.⁴⁹⁸ Although it was understood that the conservation of biodiversity outside protected areas was dependant on some degree of control over private landowners, the country's environmental legislation pertaining to private landowners adopted a "command and control" type approach.⁴⁹⁹ This approach is reflected in a number of Acts, promulgated during this era, which make provision for the relevant authority to issue a directive relating to the use of the land by the landowner or occupier of the land in question.⁵⁰⁰

7.2.1 Conservation of Agricultural Resources Act 1967

The *Conservation of Agricultural Resources Act* empowers the Minister of Agriculture to prescribe compulsory control measures with which all land users must comply.⁵⁰¹ The control measures are designed to restrict soil loss, control weeds and invader plants and limit exploitative land use practices.⁵⁰² The control measures are supplemented with directions. Under the Act, the executive officer may use directions to order a land user to comply with a specific control measure.⁵⁰³ Directions must be published by notice in the Government Gazette and are binding on both the current land user and his or her successor in title.⁵⁰⁴

⁴⁹⁷ Wynberg (n495) at 234.

⁴⁹⁸ Republic of South Africa President's Council *Report of the three committees of the President's Council on a national environmental management system* (1991).

⁴⁹⁹ Rabie (n52) at 86.

⁵⁰⁰ RF Fuggle and MA Rabie (eds) *Environmental management in South Africa* (1992) at 735.

⁵⁰¹ C McDowell 'Legal Strategies to optimize conservation of natural ecosystems by private landowners – Restrictive legislation' (1986) XIX *CILSA* 450 at 453.

⁵⁰² Section 6(2) of the *Conservation of Agricultural Resources Act* lists various aspects that control measures relate to including the cultivation of virgin soil; the utilization and protection of land which is cultivated; the irrigation of land; the prevention or control of waterlogging or salination of land; the utilization and protection of vleis, marshes, water sponges, water courses and water sources; the regulating of the flow pattern of run-off water; the utilization and protection of the vegetation; the grazing capacity of veld, expressed as an area of veld per large stock unit; the maximum number and the kind of animals which may be kept on veld; the prevention and control of veld fires; the utilization and protection of veld which has burned; the control of weeds and invader plants; the restoration or reclamation of eroded land or land which is otherwise disturbed or denuded; the protection of water sources against pollution on account of farming practices; the construction, maintenance, alteration or removal of soil conservation works or other structures on land; and any other matter which the Minister may deem necessary or expedient in order that the objects of this Act may be achieved.

⁵⁰³ Glazewski (n5) at 215.

⁵⁰⁴ Section 7(4)(a) of the *Conservation of Agricultural Resources Act*.

7.2.2 *The Mountain Catchment Areas Act No. 63 of 1970*

The *Mountain Catchment Areas Act* empowers the Minister of Water Affairs and Forestry to declare any area⁵⁰⁵ to be a mountain catchments area, and to define its boundaries by way of a notice in the Government Gazette.⁵⁰⁶ The Act empowers the Minister to issue directions in respect of land situated within or adjacent to (within 5km from the boundary) the mountain catchments area.⁵⁰⁷ These directions may relate to the conservation, use, management and control of such land, the prevention of soil erosion, the protection of indigenous vegetation and the destruction of “intruding vegetation”.⁵⁰⁸ The Act provides for compensation to be paid to any owner or occupier of land who may have suffered financial loss as a result of complying with the directions issued by the Minister.⁵⁰⁹ Furthermore, any land situated within a mountain catchment area may be exempt from all property taxes imposed by the local authority in respect of such land.⁵¹⁰

7.2.3 *Environment Conservation Act No 73 of 1989*

The *Environment Conservation Act* made provision for the establishment of “protected natural environments”⁵¹¹ and “special nature reserves”⁵¹² for the purpose of promoting the preservation of specific ecological processes, natural systems, natural beauty, indigenous species or the preservation of biotic diversity in general.⁵¹³ The Act empowered a competent authority to declare any area as defined by him, whether privately or state owned, as a protected natural environment or special nature reserve.⁵¹⁴ The competent authority was also entitled to issue directions in respect of the land⁵¹⁵ which could be registered on the title deeds of the property⁵¹⁶ and bind any successors in title.⁵¹⁷

⁵⁰⁵ This area may be on privately-owned or state-owned land.

⁵⁰⁶ Glazewski (n5) at 404.

⁵⁰⁷ Patterson and Winstanley (n33) at 42.

⁵⁰⁸ Section 7 of the Mountain Catchment Areas Act.

⁵⁰⁹ A Rabie ‘South African law relating to conservation areas’ (1985) XVII *CILSA* 51 at 60.

⁵¹⁰ Ibid.

⁵¹¹ Section 16 of the Environment Conservation Act.

⁵¹² Section 18 of the Environment Conservation Act.

⁵¹³ Section 16(1)(a) of the Environment Conservation Act.

⁵¹⁴ Sections 16(1) and Section 18(2) of the Environment Conservation Act state that in respect of protected natural environments ‘after consultation with the owners of, and the holders of real rights in land situated within the defined area’ and in respect of special nature reserves ‘at the request of and with the written consent of the owner’.

⁵¹⁵ Section 16(2) of the Environment Conservation Act.

⁵¹⁶ Section 16(4) of the Environment Conservation Act.

⁵¹⁷ Section 16(3) of the Environment Conservation Act.

7.2.4 *The National Parks Act No 57 of 1976*

Similarly, the *National Parks Act* provided for both the establishment of South African national parks on state land⁵¹⁸ and “contractual parks” where an agreement was entered into between the South African National Parks Board and the landowners concerned.⁵¹⁹

The *National Parks Act* and all sections of the *Environment Conservation Act* (with the exception of Section 1(2) and Schedule 2) have been repealed and replaced by the coming into force of the *Protected Areas Act No 57 of 2003*.

7.3 Post 1994 legislation

Post-apartheid, there was a growing awareness that without the continuous goodwill of the landowners themselves, the concept of biodiversity conservation on private land in the long term, would fail.⁵²⁰ At the same time, South Africa ratified the Convention on Biological Diversity and the government was obliged to enact national laws to give effect to the provisions of the Convention. This understanding, coupled with the government’s obligations in terms of the Convention, led to the preparation of the White Paper on the conservation and sustainable use of South Africa’s biological diversity.

The White Paper recognized that the command and control approach had not been successful in achieving biodiversity conservation and that an incentive based approach was necessary.⁵²¹ Consequently, South Africa began major policy changes which included the use of conservation tools previously lacking in the country and property rights instruments and incentive mechanisms were introduced by way of new environmental biodiversity policies.⁵²²

7.3.1 *South African Constitution 108 of 1996*

The Constitution is important in the context of biodiversity conservation not only for the environmental clause contained in the Bill of Rights but also because it sets out the

⁵¹⁸ Section 2A of the National Parks Act.

⁵¹⁹ Section 2B(b) of the National Parks Act.

⁵²⁰ McDowell (n501) at 459.

⁵²¹ Patterson and Winstanley (n33) at 31.

⁵²² GQK Pence, MA Botha and JK Turpie ‘Evaluating combinations of on-and off-reserve conservation strategies for the Agulhas Plain, South Africa; a financial perspective’ (2003) 112 *Biological Conservation* 253 at 255.

administrative framework and prescribes the functions with which national, provincial and local spheres of government are tasked.⁵²³

Section 24 of the Constitution states that

“Everyone has the right –

- (a) to an environment which is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation;
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

Section 24 comprises two components. Subsection (a) grants everyone the right to environment that is not harmful to their health and well-being. Part (b), however, imposes a duty on the State to protect the environment from ecological degradation and promote conservation through reasonable legislative and other measures. The term “other measures” would include guidelines, plans and policies.⁵²⁴

Schedule 4 and 5 of the Constitution give concurrent legislative competence to national and provincial government for most functions relevant to biodiversity conservation. With the exception of “national parks, national botanical gardens and marine resources” (which are exclusively a national competence) both national and provincial spheres of government have designated authority to administer laws and create mechanisms which promote and regulate biodiversity conservation.⁵²⁵

7.3.2 The National Environmental Management Act 107 of 1998

The *National Environmental Management Act* (the NEMA) was passed in November of 1998 and came into force in January 1999.⁵²⁶ The Act is underpinned by a set of environmental principles which further concretise the environmental right contained in the Constitution. The 18

⁵²³ Patterson and Winstanley (n33) at 29.

⁵²⁴ Ibid.

⁵²⁵ Patterson and Winstanley (n33) at 29.

⁵²⁶ Glazewski (n5) at 166.

principles and 8 sub-principles cover a wide spectrum of aspects and many of them have relevance to biodiversity conservation including the following:⁵²⁷

- that the disturbance of ecosystems and loss of biological diversity be avoided, or, where they cannot be altogether avoided, be minimised and remedied;⁵²⁸
- that the use and exploitation of non-renewable natural resources be responsible and equitable, and take into account the consequences of the depletion of the resource;⁵²⁹
- that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised;⁵³⁰
- that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, be minimised and remedied;⁵³¹
- that the environment is held in public trust for the people. Therefore the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage;⁵³² and
- that sensitive, vulnerable, highly dynamic or stressed ecosystems, such as coastal shores, estuaries, wetlands and similar systems require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure.⁵³³

The Act provides various mechanisms through which these ideals may be achieved including the inclusion of Environmental Management Co-operation Agreements (EMCAs).⁵³⁴ Section 35 of the NEMA provides that the Minister and every MEC and municipality, may enter into EMCAs with any person or community for the purpose of promoting compliance with the National Environmental Management Principles listed in the Act. EMCAs may relate to an undertaking by an individual or community to improve environmental standards and set measurable targets

⁵²⁷ Patterson and Winstanley (n33) at 40.

⁵²⁸ Section 2(4)(a)(i) of the NEMA.

⁵²⁹ Section 2(4)(a)(v) of the NEMA.

⁵³⁰ Section 2(4)(a)(vi) of the NEMA.

⁵³¹ Section 2(4)(a)(viii) of the NEMA.

⁵³² Section 2(4)(o) of the NEMA.

⁵³³ Section 2(4)(r) of the NEMA.

⁵³⁴ Glazewski (n5) at 167.

to protect the environment.⁵³⁵ The agreements may also provide for periodic monitoring and reporting,⁵³⁶ independent verification of reports,⁵³⁷ independent monitoring and inspections,⁵³⁸ and prescribe targets, norms and standards,⁵³⁹ penalties for non-compliance,⁵⁴⁰ and incentives to individuals or communities who enter into an EMCA.⁵⁴¹

The Minister may prescribe requirements for Environmental Management Co-operation Agreements by way of regulations. Such regulations may set out procedures for the establishment of EMCAs, the duration of the agreements, general conditions and prohibitions, procedures for reporting and monitoring and inspection.⁵⁴² These regulations have not been published to date.

