

# **TITLE CONDITIONS (SCOTLAND) ACT 2003**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **BACKGROUND**

3. The first part of the Executive's programme of property law reform, the Abolition of Feudal Tenure etc. (Scotland) Act (the "2000 Act"), received Royal Assent on 9 June 2000. The 2000 Act will abolish the feudal system of land tenure, that is to say the entire system whereby land is held by a vassal on perpetual tenure from a superior. Land previously held feudally will be owned outright. Superiority interests will disappear.
4. The abolition of feudal tenure will have a profound effect on the way in which property is held in Scotland. The vast majority of land is held at present under feudal tenure and many real burdens were created in feudal deeds. Together with the second Act in the programme of property law reform, the Title Conditions (Scotland) Act 2003, the 2000 Act will provide a modern and simplified framework for property ownership in Scotland.
5. Most feudal burdens (i.e. obligations in title deeds to perform a particular act such as to maintain a common facility or a prohibition not to do a specific thing) will cease to be enforceable by superiors. The rights of enforcement of third parties, for example other proprietors in the same housing estate or tenement whose properties are protected by the same burdens, will not be affected. In most cases, however, the superior's right to enforce burdens will be ended. The feudal burdens that survive abolition will be converted into ordinary, non-feudal burdens. As a result, there is a close interaction between the 2000 Act and the Title Conditions (Scotland) Act.
6. The Scottish Law Commission estimate that only around half of all real burdens affecting property in Scotland are imposed in feudal deeds. Equivalent real burdens can be and are created in ordinary dispositions. These non-feudal real burdens will not be affected by abolition of the feudal system. The Title Conditions (Scotland) Act will reform the general law on all real burdens for the future and for all existing burdens, whether or not they were always non-feudal ordinary burdens or have survived feudal abolition by conversion into ordinary real burdens.

7. Although the 2000 Act has been passed, much of it has not yet been commenced. Feudal burdens will disappear along with the feudal system, but the 2000 Act allows some feudal burdens to be converted into ordinary burdens. They will be assimilated into the law of real burdens, and it is desirable that this assimilation forms a single process along with the reform of the law on title conditions. Most of the Title Conditions (Scotland) Act and the remaining parts of the 2000 Act will be commenced simultaneously on a date which is referred to as the **appointed day**. This will result in a significant clarification of the law. Time is required for transitional arrangements to be put in place, and the Deputy First Minister, Mr Jim Wallace, announced on 21 November 2002 the Executive's intention for the appointed day to fall on 28 November 2004.

## **THE ACT**

8. The Act largely implements the recommendations of the Scottish Law Commission *Report on Real Burdens* (Scot Law Com No 181), published on 26 October 2000. It provides a re-statement and clarification of the law of real burdens. The Act stipulates rules for the creation, enforcement and extinction of real burdens, and special rules for community burdens and manager burdens. Burdens validly created under the old law will remain valid burdens – the legal effect will remain the same. No valid burdens will disappear as a result of the Act, though it provides a mechanism for getting rid of obsolete burdens. It should become easier to find out who has the right to enforce burdens.

9. The Act achieves **greater clarity in the law**. It **reduces the number of outdated burdens** by making it easier to discharge or vary them. It creates a framework for the way in which individuals may impose their own controls on property. The Act provides default rules for a number of areas where property may not be fully regulated by title deeds. This is intended to improve the management of property in order to allow repair work to be carried out when required.

10. The Act is in 11 Parts:

### **Part 1: Real burdens: general**

11. This Part codifies the existing law and introduces some changes such as a 'sunset rule' (with the option of renewal) for burdens over 100 years old. It sets out how to create a real burden, what its contents may be, and how it may be terminated. These rules apply to existing burdens as well as burdens to be created in the future.

### **Part 2: Community burdens**

12. This Part deals with burdens which apply to communities in the sense of groups of properties which have a common scheme of burdens. These communities have common or similar burdens which apply to all the units within them, and which can be mutually enforced.

### **Part 3: Conservation and other personal real burdens**

13. This Part sets out the rules for conservation and other personal real burdens. These burdens are of public benefit.

### **Part 4: Transitional: implied rights of enforcement**

14. Part 4 abolishes enforcement rights implied by common law but provides a preservation procedure and recreates some of these rights with a statutory basis. In future it will not be possible to create implied rights.

### **Part 5: Real burdens: miscellaneous**

15. This Part deals with a variety of different issues. They include the power to create a new legal category of burden called a manager burden. This burden will allow a developer to keep control of a group of properties while they are being developed.

### **Part 6: Development Management Scheme**

16. This Part makes provision for a model Development Management Scheme, based upon the Management Scheme B contained in the Law Commission's *Report on the Law of the Tenement* (Scot Law Com No. 162). The Scheme is not confined to tenements, and can be adapted for use in other developments with shared facilities.

### **Part 7: Servitudes**

17. This Part of the Act realigns the boundary between servitudes and real burdens.

### **Part 8: Pre-emption and reversion**

18. This Part of the Act modifies the rules for pre-emption, and rights of reversion arising under various statutory provisions.

### **Part 9: Title conditions: powers of Lands Tribunal**

19. This Part of the Act sets out the powers of the Lands Tribunal. The existing jurisdiction is restated, with some modifications.

### **Part 10: Miscellaneous**

20. This Part of the Act contains miscellaneous provisions, including provision on compulsory purchase powers. It also amends the existing legislation on the ranking of standard securities.

*These notes relate to the Title Conditions (Scotland) Act 2003 (asp 9)  
which received Royal Assent on 3 April 2003*

**Part 11: Savings, transitional and general**

21. This Part of the Act lists the various savings and transitional arrangements pertaining to the Act, and the interpretation, short title and commencement provisions.

## COMMENTARY ON SECTIONS

### PART 1: REAL BURDENS: GENERAL

#### Section 1: The expression "real burden"

22. *Section 1* defines 'real burden', and introduces the terms 'benefited property', 'burdened property' and 'personal real burden'.

23. *Subsection (1)* re-states, but does not change, the current law concerning real burdens. A **real burden** is an obligation affecting land or buildings. It is a condition of ownership which runs with the land. The word 'real' is used to distinguish this sort of obligation from a 'personal' obligation, such as a contract. A personal real burden is, despite the name, not a 'personal' obligation: it is a real burden and as such must be an obligation affecting land or buildings. A personal real burden is an encumbrance on land but, unlike other real burdens, is constituted in favour of a person rather than in favour of the owner of other land in that person's capacity as owner of that land.

24. The land that benefits from the condition, and whose owner is able to enforce the *burden*, is called the **benefited property**. Except for personal real burdens which are limited to the special types of burden listed in subsection (3), there must always be a benefited property; and the holder of a burden is the person who for the time being is the owner of that property. Viewed from the position of the holder, a real burden is a real right. The benefited property must be 'land' (defined in section 122(1)). The benefited property will commonly be neighbouring land. The definition of 'land' does not generally include a superiority interest, the estate of *dominium directum*, however for the purposes of the definition of real burden does include the estate of *dominium utile*. This is to include feudal burdens created before the appointed day within the provisions of the Act. Following the abolition of the feudal system it will no longer be possible for real burdens to be created for the benefit of feudal superiorities. In terms of section 2 of the 2000 Act not only do all existing superiority interests in land cease to exist but it becomes impossible to create a new feudal estate.

25. *Subsection (2)* gives names to the properties affected, or benefited, by real burdens. The land subject to the burden will be known as the '**burdened property**'.

26. *Subsection (3)* provides 8 exceptions to the rule expressed in subsection (1) that burdens must be in favour of other land. It will be possible in future to create burdens that directly favour a person without reference to a benefited property. These are personal real burdens. Personal real burdens represent a new category of right but the category is limited to the types of burdens set out in subsection (3), namely: conservation burdens, rural housing burdens, maritime burdens, economic development burdens, health care burdens, manager burdens, personal pre-emption burdens and personal redemption burdens.

27. Personal pre-emption burdens and personal redemption burdens cannot be created in the future. They exist as a limited category of former feudal burdens converted by notice registered under section 18A of the 2000 Act. Some personal pre-emption burdens may become rural housing burdens if held by a rural housing body (see the note on section 43). Personal real

burdens are the subject of Part 3 of the Act, although manager burdens are primarily regulated by section 63.

## **Section 2: Affirmative, negative and ancillary burdens**

28. *Section 2* is concerned with the *type* of obligation which can be created as a real burden. In future all real burdens will be either **affirmative** burdens, **negative** burdens or **ancillary** burdens.

29. *Subsections (1) and (2)* provide that in future new real burdens must be either obligations **to do** something (an affirmative burden), such as to use the property for a particular purpose, or to maintain a building, or obligations **to refrain** from doing something (a negative burden), such as to build on the property, or to use it for commercial purposes. It is rare under the current law for a real burden to take the form of any other type of obligation than affirmative or negative. It is possible under the current law, to create a real burden as a *self-standing* right to enter or make use of property. This could be to walk or drive over property, or to run a pipe through it. It is more usual for such rights to be constituted as positive servitudes. In future it will only be possible to create this sort of obligation as a positive servitude, and any existing real burdens in this form will be converted into positive servitudes by section 81.

30. *Subsection (3)* provides a *degree* of flexibility to the rule in subsection (1). It is sometimes necessary for a burden to reserve a right of access or use. This is not a right of access of itself: that would be a servitude. It is instead a right to enter or use a burdened property for a purpose ancillary to other obligations imposed by real burdens. For instance, a burden might oblige an owner to maintain property. An ancillary part to this burden could be to allow the benefited proprietor to access the property to inspect the maintenance work.

31. *Subsection (5)* prevents the rules set out in section 2 being avoided by labelling a burden as something that it is not. Whether an obligation falls within the permitted categories will be judged by the effect of the words rather than the words themselves.

## **Section 3: Other characteristics**

32. *Section 3* sets out the rules that a burden must comply with concerning the *content* of an obligation. Real burdens affect land. Subsections (1) to (4) re-state what is known as the praedial rule. This rule provides that real burdens must affect, and relate to, a burdened property for the benefit of the benefited property.

33. *Subsections (1) and (2)* re-state the rule that a real burden must affect the burdened property. This is the first aspect of what is known as the praedial rule. The praedial rule requires that the burden must in some way relate to the burdened property. Subsection (2) makes it clear that if the *only* link between the burden and the property is that the burden is imposed on the person who owns that property, the praedial rule is not complied with. The other aspect of the praedial rule is that the burden must benefit the benefited property. This second requirement of praedial benefit does not apply to personal real burdens as there is no benefited property in these cases (see subsection (3)). All real burdens, including personal real burdens, must in terms of subsection (1) comply with the first aspect of the praedial rule.

