

TITLE CONDITIONS (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 Conservation and Other Personal Real Burdens

Section 38: Conservation burdens

177. *Section 38* allows the creation of new conservation burdens. This section along with the rest of Part 3 comes into force on a day to be appointed by order by the Scottish Ministers. *Subsection (1)* sets out the type of burden which may be created and in favour of whom it may be created. A conservation burden may be created by anyone but may be created only in favour of a conservation body or the Scottish Ministers. A conservation burden is one which preserves or protects, for the benefit of the public, the architectural or historical characteristics of the land or any other special characteristics of the land (including, without prejudice to the general rule, a special characteristic derived from the flora, fauna or general appearance of the land). Subsections (4) to (7) provide for the establishment by the Scottish Ministers of a list of conservation bodies. Names may be added to or removed from the list.
178. *Subsection (2)* provides that if someone other than a conservation body or the Scottish Ministers wish to create a conservation burden they must first obtain the consent of the body which it is intended will hold the right to enforce the burden.
179. *Subsection (3)* prohibits the creation of a standard security over a conservation burden. Following the amendment made (on the appointed day) to section 9 of the Conveyancing and Feudal Reform (Scotland) Act 1970 by paragraph 4(2) of Schedule 14 to the Act, it would notwithstanding *subsection (3)* be incompetent to grant a standard security over any real burden, including a conservation burden. *Subsection (3)* extends the prohibition to any conservation burden created under section 38 before the appointed day.
180. *Subsection (4)* provides for the Scottish Ministers to prescribe by subordinate legislation a list of conservation bodies who will be entitled to hold the right to enforce conservation burdens preserved (under the 2000 Act) or created in their favour. In addition to the bodies on this list, the Scottish Ministers will in terms of *subsection (1)* be entitled to hold the right to enforce conservation burdens preserved or created in their favour.
181. *Subsection (5)* sets out the criteria for a body to be included on the list. The definition of the type of body which may be prescribed as a conservation body is intended to be broad enough to catch all the bodies who have a function or object of preserving or protecting for the benefit of the public the architectural, historical or other characteristics of land.
182. Since trusts are not separate legal persons, *subsection (6)* makes it clear that in relation to a trust the conservation body would be the trustees.
183. *Subsection (7)* allows bodies to be removed from the list.