Although the underlying purpose of EMCAs relates to environmental management rather than biodiversity conservation, these agreements could be used as a vehicle to encourage individuals, communities and organisations to adopt sustainable land use practices on their land or contract their land into a protected area.⁵⁴³

7.3.3 National Environmental Management: Protected Areas Act, No 57 of 2003

The *Protected Areas Act* provides for the protection and conservation of ecologically viable areas representative of South Africa's biological diversity on state land, private land and communal land. The Act appoints the government as the trustee of South Africa's protected areas and in addition to declaring a further three types of protected areas, retains the validity of various other forms of current protected areas.⁵⁴⁴ These include special nature reserves,⁵⁴⁵ world heritage sites⁵⁴⁶, mountain catchment areas⁵⁴⁷, and specially protected forest areas, forest nature

⁵³⁵ Section 35(3)(a) and (b) of the NEMA.

⁵³⁶ Section 35(3)(c)(i) of the NEMA.

⁵³⁷ Section 35(3)(c)(ii) of the NEMA.

⁵³⁸ Section 35(3)(c)(iii) of the NEMA.

⁵³⁹ Section 35(3)(c)(iv) of the NEMA.

⁵⁴⁰ Section 35(3)(d) of the NEMA.

⁵⁴¹ Section 35(3)(d) of the NEMA.

⁵⁴² Section 45(1) of the NEMA.

⁵⁴³ Patterson and Winstanley (n33) at 39 and 46.

⁵⁴⁴ Section 3(a) of the Protected Areas Act.

⁵⁴⁵ Declared in terms of the *Environment Conservation Act No 73 of 1989*, immediately before the repeal of Section 18 of that Act by Section 90 of the *Protected Areas Act No 57 of 2003*.

⁵⁴⁶ Declared and regulated in terms of the *World Heritage Convention Act No 49 of 1999*.

reserves and forest wilderness areas.⁵⁴⁸ The further three types of protected areas which the Act provides for include:

- **Special Nature Reserves** – The purpose of a Special Nature Reserve is to protect highly sensitive, outstanding ecosystems, species or geological or physical features in an area and to make the area primarily available for scientific and environmental monitoring.⁵⁴⁹ Special Nature Reserves are declared by the Minister of Environmental Affairs and Tourism⁵⁵⁰ but in respect of private land, the declaration may only be issued if the owner has consented by way of written agreement with the Minister.⁵⁵¹ The declaration of an area as a special nature reserve may only be withdrawn by resolution of the National Assembly.⁵⁵²
- **Nature Reserves** – The purpose of a Nature Reserve is to protect an area which has significant natural features or biodiversity,⁵⁵³ is of scientific, cultural, historical or archaeological interest⁵⁵⁴ or is in need of long-term protection for the maintenance of its biodiversity or for the provision of environmental goods and services.⁵⁵⁵ A Nature Reserve may also be declared to provide for a sustainable flow of natural products and services to meet the needs of a local community,⁵⁵⁶ to enable the continuation of traditional consumptive uses as sustainable⁵⁵⁷ or to provide for nature-based recreation and tourism opportunities.⁵⁵⁸ Nature Reserves are declared by the Minister of Environmental Affairs and Tourism or the MEC⁵⁵⁹ but in respect of private land, the declaration may only be issued if the owner has consented by way of written agreement

⁵⁴⁷ Declared and regulated in terms of the *Mountain Catchment Areas Act No 63 of 1970*.

⁵⁴⁸ Declared and regulated in terms of the *National Forests Act No 84 of 1998*.

⁵⁴⁹ Section 18(2) of the Protected Areas Act.

⁵⁵⁰ Section 18(1)(a) of the Protected Areas Act.

⁵⁵¹ Section 18(3) of the Protected Areas Act.

⁵⁵² Section 19 of the Protected Areas Act.

⁵⁵³ Section 23(2)(b)(i) of the Protected Areas Act.

⁵⁵⁴ Section 23(2)(b)(ii) of the Protected Areas Act.

⁵⁵⁵ Section 23(2)(b)(iii) of the Protected Areas Act.

⁵⁵⁶ Section 23(c) of the Protected Areas Act.

⁵⁵⁷ Section 23(d) of the Protected Areas Act.

⁵⁵⁸ Section 23(e) of the Protected Areas Act.

⁵⁵⁹ Section 23(1)(a) of the Protected Areas Act. “MEC” means the member of the Executive Council of a province in whose portfolio provincial protected areas in the province fall.

with the Minister or the MEC.⁵⁶⁰ A declaration of a Nature Reserve may be withdrawn by resolution of the National Assembly⁵⁶¹ or the legislature of the relevant province,⁵⁶² or by the minister or MEC where any party withdraws from the written agreement.⁵⁶³ The Minister or MEC may also designate a nature reserve as a specific type⁵⁶⁴ including a wilderness area.⁵⁶⁵

- **Protected Environments** – These may be declared for a variety of purposes including to regulate the area as a buffer zone for the protection of a special nature reserve, world heritage site or nature reserve,⁵⁶⁶ to enable owners of land to take collective action to conserve biodiversity on their land and to seek legal recognition for this,⁵⁶⁷ or to protect the area if the area is sensitive to development due to its biological diversity; natural characteristics; scientific, cultural, historical, archaeological or geological value; scenic and landscape value; or provision of environmental goods and services.⁵⁶⁸ An area may also be declared as a Protected Environment to protect a specific ecosystem outside of a special nature reserve, world heritage site or nature reserve,⁵⁶⁹ to ensure that the use of natural resources in the area is sustainable,⁵⁷⁰ or to control change in land use in the area.⁵⁷¹ Protected Environments are declared by the Minister of Environmental Affairs and Tourism or the MEC but in respect of private land, the declaration may only be issued if the owner has consented by way of written agreement with the Minister or the

⁵⁶⁰ Section 23(3) of the Protected Areas Act.

⁵⁶¹ Section 24(1)(a) of the Protected Areas Act.

⁵⁶² Section 24(1)(b) of the Protected Areas Act.

⁵⁶³ Section 24(2) of the Protected Areas Act.

⁵⁶⁴ Section 25 of the Protected Areas Act.

⁵⁶⁵ Section 26(2) stipulates that a Nature Reserve may be designated as a wilderness area (a) to protect and maintain the natural character of the environment, biodiversity, associated natural and cultural resources and the provision of environmental goods and services; (b) to provide outstanding opportunities for solitude; (c) to control access which, if allowed, may only be by non-mechanised means.

⁵⁶⁶ Section 28(2)(a) of the Protected Areas Act.

⁵⁶⁷ Section 28(2)(b) of the Protected Areas Act.

⁵⁶⁸ Section 28(2)(c) of the Protected Areas Act.

⁵⁶⁹ Section 28(2)(d) of the Protected Areas Act.

⁵⁷⁰ Section 28(2)(e) of the Protected Areas Act.

⁵⁷¹ Section 28(2)(f) If the area is proposed as or declared a Nature Reserve. Under Section 28(5) the declaration lapses at the expiry of three years from the date of publication of the notice contemplated in subsection (1), but the Minister or the MEC may by notice in the Gazette extend that period for not more than one year.

MEC.⁵⁷² The declaration of an area as a protected environment may be withdrawn by the Minister of the MEC.⁵⁷³

The declaration of private land as a special nature reserve, nature reserve or protected environment may be initiated either by the Minister, or the MEC or the owners of that land acting individually or collectively.⁵⁷⁴ In terms of the Act, any written agreement entered into between the Minister or MEC and the owner of private land must be registered against the title deeds of the property⁵⁷⁵ and is binding on the owner and any successors in title.⁵⁷⁶

Management of these protected areas is assigned by the Minister or the MEC to a management authority: a suitable individual, organisation or organ of state.⁵⁷⁷ The management authority is required to prepare a management plan for the area⁵⁷⁸ which should include planning measures, controls, performance criteria and a programme for the implementation of the plan and its costing.⁵⁷⁹ The management authority may enter into an agreement with another organ of state, local community or any other party for the co-management of the area by the parties or for the regulation of human activities that affect the environment in the area.⁵⁸⁰

If the management authority of a protected area is not performing its duties in terms of the management plan or is underperforming with regard to the management of the area or its biodiversity, the Minister of the MEC may direct the management authority, by way of a notice, to take corrective steps.⁵⁸¹ Failure to take the required steps may result in the Minister or the MEC terminating the management authority's mandate and assigning the management of the area to another organ of state.⁵⁸²

⁵⁷² Section 28(3) of the Protected Areas Act.

⁵⁷³ Section 29 of the Protected Areas Act.

⁵⁷⁴ Section 35(1) of the Protected Areas Act.

⁵⁷⁵ Section 35(3)(b) of the Protected Areas Act.

⁵⁷⁶ Section 35(3)(a) of the Protected Areas Act.

⁵⁷⁷ Section 38(1) of the Protected Areas Act. Management of a protected environment may only be assigned to a suitable person, organisation or organ of state at the request or consent of the owner or lawful occupier of the land.

⁵⁷⁸ Section 39(2) of the Protected Areas Act. The management authority must prepare and submit the plan within 12 months of assignment and must consult municipalities, other organs of state, local communities and other affected parties which have an interest in the area.

⁵⁷⁹ Section 41(2) of the Protected Areas Act.

⁵⁸⁰ Section 42(1)(a) of the Protected Areas Act.

⁵⁸¹ Section 44(1)(b) of the Protected Areas Act.

⁵⁸² Section 44(2) of the Protected Areas Act.

7.3.4 *The National Environmental Management: Biodiversity Act No 10 of 2004*

The *Biodiversity Act* has significantly reformed the manner in which biodiversity is conserved in South Africa. The Act provides for the management of South Africa's biodiversity within the framework of the National Environmental Management Act and applies to any human activity affecting the biodiversity within the country.⁵⁸³ The Act appoints the state as the trustee of South Africa's biodiversity⁵⁸⁴ and binds all national, provincial and local spheres of government.⁵⁸⁵ The following three main planning instruments are set out within the Act:

- **The National biodiversity framework** – The Minister of Environmental Affairs and Tourism is required to prepare and adopt a national biodiversity framework.⁵⁸⁶ The framework should provide for an integrated, co-ordinated and uniform approach to biodiversity management by all spheres of government, non-governmental organisations, the private sector, local communities, other stakeholders and the public.⁵⁸⁷ In addition, the framework should reflect regional co-operation on issues concerning the management of biodiversity;⁵⁸⁸ identify priority areas for conservation action and the establishment of protected areas;⁵⁸⁹ and determine norms and standards for provincial and municipal environmental conservation plans.⁵⁹⁰
- **Bioregional plans** – The Minister or provincial MEC for Environmental Affairs is required to determine particular geographic areas as bioregions⁵⁹¹ and publish bioregional plans for the management of biodiversity in these regions.⁵⁹² A bioregional plan must contain measures for the effective management of biodiversity and provide for monitoring of the plan within the national biodiversity framework.⁵⁹³ The Minister or the MEC must review a bioregional plan at least every five years, assess compliance with

⁵⁸³ Section 4(b) of the Biodiversity Act

⁵⁸⁴ Section 3 of the Biodiversity Act.

⁵⁸⁵ Section 4(2) of the Biodiversity Act.

⁵⁸⁶ Section 38(1)(a) of the Biodiversity Act.

⁵⁸⁷ Section 39(1)(a) of the Biodiversity Act.

⁵⁸⁸ Section 39(1)(d) of the Biodiversity Act.