34. *Subsection (4)* makes a special provision for community burdens so that the praedial test for a community burden will be satisfied if it confers a benefit on the community or any part of the community. Community *burdens* are defined in section 25. Certain burdens, such as for management structures and service charges, will clearly be in the community's interest, and subsection (4) will accordingly make them praedial, regardless of their relationship with an individual property. The subsection also allows for an exception for communities in special circumstances. In a normal housing estate a prohibition on occupation by residents over the age of 60 would probably not normally be praedial because it would not benefit the property. It would consequently be invalid. However, the special needs of certain types of community, such as a sheltered or retirement housing complex where the housing is specifically adapted for occupation by the elderly, would allow for an exception. This sort of condition would be for the benefit of the community as a whole.

35. *Subsection (5)* provides that a right of pre-emption is the only type of option to acquire land that may be created as a real burden in the future. The present law also allows redemption and reversion options to be constituted as real burdens. Pre-emption entitles the holder to first refusal in the event of the property coming up for sale. The decision by the owner to sell is the only thing that can trigger the pre-emption. Redemption does not depend upon the decision of the owner. It is a right to repurchase triggered by a specified event such as death of an owner or the granting of planning permission. Reversion is similar, but does not necessarily require the payment of money or value. Further provision for rights of pre-emption is made by sections 82 to 84. Although the Act (section 1(3)) recognises personal pre-emption burdens and personal redemption burdens it is not possible to create such burdens under the Act. These burdens are by definition (see section 122) only capable of arising by the conversion of a former feudal burden under section 18A of the 2000 Act, introduced by section 114 of the Act.

36. *Subsection (6)* re-states the rule of the common law that a real burden must not be illegal nor contrary to public policy. The illegality requirement would include a purported burden that attempted to breach race or sex discrimination laws. There are 3 main categories of public policy prohibitions. A burden cannot be repugnant with ownership, i.e. it could not be so restrictive that the value of ownership would be lost. In addition, a burden cannot form an unreasonable restraint of trade. There is no bar, however, on a general prohibition, for example from carrying on a business in a housing estate. The third category is that a burden must not create a monopoly. This is dealt with by subsection (7).

37. *Subsection (7)* makes clear that a real burden cannot create a monopoly, except where the contrary is expressly permitted by the Act. Despite the reference in *paragraph (a)* to manager appointment, a temporary monopoly is permitted elsewhere in the Act: see sections 26(1)(d) and 63.

38. *Subsection (8)* provides that a provision which purports to allow a person who is not the holder of a real burden to waive compliance with or vary the terms of a burden is not competent after the appointed day. The holder of a burden will most commonly be a benefited proprietor but could include the holder of a personal real burden. Subsection (8) prevents a person who cannot enforce the burden from being able to waive or vary the burden. The new subsection (2A) inserted into section 73 of the 2000 Act by paragraph 13(c) of Schedule 13 makes an equivalent provision for feudal burdens.

39. *Subsection (9)* ensures that there is no conflict between the terms of subsection (8) and section 33(1)(a). Section 33(1)(a) permits the terms of a community burden to be varied or discharged without the need for all holders to sign the deed of variation or discharge. In terms of subsection (8) “the holder” would, where there is more than one holder, mean all the holders. Subsection (9) therefore clarifies that subsection (8) does not prejudice the operation of section 33(1)(a).

#### **Section 4: Creation**

40. *Section 4* explains how a real burden is created after the appointed day. In summary, a burden is created by a deed (known as a ‘**constitutive deed**’) granted by the owner of the burdened property and registered in the Land Register or Register of Sasines against both the benefited and the burdened properties.

41. *Subsection (1)* restates the current law that a real burden is created by registration of a constitutive deed. By section 122(1) “registration” means registration of the real burden in the Land Register or recording of the constitutive deed in the Register of Sasines. These property registers record ownership of land in Scotland. The time of creation is usually the time of registration, but where the constitutive deed is a deed of conditions, it is permissible under the present law to prevent the creation of burdens on registration of the deed of conditions by disapplying section 17 of the Land Registration (Scotland) Act 1979 (section 17 is repealed by schedule 15 to the Act). In this case the burdens are created on the date of registration of a subsequent conveyance into which the deed of conditions is incorporated. For instance, a builder might create a deed of conditions over an entire development, but choose to postpone the activation of the real burdens on each unit until it is sold. The sale of the unit is the subsequent conveyance: that is the point at which the burdens will affect that part of the development. Subsection (1) allows the continuation of this practice (by *paragraph (b)*) but by different means and also allows (by *paragraph (a)*) a more straightforward postponement to a specifically specified date. After the appointed day the constitutive deed must itself provide for a delay in the effectiveness of a real burden. The postponement must be in accordance with subsection (1). If the deed is silent, the burden will take effect immediately upon registration.

42. Under the current law the terms of a real burden must be set out either in a conveyance or a deed of conditions. *Subsection (2)* abandons this limitation. In future it will be possible to create a real burden using any deed, provided that the deed complies with the three conditions set out in paragraphs (a) to (c).

43. Paragraph (a) of subsection (2) should be read together with section 5 (which qualifies the rule that the terms of the burden must be set out in full). The requirement that the term “real burden” (or “community burden” etc.) be used is new.

44. Paragraph (b) of subsection (2) restates the rule that only an owner can burden land. “Owner” includes a person who has right to the property but has not completed title by registration (section 123(1)(a)). Where title has not been completed and the land is not already on the Land Register, there must be a deduction of title. This is further explained in the note on section 60. Where property is owned in common, both (or all) *pro indiviso* owners must grant. This is indicated by the use of the definite article (“the” owner). If the constitutive deed is a



conveyance of the burdened property, the granter satisfies paragraph (b) on the basis that he continues to own until the time of registration, and in such a case transfer of ownership and creation of the real burden occur simultaneously. An owner “grants” a deed by subscribing it in accordance with section 2 of the Requirements of Writing (Scotland) Act 1995, and in practice the deed will also be witnessed under section 3 of that Act.

45. Paragraph (c) of subsection (2) requires nomination and identification of both the benefited and the burdened property. With personal real burdens, there is no benefited property, and the requirement is merely to identify the person in whose favour the burden is created. Subsection (4) contains an exception in respect of community burdens where it is only necessary to identify the community. Where this is done section 27 provides that each unit in the community is both a burdened and benefited property.

46. Many burdens are given special names by the Act. *Subsection (3)* makes clear that such special names can be used in the constitutive deed instead of “real burden”. Examples of these include community burdens, facility burdens, conservation burdens, maritime burdens and manager burdens. The word “purports” ensures that where a constitutive deed states that it creates a nameable type of real burden but does not in fact do so that the real burden is not invalid. This situation may typically arise where community burdens are created on the sequential sale of units. The burdens will not in fact be community burdens in terms of section 25 until at least four units are both burdened and benefited properties.

47. In community burdens, each benefited property is also a burdened property. Taken together, each of these units forms the “community” which is being regulated by the burdens (section 26(2) defines ‘community’ as any units subject to community burdens). Since it would be pointless to describe the same land twice, *subsection (4)* modifies subsection (2)(c) by requiring merely that there is nomination and identification of the community to which the burdens are to apply.

48. *Subsection (5)* provides for dual registration of the constitutive deed. At present registration is required against only the burdened property. It will now be required that registration occurs against both the burdened and the benefited property (or properties). Registration against the benefited property is excused where there is no such property (as with personal real burdens) or where the property is not in Scotland (for which see section 116). This subsection should be read in conjunction with section 120, which makes it clear that in future a deed creating a new burden cannot be registered against one property only: it will have to be registered against both properties.

49. It is unclear at present whether a real burden can be created over, or in favour of, a mere *pro indiviso* right to land that is where land is undivided but held in common by more than one owner. *Subsection (6)* puts the position beyond doubt by disallowing such burdens.

50. In certain circumstances real burdens can be created by the Lands Tribunal (section 90(8)). Section 4 does not then apply. Section 73(2) permits the creation of real burdens in a deed of disapplication of a Development Management Scheme. In this case section 4 would generally apply other than the requirement for the deed to be signed by all the owners of the

burdened properties. Section 73(2) permits the deed to be signed by the owners association. These exceptions are acknowledged by *subsection (7)*.

### **Section 5: Further provision as respects constitutive deed**

51. Section 4(2)(a) restates the common law rule that the terms of a real burden must be set out in full in the constitutive deed. *Section 5* introduces an exception to that rule.

52. Section 5 means that it should not be necessary to specify the amount payable towards an obligation to pay some cost provided that some method is provided for calculating liability. This is applied to existing burdens. Although this may not in fact change the existing law, it will remove a current uncertainty. The provision is retrospective in order to ensure the validity of existing burdens which make this sort of provision.

53. *Subsection (1)* makes a distinction between an obligation to defray the whole of some cost and an obligation to contribute towards some cost. In the case of an obligation to defray paragraph (a) removes any question that it is necessary for a real burden to specify the actual amount payable. It is sufficient (the other terms of the burden being adequately specified) if, for example, the burden is simply stated to be an obligation to pay for the cost of maintaining some item of property. Paragraph (b) removes any doubt as to the validity of a real burden which provides for the burdened property to pay a proportion or share of some cost. If no proportion or share is set out in the deed itself then it may be ascertained by a means specified in the deed. In terms of *subsection (2)* the deed may, as a way of arriving at the proportion or share due, make reference to another document. This document however must be readily available to the public. If, for example, the method of calculating liability makes reference to extrinsic material, for example the valuation roll, this will not invalidate the burden. This is a change to the current law.

### **Section 6: Further provision as respects creation**

54. *Section 6* makes a necessary, if limited, provision for the creation of burdens by reference to a deed of conditions registered before the appointed day. Schedule 15 of the Act repeals section 32 and schedule H of the Conveyancing (Scotland) Act 1874 which are the statutory provisions under the current law which allow burdens to be set out in a deed of conditions and then to be imported by reference into a subsequent conveyance. Section 4(1) makes a different but equivalent provision for the future. Section 6 allows deeds imposing real burdens after the appointed day to do so by reference to a deed of conditions registered before the appointed day. “Deed of conditions” is defined in section 122(1).

55. *Subsections (1)* and *(2)* allow an owner of the land which is to become the burdened property to create a real burden by importing the terms of the burden into the deed to be registered after the appointed day from a deed of conditions. “Owner” is defined in section 123. The definition of deed of conditions in section 122(1) makes it clear that this term is used only to refer to deeds executed under section 32 of the 1874 Act which are registered before the appointed day. It is sufficient when importing burdens to use the form of words in schedule 1. It should be noted that schedule 1 is cast in the language of the Act and differs somewhat from the form of words in schedule H of the 1874 Act (to be repealed by schedule 15 to the Act). The

same considerations however arise in completing the reference and the amendment to section 8(5) of the Conveyancing (Scotland) Act 1924 by paragraph 3 of schedule 14 to the Act applies the same notes for completion to the new form set out in schedule 1 as were applied to the form it replaces.

56. *Subsection (3)* provides that, as for section 4, it is not competent to create a burden over a right of ownership held pro indiviso.

### **Section 7: Duration**

57. *Section 7* re-states the existing rule that real burdens are perpetual, unless they have been extinguished by one of the methods recognised by law. Extinction of burdens is provided for by sections 16 to 24. The section also makes clear that the constitutive deed can provide for a shorter duration, if desired.

### **Section 8: Right to enforce**

58. *Section 8* identifies the person who has right to enforce a real burden.

59. *Subsection (1)* sets out the rule, familiar from the common law, that a benefited proprietor cannot enforce a real burden unless he has both title and interest to enforce. Establishing title is a matter of proving that the property is the benefited property. This usually will be by virtue of the deed that constituted the burden. A property can also become a benefited property under the provisions of Part 4 of the Act or Part 4 of the 2000 Act. The concept of interest to enforce is a question of whether a breach of the burden would have a detrimental effect upon the benefited property. *Subsection (2)* details who has title to enforce, and *subsection (3)* specifies the interest requirement.

60. *Subsection (2)* provides a change to the current law. The main person with title to enforce is the owner of the benefited property, for it is the owner who is holder of the real burden (see section 1(1)). The meaning of “owner” is given in section 123. The owner has the primary role in the enforcement of burdens, but *subsection (2)* extends title to enforce to tenants, liferenters, heritable creditors in possession, and non-entitled spouses under the Matrimonial Homes (Family Protection) (Scotland) Act 1981. These categories, set out in paragraphs (a) and (b), comprise the holders of such real (or quasi-real) rights as give a right to possession of the benefited property. The idea is that a possessor should be able to protect their interest by founding on the real burden. Paragraph (c) allows former owners (or right holders) to recover certain costs. Section 15, on discharging burdens, continues the rule that it is the owner’s prerogative alone to agree to the discharge of a condition.

61. If a right is held by two or more people as co-owners, each has an independent entitlement to enforce the real burden. In *subsection (2)* this is indicated by the use of the indefinite article (“an owner”, “a person”, and so on). So if the benefited property is owned in common by a husband and wife, each could enforce without reference to the other but in terms of section 15 both would have to grant a discharge.

62. *Subsection (3)* provides a statutory restatement of interest to enforce. The question of interest is specific to each particular burden and the circumstances in which enforcement is sought. Paragraph (a) clarifies the meaning of interest to enforce. The opening words (“in the circumstances of any case”) emphasise that whether interest arises depends on the nature of the particular breach. Though interest to enforce is in many ways related to the praedial rule outlined in section 3, there is a distinction. The praedial rule is merely a test of whether a burden is capable of benefiting certain land in general.

63. The interest of an owner is likely to be stronger than that of a person holding a lesser right, such as a lease. For example, if a breach affects the value of the benefited property but not its enjoyment, a tenant might not have interest to enforce. For in such a case the value of the *lease* might be unaffected.

64. Paragraph (b) sets out a special rule for payment of maintenance and other costs. In such a case a person has interest only if he has some ground for seeking payment – for example, he has paid for a repair or other shared expense and is trying to recover the cost from the other owners. In such a case, the detriment arising from a refusal to pay would be to that person rather than to their property.

65. It would be inappropriate for anyone other than the owner to exercise an option to acquire. These options are discussed further in the note on section 3. *Subsection (4)* restricts title to enforce in respect of pre-emptions, and other options to acquire, to the owner of the benefited property. The use of the definite article (“the” owner) indicates that, contrary to the rule set out in subsection (2), *pro indiviso* owners do not have independent rights. In future it will not be possible to create as real burdens options other than pre-emptions: see section 3(5).

66. Some special types of real burden do not have benefited properties. These are personal real burdens, namely: conservation burdens, rural housing burdens, maritime burdens, economic development burdens and health care burdens (see sections 38 to 46), manager burdens (see section 63), personal pre-emption burdens and personal redemption burdens (see section 114). *Subsection (6)* indicates that personal real burdens have special rules.

## **Section 9: Persons against whom burdens are enforceable**

67. In the past it was unclear whether liability extended to parties connected with the burdened property other than the owner. *Section 9* resolves this doubt by identifying who has liability in respect of a real burden. The terminology (“affirmative”, “negative” and “ancillary” burdens) is explained in the note on section 2.

68. *Subsection (1)* provides that burdens which provide for an obligation to do something (an **affirmative burden**) should only be enforceable against the **owner** of the benefited property.

69. *Subsection (2)* provides that burdens other than affirmative burdens (**negative** or **ancillary** burdens) should be enforceable against **anyone having use of the burdened property**.

## **Section 10: Affirmative burdens: continuing liability of former owner**

70. In most cases only the owner of the burdened property can be liable in respect of an affirmative burden (section 9(1)), which means that liability is lost when ownership transfers, but a former owner will retain liability for the performance of a ‘relevant obligation’ in the circumstances detailed in *section 10*. The section clarifies and develops a rule of the existing law. ‘Relevant obligation’ is defined in subsection (4). A person ceases to be “owner” (in the sense meant here) on delivery of a conveyance by virtue of section 123(1).

71. The effect of *subsection (1)* is that the former owner retains liability in respect of any obligation which was already due for performance at the time when the property was sold on. As well as obligations becoming due during the period of ownership, this includes obligations attributable to an earlier period (for which see subsection (2)).

72. Under section 9(1), affirmative burdens are enforceable against the owner of the property. As a result, an incoming owner (B) is also liable for any ‘relevant obligation’ incurred by the former owner (A). *Subsection (2)* provides that a benefited proprietor trying to enforce an affirmative burden could seek to do so against either A or B or both.

73. *Subsection (3)* makes clear that while the liability of former and new owners is joint and several, the underlying liability rests with the former owner. A benefited proprietor could enforce an obligation liable during the ownership of A against a subsequent owner B. B would then have the right to recover the cost from A.

74. *Subsection (4)* explains which type of obligation is ‘relevant’ for the purposes of section 10, i.e. obligations for which a subsequent owner could become liable in conjunction with a previous owner. It also explains when an obligation becomes due for performance. Paragraph (a) deals with expenditure (typically for maintenance) incurred by virtue of a community burden. Usually such expenditure will be sanctioned by some collective decision-making process, whether under the titles or in terms of section 29. If so, the obligation to contribute to the expenditure is treated as becoming due when the decision is made and not when the expenditure occurs. Paragraph (b) sets out a (necessarily) general rule for other cases.

## **Section 11: Affirmative burdens: shared liability**

75. The first four subsections of *section 11* specify who is liable for an affirmative burden when the burdened property is divided into two or more parts. Subsection (5) apportions liability where the burdened property is owned in common. An affirmative burden is an obligation to do a specific thing: see section 2(2)(a). Internal liability is the liability between each owner for the burden: the owner of a smaller property might have a lesser share of liability. External liability is where the benefited proprietor is attempting to enforce the burden against one or more of the burdened proprietors.

76. *Subsection (1)* clarifies and develops the existing law. If a burdened property is divided, the owner of each part is jointly and severally liable for any affirmative burdens. An enforcer would have a choice of debtors. If one owner performed the burden at the instigation of an enforcer, a share of the cost would be recoverable from the other owner(s). The liability of

owners would be determined by the respective sizes of their part of the property. This would be calculated by area. Since the effect of division is to create two separate burdened properties (see section 13), subsection (1) would be applied again if either burdened property were further divided. Subsection (1) applies even where the division took place before the appointed day (i.e. the day on which most of the Act comes into force: see sections 122(1) and 129(2)).

77. *Subsection (2)* introduces a necessary exception. Some affirmative burdens are, by their nature, restricted to a particular part of the burdened property. It might only be possible for an affirmative burden to be performed in one part of the burdened property. In such a case, the other part, if separated, would not be subject to the burden. For example, a burdened property comprising a house and a garden might be divided so that the garden was sold separately. In such a case, the owner of the garden should not be liable for maintenance of the house.

78. *Subsection (3)* introduces a special rule for tenement flats in relation to calculation of internal liability. Measurement of liability shares will be by the floor area of each flat.

79. *Subsection (4)* allows contracting out from the rules set out in subsection (1). The rules of external liability can be varied only in the constitutive deed.

80. *Subsection (5)* does not deal with division. Instead it regulates both external and internal liability in a case where the burdened property is owned in common. If the property is owned in common, each owner should be liable jointly and severally, but subject to a right of relief proportionate to the size of the shares.

## **Section 12: Division of a benefited property**

81. Sections 12 and 13 are concerned with division of the properties.

82. If a benefited property is divided, the current law confers on each part the status of an independent benefited property. The result is an, often unwelcome, multiplication of benefited properties. *Subsection (1)* changes the rule in respect of divisions of property made by a deed registered on or after the appointed day. If A divides his land and conveys part to B, then only the part retained by A will be the benefited property – unless the conveyance provides otherwise. It will be possible for the break-off deed to provide either that both properties or just the part being sold will be benefited properties. Subsection (1) will apply again if the new, reduced, benefited property comes to be divided at a later date.

83. Sometimes it may be desirable to provide that certain burdens are enforceable by the owner of the retained land and certain others by the owner of the conveyed land. *Subsection (2)* makes clear that this is permissible.

84. Paragraphs (a) and (b) of *subsection (3)* explain the method by which contrary provision is made. Paragraph (c) restricts choice in the case of pre-emptions and other options. In such a case there is only to be one benefited property. If the default rule (that the retained land is to be the benefited property) is disapplied, the only alternative provision which may be made is that the conveyed property is to be the benefited property.

85. *Subsection (4)* disapplies these rules in certain cases where they would be inappropriate. Sections 52 to 54 and 56 and 57 provide special rules for the identification of benefited properties in relation to common scheme burdens created before the appointed day. Paragraph (a) ensures that the rules operate regardless of division. Community burdens are designed for the benefit of the entire community, regardless of the number of units that it may be divided into. In a community each property is both a burdened and a benefited property. Paragraph (b) follows the principle that it is undesirable that any unit in the community should be deprived of enforcement rights. If the burdens are set out in a deed of conditions, each sale will amount to a division of benefited property and so, under the above rules, the part conveyed would cease to be a benefited property. Paragraph (c) disapplies these rules so that in each sale there is no requirement to make the special provision referred to in subsection (1). Paragraph (c) refers to a “common deed of conditions”. This is not a “deed of conditions” as defined by section 122(1) and could be a constitutive deed registered after the appointed day which sets out the terms of burdens to be imposed on a number of properties.

### **Section 13: Division of a burdened property**

86. This section makes clear that, on division of a burdened property, each part is treated as a separate burdened property. This means, for example, that the owner of a part may make an application to the Lands Tribunal under section 90(1)(a) in respect of that part only. Liability for affirmative burdens (obligations to do a particular thing), following division, is regulated by section 11.

### **Section 14: Construction**

87. Section 14 overturns the rule that real burdens are to be interpreted more strictly than other comparable obligations, such as servitudes.

### **Section 15: Discharge**

88. The remaining provisions of Part 1 are concerned with the manner in which real burdens are extinguished.

89. The standard method of discharging or varying real burdens is by obtaining a minute of waiver from the benefited proprietor(s) and registering it in the Land Register or Register of Sasines. *Section 15* re-states the current rules for this voluntary discharge mechanism.