⁵⁸⁹ Section 39(1)(c) of the Biodiversity Act.

⁵⁹⁰ Section 39(2) of the Biodiversity Act.

⁵⁹¹ Section 40(1)(a) A bioregion is determined if that region contains whole or several nested ecosystems and is characterised by its landforms, vegetation cover, human culture and history.

⁵⁹² Section 40(1)(b) of the Biodiversity Act.

⁵⁹³ Section 41 of the Biodiversity Act.

the plan and the extent to which its objectives are being met,⁵⁹⁴ and where necessary amend a bioregional plan or the boundaries of the bioregion.⁵⁹⁵

- **Biodiversity management plans** – Any person, organisation or organ of state wishing to contribute to biodiversity management may submit to the Minister for his approval a draft management plan for an ecosystem,⁵⁹⁶ indigenous species⁵⁹⁷ or migratory species.⁵⁹⁸ The Minister must identify a suitable person, organisation or organ of state which is willing to be responsible for the implementation of the plan⁵⁹⁹ and determine the manner in which the plan will be implemented.⁶⁰⁰ Responsibility for the implementation of the plan is then assigned by way of a notice to this individual, organisation or organ of state.⁶⁰¹ The Minister may enter into a biodiversity management agreement with the individual, organisation or organ of state or any other suitable person, organisation or organ of state, regarding the implementation of a biodiversity management plan.⁶⁰² A biodiversity management plan must be aimed at ensuring the long-term survival in nature of the species or ecosystem to which the plan relates⁶⁰³ and provide for the responsible party to monitor and report on progress with implementation of the plan⁶⁰⁴ in accordance with the national biodiversity framework and any applicable bioregional plan.⁶⁰⁵ The Minister must review a biodiversity management plan at least every five years, assess compliance with the plan⁶⁰⁶ and where necessary, either of his own initiative or at the request of interested person, organisation or organ of state, amend a biodiversity management plan.⁶⁰⁷

⁵⁹⁴ Section 42(1) of the Biodiversity Act.

⁵⁹⁵ Section 42(2) and (3) of the Biodiversity Act.

⁵⁹⁶ Section 43(1)(a) of the Biodiversity Act.

⁵⁹⁷ Section 43(1)(b) of the Biodiversity Act.

⁵⁹⁸ Section 43(1)(c) of the Biodiversity Act.

⁵⁹⁹ Section 43(2) of the Biodiversity Act.

⁶⁰⁰ Section 43(3)(b) of the Biodiversity Act.

⁶⁰¹ Section 43(3)(c) of the Biodiversity Act.

⁶⁰² Section 44 of the Biodiversity Act.

⁶⁰³ Section 45(a) of the Biodiversity Act.

⁶⁰⁴ Section 45(b) of the Biodiversity Act.

⁶⁰⁵ Section 45(c) of the Biodiversity Act.

⁶⁰⁶ Section 46(1) of the Biodiversity Act.

⁶⁰⁷ Section 46(2) of the Biodiversity Act.

The Act also establishes the South African National Biodiversity Institute and sets out the functions which the institute is obligated to perform.

7.4 Servitudes

South African common law provides for three types of servitudes namely *praedial*, personal and public.⁶⁰⁸ A *praedial* servitude is “a limited real right to the immovable property of another which grants certain specific entitlements of use and enjoyment to the holder of the servitude in his capacity as owner of the dominant tenement.”⁶⁰⁹ A *praedial* servitude therefore requires that there is a dominant and a servient tenement. The *praedial* servitude is then granted by the owner of the servient tenement in favour of the dominant tenement.⁶¹⁰ Generally a servitude granted for conservation purposes would not satisfy this requirement as this instrument does not generally impose a burden on one property in favour of another but rather on a particular landowner in relation to his land.⁶¹¹ Consequently, if *praedial* servitudes were to be used for conservation purposes the law relating to them would need to be amended.⁶¹²

In contrast, a personal servitude is granted in favour of a specific person with respect to a particular piece of property. Unlike *praedial* servitudes, personal servitudes do not require two adjacent properties.⁶¹³ This aspect does suggest that they could be used as a vehicle for land conservation, however a major drawback is that they do not exist in perpetuity but only for the lifetime of the person in whose favour they are granted.⁶¹⁴

Conservation areas can be established in South Africa through the creation of a public servitude. A public servitude may be granted in favour of the public. Where the servitude is used for conservation purposes, it may imply that the encumbered land, or part thereof, be conserved in its original state.⁶¹⁵ Under the *Deeds Registries Act* 47 of 1937, the servitude is registered on the title deeds of the property thereby binding the current owner and any successors in title.⁶¹⁶

⁶⁰⁸ Patterson and Winstanley (n33) at 17.

⁶⁰⁹ van wyk (n38) at 281.

⁶¹⁰ Ibid.

⁶¹¹ Patterson and Winstanley (n33) at 17.

⁶¹² Ibid.

⁶¹³ Patterson and Winstanley (n33) at 17.

⁶¹⁴ Ibid.

⁶¹⁵ Rabie (n509) at 77.

⁶¹⁶ Section 65(1) of the Deeds Registries Act.

However, the conservation of the land is not guaranteed as the state may, in terms of the *Expropriation Act* 63 of 1975, expropriate a servitude. Public servitudes are also not suited to controlling the management of the land as they generally impose negative conditions essentially by defining what may not be done on the land.⁶¹⁷ Furthermore, the reliance of enforcement is placed upon the public rather than a person or body who is directly responsible for this task.⁶¹⁸

7.5 Tax Legislation

In many of the countries, particularly the United States, private landowners are generally provided with incentives to enter into servitudes or other conservation instruments. Tax legislation is therefore important for the conservation of natural resources and biodiversity as it both makes provisions for incentives which may promote or hinder conservation activities and also facilitates the formation of conservation organisations. At present, the formation and activities of conservation organisations is regulated by three key laws.

7.5.1 *The Non-Profit Organisations Act 71 of 1997*

The purpose of the *Non-Profit Organisations Act* is to establish a regulatory and administrative framework within which non-profit organisations can conduct their affairs.⁶¹⁹ Such organisations may include a trust, company, or other association of persons established for public purpose.⁶²⁰ Although “public purpose” is not defined in the Act, various categories of activities including conservation, environment and animal welfare, are generally accepted as public benefit activities.⁶²¹ A further mandatory requirement to qualify as a non-profit organisation is that the income and property of the organisation may not be distributed to its members or office bearers except as reasonable compensation for services rendered.⁶²²

The Act outlines the responsibility of the state to determine and co-ordinate the implementation of policies and measures designed to promote, support and enhance the capacity of non-profit organisations to perform their functions.⁶²³ The Act also details requirements for registration,⁶²⁴

⁶¹⁷ Rabie (n509) at 77.

⁶¹⁸ Ibid.

⁶¹⁹ Patterson and Winstanley (n33) at 34.

⁶²⁰ Section 1(x)(a) of the Non-Profit Organisations Act.

⁶²¹ Patterson and Winstanley (n33) at 34.

⁶²² Section 1(x)(b) of the Non-Profit Organisations Act.

⁶²³ Section 3 of the Non-Profit Organisations Act.

⁶²⁴ Section 11-16 of the Non-Profit Organisations Act.

accounting records and reports,⁶²⁵ changing of names⁶²⁶ and deregistration⁶²⁷ of non-profit organisations.

Historically, non-profit organisations were afforded some degree of preferential tax treatment and donor incentives. However, following recommendations by the Katz Commission, the Minister of Finance, in his 2000 Budget Speech, announced several changes to the legislation regulating tax exemptions of non-profit organisations.⁶²⁸ Tax exemptions are now only granted to those organisations who qualify as a Public Benefit Organisation (PBO).

7.5.2 *Companies Act No 61 of 1973*

The *Companies Act* has relevance to biodiversity conservation in that it provides for an “association not for gain” in terms of Section 21.⁶²⁹ This is a useful mechanism for individuals, communities or companies to form a conservation organisation.

In order to qualify as “Section 21 Company”, the association must be formed for a legal purpose⁶³⁰ and have a primary objective to promote religion, arts, sciences, education, charity, recreation, or any other cultural or social activity or communal or group interest.⁶³¹ Payment of any income or dividend to company members is prohibited except for reasonable compensation for services rendered.⁶³² A Section 21 Company must register with the Registrar of Companies⁶³³ and on its closure, its assets must be transferred to another organisation or institution with a similar objective.⁶³⁴

7.5.3 *Income Tax Act No 36 of 1996*

The *Income Tax Act* provides two major benefits to the not-for-profit sector. Those organisations that qualify as a Public Benefit Organisation under Section 30 of the Act enjoy tax exemption,

⁶²⁵ Section 17 of the Non-Profit Organisations Act.

⁶²⁶ Section 19 of the Non-Profit Organisations Act.

⁶²⁷ Section 21 of the Non-Profit Organisations Act.

⁶²⁸ Budget speech by Trevor Manuel, Minister of Finance, 23 February 2000.

⁶²⁹ Patterson and Winstanley (n33) at 35.

⁶³⁰ Section 21(1)(a) of the Companies Act.

⁶³¹ Section 21(1)(b) of the Companies Act.

⁶³² Section 21(2)(a) of the Companies Act.

⁶³³ Section 63(1) of the Companies Act.

⁶³⁴ Section 21(2)(b) of the Companies Act.

and contributions to those PBOs which carry out certain specified Public Benefit Activities are donor deductible.⁶³⁵ To be eligible, an organisation must meet all the following criteria:

- It must qualify as a PBO either as a company incorporated under Section 21 of the Companies Act; or as a trust with a trust deed registered under the Master of the High court; or as a voluntary association of persons governed by a constitution.⁶³⁶
- The sole object of the organisation must be to carry out a public benefit activity.
- The activities must be carried out with an altruistic or philanthropic intent and no activity may directly or indirectly promote the economic self interest of any fiduciary or employee.⁶³⁷
- At least 85% of the public benefit activities, measured either in time spent or in cost must be carried out for the benefit of persons in South Africa. The Minister of Finance may in some special circumstances grant permission for an organisation to spend more time working in other countries.⁶³⁸
- The activities of the PBO must be carried out for the benefit of the general public; for the benefit of, or be accessible to, the poor and needy; and the organisation must be at least 85% funded by donations, grants from any organ of state or any foreign grants.⁶³⁹

Aside from exemption from income tax, PBO's enjoy several other benefits including exemption from transfer duty, stamp duty, skills development levy and capital gains tax. A donor is also exempt from the 20% donation tax and an estate is exempt from the 20% estate duty on property bequeathed to a PBO.⁶⁴⁰

The Act also provides for the deduction of certain expenses incurred as a result of undertaking certain conservation activities. Section 26 enables any person to deduct from his or her income, for the purposes of determining his or her annual taxable income, any expenditure incurred while undertaking pastoral, agricultural or other farming operations in the eradication of noxious plants and the prevention of soil erosion.

⁶³⁵ Law administration *Tax exemption guide for public benefit organisations* (2002).

⁶³⁶ Section 30(1)(a) of the Income Tax Act.

⁶³⁷ Section 30(1)(b) i and ii of the Income Tax Act.

⁶³⁸ Section 30(1)(b)(iii) of the Income Tax Act.