90. Section 15 provides that a real burden is discharged by registration of an appropriate deed granted by or on behalf of the owner of the benefited property. As *subsection (1)* makes clear, the discharge is effective only in respect of the benefited property whose owner has granted it. As a result, any *other* benefited properties are unaffected. An owner can only discharge a burden in relation to their own property: the effect of a benefited proprietor discharging their enforcement rights means that the burden no longer benefits their property. It does not mean that the rights of the owner of any other benefited property are affected. A burden is not completely ‘extinguished’ until the owner of every benefited property has discharged their enforcement rights. Even though section 8 will extend enforcement rights beyond owners (to tenants etc.), a discharge by the owner will remove the right of these parties to enforce. The Act makes separate provision in section 48 for personal real burdens.

91. This discharge procedure has to be carried out by or on behalf of the owner. Unlike under the present law, ‘owner’ includes a person who has right to the property but has not completed title by registration (section 123(1)(a)). Where property is owned in common, all *pro indiviso* owners must grant a deed (subsection (1) refers to ‘the’ owner). The owner ‘grants’ a deed by subscribing it in accordance with section 2 of the Requirements of Writing (Scotland) Act 1995, and in practice the deed will also be witnessed under section 3 of that Act. There is no requirement for a grantee (the owner of the burdened property) to be specified (section 69(1)). By section 122(1) ‘registration’ means registration of the discharge in the Land Register or recording of the deed of discharge in the Register of Sasines; and while registration is required only against the burdened property, the Keeper has power, and in some cases a duty, to make a corresponding entry against the title sheet of the benefited property (section 105). No particular deed or form of deed is specified.

92. *Subsection (2)* makes clear that partial discharge is included. If a burden is discharged wholly or in part then the discharge only needs to be registered against the burdened property. If, however, a burden is discharged and a replacement burden created the deed would then be both a discharge and a constitutive deed. It would then become necessary to register the deed against the burdened property and the benefited property in terms of section 4(5).

### **Section 16: Acquiescence**

93. The three paragraphs of *subsection (1)* restate the pre-conditions for acquiescence. Paragraph (c) provides for either active or passive consent. There is no specific form of words that active consent must take: a casual word exchanged over the garden fence would be sufficient, if awkward to prove. Passive consent requires knowledge (actual or constructive) of the activity coupled with an absence of opposition. In both cases (and by contrast with section 15) the consent is to the activity itself rather than to the breach of the burden. Neither party need know that the burden is being breached.

94. By contrast with the rules for voluntary discharge (set out in section 15), consent is required from all enforcers (including in the case of passive consent tenants and others with subsidiary rights under section 8(2)(a) and (b)), and in respect of all benefited properties. This means that a burden cannot be extinguished in respect of some enforcers, or benefited properties, but not in respect of others. If all those able to enforce a burden do not acquiesce, then the burden cannot be discharged by section 16, even in respect of those who have given their consent. The two types of consent may be mixed, so that some enforcers give active and others merely passive consent. If active consent is obtained from the owners of all the benefited properties which have title and interest to enforce the particular breach of the burden then the burden would, to the extent of the breach, be extinguished without the need for either active or passive consent, or indeed even in the face of actual objection from an person with a right to enforce other than an owner. Passive consent, likewise, is only needed from those benefited proprietors who have both title and interest to enforce the particular breach. An objection by a benefited proprietor with title but no interest to enforce will not prevent extinguishment of the burden. The test for interest to enforce is set out in section 8(3)(a). The requirement for interest to enforce reinforces the presumption introduced by subsection (2) that an enforcer was aware or ought to have been aware of the activity constituting the breach. If the nature of the breach is such that an enforcer will suffer material detriment to the value or enjoyment of their interest in



the benefited property then it will be difficult to rebut the presumption that the enforcer ought to have been aware of the activity constituting the breach.

95. Because of the difficulty in establishing acquiescence under the existing law, *subsection (2)* introduces a presumption that after the expiry of 12 weeks from the substantial completion of the activity breaching the burden those entitled to enforce the burden knew of the breach, but did not make any objection. This presumption could be rebutted by a benefited proprietor.

### **Section 17: Further provision as regards extinction where no interest to enforce**

96. *Section 17* makes it clear that to the extent that a burden is unenforceable it is extinguished. For a burden to be enforceable there must in terms of section 8(1) be someone with both title and interest to enforce it. Whether a person has interest is determined by the test set out in section 8(3) and is particular to each set of circumstances that arise. *Section 17* also supplements section 16 which assumes that there will be someone who has interest to enforce. That section would not operate to extinguish a burden (to the extent of the breach) if there is no one with interest to enforce to give active or passive consent. As the provision has a wider application than just the circumstances envisaged by section 16 it merits a separate section of its own.

### **Section 18: Negative prescription**

97. *Section 18* makes an alteration to the law on prescription. The existing law of negative prescription provides that if a burdened proprietor breaches a burden, and the benefited proprietor takes no action, the burden will fall (to the extent of the breach) in 20 years. The prescription is interrupted if the breach is challenged by the benefited proprietor or acknowledged by a burdened proprietor. The change is made by a self-standing provision rather than (as in section 88) by amendment to the Prescription and Limitation (Scotland) Act 1973. But prescription is to operate in substantially the same way as under that Act, and subsection (3) applies some of the 1973 Act provisions.

98. *Subsection (1)* provides for extinction if a breach is unchallenged for a period of five years. As with acquiescence (section 16), the extinction is only to the extent of the breach. Paragraph (b) repeats the rule of the existing law that a claim or acknowledgement will interrupt the prescriptive period.

99. *Subsection (2)* provides a modification to the rule for pre-emptions and other options to acquire. For these obligations a single failure to convey (or, with pre-emptions, to offer to convey) results in the complete extinction of the burden. Any sale in breach of a right of pre-emption will extinguish the pre-emption within 5 years by virtue of negative prescription. This differs from the standard position in subsection (1) in that the obligation will be completely removed, and not merely to the extent of the breach. Subsection (6) modifies the application of subsection (2) as regards rural housing burdens. Where there is a failure to offer to convey to a rural housing body, the passage of 5 years with no relevant claim or acknowledgement will not extinguish the burden but will prevent any enforcement action being taken in respect of the particular failure.

100. *Subsection (3)* applies the definition of ‘relevant claim’ and ‘relevant acknowledgement’ (terms used in subsection (1)) used in the Prescription and Limitation (Scotland) Act 1973. Paragraphs (a) to (c) specify that for the purposes of section 18, the specified definitions in the 1973 Act will be modified so as to relate to real burdens and those with right to enforce them. The definition of ‘relevant acknowledgement’ in section 10 of the 1973 Act states that the burdened proprietor will be regarded as having acknowledged that the burden is still in force if he has acted to implement the obligation or has given a written acknowledgement that it subsists.

101. *Subsection (4)* applies to subsections (1) and (2) section 14 of the Prescription and Limitation (Scotland) Act 1973. Section 14 contains rules for the computation of prescriptive periods, for example, that such periods commence on the day following the event which triggers the prescriptive period, if that event falls at a time other than the beginning of the day. Subsection (1)(a) of section 14 is however excluded because it makes provision for time occurring before the commencement of the 1973 Act to be included in the computation of prescriptive periods. There is special provision in subsections (5) and (7) for computing the prescriptive period in respect of any breach of a real burden which occurred before the appointed day when this section comes into force.

102. *Subsection (5)* relates to breaches of real burdens that occur before the appointed day when this section comes into force. Instead of 5 years, the prescriptive period for such breaches is to be the period described in subsection (7).

103. *Subsection (6)* modifies the application of subsection (2) in respect of rural housing burdens. See further the note to subsection (2).

104. *Subsection (7)* provides that the prescriptive period for breaches of real burdens that occur before the appointed day is to be 20 years, computing the period from the date of the breach, or 5 years, computing the period from the appointed day, whichever period expires earlier. This means that where a breach occurred more than 15 years before the appointed day, the prescriptive period will still be 20 years but no longer. If the breach occurred less than 15 years before the appointed day, the prescriptive period will expire 5 years after the appointed day.

### **Section 19: *Confusio* not to extinguish real burden**

105. A real burden (usually) requires both a burdened and a benefited property (section 1(1)), but there is no requirement that the properties be in separate ownership. The term ‘*confusio*’ is used to describe the situation where the benefited and burdened proprietors are the same person. Section 19(a) resolves a doubt by making clear that a burden is not extinguished by confusion. This means that the owner of both properties will be able to enforce an obligation against a tenant under section 9(2). Paragraph (b) gives an equivalent rule for personal real burdens.

### **Section 20: Notice of termination**

106. Sections 20 to 24 introduce a completely new termination procedure for real burdens which are at least 100 years old. *Subsection (1)* of section 20 sets out the essential criteria. The burden must be at least 100 years old. The 100 years run from the date of registration of the

constitutive deed. Normally this would be the date of registration of the disposition or feu disposition creating the burden but if the constitutive deed is a deed of conditions the 100 year period begins on the registration of the deed of conditions even if the burdens are not in fact imposed until a later date. For this purpose variations or renewals (whether by charter of novodamus or judicially, under section 90(1)(b)) are disregarded. If, for example, a burden was created in 1900 and renewed or waived to a certain extent in 1950, the relevant date would still be 1900. The procedure may be used by any owner of the burdened property (including a *pro indiviso* owner) or any other person (such as a tenant) against whom the burden is enforceable. It comprises two stages: intimation is given under section 21 of an intention to register a notice of termination, and the notice is then executed and registered under section 24. If there are no applications to renew the burden the notice of termination may be submitted for registration. A notice of termination cannot be registered unless a certificate is endorsed on it by the Lands Tribunal under section 23. The form of notice of termination is provided in schedule 2.

107. *Subsection (2)* makes clear that an owner (or other person) can continue with a termination process initiated by a predecessor in title. An owner might begin the process of termination, but sell the burdened property before it is complete. The new owner would be able to step into the process. ‘Terminator’ is used throughout this group of sections to refer to the person who is currently using the procedure.

108. The termination procedure is not available for all burdens. *Subsection (3)* sets out the exclusions. They include facility burdens (defined in section 122(1)). These burdens regulate the maintenance, use or management of a common facility. Conservation, maritime, and service burdens are also protected. Paragraph (e) excludes the title conditions that are excluded from the jurisdiction of the Lands Tribunal under section 90(3). These are specified in schedule 11.

109. *Subsection (4)* specifies the content of a notice of termination. A statutory form is given in schedule 2. Paragraph (c) makes clear that partial termination is permitted (and see also section 24(1)). Paragraphs (e) and (f) require information about intimation, both in general terms and also in the form of a list of those to whom intimation was sent. This will allow recipients to contact each other and consider the possibility of a joint challenge. There is no requirement to identify the benefited property or properties, and in practice these may often be unknown to the terminator.

110. *Subsection (5)* provides that the renewal date stipulated in the notice must be not less than eight weeks after the date of last intimation. The renewal date is, ordinarily, the last day on which the notice may be opposed, by application to the Lands Tribunal for renewal of the burden. An application can only be made after the renewal date with the consent of the terminator (section 90(4)(a)) and then must still be made before the Lands Tribunal have endorsed a certificate on the notice (section 90(4)(b)). The renewal date must have previously appeared in the notice which is sent for the purposes of intimation.