⁶³⁹ Section 30(1)(c) of the Income Tax Act.

⁶⁴⁰ Jamiatul Ulama *Guidelines pertaining to tax exemption in terms of the Income Tax Act No 58 of 1962 for a Public Benefit Organisation (PBO)* (n.d.)

7.6 Property Tax

Property tax has played a pivotal role in influencing land use and the resulting impact on biodiversity. Legislative reform has extended the ambit of the property tax regime to include both urban and rural environments. Although tax is still currently administered under provincial legislation, the Constitution has empowered the Government to regulate property tax at a national level in terms of the *Property Rates Act*.⁶⁴¹

7.6.1 *Property Rates Act No 6 of 2004*

The *Property Rates Act* sets out to regulate the power of local government to impose rates on property, to exclude certain properties from rating in the national interest and to make provision for municipalities to implement a transparent and fair system of exemptions, reductions and rebates through their rating policies.⁶⁴² The Act effectively prescribes the framework within which every municipality must develop and implement its property tax regime.⁶⁴³ Patterson (2005) notes that in addition to this national framework, the *Property Rates Act* is of relevance to landscape protection in South Africa because it provides for the adoption of local government tax policies, sets out a system of exemptions, reductions and rebates, enables differential property tax rates to be levied on different types of property and imposes prohibitions on levying property tax in particular circumstances. Although these aspects provide opportunities for land conservation, one of the major challenges is that the Act does not impose a mandatory mechanism on local government to ensure that their property rates systems encourage sustainable land use practices and promote biodiversity conservation.⁶⁴⁴ The Act does however enable differential property taxes to be levied on protected areas and properties owned by public benefit organisations.⁶⁴⁵ Of particular importance is the success of the Botanical Society in their lobbying for a landmark clause to be included in the Act. Conservation land on private property that has formally been declared in terms of the *Protected Areas Act 57 of 2003* may now be exempted from municipal rates.⁶⁴⁶

⁶⁴¹ A Patterson 'Property tax: A friend or foe to landscape protection in South Africa' (2005) 12 *South African Journal of Environmental Law and Policy* 97 at 111.

⁶⁴² Preamble of the Property Rates Act.

⁶⁴³ Patterson (n641) at 114.

⁶⁴⁴ Patterson and Winstanley (n33) at 75.

⁶⁴⁵ Section 8 of the Property Rates Act.

⁶⁴⁶ South African National Biodiversity Institute *Enabling stewardship* (2006) at 125.

CHAPTER EIGHT

CONCLUSION

8.1 Introduction

Although South Africa has made unprecedented advances in developing a strong legal framework for biodiversity conservation, the limited attention afforded to private land conservation tools is a major barrier to conservation efforts in the region. The country still adopts a conventional approach to conservation through the establishment of formally protected regions and has a fragmented collection of national and provincial legislation that provides for the establishment of some twenty five varying types of terrestrial protected areas.⁶⁴⁷

The majority of laws adopt traditional approaches to establishing and managing protected areas in that they identify areas of conservation significance, appoint management authorities and restrict access and activities that can be undertaken.⁶⁴⁸ Most types of protected areas must be recognized by a government entity as having a special value for conservation, which provides government endorsement but also limits the opportunity for creating them, particularly under voluntary conditions.

Although South African common law does provide for the potential use of servitudes for conservation purposes, these instruments were not developed with private land conservation in mind and consequently a number of impediments exist including administration of the instruments and control of land management. Furthermore, these techniques have not been implemented probably because of the availability of potentially less onerous and more attractive mechanisms such as the establishment of private protected areas.⁶⁴⁹ The lack of specific easement legislation in South Africa and the recognition of the importance of private land conservation have lead some organisations including the Botanical Society and Ezemvelo KZN Wildlife to initiate conservation stewardship pilot projects through which private land is conserved under the *Protected Areas Act 57 of 2003*. The Act enables the Minister to declare an area to be a special nature reserve, nature reserve or protected environment by way of written notice in the Gazette provided that in respect of private land, the owner has consented to the declaration by way of written agreement with the Minister.

⁶⁴⁷ Patterson (n641) at 106.

⁶⁴⁸ Ibid.

⁶⁴⁹ Rabie (n509) at 77.

The review of international legislation in this study indicates that the majority of countries reviewed have enacted specific legislation enabling the establishment of conservation agreements. Although this approach is recommended, it is perhaps more pertinent to assess the current process of establishing conservation agreements under the *Protected Areas Act* and provide recommendations as to how this process could be enhanced. Should South Africa embark on the establishment of specific easement legislation, these recommendations could still be applied.

Experience from abroad has highlighted that successful conservation agreement legislation requires the inclusion of key provisions ranging from permissible purpose and clear definitions of “grantors” and “holders” to registration, monitoring and enforcement of this conservation tool. The following section examines each of these key provisions within context of the current South African environment and provides possible recommendations for their inclusion either through amendments to the *Protected Areas Act* or by way of regulation.

8.2 The inclusion of key provisions in current and future legislation

8.2.1 Permissible purpose

International experience has highlighted two approaches to the inclusion of a permissible purpose. While the United States and Canada have included a detailed list of purposes within the overall provision, Australia and New Zealand have established trusts to which purposes are assigned. The permissible purpose of the conservation agreement is then inferred from those of the trust. In the South African context the former approach is recommended. This is primarily because the respective acts enabling the establishment of trusts in Australia and New Zealand only facilitate agreements to be held by the relevant trust. However in the South African context it would be better to enable as wide a range of holders as possible (this is discussed further under the section on holders).

As with much of the current protected areas legislation in South Africa, the primary purpose of any conservation agreement should be the conservation of biodiversity. However the purposes detailed in much of the current legislation are limiting in that they generally only enable the protection of areas of conservation significance which is applied at the discretion of the designated authority. Given that incentive payments and the costs of administering conservation agreements are likely to be high, resources should not be expended on areas that are not worth protecting. However, there may be circumstances in which there is a need to conserve areas

which are not necessarily of significant biodiversity value. These may include areas which contribute to the creation of essential biodiversity corridors by linking biodiversity nodes across productive landscapes.⁶⁵⁰ Furthermore, recent studies on ecosystem services suggest that some areas which are not necessarily of high biodiversity value may also provide significant benefits to society through ecosystem services.⁶⁵¹

A further consideration is the protection of biodiversity for the purposes of scientific studies, cultural attributes and/or historical value. Biodiversity conservation is enhanced by an increased understanding of the subject. Much of our knowledge and information about plant and animal species and their interactions has been gained through research conducted in protected areas. This requirement has been included in the list of permissible purposes detailed for special nature reserves, nature reserves and protected environments under the *Protected Areas Act*. A complete list of purposes for which these protected areas may be established is detailed in Table 1.

Table 1. List of permissible purposes detailed for Special Nature Reserves, Nature Reserves and Protected Environments under the *Protected Areas Act 57 of 2003*.

Special Nature Reserve	Nature Reserve	Protected Environment
<ul style="list-style-type: none"> • To protect highly sensitive, outstanding ecosystems, species or geological or physical features in the area; and • To make the area primarily available for scientific research or environmental monitoring. 	<ul style="list-style-type: none"> • To protect an area if it has significant natural features or biodiversity, is of scientific, cultural, historical or archaeological interest, is in need of long-term protection for the maintenance of its biodiversity or for the provision of environmental goods and services. • To provide for a sustainable flow of natural products and services to meet the needs of a local community • To enable the continuation of such traditional consumptive uses as are sustainable; or physical features area; and • To provide for nature-based recreation and tourism opportunities. 	<ul style="list-style-type: none"> • To protect the area if the area is sensitive to development due to its biological diversity; natural characteristics; scientific, cultural, historical, archaeological or geological value; scenic and landscape value; or provision of environmental goods and services; • To protect a specific ecosystem outside of a special nature reserve, world heritage site or nature reserve; • To ensure that the use of natural resources in the area is sustainable; or • To control change in land use in the area if the area is earmarked for declaration as, or inclusion in, a nature reserve.

⁶⁵⁰ South African National Biodiversity Institute (n646) at 127.

⁶⁵¹ M Mander (ed) *Maloti Drakensberg Transfrontier Project: Payment for Ecosystem Services - Developing an Ecosystem Services Trading Model for the Mnweni/Cathedral Peak and Eastern Cape Drakensberg Areas* (In prep).

It is evident that a nature reserve may be established for the protection of an area which has significant biodiversity features⁶⁵² however with respect to protected environments; these may only be established to protect an area which contains specific features that may be sensitive to development.⁶⁵³ Given that many of the areas which contain significant biodiversity features are situated in predominantly rural areas, it is arguable that the most significant threat to biodiversity is transformation of land rather than development. It is therefore recommended that the term “development” be removed from this purpose to facilitate the protection of an area for its biodiversity and natural characteristics irrespective of the potential threat.

Although the protection of areas which may render environmental goods and services is adequately addressed within these provisions,⁶⁵⁴ the potential to conserve areas which function as important corridors is not. It is therefore further recommended that the permissible purposes for both nature reserves and protected environments be amended to include the protection of areas which contribute to the maintenance of biodiversity on neighbouring or adjoining properties.

8.2.2 *Holders*

Experience suggests that legislation should enable as wide a range of holders as possible. In deciding who should hold conservation agreements within South Africa it is necessary to consider both the current and potential political climates. The success of acquiring and protecting every parcel of land which might hold a conservation agreement requires substantial resources, both human and financial. In South Africa, many of the government agencies are short-staffed and are currently unable to meet their existing commitments. There is little doubt that the added demands of administration, monitoring and enforcement of numerous conservation agreements will in no way contribute favourably to an already tenuous situation. Furthermore, the majority of conservation agencies in South Africa are either government departments or parastatal boards and consequently do not enjoy favourable tax positions on any income or donations. It is also questionable whether landowners would be prepared to relinquish

⁶⁵² Section 23(2) of the Protected Areas Act.

⁶⁵³ Section 28(2) of the Protected Areas Act.

⁶⁵⁴ The Protected Areas Act states that a Nature Reserve may be declared to protect an area which ‘is in need of long-term protection for the maintenance of its biodiversity or for the provision of environmental goods and services’. Similarly, with respect to Protected Environments, the Act states that an area may be declared as a Protected Environment ‘to protect the area if the area is sensitive to development due to its provision of environmental goods and services’.

control of their land, or part thereof, to the state or its representatives, particularly given the current situation in Zimbabwe and the resulting insecurities of landowners within South Africa.

This is supported by the results of a survey conducted in California in which landowners were asked who should manage easement programs. Of the 57 interviewees, 46 favoured non-profit land trusts over public agencies to undertake this task.⁶⁵⁵ Similarly, various studies undertaken in New Zealand found that Maori landowners in particular were reluctant to deal with government agencies.⁶⁵⁶

These issues provide a sound argument for potential “holders” to be public benefit organisations, such as a land trust, which could then benefit from tax deductions and would to some extent relieve the anxiety of landowners regarding government involvement in the process. This said there are currently very few land trusts within South Africa and those that do exist do not have the capacity to undertake this role. The “permitting of joint holders” and “third party right to enforcement” may be two provisions which could go some way to alleviating capacity and financial issues.