111. *Subsection (6)* makes clear that a single notice can be used in respect of more than one burden even if the burdens are not contained in the same deed.

## **Section 21: Intimation**

112. Intimation is the first stage of the termination procedure.

113. *Subsection (1)* imposes a requirement to intimate the proposal to terminate the burden. Intimation must be given to the owners of all the benefited properties, to the holder of any personal real burden, (as defined in section 122(1) and, if the terminator is not the owner (or is only one of the owners), to the owner of the burdened property. As the termination procedure operates to extinguish a burden, it cannot be used to target individual benefited proprietors. All benefited proprietors must be given intimation and the renewal date cannot occur until intimation has been given to all, as the renewal date must always be at least 8 weeks after the last date of intimation.

114. *Subsection (2)* explains the permissible methods of intimation. It may be difficult to identify all of the benefited properties. Method (a) involves sending a copy of the proposed notice (with an explanatory note). A form for this explanatory note is contained in schedule 2. Section 124 details the various methods of ‘sending’ the notice. The notice must be substantially complete, but should not be signed. Method (b) requires the posting of the intimation on the burdened property and on lamp posts in the neighbourhood. The form of this notice is set out in schedule 3. Method (c) is by newspaper advertisement. Evidence of intimation should be retained, for example, recorded delivery slips, a copy of the affixed notice or the advertisement as these may be required by the Lands Tribunal or the Keeper.

115. *Subsection (3)* provides that the first method of intimation (directly sending a copy of the intimation) will have to be used to give intimation to the owner of the burdened property, the holder of any personal real burden and the owner of any benefited property which is within four metres of the burdened property. For other benefited proprietors, the terminator has a choice of intimating by sending, or by affixing notices to the burdened property and to lamp posts. Where this is not possible (or where the burdened property is minerals or salmon fishings) intimation may be given by advertisement. In the measurement of the four metres there is to be disregarded (i) pertinents and (ii) any road if of less than twenty metres in width (section 125).

116. *Subsection (4)* sets out the content of the advertisement used in method (c).

117. *Subsection (5)* obliges the terminator to provide a copy of the proposed notice on request. This will mainly be necessary where intimation has been by lamp post or advertisement (see subsection (4)(c)).

118. *Subsection (6)* makes provision for the removal of lamp post notices no later than one week after the renewal date specified in the notice. The person affixing the notice must take care that it remains conspicuous and legible.

119. *Subsection (7)* confirms that planning permission is not required for the display of termination notices.

## **Section 22: Oath or affirmation before notary public**

120. This and the following two sections are concerned with the second (and final) stage of the termination procedure, namely the execution and registration of the notice of termination.

121. *Section 22* deals with execution. *Subsection (1)* provides that the terminator must swear or affirm before a notary public that the information in the notice is true, and that the notice has been duly intimated. In the normal case this must be done by the terminator personally, but *subsection (2)* sets out some exceptions. *Subsection (2)(b)* should be read with schedule 2 to the Requirements of Writing (Scotland) Act 1995, which identifies who may sign on behalf of companies and other juristic persons. ‘Notary public’ is given an extended meaning, in relation to overseas execution, by section 122(1).

## **Section 23: Prerequisite certificate for registration of notice of termination**

122. A notice of termination cannot be registered if it is opposed (other than opposed in part). A notice is opposed by making an application to the Lands Tribunal under section 90(1)(b) (and see also section 90(2) for renewal or variation of the real burden (or burdens). Variation is defined in section 122(1) but in this instance does not include the imposition of a new obligation or the creation of a new benefited property (see section 90(5)(b). For the Keeper to register the notice, there must be a certificate from the Lands Tribunal endorsed on or annexed to the notice. *Section 23* requires the Lands Tribunal to certify on the notice that no application has been made. Where an application has been received, but it relates to only some of the benefited properties or to only some of the burdens, the Tribunal will be able to give a certificate stating in respect of which benefited properties and/or which burdens an application has been made.

123. *Subsection (1)* provides for the Lands Tribunal certificate. A certificate may be given if there has been no application for renewal or variation by the renewal date, or if an application has been made but then withdrawn. Even if an application has been made in respect of some of the burdens or only some of the benefited properties, the Lands Tribunal may still execute the certificate. Where there are several benefited properties, not all of their owners will necessarily apply to renew the burden. Alternatively, where there are several burdens in the notice of termination, a benefited proprietor applying for renewal might be content for some of the burdens to fall and so only apply in respect of certain of the listed burdens. In either case, the application for renewal does not encompass the entire notice of termination: it only applies to some of the burdens or some of the benefited properties. As a result, the notice of termination has not been fully opposed, and may be registered to the extent that it has not been contested. The certificate given by the Lands Tribunal under section 23(1)(b) will list the burdens and the relevant properties that are subject to applications for renewal or variation. When the notice of termination is registered the burdens set out in the certificate will not be extinguished nor will the rights of a benefited property named in the certificate be discharged. If an owner does not make an application for renewal or variation, then his property will cease to be a benefited property in relation to the burden, regardless of what other owners do. The meaning of ‘renewal date’ is given in section 20(4)(d) and (5) as the date by which an application to renew or vary must be made. The reference in paragraph (b)(ii) of subsection (1) to ‘probably or possibly’ reflects the difficulty, under the current law, of making an accurate identification of the benefited properties.

124. *Subsection (2)* allows a notice of termination to be withdrawn at any time before the certificate is endorsed.

#### **Section 24: Effect of registration of notice of termination.**

125. Section 24 explains the effect of registration. Registration extinguishes the burdens, subject to any qualifications (i) in the notice itself or (ii) in the Lands Tribunal certificate endorsed on the notice.

126. If, at a later time, opposition was withdrawn by a benefited proprietor, *subsection (2)* allows a further certificate (under section 23(1)(a)) and a second registration. This second registration will rely upon the second certificate. If, however, the opposition (partial or full) was not withdrawn but the application for renewal or variation was instead refused by the Lands Tribunal and the burden discharged, the proper procedure is to register the Tribunal's order in terms of section 104(2). The notice itself cannot be registered because no certificate can be given under section 23(1).

## **PART 2: COMMUNITY BURDENS**

### **Section 25: The expression “community burdens”**

127. This section introduces Part 2 of the Act, which is concerned with community burdens. The label ‘community burden’ is a new term, but the types of burden that can be included under this name already exist in large numbers. The rules in Part 2 for community burdens are essentially designed to allow burdens affecting communities to be governed by majority rule. ‘Communities’ can take a variety of forms, for example, modern housing estates, tenements, terraces, sheltered and retirement housing and business parks. The term ‘community’ is used in the Act in a technical sense (for which see section 26(2)). A community is a group of four or more properties all subject to the same or similar burdens and which can be mutually enforced. Mutually enforced means that the owner of each property in the community will be able to enforce all or at least some of the burdens against the others. Part 2 applies to all community burdens, whether created before or after the Act comes into force (section 119(10)).

128. *Subsection (1)* defines ‘community burdens’. Its essence is the mutual enforceability of common burdens. A common scheme refers to the imposition of burdens that are normally, but not necessarily, exactly the same for each property. Community burdens only exist where burdens are imposed under a common scheme on four or more units and each of those units can enforce all or some of those burdens against the others. The meaning of ‘unit’ is given in section 122(1).

129. *Subsection (2)* is included to ensure that there is no doubt that where burdens have been imposed under a common scheme in relation to a sheltered or retirement housing development the fact that no burdens may have been imposed on a unit retained for special use (typically as a warden's flat) would not prevent the whole development from being a community for the purposes of Part 2 of the Act. Section 26(2)(b), which defines the term ‘community’ in the legal sense used by the Act expressly provides that a unit, such as a warden's flat, that is not subject to community burdens is nevertheless part of the community. This is an exception to the general

rule that to form part of the community it is necessary for the unit to be a burdened property under the common scheme as well as a benefited property.

### **Section 26: Creation of community burdens: supplementary provision**

130. Community burdens are real burdens and are generally subject to the same rules as other real burdens. Section 2 makes general provision as to what a real burden may do. *Subsection (1)* amplifies those provisions by giving a non-exhaustive list of possible content for community burdens. This is in recognition that communities may require a degree of regulation and management to put it beyond doubt that certain obligations can be validly created as community burdens. There is an equivalent provision in section 3(4) to make it clear that a community burden may be for the benefit of the community rather than individual units. The meaning of ‘manager’ is given in section 122(1).

131. *Subsection (2)* defines ‘community’. This refers back to the definition of “community burdens” in section 25. A community is made up of units all burdened with obligations imposed under the same common scheme. It comprises the units which can enforce or are burdened by some - not necessarily all - of the burdens imposed under the common scheme. This means that a community remains the same notwithstanding that one or more units may cease over time to be subject to or entitled to enforce a particular burden. This may happen, for example, if the owner of a burdened property obtains a discharge. Paragraph (b) takes account of the fact that a unit in sheltered or retirement housing which is used in a special way (for example as a warden’s flat) might not itself be subject to the burdens. Nonetheless it is part of the community, and is, for example, counted for the purposes of majority decision-making (for which see sections 28 to 37).

### **Section 27: Effect on units of statement that burdens are community burdens**

132. This section introduces a conveyancing shortcut. The effect of using the term ‘community burdens’ in a constitutive deed will be to create reciprocal enforceability. That is one of the two criteria for community burdens set out in section 25(1). Notwithstanding the use of the term, however, the burdens will not qualify as community burdens unless the other criterion (common scheme burdens imposed on four or more units) is also met. The term ‘community burden’ will not *have* to be used in order to create a community burden. It could simply be called a real burden: the criteria in section 25 are the decisive factors in every case.

### **Section 28: Power of majority to appoint manager etc.**

133. This is the first of a group of sections (sections 28 to 31) which set out some basic rules for the management of a community. The rules are **default rules** – or in other words, they apply **only** to the extent that *alternative (or contrary)* provision **is not made** in the titles.

134. *Section 28* itself confers on the owners of a majority of units various powers in relation to managers. The meaning of “manager” is given in section 122(1).

135. *Subsection (1)* sets out the powers in question. Since acts carried out under paragraphs (a) and (b) bind both the dissenting minority and also successors (section 30), it is necessary – through paragraphs (c) and (d) – to allow the acts to be undone if a different majority can be

assembled. Although paragraph (a) permits the majority to specify the terms of a manager's appointment and paragraph (b) permits a majority to confer powers exercisable by a majority on a manager, this has to be read alongside the opening paragraph of the subsection which provides that it is *subject to the terms of the community burdens*. This means that paragraphs (a) and (b) do not permit a majority to interfere through a manager with the basic management regime set out in the titles. There is no limit on who can be appointed as a manager under paragraph (a): it could be one of the owners or a professional property manager. The reference to section 54(5)(a) means that in sheltered or retirement housing a majority of at least two thirds of the units will be required in order for them to use the power under paragraphs (b) or (c). The ability of a majority to dismiss a manager under paragraph (d) is to apply only where the title deeds do not provide for an alternative majority (but this should be considered alongside section 64 which provides for a default two thirds majority for dismissal that overrides the title deeds). The power to dismiss a manager under paragraph (d) will not be operational where a valid manager burden is in existence, hence subsection (1) is subject to section 63(8).