Currently the *Protected Areas Act*, under sections 18(3), 23(3) and 28(3) only enables the Minister to enter into an agreement. In the light of the findings of the current study, it is recommended that these provisions be amended to facilitate persons or organisations, other than the Minister to enter into these agreements. This would also assist in alleviating some of the issues identified above, as non-government and public benefit organisations could then qualify to enter into conservation agreements under the Act.

The amendment could follow a similar format to that of Prince Edward Islands Protection Act and provide that “a private landowner may ...enter into an agreement with the Minister, suitable person, organisation or organ of state”. In order to ensure that the person or organisation is both competent and has sufficient resources to manage these agreements, a list of criteria with which a person or organisation need comply in order to be eligible to hold these agreements, should be published by way of regulation. For example, these eligibility criteria could include that the organisation has land conservation as one of its purposes.

⁶⁵⁵ E Rilla ‘Landowners, while pleased with agricultural easements, suggest improvements’ (2002) *California Agriculture* 21 at 22.

⁶⁵⁶ Edwards and Sharp (n36) at 322.

The *Protected Areas Act* does allow the Minister to assign the management of a special nature reserve or nature reserve to a suitable person, organisation or organ of state provided that this person, organisation or organ of state is the management authority for the area.⁶⁵⁷ It is recommended that the latter part of this provision be removed and that the criteria for ensuring the competency of these entities, described above, rather be applied. The Act also provides for the co-management of an area under Section 42 which in essence is similar to the permitting of joint holders. However, as with the “holders” of agreements and management authorities this should be amended to encompass persons, organisations or organs of state who comply with the list of criteria set out by way of regulation.

8.2.3 Grantors

There is considerable variation in the definition of “grantor” or “landowner” in the array of legislation examined in this study. In the South African context numerous types of “landowners” exist ranging from corporate and private owners through to national, provincial and local government agencies and tribal authorities. As with “holders”, it is recommended that the definition of “owner” encompass as wide a range of “owners” as possible. Currently, the *Protected Areas Act* does not define the “owner” of land or property. It is recommended that a clear definition of “owner” is provided in the Act which, in addition to those owners listed above also includes heirs, administrators, liquidators and trustees of the owner.

8.2.4 Registration

The registration of conservation agreements with the appropriate deeds office is often viewed as the most important provision as it has the ability to bind both current and successive owners to sound management objectives stipulated in the agreement. In line with much of the international legislation, the *Protected Areas Act* adequately addresses this issue through the inclusion of two key provisions. Section 35 includes that:

- 3)(a) The terms of any written agreement entered into between the Minister or MEC and the owner of private land in terms of section 18(3) or 23(3) are binding on the successors in title of such owner.
- (b) The terms of agreement must be recorded in a notarial deed and registered against the title deeds of the property.

⁶⁵⁷ Section 38 of the Protected Areas Act.

Furthermore, international legislation applies two possible approaches to detailing a specific registration process. Either the Act itself outlines a specific registration process to be followed or it refers to a particular process detailed in other legislation. The *Protected Areas Act* adopts the latter approach and in Section 36(3) requires that “on receipt of the notification, the Registrar of Deeds must record any such declaration, withdrawal or alteration in relevant registers and documents in terms of section 3(1)(w) of the Deeds Registries Act, 1937 (Act No. 47 of 1937).”

The Act also requires that the notification include a description of the land involved and the terms and conditions of any notarial deed.⁶⁵⁸

8.2.5 *Monitoring*

The ability to monitor compliance with the agreement is a provision which has seldom been included in the legislation examined in this study. Although it is evident that the lack of this provision has not jeopardised the functioning of these agreements it is still recommended that conservation agreement legislation in South Africa include the ability to inspect the property in question. Without this provision it is difficult assess compliance and enforce consequent penalties.

This requirement has been addressed under Sections 45(2) and 46(2) of the *Protected Areas Act*, which enables an official of the Department or another organ of state designated by the Minister to access a special nature reserve or nature reserve for the purpose of monitoring the state of conservation in the reserve or the implementation of the management plan. However, if “holders” and “management authorities” are amended to include any person, organisation or organ of state (as recommended under the section on holders) then the “persons” tasked with monitoring under Sections 45(2) and 46(2) will also need to be amended accordingly.

8.2.6 *Enforcement*

The majority of international conservation agreement legislation includes provisions relating to various aspects of enforcement ranging from who is able to enforce the agreement and who should bear the cost of the agreement to what remedies are available for breaches of the terms of the agreement and before what level of court agreements can be enforced. Although it is evident that few statutes address all these aspects of enforcement, it is recommended that at the very least, the question of who can enforce the agreement is considered.

⁶⁵⁸ Section 36(2) of the Protected Areas Act.

The *Protected Areas Act* does not provide for enforcement of the agreement. Ideally, the Act should be amended to enable all parties to the agreement to enforce it, and should include a provision such as “the terms of the agreement may be enforced by the owner or subsequent owner, or the person, organisation or organ of state appointed to hold or manage the agreement, or by both the owner or subsequent owner and the person, organisation or organ of state appointed to hold or manage the agreement.” This provision could possibly be included under Section 35 of the Act.

Consideration should also be given to third-party right to enforcement. Given that the formation of land trusts in South Africa (or similar organisations who may have an interest in managing these agreements) is currently in the infancy stages, it is still unclear whether these organisations will have the capacity and resources to successfully manage these agreements in the long-term. It may therefore be pertinent to enable another organisation, which are eligible to enter into and manage an agreement, but have not themselves entered into the agreement in question, to enforce the terms thereof.

8.2.7 Assignment, Modification and Termination

Generally, conservation agreements are intended to remain in existence in perpetuity or for a specified period of time. Given that changes are likely to occur over time, the majority of legislation reviewed in this study, provides owners and administrators the ability to modify or terminate the agreement.

Similarly, the *Protected Areas Act* addresses the issue of withdrawal of a declaration of a special nature reserve, nature reserve or protected environment under Sections 19, 24 and 29 respectively. Section 19 stipulates that the declaration of a special nature reserve may not be withdrawn except by resolution of the National Assembly; Section 24 states that the declaration of an area as a nature reserve may only be withdrawn, in the case of declaration by the Minister by resolution of the National Assembly, or where the MEC has made the declaration by resolution of the legislature, or if either the Minister, MEC or other party to the agreement wishes to withdraw then the Minister of MEC must withdraw the notice; and Section 29 enables the Minister or MEC to withdraw the declaration of a protected environment by way of notice in the Government Gazette.

Although the agreements are recorded in a notarial deed and registered against the title deeds of the property it is apparent that Section 24(2) of the *Protected Areas Act* still grants landowners too much flexibility to simply withdraw from an agreement. This undermines the ability of the agreements to be granted in perpetuity. It is recommended that Section 24(2) be amended to allow landowners to withdraw from an agreement only with the Minister's consent. In addition, the *Protected Areas Act* does not provide for the modification of an agreement. It is also recommended that this provision be included in the Act and that it includes obtaining written consent from all respective parties.

8.3 Institutional arrangements

The recommendations provided above include the need to enable non-government organisations to hold conservation agreements. Currently however, these agreements are administered by state agencies largely because these organisations were already in place and have, with relatively little effort, been modified to facilitate this administration. Consequently, it is necessary to consider what structure is needed to enable the shift of administration and management of these agreements from state agencies to that of public benefit organisations. Binning and Young (2000) provide a useful model for securing non-government involvement in the use of biodiversity conservation instruments.⁶⁵⁹ Applying this model to the South African context suggests that ultimately state conservation organisations could operate as the “supporting organisations”. However, until such time as suitable “land trusts” have been established, it may be necessary for government organisations to assume the position of an overarching conservation trust.

⁶⁵⁹ Binning and Young (n54) at 26.

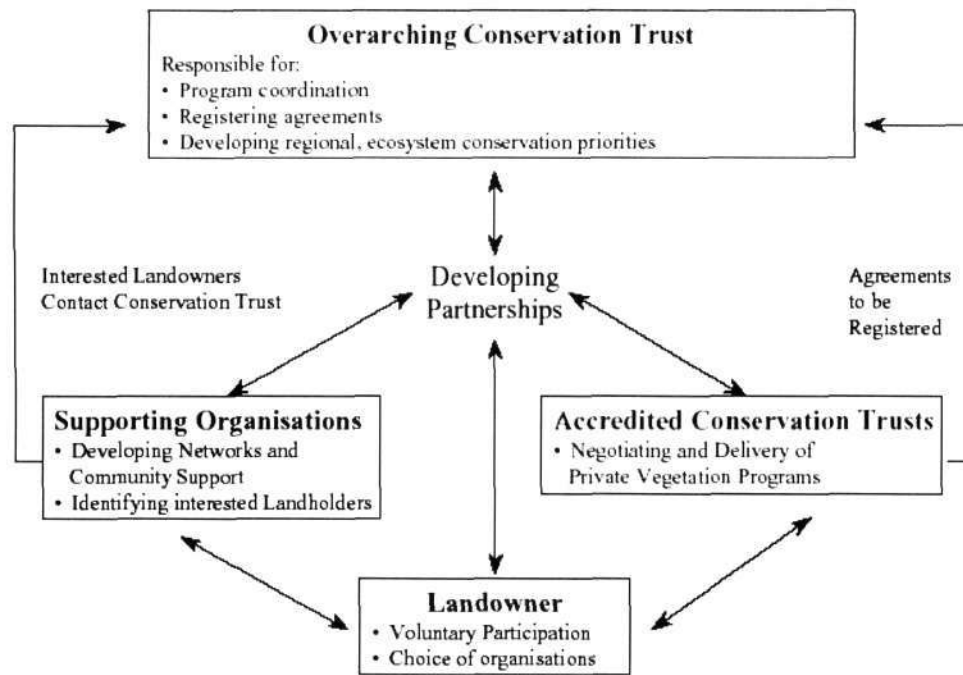


Figure 2. Non-government involvement in securing on the ground biodiversity conservation (Taken from Binning & Young, 2000)

8.4 Incentives

Significant discussion is also required regarding the issue of “who pays?” If landowners are to contribute to the system then the incentives will need to be substantially larger than the initial cost incurred. The lack of fiscal and other incentives are major obstacles which prevent the participation of South African landowners in stewardship of their land. The success of private conservation tools in all countries examined in this study is largely underpinned by the use of a vast array of incentives. These range from a reduction in estate taxes in the case of post mortem easement donations in the United States to government covering all costs associated with registering a covenant, exemption from paying state land tax, funding for fencing and weed control, up-front payments or ongoing stewardship payments and management assistance in Tasmania. Other countries, such as Costa Rica, have established innovative incentive programs for participants in a Wildlife Refuge Program which include not only exemption from property taxes and access to technical assistance for management but also protection from “squatter invasion”.⁶⁶⁰ The “squatter incentive” entails the agency responsible for protected areas making a formal request to the agency responsible for police, to remove the squatters from the premises.

⁶⁶⁰ J Langholz, J Lassoie and J Schelhas ‘Incentives for biological conservation: Costa Rica’s Wildlife Refuge Program’ (2000) 14 *Biological Conservation* 1735 at 1736.