136. *Subsection (2)* gives a non-exhaustive list of the powers that might be conferred on a manager. Paragraph (b) of subsection (1) provided that only "their" powers (i.e. the powers of a majority, whether collectively or individually) may be conferred on a manager. The majority would obviously be unable to confer on a manager the power to do something that they themselves could not. The powers mentioned in paragraphs (a) and (c) in subsection (2) are collective powers of a majority, and include powers given by virtue of sections 29 and 32 to 37. The power mentioned in paragraph (b) is an individual power: it is of the very essence of a community burden (section 25(1)(b)) that the owner of each unit has a right to enforce the community burdens. The conferral of powers may be subject to qualification. The extent of the powers delegated is a matter for the majority's discretion. Section 54(5)(a)(ii) provides that power to vary burdens under paragraph (c) may only be delegated to a manager in a sheltered or retirement housing complex if the burdens are not core burdens (as defined by section 54(4)). The power to discharge community burdens may not be conferred on a manager in this situation.

137. *Subsection (3)* makes provision for voting in a case where a unit is owned in common. The most frequent example of this is where husband and wife own the property together, but it is possible for other arrangements to occur and for ownership to be split unequally e.g. on a 75%/25% basis. Subsection (3) means that the owner of more than a one half share of a unit, would be able to exercise the vote in respect of the property for the purposes of subsection (1). If several co-owners taken together owned more than a one half share of the unit, then they would be able to collectively exercise the vote attached to the unit (provided, of course that they shared the same voting intention). Where, however, the unit is held in equal shares and the owners who wish to use section 28 do not own a majority share of the unit, that unit would not count towards a majority. Where husband and wife own equal *pro indiviso* shares in a unit they would both have to agree for the unit to be included in the calculation of the majority.

138. *Subsection (4)* allows the powers in subsection (1) to be used for managers appointed in some other way (i.e. other than by a majority of owners). Thus a manager might have been nominated in the constitutive deed either as a first manager (under section 26(1)(d)) or by virtue of a manager burden (under section 63).



## **Section 29: Power of majority to instruct common maintenance**

139. *Section 29* applies where there is no provision in the title deeds of a particular community for decision making on common maintenance. It provides a default mechanism to allow the owners of a majority of units to arrange for maintenance to be carried out and paid for. In order for this to be fully effective, the section provides that a majority would be able to require each owner to deposit a contribution in advance of that person's estimated share of the cost. 'Maintenance' is defined in section 122(1) and includes repairs. However, the section does not apply to improvements unless they are reasonably incidental to the maintenance. 'Unit' is also defined in section 122(1).

140. As *subsection (1)(a)* makes clear, section 29 is concerned with **common** maintenance, that is to say, with maintenance obligations imposed by community burdens on more than one unit. Paragraph (a) makes clear that there must be a community burden providing for common maintenance in the title deeds for section 29 to operate. The section is only concerned with majority *enforcement* of these burdens: it is not *creating* new maintenance obligations where none existed previously. Paragraph (b) of subsection (1) requires the cost of carrying out the works to be fully apportioned by the community burdens.

141. *Subsection (2)* sets out a list of powers. These are exercisable, not by a majority of units in the community, but by a majority of the units *subject to the particular maintenance obligation* (which may not be the same thing). The powers allow the majority to require each owner to deposit a contribution in advance based on an estimate of that person's share of the cost. Paragraph (b) allows the money to be collected in advance of the repair. Paragraph (e) allows owners to change their minds. The powers are default provisions and the community burdens may provide for different mechanisms to apply.

142. *Subsection (3)* makes provision for voting in a case where a unit is owned in common. The most frequent example of this is where husband and wife own the property together, but it is possible for other arrangements to occur and for ownership to be split unequally e.g. on a 75%/25% basis. *Subsection (3)* means that the owner or owners of more than a one half share of a unit would be able to exercise the vote in respect of their property for the purposes of subsection (2).

143. *Subsection (2)* requires a notice to be sent to each owner detailing the sum of money to be deposited. *Subsection (4)* provides that when this happens owners must be given certain additional details in order to provide them with information regarding the nature of the works, the cost, and timescale for the works, and the apportionment of the cost and how and where the monies collected will be held.

144. *Subsection (5)* provides that the monies must be held in an interest bearing bank or building society account. The money is to be held by the account holders in trust for owners who have deposited money (*subsection (8)*). The account holders do not have to be owners of units within the community: the account holder could be, for example, a solicitor acting as agent or a manager. The account should only be operable by those authorised by the majority to do so in terms of paragraph (c) of subsection (2).

145. *Subsection (6)* requires the owners to be notified of any modification or revocation that affects the information given under subsection (4).

146. *Subsection (7)* makes provision for exhibition of tenders received for the works and for a refund if the work has not commenced within a certain period. If, however, the works have commenced before the demand for a refund is received, then there is no obligation to repay the monies even if work commenced after the date stated in the timetable.

147. *Subsection (8)* makes provision for the refunding of any monies left over after the work has been completed. In the absence of alternative written agreement, each owner should receive the amount contributed by him or her plus accrued interest less his or her share of the cost of the works.

### **Section 30: Owner's decision binding**

148. *Section 30* confirms the principle of majority rule. Decisions, and acts (such as the appointment of a manager), bind both the dissenting minority and also incoming owners. An incoming owner would, for example, be liable for maintenance costs which had already been agreed to (and see sections 9(1) and 10). The section is *not* confined to the default code but applies also to decisions and acts carried out in terms of the title deeds.

### **Section 31: Remuneration of manager**

149. If a professional manager is used, a fee will be due, probably at regular intervals. The amount is a matter for negotiation with the manager. *Section 31* apportions that amount equally among owners in the community (subject to different provision in the titles). The second half of section 31 provides rules for apportioning liability between co-owners. The manager is entitled to payment in full from a co-owner. The co-owners are only liable in a question amongst themselves for a share equal to their share of ownership of the unit.

### **Section 32: The expressions “affected unit” and “adjacent unit”**

150. An individual owner, or a small group within the larger community, may wish to discharge or vary one of the burdens affecting their property. Alternatively, a majority group within the community may wish to vary or discharge the burdens affecting the whole community, for example, to update or correct an existing deed of conditions. Under the present law, a deed of variation or discharge, even for a single unit, must be granted by the owners of all the units in the community. Sections 33 to 36 introduce two new mechanisms which may be used to vary or discharge a community burden in circumstances where this is not provided for in the relevant title deeds. A variation or discharge under sections 33 or 35, if unopposed, can affect the enforcement rights of the whole community in respect of one or several units even although not all owners in the community have signed the deed. A section 33 deed of variation or discharge may also vary the burdens affecting, or even impose new burdens on, properties in the community without the owners of those units signing the deed. This is not possible for a section 35 deed of variation or discharge as the owners of the affected units must sign. (See section 35(1)). If opposed, such a deed can still operate as an “ordinary” deed of discharge or variation to discharge or vary the enforcement rights of those units whose owners have all signed the deed. A deed of discharge or variation under section 33 is particularly suitable where there

are changes to be made to the burdens affecting all or many of the units. A deed under section 35 is more suited to a variation or discharge of a burden affecting one or a few units only.

151. *Section 32* explains some of the terminology used in sections 33 to 36. ‘Communities’ consist exclusively of ‘units’ (section 26(2)). For the purposes of these sections ‘**affected unit**’ is used to describe the property/properties for which the burden is to be changed, i.e. the burdened property. An ‘**adjacent unit**’ is one that is near to an affected unit: it must be within 4 metres of the unit. The 4 metre distance is subject to section 125, which makes provision for disregarding any pertinent of either property and the width of any intervening road if less than 20 metres. Roads and pertinents are, however, ‘disregarded’ in different ways – see the note to section 125(b). ‘Discharge’ is the extinction of a burden, while ‘variation’ includes both changes to an existing burden to impose a new obligation (section 122(1)) and also the imposition of a new burden.

### **Section 33: Majority etc. variation and discharge of community burdens**

152. The procedure in *section 33* allows a community burden to be discharged or varied in relation to any or all of the units in a community. Section 33 both allows a constitutive deed to make provision for the variation or discharge of community burdens (subsection (1)(a) and provides a default rule (subsection (2)). Essentially, the default procedure involves: signature of a deed by the owners of a majority of the units; notification of the proposal to those owners who did not sign; a period of 8 weeks in which those owners can raise the matter in the Lands Tribunal and if they do not, the endorsement on the deed of an oath by the person proposing to register the deed that the intimation procedure has been complied with and a certificate by the Tribunal. The deed can then be registered and is effective against the whole community. The unit(s) which are to have the burden modified or removed - ‘*affected units*’ - will each require to have the deed of variation or discharge registered against them. *Subsection (1)* prescribes those who may grant the deed. Paragraph (a) provides that an express provision in the title deeds specifying those who may grant such a deed will apply. Where the titles do not make provision, subsection (2) will operate. An express provision in the title deeds nominating certain properties would have to comply with the requirements of section 3 on what constitutes a valid real burden. The procedural requirements set out in section 34 only apply to deeds granted under subsection (2) and do not apply where there is express provision in the constitutive deed for owners to vary or discharge burdens as envisaged by section 33(1)(a). However, it should be noted that in terms of section 55, before the procedure under section 33(1) or (2) can be used in sheltered or retirement housing, a community consultation notice must be issued and the consultation period observed.

153. *Subsection (2)* provides that variation and discharge is granted either by the owners of a majority of units or, where authorised to do so, by the manager. Authorisation to the manager might be contained in the constitutive deed (section 26(1)(c)), or might be given following a decision by a majority of owners (section 28(1)(b) and (2)(c)). Paragraph (a) ensures that the majority must always consist of at least 2 owners, regardless of the number of units one owner may have.

154. *Subsection (3)* ensures that if the owner(s) of the affected unit(s) (i.e. the grantee(s)) sign, their unit(s) count for the purposes of assembling a majority.

155. *Subsection (4)* provides that an owner (or owners collectively owning more than half of a unit owned in common) can grant the deed for the purposes of section 33. Where, however, a unit is held in equal shares and the owners who are willing to sign the discharge do not own a majority share of the unit, that unit would not count towards a majority. It is possible for other ownership arrangements to occur and for ownership to be split unequally e.g. on a 75%/25% basis. Unlike under the present law, ‘owner’ includes a person who has right to the property but has not completed title by registration (section 123(1)(a)); but (section 60(1)) there must then be deduction of title (other than for units on the Land Register). A manager, however, need not deduce title (section 60(2)). The owner ‘grants’ a deed by subscribing it in accordance with section 2 of the Requirements of Writing (Scotland) Act 1995, and in practice the deed will also be witnessed under section 3 of that Act. A grantee is not required (section 69(1)) but would be normal in practice. No particular deed or form of deed is specified. Registration can be by a grantor as well as by a grantee (section 69(2) and (3)); and while the deed need only be registered against the affected unit, the Keeper has power to make a corresponding entry against the title sheets of the other units in the community (section 105).