In South Africa, some tax incentives are offered under the *Income Tax Act* and other pieces of legislation however these are generally limited to the agricultural sector or environmental management and do not extend to conservation activities. This issue has been identified as a limiting factor to both biodiversity conservation and sustainable development and consequently much attention has been focussed on the creation of fiscal incentives and the removal of perverse incentives, most recently in the Draft Policy Paper “A framework for considering market-based instruments to support environmental fiscal reform in South Africa”. This document provides a review of specific tax provisions to incentivise conservation activities as detailed in Table 3.

The development of fiscal incentives for conservation is a positive step for South Africa, however, further development of both these incentives and other more innovative mechanisms is needed. Botha (2001) notes that a mix of incentives, targeted at a range of threats and opportunities is required if the desired level of conservation is to be achieved.⁶⁶¹ It is therefore imperative that government, together with the various conservation agencies, commit themselves to the development of a comprehensive incentive toolbox.

8.5 Concluding remarks

Conservation agreements are a powerful tool which could be used extensively for the protection of biodiversity on private land in South Africa. In so doing, these tools could assist government in attaining their target of increasing the area of land under conservation to 8%. It has been shown that these tools have been used with enormous success across the globe and that the legal system within South Africa could accommodate these proposals. Given that a platform for the potential use of conservation agreements has already been established under the *Protected Areas Act*, the study proposed several amendments to this statute (summarised in Table 4) which could assist in the enhancement of stewardship programmes currently underway in several parts of the country. What is however required is an understanding by decision-makers of the necessity to implement these recommendations and the urgency to create attractive incentives for potential participants. Although these incentives may go some way to assisting biodiversity conservation on private land, the South African Biodiversity Institute note that ultimately the success of conservation agreements depends on landowners who care about the environment and are willing to play an active role as conservation stewards.⁶⁶²

⁶⁶¹ M Botha *Incentives for conservation on private land: Options and opportunities* (2001) at 8.

⁶⁶² South African National Biodiversity Institute (n646) at 125.

Table 2. Review of specific tax provisions to incentivise conservation activities (Taken from National Treasury (2006) Draft Policy Paper: A framework for considering market based instruments to support fiscal reform in South Africa).

Tax Instrument	Fiscal incentive/ environmental incentive	Environmental aim and/or problem	Possible measure to improve environment outcomes
Income tax	Private conservation organisations cannot qualify as <i>public benefit organisations</i> , because they have to undertake income-generating activities.	Boost resources to the NGO and private sector conservation groups. This presumes they are effective vehicles for conservation.	Private conservation organisations that undertake income-generating activities for conservation could be re-classified as public benefit organisations.
	Conservation organisations cannot qualify as income tax exempt, because they are not designed to <i>promote commerce, industry or agriculture</i> .	Boost resources to the NGO and private sector conservation groups. Assumes that they are effective vehicles for conservation.	Conservation organisations should qualify for income tax exempt status, despite the fact they do not promote commerce, industry or agriculture.
	Conservation activities of mining sector are income tax deductible.	Specifically aimed at mining industry.	Should this be broadened to other primary and industrial sectors?
	Limited donations to trans-frontier conservation areas are tax deductible	Build on current incentive to support philanthropy towards conservation initiatives.	Threshold from deductions should be increased and should include land. Tax deductions should be extended to other conservation areas.
Donations Tax	Conservation organisations don't receive donations tax exemptions when they don't qualify as <i>public benefit organisations</i> .	Build on current incentive to support philanthropy towards conservation initiatives.	Private conservation organisations could be re-classified as public benefit organisations.
	Donations of less than R50, 000 are exempt from donations tax.	Build on current incentive to support philanthropy towards conservation initiatives, especially the donation of land.	Consider increasing threshold for deductions and the inclusion of land. Consider extending deductions to other conservation areas.
Transfer Duty	Public benefit organisations do not have to pay transfer duty on the sale and/or donation of land and/or a conservation servitude to another person.	Boost resources (particularly land) to NGO and private sector conservation groups. Presumes that they are effective vehicles for conservation.	Consider public benefit organisation status "privileges" for private conservation organisations. Management authorities for protected areas to be exempted from transfer duty.
Estate Duty	Parts of an estate left to a public benefit organisation or institutions exempt from paying income tax under section 30 of the Income Tax Act are deductible.	Boost resources to NGO and private sector conservation groups. Presumes that they are effective vehicles for conservation.	Consider public benefit organisation status "privileges" for private conservation organisations. Management authorities for protected areas to be included as organisations for which bequests of money or land are deductible.

Table 3. Summary of recommended amendments to the *Protected Areas Act*.

Provision	Recommended amendment to the <i>Protected Areas Act</i>
Permissible purpose	<ul style="list-style-type: none"> • Removal of the term “development” in respect of nature reserves, and • The inclusion of the protection of areas which contribute to the maintenance of biodiversity on neighbouring or adjoining properties under special nature reserves, nature reserves and protected environments.
Holders	<ul style="list-style-type: none"> • The inclusion of “any person, organisation or organ of state” to <ul style="list-style-type: none"> ▪ enter into an agreement with an owner of land ▪ be appointed as a management authority ▪ be appointed as a co-management organisation, and • The formulation of specific eligibility criteria for these organisations.
Grantors	<ul style="list-style-type: none"> • The inclusion of a specific definition of “owner” which includes corporate owners, private owners, government agencies, tribal authorities, heirs, administrators, liquidators and trustees of the “owner”.
Registration	<ul style="list-style-type: none"> • No amendments to the registration process are required.
Monitoring	<ul style="list-style-type: none"> • The inclusion of “any person, organisation or organ of state” (defined by the eligibility criteria) to undertake monitoring.
Enforcement	<ul style="list-style-type: none"> • The ability for all parties to the agreement to enforce the agreement, and, • The inclusion of third party right to enforcement.
Assignment, Modification and Termination	<ul style="list-style-type: none"> • The amendment of section 24(2) to enable owners to withdraw from agreements only with the Ministers consent, and • The ability of all parties to modify the agreement providing written consent is obtained.

LIST OF STATUTES

Australia

Conservation and Land Management Act 1984
Conservation, Forests and Lands Act 1987
Environment Protection and Biodiversity Act 1999
Heritage Act 1993
Heritage Conservation Act 2000
Heritage of Western Australia Act 1990
Land (Planning and Environment) Act 1991
Land Act 1994
Land Titles Act 1994
Local Government Act 1993
Local Government Amendment Act 1997
National Parks and Reserve Management Act 2002
National Parks and Wildlife Act 1970
National Parks and Wildlife Act 1974
Native Vegetation Act 1991
Native Vegetation Conservation Act 1997
Native Vegetation Management Act 1985
Nature Conservation Act 1980
Nature Conservation Act 1992
Nature Conservation Act 2002
Nature Conservation Trust Act 2001
Planning and Environment (Restrictive Covenants) Act 2000
Planning and Environment Act 1987
Soil and Land Conservation Act 1945
Soil Conservation and Land Care Act 1989
Territory Parks and Wildlife Act 1993
Victorian Conservation Trust Act 1972

Canada

Agricultural Research Institute of Ontario Act, R.S.O., 1990, c. A.13
Beaches Act, R.S., 1989, c. 32, s.1
Constitution Act, 1982

Conservation Agreements Act, C.C.S.M., 1997, c. C173
Conservation Districts Act, C.C.S.M., 1989-90, c. C175
Conservation Easements Act, R.S.N.B., 1998, c. C-16.3
Conservation Easements Act, R.S.S., 1996, c. C-27.01
Conservation Easements Act, S.N.S., 2001, c.28
Conservation Land Act, R.S.O., 1990, c. C.28
Corporations Act, C.C.S.M., 1987, c. C225
Ecological Reserves Act, R.S.Q., 1974, c.R-26
Environment Act, R.S.Y., 2002, c. 76
Environmental Protection and Enhancement Act, R.S.A., 2000, c. E-12
Heritage Places Protection Act, R.S.P.E.I., 1988, c. H-3.1
Heritage Property Act, S.S., 1979-80, c. H-2.2
Heritage Property Act, R.S.N.S., 1989, c. 199
Heritage Resources Act, C.C.S.M., 1985, c. H39.1
Historic Resources Act, R.S.N.L., 1990, c. H-4
Historic Resources Act, R.S.N.W.T., 1988, c. H-3
Historic Sites Protection Act, R.S.N.B., 1973, c. H-6.
Historical Resources Act, R.S.A., 2000, c. H-9
Income Tax Act (Canada), R.S.C., 1985, c. 1 (5th Supp.)
Indian Act, R.S.C., 1985, c. R-5
Land Title Act Amendment Act (Bill 28) 1994
Land Title Act, R.S.B.C., 1996 c. 250
Land Titles Act, R.S.O., 1990, c. L.5.
Land Titles Act, S.Y., 1991, c. 5
Local Government Act, R.S.B.C., 1996, c. 323
Museum Act, R.S.P.E.I. 1988, c. M-1.4
Natural Areas Protection Act, R.S.P.E.I. 1988, c. N-2
Natural Heritage Conservation Act, L.R.Q., 2002, c-61.01
Ontario Heritage Act, R.S.O., 1990, c. O.18
Parks Act, R.S.Q., 1978, c. P-9
Property Law Act, R.S.B.C., 1996, c. 377
Provincial Parks Act, R.S.N.S., 1989, c. 367
Registry Act, R.S.P.E.I., 1988, c. R-10
Special Places Protection Act, R.S.N.S., 1989, c. 438

Species at Risk Act, S.C., 2002, c.29
Trails Act, R.S.N.S., 1989, c. 476.
Wilderness Areas Protection Act, S.N.S., 1998, c. 27
Wildlife Conservation Act, R.S.P.E.I., 1988, c. W-4.1

New Zealand

Conservation Act 1987
Property Law Act 1952
Queen Elizabeth the Second National Trust Act 1977
Reserves Act 1977
Resource Management Act 1991

South Africa

Biodiversity Act 10 of 2004
Companies Act 61 of 1973
Conservation of Agricultural Resources Act 43 of 1967
Constitution of the Republic of South Africa Act 108 of 1996
Deeds Registries Act 47 of 1937
Environment Conservation Act 73 of 1989
Income Tax Act 36 of 1996
Mountain Catchments Areas Act 63 of 1970
National Environmental Management Act 107 of 1998
National Parks Act 57 of 1976
Non-Profit Organisations Act 71 of 1997
Property Rates Act 6 of 2004
Protected Areas Act 57 of 2003

United States

Uniform Conservation Easement Act 1981
Tax Reform Act 1976
Tax Reduction and Simplification Act 1977
Tax Treatment Extension Act 1980
Taxpayer Relief Act 1997
Internal Revenue Code 1986
Georgia Uniform Conservation Easement Act, OCGA §§ 44-10-1 to 8

BIBLIOGRAPHY

Andrews, W. J. and Loukidelis, D. (1996). Leaving a living legacy: Using conservation covenants in BC. Vancouver: West Coast Environmental Law Research Foundation.

Atkins, J., Hillyer, A. and Kwasniak, A. (2004). Conservation easements, covenants and servitudes in Canada: A legal review. 154. Ottawa: Canada: North American Wetlands Conservation Council (Canada).