156. *Subsection (5)* refers to the provisions in section 54 for ‘core burdens’ within sheltered or retirement housing. The effect is that a deed under section 33(2) can only vary and not discharge a “core burden” as defined in section 54(4). Furthermore, a two thirds majority would be needed rather than a simple majority. In relation to non-core burdens a simple majority would suffice. The modifications made by section 54(5) do not apply to a deed of variation or discharge granted in accordance with provisions made in the constitutive deed (i.e. under section 33 (1)(a)).

### **Section 34: Variation or discharge under section 33: intimation**

157. *Section 34* provides for the intimation of a proposal to vary or discharge a community burden by a deed signed in accordance with section 33.

158. *Subsection (1)* requires notification of a proposal to vary or discharge a burden under section 33 to all the owners in the community who did not grant the deed. This could include an owner of a less than one half share of a unit who did not grant the deed (see section 33(4)) notwithstanding that the unit counts towards the assembly of a majority because the other owners of that unit signed the deed.

159. *Subsection (2)* provides for the intimation of the notice. A copy of the executed deed and an individual written notice in, or near to, the form in schedule 4 must be sent to each owner of units in the community that did not grant the deed. Rules for sending are given in section 124. The notice advises owners of their right under subsection (3) to make an application to the Lands Tribunal to preserve the burden. Such an application is made under section 90(1)(c).

160. *Subsection (3)* allows any owner in the community who did not grant the deed to apply to the Lands Tribunal for its preservation, provided the application is made within eight weeks of the date of the last intimation under section 34(1). Unlike a notice of termination under sections 20 to 24, a successful application for preservation preserves enforcement rights for all those benefited properties whose owners did not all sign the deed of discharge or variation regardless of whether or not a particular owner of such a benefited property actually made an application for preservation to the Tribunal. It also preserves unvaried the burden in the title of any burdened

property whose owners did not all sign the deed. However, where all the owners of a benefited property have signed the deed of discharge it operates and can be registered under section 15 as a valid discharge in respect of the enforcement rights of that property.

161. *Subsection (4)* adopts the provisions in subsections (2) to (4) of section 37 subject to the modifications in *subsection (5)*. This means that a deed of variation or discharge is not effective under section 33 (that is it does not vary or discharge burdens enforceable by or against proprietors who have not signed the deed) unless when registered it has endorsed on it a certificate from the Lands Tribunal. In addition it will not vary or discharge any burden described in the Lands Tribunal certificate, as that burden is the subject of an application for preservation (section 37(3)). A certificate would only be endorsed after the expiry of the 8 week period referred to in subsection (3) in which applications for preservation can be made and would only be available if no application is made (or all applications made have been withdrawn) or if applications received do not seek to preserve all the burdens which form the subject matter of the deed. The application of subsection (4) of section 37 means that the person who proposes to register the deed has to swear or affirm that the intimation requirements in subsections (1) and (2) of section 34 have been carried out and also provide under oath/affirmation, the date on which the 8 week period expired. It should be noted that all this is only required before registration but in practice it will have to be endorsed before sending the deed to the Lands Tribunal for a certificate as the Tribunal will only in some cases know of the existence of the deed and the final date for application from the terms of the endorsement on the deed submitted.

162. *Subsection (6)* provides for situations where the granter is unable to swear or affirm in person.

### **Section 35: Variation and discharge of community burdens by owners of adjacent units**

163. *Section 35* introduces a second default mechanism for the discharge and variation of community burdens. It permits a burdened proprietor to obtain a variation or discharge of a community burden from the benefited proprietors of properties lying within 4 metres of the burdened property, if there are any. It is subject to a notification procedure. The procedure is essentially the same as for a deed of variation or discharge granted under section 33. In this case the deed must be signed by the owners of those units lying within a 4 metre radius of the burdened property and by the burdened proprietor. Notification is then given to other owners within the community who have 8 weeks in which to raise the matter before the Lands Tribunal if they wish to preserve the burden. Section 36 makes provision for intimation of a proposal to register a section 35 deed. After these requirements are met an oath or affirmation that intimation has been duly given should be endorsed on the deed. In addition, a certificate must also be obtained from the Lands Tribunal confirming that no application has been made to preserve a burden mentioned in the deed. Once this is done, the deed may be registered against the affected unit. The deed is effective against the whole community except in respect of any burden that is described on the Lands Tribunal certificate as the subject of an application for preservation.

164. *Subsection (1)* provides that a burdened proprietor wishing to vary or discharge a community burden may do so by obtaining a discharge from all ‘adjacent units’. Owners of “affected units” must also sign the deed. See the note for section 32. Paragraphs (a) and (b)

provide for some circumstances in which the procedure cannot be used. Paragraph (a) prevents a section 35 discharge from affecting facility or service burdens or burdens imposed on sheltered or retirement housing development. Paragraph (c) requires notification under section 36 of a proposal to use section 35 to all the other benefited proprietors in the community.

165. *Subsection (2)* ensures that an owner (or owners collectively owning more than half of a unit owned in common) can grant the deed for the purposes of section 35. Co-owners who did not sign the deed would require to be notified under the procedure in section 36. If under section 37 the Lands Tribunal finds in favour of preservation so that the deed cannot be registered as effective against all units, it could still be registered as an “ordinary” discharge but only if it complies with section 15, which would require the signature of all the owners of each benefited property which was losing enforcement rights. Likewise, an “ordinary” deed of variation would only be effective against the burdened property if all the owners of that property had signed it.

### **Section 36: Variation and discharge under section 35: intimation**

166. *Subsection (1)* requires notification of a proposal to discharge a burden under section 35 to all the owners who did not grant the deed. This will include any benefited properties that are not adjacent units (i.e. are outwith the 4 metre distance), any co-owners of adjacent units who did not sign the deed and any owner of an affected unit who did not sign the deed.

167. *Subsection (2)* provides for the intimation of the notice. A choice may be made to use either (or indeed a mixture of both) of the methods in paragraphs (a) and (b). Individual notification may not always be possible if the extent of the community and therefore of the benefited proprietors is not known. The methods are by either “sending” (as defined in section 124) an individual written notice as set out in schedule 5 or by affixing a conspicuous notice as set out in schedule 6 to a clearly visible part of the burdened property and to lamp posts. Paragraph (c) provides that where it is not possible to display conspicuous notices, intimation requires to be given by newspaper advertisement.

168. *Subsection (3)* provides for the required details of any advertisement used under subsection 2(c).

169. *Subsection (5)* adopts the provisions in section 21 on affixing a notice to the burdened property and to the appropriate lamp posts. The words “by virtue of subsection (2)(b)” mean that the date specified is the date specified in the affixed notice required by subsection (2)(b). This requires the notice to be in the form set out in schedule 6 and that form requires the specification of the date on which the period set out in section 37(1) expires. The result is that when reading section 21(6)(a)(ii) for the purposes of a notice affixed in accordance with section 36(2)(b) the reference to renewal date is to be taken as a reference to the date set out in the notice affixed under section 36(2)(b) on which the period set out in section 37(1) expires.

### **Section 37: Preservation of community burden in respect of which deed of variation or discharge has been granted as mentioned in section 35(1)**

170. *Subsection (1)* allows any owner of a benefited property (or an owner of the burdened property: see the note on section 36(1)) who did not grant the deed to apply to the Lands

Tribunal for its preservation, provided the application is made within 8 weeks of the date of the last intimation under section 36(2). Subsection (6) provides that intimation by affixing is given on the first day when the notice is affixed. A successful application means that the enforcement rights and the burdens in the titles of all those units whose owners have not all signed the deed are unaffected by the registration of the deed.

171. The deed of variation or discharge will vary or discharge the community burden in respect of any unit whose owner has granted it, or if there are several co-owners, where they have all granted the deed. In respect of benefited properties whose owners did not grant the deed (or for burdened properties where there was a co-owner who did not sign), *subsection (2)* provides that the burden will not be varied or discharged unless a certificate is endorsed on the deed by the Lands Tribunal stating that no application for preservation has been received by the Tribunal (or all such applications have been withdrawn) or the application only relates to some of the burdens referred to in the deed. The Tribunal cannot give a certificate until after the 8 week period has expired. For practical purposes the oath or affirmation required by subsection (3) will need to be endorsed before sending the deed to the Tribunal in order to provide the Tribunal with sufficient information as to the date the 8 week period expired.

172. *Subsection (3)* provides that the enforcement rights of and the burdens in the titles of those units whose owners have not all signed the deed are not affected by the deed in respect of a burden described in the Lands Tribunal certificate, that is one which is the subject of an application for preservation.

173. *Subsection (4)* provides that a person, before submitting a deed of variation or discharge under section 35 for registration, must swear or affirm before a notary public that the proposal to register the deed has been duly intimated.

174. In *subsection (5)* the provisions of section 22(2) are adopted in relation to circumstances in which the granter is unable to grant in person.

### **PART 3 CONSERVATION AND OTHER PERSONAL REAL BURDENS**

175. Part 3 of the Act is concerned with the new class of burden called personal real burdens: these are conservation burdens, rural housing burdens, maritime burdens, economic development burdens and health care burdens. There are other types of personal real burden, namely manager burdens, personal pre-emption burdens and personal redemption burdens. Sections 47 and 48 apply to all personal real burdens. The other provisions in Part 3 relate to specific burdens. Manager burdens are dealt with primarily by section 63 rather than Part 3 (they are not pure personal real burdens as while not tied to any one benefited property they are only enforceable if the holder owns a related property (see section 63(2))). Personal pre-emption burdens and personal redemption burdens are dealt with primarily by the new section 18A, inserted into the 2000 Act by section 114 of this Act, as it will not be possible to create these types of burden after the appointed day. The 2000 Act allowed some feudal burdens to be preserved under the classes of conservation burdens, maritime burdens, economic development burdens and health care burdens. The purpose was to preserve valuable rights, for the benefit of the public, which would otherwise have been lost on the appointed day. Personal real burdens do not require a benefited property. These burdens cannot however be created in favour of any person. A conservation

burden may only be created in favour of a conservation body or the Scottish Ministers, a rural housing burden may only be created in favour of a rural housing body, a maritime burden may only be created in favour of the Crown, an economic development burden may only be created in favour of a local authority or the Scottish Ministers and a health care burden may only be created in favour of a National Health Service trust or the Scottish Ministers. Part 3 is to be brought into force on the day appointed by an order, or orders, made by the Scottish Ministers (section 129(4)). While, unlike the other types of personal real burden dealt with by Part 3, rural housing burdens do not have a direct equivalent in the 2000 Act, a right of pre-emption which is converted on the appointed day into a personal pre-emption burden by (or which later comes to be held by) a rural housing body will become a rural housing burden (see the definition of rural housing burden in section 122(1)).