Binning, C. and Young, M. (1997). Motivating people: using management agreements to conserve remnant vegetation. 97. Canberra: Environment Australia.

Binning, C. and Young, M. (2000). Native vegetation institutions, policies and incentives. 64. Canberra: CSIRO Wildlife & Ecology Resources Future Program.

Botha, M. (2001). Ecosystem conservation for the next decade. *Veld & Flora* 87(4): 160-161.

Botha, M. (2001). Incentives for conservation on private land: Options and opportunities. 21. Cape Town: Botanical Society - Cape Conservation Unit.

Botha, M. (2001). So you want to conserve your land? *Veld & Flora* 87(1): 6-9.

Bradby, K. (2001). Opening our hearts and wallets to the needs of bushland. In State Heritage Convention 2001: A holistic approach to Heritage (Issues forum). Constitutional Centre of Western Australia, West Perth: The National Trust of Australia (W.A.).

Burgess, P. (ed.) (1993). The world almanac and book of facts 1993. Pan Books Ltd.

Burke, J. and Ewan, J. (1998). Sonoran Preserve Master Plan - an open space plan for the Phoenix Sonoran Desert. Phoenix, Arizona: Herberger Center for Design Excellence

Byron, N., Holland, P. and Scheule, M. (2001). Constraints on private conservation: some challenges in managing Australia's tropical rainforests. In Annual Conference of the Rainforest: 23. Cooperative Research Centre, Cairns.

Canadian Parks Ministers' Council (2000). Working together: parks and protected areas in Canada. 68. Warsaw On Canada: Canadian Parks Ministers' Council.

Carter, M. (1998). A revolving fund for biodiversity conservation in Australia. In Seventh Meeting of the Expert Group on the Economic Aspects of Biodiversity. Paris: Environment Policy Committee, Group on Economic and Environment Policy Integration.

Cripps, E., Binning, C. and Young, M. (1999). Opportunity denied: Review of the legislative ability of local governments to conserve native vegetation. 135. Canberra: CSIRO Wildlife & Ecology.

Crompton, J. L. (1996). Tax incentives for making donations to park and recreation agencies. *Journal of Park and Recreation Administration* 14(4): 65-81.

Davis, P. and Cocklin, C. (2001). Protecting habitats on private land: perspectives from Northland New Zealand. 69. Wellington: Department of Conservation.

Denys Slee and Associates (1998). Remnant native vegetation – perceptions and policies. A review of legislation and incentive programs. 55. Canberra: National Research and Development Program on Rehabilitation, Management and Conservation of Remnant Vegetation,.

Department of Conservation and Ministry for the Environment (2000). The New Zealand Biodiversity Strategy. 144. Wellington: Ministry for the Environment.

Department of Environmental Affairs and Tourism (1997). White Paper on the conservation and sustainable use of South Africa's biological diversity. Government Gazette No 18153.

Department of Environmental Affairs and Tourism. (2001). A bioregional approach to South Africa's protected areas. Pretoria: DEAT.

Department of Natural Resources (n.d.). The Canadian Biodiversity Strategy and New Brunswick Progress: Conservation and Sustainable Use. Fredericton, New Brunswick.

Donahue, D. L. (2003). The law and practice of open space covenants. *New Zealand Journal of Environmental Law* 7: 119-168.

Eagle, S. J. (1998). Conservation easements and private land stewardship. 15. Washington, D.C.: Center for Private Conservation.

Echeverria, J. D. (2004). Top ten reasons to be skeptical about voluntary conservation easements. In Land Trust Alliance Rally. Providence, Rhode Island: Georgetown Environmental Law & Policy Institute.

Edwards, V. M. (1995). *Dealing in diversity: America's market for nature conservation*. Cambridge: Cambridge University Press.

Edwards, V. M. and Sharp, B. M. H. (1990). Institutional arrangements for conservation on private land in New Zealand. *Journal of Environmental Management* 31: 313-326.

Environment Canada (2003). Environmental signals: Canada's national environmental indicator series. 77. Gatineau, Quebec: Environment Canada.

Environment Canada and Yukon Department of Renewable Resources (1996). *Yukon State of Environment Report 1995*.

Farrier, D. (1995). Conserving biodiversity on private land: Incentives for management or compensation for lost expectations? *Harvard Environmental Law Review* 19: 303-408.

Figgis, P. (2004). Conservation on private lands: The Australian experience. 31. Gland, Switzerland and Cambridge, UK: IUCN.

Fuggle and Rabie, M. A., (eds.). (1992). *Environmental management in South Africa*. Cape Town: Juta.

Glazewski, J. (2000). *Environmental law in South Africa*. Durban: Butterworths.

Groombridge, B., (ed.) (1992). *Global Biodiversity: Status of the Earth's Living Resources*. London: Chapman & Hall.

Gustanski, J. A. and Squires, R. H., (eds.). (2000). *Protecting the land: Conservation easements past, present and future*. Washington, D.C.: Island Press.

- Haritgan, M. L. (Nova Scotia Government). Personal communication on 12 November 2007.
- Hillyer, A. and Atkins, J. (2000). *Greening your title: A guide to best practices for conservation covenants*. Vancouver: West Coast Environmental Law.
- Jamiatul Ulama (n.d.). *Guidelines pertaining to tax exemption in terms of the Income Tax Act No 58 of 1962 for a Public Benefit Organisation (PBO)*. 4. Fordsburg: Jamiatul Ulama.
- Jay, J. (2002). *Conservation easements and tax credits*. 7. Florissant, Colorado.
- Langholz, J. and Lassoie, J. (2001). Combining conservation and development on private lands: lessons from Costa Rica. *Environment, Development & Sustainability* 3(4): 309-322.
- Langholz, J., Lassoie, J. and Schelhas, J. (2000). Incentives for biological conservation: Costa Rica's Private Wildlife Refuge Program. *Conservation Biology* 14(6): 1735-1743.
- Law Administration (2002). *Tax exemption guide for public benefit organisations in South Africa*. 28. Hatfield: South African Revenue Service.
- Low, A. B. and Robelo, A. G., (eds.). (1996). *Vegetation of South Africa, Lesotho and Swaziland*. Pretoria: Department of Environmental Affairs and Tourism.
- MacDonald, I. A. W. (1989). Man's role in changing the face of southern Africa. In *Botanical Diversity in Southern Africa: Concepts and conservation*. Huntley, B. J. (Ed.) Cape Town: Oxford University Press.
- Mahoney, J. D. (2001). Perpetual restrictions on land and the problem of the future. In *Public law and legal theory research papers*: 43. University of Virginia School of Law.
- Mander, M. (In prep). *Maloti Drakensberg Transfrontier Project: Payment for ecosystem services - Developing an ecosystem services trading model for the Mnweni/Cathedral Peak and Eastern Cape Drakensberg areas.*: Development Bank South Africa, Department of Water Affairs and Forestry, Department of Environmental Affairs and Tourism and Ezemvelo KZN Wildlife.
- Manual, T. (2000). *Budget speech by the Minister of Finance, 23 February*.
- Mason, B. (1994). Private management of 'the public interest'? PANZ Monograph Series Number 7: 1-12.
- McClellan, R. and Smith, T. (2001). *The Crown and flora and fauna: legislation, policies and practices 1983-1998*. 292. Wellington: Waitangi Tribunal unpublished report.
- McDowell, C. (1986). Legal Strategies to optimize conservation of natural ecosystems by private landowners - Economic Incentives. *CILSA XIX*: 460-473.
- McDowell, C. (1986). Legal Strategies to optimize conservation of natural ecosystems by private landowners - Restrictive legislation. *CILSA XIX*: 450-459.
- Merenlender, A. M., Huntsinger, L., Guthey, G. and Fairfax, S. K. (2004). Land trusts and conservation easements: who is conserving what for whom? *Conservation Biology* 18(1): 65.
- Ministry of Agriculture and Forestry (2004). *National Report to the Fifth Session of the United Nations Forum on Forests*. 26. Wellington: Ministry of Agriculture and Forestry.

- Ministry of Water Land and Air Protection (2002). Environmental Trends in British Columbia 2002. 67. Victoria, British Columbia: MWLAP.
- Mitchell, P. (2006). Protecting the future forever; why perpetual conservation easements outperform term easements. 20. Athens, Georgia: Land Use Clinic.
- Murphy, A. (2005). Conservation easements help preserve little pieces of heaven. Agri-News (Alberta Agriculture, Food and Rural Development): 4.
- Myers, N., Mittermeier, R. A., Mittermeier, C. G., da Fonseca, G. A. B. and Kent, J. (2000). Biodiversity hotspots for conservation priorities. *Nature* 403: 853-858.
- National Treasury (2006). A framework for considering market-based instruments to support environmental fiscal reform in South Africa. 1-139. Pretoria: National Treasury.
- Parliamentary Commissioner for the Environment (2001). Managing change in paradise: sustainable development in peri-urban areas. Wellington: Parliamentary Commissioner for the Environment.
- Patterson, A. (2005). Property tax: a friend or foe to landscape protection in South Africa. *South African Journal of Environmental Law and Policy* 12(2): 97-121.
- Patterson, S. and Winstanley, T. (2003). Improving the legislative approach to biodiversity conservation and sustainable management of natural resources in South Africa. 88. Cape Town: EnAct International.
- Pence, G. Q. K., Botha, M. and Turpie, J.K. (2002). Evaluating combinations of on-and off-reserve conservation strategies for the Agulhas Plain, South Africa: a financial perspective. *Biological Conservation* 112(1): 253-273.
- Queensland Government: Office of State Revenue (2004). Conservation agreements - transfer duty and land tax. *Revenue Queensland* 18: 7.
- Queensland Statutory Covenants Working Group (2003). Statutory covenants: guidelines for their use in Queensland. Brisbane: Department of Natural Resources and Mines.
- Rabie, M. A. (1985). The impact of environmental conservation on land ownership. *Acta Juridica*: 289-313.
- Rabie, M. A. (1985). South African law relating to conservation areas. *CILSA XVIII*: 51-89.
- Rabie, M. A. (1991). The influence of environmental legislation on private landownership. In *Land reform and the future of land ownership in South Africa*: 81-101. van der Walt, A. J. (Ed.) Cape Town: Juta.
- Republic of South Africa President's Council (1991). Report of the Three Committees of the President's Council on a National Environmental Management System. Cape Town: Government Printer.
- Richardson, J. A. (1998). Wildlife utilization and biodiversity conservation in Namibia: conflicting or complementary objectives? *Biodiversity and Conservation* 7(4): 549-559.
- Rilla, E. (2002). Landowners, while pleased with agricultural easements, suggest improvements. *California Agriculture* (January-February): 21-25.

- Robinson, J. and Ryan, S. (2002). A review of economic instruments for environmental management in Queensland. 41. Brisbane: Coastal CRC.
- Rushworth, I. (Ezemvelo KZN Wildlife). Personal communication on 9 January 2008.
- Saunders, C. (1996). Conservation covenants in New Zealand. *Land Use Policy* 13(4): 325-339.
- Sealey, L., (ed.) (1986). *The MacMillan Childrens Encyclopedia*. London: MacMillan.
- South African National Biodiversity Institute (2006). Enabling stewardship. In *Biodiversity Series 4*. SANBI.
- State Biodiversity Committee (2002). *Tasmania's Nature Conservation Strategy 2002-2006 Final Report: An action plan to protect Tasmania's natural diversity and maintain ecological processes and systems*. Hobart: Department of Primary Industries, Water and Environment.
- State of Environment Advisory Council (SOEAC) (1996). *Australia State of the Environment 1996*. Melbourne: CSIRO.
- Statistics New Zealand (2002). *Physical Stock Account for Forestry Resources in New Zealand 1995-2000*. Wellington: Statistics New Zealand.
- Swift, B. (2003). *Legal tools and incentives for private land conservation in Latin America: building models for success*. 217. Washington D.C.: Environmental Law Institute.
- Tasmania Department of Primary Industries Water and Environment (2003). *Nature Conservation on Private Land in Tasmania: A guide to programs and incentives*. 26. Canberra: Natural Heritage Trust.
- Taylor, R. and Smith, I. (1997). *The State of New Zealand's Environment*. Wellington: The Ministry for the Environment.
- Thomas, L. (2001). *New tools for old: Mechanisms for protection of natural heritage value on private land in WA*. In *State Heritage Convention*. Constitutional Centre of Western Australia, West Perth: The National Trust of Australia (W.A.).
- Thornburg, M. (n.d.). *Conservation Easement Overview*. 1-10. Indiana Farm Bureau, Inc.
- van Schalkwyk, M. (2007). *Speech at the National Council of Provinces Debate on the Budget Vote of the Department of Environmental Affairs and Tourism*, 7 June.
- van wyk, J. (1992). *The nature and classification of restrictive covenants and conditions of title*. *De Jure* 270: 281-287.
- Voluntary Planning Heritage Strategy Task Force (2006). *Our heritage future - a shared responsibility: Recommendations for Nova Scotia's heritage strategy*. 75. Halifax: Voluntary Planning Heritage Strategy Task Force.
- Wright, J. B. (1992). *Land trusts in the USA*. *Land Use Policy* 9(2): 83-86.
- Wright, J. B. (1994). *Designing and applying conservation easements*. *Journal of the American Planning Association* 60(3): 380-388.

Wright, J. B. and Skaggs, R. (2002). Purchase of development rights and conservation easements: frequently asked questions. 9. Las Cruces: New Mexico State University and U.S. Department of Agriculture.

Wynberg, R. (2002). A decade of biodiversity conservation and use in South-Africa - tracking progress from the Rio Earth Summit to the Johannesburg World Summit on sustainable development. *South African Journal of Science* 98(5-6): 233-243.

Yencken, D. and Wilkinson, D. (2000). *Resetting the Compass - Australia's journey towards sustainability*. Melbourne: CSIRO.

Websites

Australia Museum

<http://www.amonline.net.au/biodiversity/happening/extinction.htm>

Australian Natural Resource Atlas

<http://www.anra.gov.au/>

Central Intelligence Agency

<https://www.cia.gov/library/publications/the-world-factbook/index.html>

Community Land Trust

<http://www.nbclt.org/whatwedo.htm>

Department of Conservation

<http://www.doc.govt.nz/>

Department of Planning and Community Development

<http://www.dpcd.vic.gov.au/>

Department of Primary Industries and Water

<http://www.dpiw.tas.gov.au/inter.nsf/Home/1?Open>

Environmental Defender's Office New South Wales

<http://www.edo.org.au/edonsw/site/default.php>

Government of New Brunswick

<http://www.gnb.ca/>

Government of Saskatchewan

<http://www.se.gov.sk.ca/>

Island Nature Trust

<http://www.islandnaturetrust.ca/>

Manitoba Conservation: Wildlife and Ecosystem Protection Branch

<http://www.gov.mb.ca/conservation/>

Manitoba Government

<http://www.gov.mb.ca/>

Nature Conservation Trust of New South Wales

<http://www.naturetrust.org.au/>

Nature Trust of New Brunswick

<http://www.naturetrust.nb.ca/main.php>

New South Wales National Parks and Wildlife Service

<http://www.nationalparks.nsw.gov.au/>

Ohio State University
<http://ohioline.osu.edu>

Ontario Heritage Trust
<http://www.heritagefdn.on.ca>

Ontario Ministry of Culture
<http://www.culture.gov.on.ca/>

Prospectors and Development Association of Canada
<http://www.pdac.ca/>

QEII National Trust
<http://www.openspace.org.nz/>

Quebec Biodiversity
<http://redpath-museum.mcgill.ca/>

Queensland Government Environmental Protection Agency/Queensland Parks and Wildlife Service
<http://www.epa.qld.gov.au/>

Saskatchewan Association of Rural Municipalities
<http://www.sarm.ca/>

Smart Communities Network
<http://www.smartcommunities.ncat.org/>

Tasmania's Resource Development and Planning Commission
<http://soer.justice.tas.gov.au/>

The Conservation Fund
<http://www.conservationfund.org/>

The National Trust of Western Australia
<http://www.ntwa.com.au/>

The Nature Conservancy
<http://www.nature.org/>

The Private landowner's network
<http://www.privatelandownernetwork.org/>

The Uniform Law Commissioners
<http://www.nccusl.org/>

Trust for Nature
<http://www.trustfornature.org.au/>

APPENDICES

Appendix A. Summary of Canadian conservation instruments and legislation

[Table adopted from J Atkins, A Hillyer and A Kwasniak *Conservation easements, covenants and servitudes in Canada: A legal review* (2004)]

Jurisdiction	Name of Act and Citation	Kind of registrable instrument	Sections
British Columbia	<i>Land Title Act</i> , R.S.B.C.1996, c.250, s. 219	Conservation covenant	s. 219
	<i>Land Title Act</i> , R.S.B.C. 1996, c. 250, s. 218	Statutory right of way	s. 218
	<i>Local Government Act</i> , R.S.B.C. 1996, c. 323	Heritage revitalization agreement	s. 966
Alberta	<i>Environmental Protection and Enhancement Act</i> , R.S.A. 2000,c.E-12	Conservation easement	ss.21-24
	<i>Historical Resources Act</i> R.S.A. 2000, c.H-9	Condition or covenant	s.29
Saskatchewan	<i>Conservation Easements Act</i> , R.S.S. 1996, c.C27.01	Conservation easement	Entire Act
	<i>Heritage Property Act</i> , S.S.1979-80, c.H-2.2	Easement or covenant protecting heritage property	s. 59
Manitoba	<i>The Conservation Agreements Act</i> , C.C.S.M. c.C173	Conservation agreement	Entire act
	<i>The Heritage Resources Act</i> , C.C.S.M. c.H39.1	Heritage agreement	s.21
Ontario	<i>Conservation Land Act</i> , R.S.O. 1990, c.C28	Conservation easement or covenant	Entire Act
	<i>Ontario Heritage Act</i> , R.S.O. 1990, c.O.18	Heritage easement or covenant	ss. 10, 22
	<i>Agricultural Research Institute of Ontario Act</i> , R.S.O. 1990, c.A. 13	Agricultural lands protection easement or covenant	ss. 3, 4.1
Quebec	<i>Natural Heritage Conservation Act</i> , L.R.Q., c.-61.01	Nature reserve agreement	Various sections throughout act, esp. s.57
New Brunswick	<i>Conservation Easements Act</i> , R.S.N.B. 1998 c.C-16.3	Conservation easement	Entire act
	<i>Historic Sites Protection Act</i> , R.S.N.B., c.H-6	Historic site easement or covenant	s. 2.1
Nova Scotia	<i>Conservation Easements Act</i> , S.N.S. 2001, C. 28	Conservation easement	Entire act

	<i>Heritage Property Act</i> , R.S.N.S. 1989, c.199	Heritage agreement	
Prince Edward Island	<i>Natural Areas Protection Act</i> , R.S.P.E.I. 1988, c.N-2	Restrictive covenant	Entire act
	<i>Wildlife Conservation Act</i> , R.S.P.E.I. 1988, c. W-4.1, s.18	Conservation covenant or easement	s. 18
	<i>Museum Act</i> , R.S.P.E.I. 1988, c. M-1.4, s. 11	Covenant or easement	s. 11
	<i>Heritage Places Protection Act</i> , R.S.P.E.I. 1988, c. H-3.1	Easement or restrictive covenant	s. 10
Newfoundland and Labrador	No conservation easement legislation	Easement or covenant	s. 30
	<i>Historic Resources Act</i> , R.S.N.L. 1990, c.H-4		
Yukon	<i>Environment Act</i> , S.Y. 1991, c.5	Conservation easement	ss. 76-80
Northwest Territories	No conservation easement legislation	Historic places agreement	Entire act
	<i>Historic Resources Act</i> , R.S.N.W.T. 1988, c.H-3		
Nunavut	No conservation easement legislation	Historic places agreement	Entire act
	<i>Historic Resources Act</i> , R.S.N.W.T. 1988, c.H-3 (historic places agreement)		
Federal	No conservation easement legislation	Conservation agreement	ss. 10-11
	<i>Species at Risk Act</i> , S.C. 2002, c.29		

Appendix B. Summary of Australian conservation instruments and legislation

Jurisdiction	Name of Act and Citation	Kind of registrable instrument	Sections
New South Wales	<i>National Parks and Wildlife Act 1974</i>	Voluntary Conservation Agreement	s. 69
	<i>Native Vegetation Conservation Act 1997</i>	Registered Property Agreement	s. 40
	<i>Conservation Trust Act 2001</i>	Revolving fund	s. 30
	<i>Environment Protection and Biodiversity Act 1999</i>	Conservation agreement	s. 305
Queensland	<i>Nature Conservation Act 1992</i>	Nature refuges	ss.21-24
	<i>Land Titles Act 1994</i>	Common law covenant	s. 97(a)
	<i>Land Act 1994</i>	Common law covenant	s.373(a)
Victoria	<i>Planning and Environment Act 1987 as amended by The Planning and Environment (Restrictive Covenants) Act 2000</i>	Land Management Cooperative Agreements	s.174
	<i>Conservation, Forests and Lands Act 1987</i>	Land Management Cooperative Agreements	s.69
South Australia	<i>Native Vegetation Act 1991</i>	Heritage Agreement	Entire act
	<i>Heritage Act 1993</i>	Heritage Agreement	s.23
	<i>Conservation and Land Care Act 1989</i>	Conservation Agreement	s.4
Western Australia	<i>Conservation and Land management Act 1984</i>	Conservation covenant or agreement	s.16
	<i>Soil and Land Conservation Act 1945</i>	Conservation covenants	Part IVA
	<i>Heritage of Western Australia Act 1990</i>	Conservation covenants	s.29
Tasmania	<i>Nature Conservation Act 2002</i>	Conservation covenants/ Management agreements	s.34
	<i>National Parks and Reserve Management Act 2002</i>		
Australian Capital Territory (ACT)	No statutory covenant legislation	Property Management agreements attached to leases	-
Northern Territory	<i>Territory Parks and Wildlife Act 1993</i>	Conservation covenants	s.74