176. The provisions on the nomination of bodies as conservation bodies and the operation of conservation burdens in the future supersede those in the 2000 Act. Sections 26 and sections 29 to 32 of the 2000 Act are essentially repealed and re-enacted by the Act. The provisions in the Act thus apply both to new conservation burdens created under section 38 of the Act, and also to former feudal burdens converted into conservation burdens under the 2000 Act (see the definitions of 'conservation burden' in section 122(1)). The same is essentially true for the other types of real burden dealt with by Part 3.

### **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.

### **Section 39: Assignment**

184. Since a conservation burden is a personal real burden the right to enforce is not tied to a benefited property. Provision is therefore made for the transfer of the right to enforce a conservation burden. This is done by assignment. *Section 39* provides that the benefit of a conservation burden can be assigned to another conservation body or the Scottish Ministers and assignment will be completed by registration of the assignment.

### **Section 40: Enforcement where no completed title**

185. A real burden may be enforced only by a person who has both title and interest to do so (section 8(1)). *Section 40* is concerned with title. The relevant conservation body will have title to enforce the burden even if its right has not been registered. The meaning of 'holder' is given in section 122(1) as the person who has right to the title condition. The holder of a conservation burden is thus the relevant conservation body or, as the case may be, the Scottish Ministers.

### **Section 41: Completion of title**

186. Where title to enforce a conservation burden passes to a successor body on the reorganisation of that body the new holder can complete its title as holder of the burden under section 41. Standard cases are likely to be the assumption by a conservation body of new trustees or a reorganisation of a body by statute. The appropriate conveyancing procedure is then to use a notice of title, and paragraph (a) allows this. A notice of title is unnecessary in the case of conservation burdens registered in the Land Register (see section 3(6) of the Land Registration (Scotland) Act 1979 (as amended by schedule 14, paragraph 7(3) of this Act)). Paragraph (b) allows an unregistered holder to grant assignments and discharges. Section 15(3) of the 1979 Act (as amended by schedule 14, paragraph 7(6) of this Act) dispenses with deduction of title in cases where the conservation burden is registered in the Land Register, but otherwise deduction of title is necessary.

### **Section 42: Extinction of burden on body ceasing to be conservation body**

187. This section makes clear that a conservation burden is extinguished if the holder ceases to be a conservation body or if the holder ceases to exist.

### **Section 43: Rural housing Burdens**

188. This section introduces a category of personal real burden to be known as “rural housing burdens”. Such burdens are to be created in favour of a ‘rural housing body’. Rural housing burdens are included in the definition of personal real burdens in section 1(3). As a result, the holder has a presumed interest to enforce, and the burden need not operate in favour of other land. *Subsection (1)* sets out the type of burden which may be created. Only rights of pre-emption can be created as rural housing burdens. Feudal rights of pre-emption which are converted into personal pre-emption burdens by the registration of a notice under section 18A of the 2000 Act will also be rural housing burdens if the holder is a rural housing body (section 122(1)). A rural housing burden may be created by anyone but may only be in favour of a rural housing body. A rural housing body is one which has as one of its main objects or functions the provision of housing on rural land or to provide rural land for housing. Subsections (5) to (8) provide for the establishment by the Scottish Ministers of a list of rural housing bodies. Names may be added to or removed from the list.

189. A rural housing burden will allow the rural housing body a personal pre-emption right when selling land. This will give them the right to repurchase the property in the event of it coming up for sale, and as a consequence, the ability to control future sales. Rural housing burdens differ from normal pre-emption burdens in two ways. The first is that instead of having 21 days in which to accept an offer, a body would have 42 days to accept (section 84(3)). Secondly, the body will not lose the right of pre-emption if it is not exercised (section 84(1)). If the right of pre-emption is not exercised when the property is being resold it will lie dormant until the next sale. Under section 84(1) most rights of pre-emption are allowed only one opportunity to repurchase. The rural housing body will not therefore *have* to step in and use the pre-emption only to recreate the burden in a subsequent resale. Because the pre-emption will survive not being used when a sale occurs, section 18 on prescription provides that a failure to offer the property back to the rural housing body will not eliminate the pre-emption by 5 year prescription. Section 83(1) will allow a rural housing body to give a pre-sale undertaking in relation to a particular sale without extinguishing the burden.

190. The terms of the rural housing burden, as with other rights of pre-emption, will be freely negotiated with the purchaser and could detail the terms and price at which the property could be bought back. It is possible in the creation of a pre-emption to specify the price at which the property can be repurchased. That provision could be used in these circumstances to allow the rural housing body to buy back the property at a similar price to that of the original sale.

191. *Subsection (2)* provides that if someone other than a rural housing body wishes to create a rural housing burden they must first obtain the consent of the body which it is intended will hold the right to enforce the burden.

192. *Subsection (3)* ensures that a rural housing burden cannot be used when a body is selling under the right to buy legislation.

193. *Subsection (4)* prohibits the creation of a standard security over a rural housing burden. Further explanation of this can be found in the note on subsection (3) of section 38 which deals with conservation burdens.

194. *Subsection (5)* provides for the Scottish Ministers to prescribe by subordinate legislation a list of rural housing bodies who will be entitled to hold the right to enforce rural housing burdens created in their favour.

195. *Subsection (6)* sets out the criteria for a body to be included on the list. Only a body which has as one of its main functions or objects the provision of housing on rural land or the provision of rural land for housing may be prescribed as a rural housing body.

196. Since trusts are not separate legal persons, *subsection (7)* makes it clear that in relation to a trust the rural housing body would be the trustees.

197. *Subsection (8)* allows bodies to be removed from the list.

198. The effect of *subsection (9)* is that the definition of rural land is drawn from section 33 of the Land Reform (Scotland) Act 2003.

199. *Subsection (10)* imports the provisions on assignation, enforcement where no completed title, completion of title and extinction which apply to conservation bodies.

#### **Section 44: Maritime burdens**

200. *Section 44* allows the creation of new maritime burdens. *Subsection (1)* states that it is only competent to create a maritime burden in favour of the Crown and over land which is part of the seabed or the foreshore. It is possible for conservation burdens to be created over foreshore sold by bodies other than the Crown.

201. *Subsection (2)* applies both to new maritime burdens created under subsection (1), and also to former feudal burdens which survive under section 60(1) of the 2000 Act (see the definition of ‘maritime burden’ in section 122(1)). Its effect is to prevent alienation by the Crown.

#### **Section 45: Economic development burdens**

202. This section introduces a new category of personal real burden to be known as “economic development burdens”. These burdens may be created by anyone but can only be in favour of a local authority or the Scottish Ministers. It will only be possible to create such a burden for the purpose of promoting economic development. Economic development burdens are included in the definition of personal real burdens in section 1(3). As a result, the holder has a presumed interest to enforce, and the burden need not operate in favour of other land.

203. Section 18B of the 2000 Act, as inserted by section 114 of this Act, will allow a feudal burden imposed in the past that meets the economic development criteria to be converted into an economic development burden. The form of notice to convert the burden will be contained in schedule 5B of the 2000 Act (inserted by schedule 13 of the Act).

204. *Subsection (2)* provides that if someone other than a local authority or the Scottish Ministers wishes to create an economic development burden they must first obtain the consent of the body which it is intended will hold the right to enforce the burden.

205. *Subsection (3)* allows local authorities (or Scottish Ministers) to include a clawback condition so that they will be able to receive a further payment if the value of the land increases, for example due to a change in use. It is not possible to create an obligation to make a periodical payment as an economic development burden. Periodical payments under title conditions are prohibited by section 2 of the Land Reform (Scotland) Act 1974 (amended by paragraph 6 of Schedule 14) except where it is a payment in defrayal of or contribution towards some continuing cost related to the land.

206. *Subsection (4)* prohibits the creation of a standard security over an economic development burden. Further explanation of this can be found in the note on subsection (3) of section 38 which deals with conservation burdens.

207. *Subsection (5)* imports the provisions on enforcement where there is no completed title and on completion of title which apply to conservation bodies.

#### **Section 46: Health care burdens**

208. This section introduces a new category of personal real burden to be known as “health care burdens”. These burdens may be created by anyone but can only be in favour of a National Health Service trust or the Scottish Ministers. National Health Service trusts are bodies established by order under section 12A of the National Health Service (Scotland) Act 1978. It will only be possible to create such a burden for the purpose of promoting the provision of facilities for health care. Health care burdens are included in the definition of personal real burdens in section 1(3). As a result, the holder has a presumed interest to enforce, and the burden need not operate in favour of other land. Health care burdens can be created where land is being sold but it is intended that it should continue to be used for health care purposes. This could, for example, occur where land is being sold to a developer to build accommodation for hospital staff and nurses. A health care burden could allow the health body to ensure that the land is developed for that purpose, and to secure compensation if another type of development occurs.

209. Section 18C of the 2000 Act, as inserted by section 114 of this Act, will allow a feudal burden imposed in the past that meets the health care criteria to be converted into a health care burden. The form of notice to convert the burden will be contained in schedule 5C of the 2000 Act (inserted by schedule 13 of this Act).

210. *Subsection (2)* provides that if someone other than a National Health Service trust or the Scottish Ministers wish to create a health care burden they must first obtain the consent of the body which it is intended will hold the right to enforce the burden.

211. *Subsection (3)* allows National Health Service trusts (or Scottish Ministers) to include a clawback condition so that they will be able to receive a further payment if the value of the land increases, for example due to a change in use. As with economic development burdens, it is not

competent to create an obligation to make a periodical payment as a health care burden. Periodical payments under title conditions are prohibited by section 2 of the Land Reform (Scotland) Act 1974 (amended by paragraph 6 of Schedule 14) except where it is a payment in defrayal of or contribution towards some continuing cost related to the land.

212. *Subsection (4)* prohibits the creation of a standard security over a health care burden. Further explanation of this can be found in the note on subsection (3) of section 38 which deals with conservation burdens.

213. *Subsection (5)* imports the provisions on enforcement where there is no completed title and on completion of title which apply to conservation bodies.

214. *Subsection (6)* provides that health care facilities include ancillary facilities, for example, accommodation for staff would be an ancillary facility to a hospital.

#### **Section 47: Interest to enforce**

215. A real burden may be enforced only by a person who has both title and interest to do so (section 8(1)). *Section 47* provides that such interest is presumed in the case of personal real burdens.

#### **Section 48: Discharge**

216. This section is based on section 15. That section provides for the discharge of real burdens by obtaining a deed of discharge from the benefited proprietor(s) and registering it. This mechanism is available for the discharge of personal real burdens. The term “holder of the burden” includes a person who has right to the burden but has not completed title by registration (section 122(1)), but deduction of title may then be necessary (section 41(b)). No particular deed or form of deed is specified.

217. *Subsection (2)* makes clear that partial discharge is included. For example, a prohibition against building on a conservation site could be varied to allow the construction of a bird watching hide. The condition would still be in force, and would prevent any other types of construction.

### **PART 4: TRANSITIONAL: IMPLIED RIGHTS OF ENFORCEMENT**

218. Part 4 of the Act contains a number of transitional provisions on the subject of implied enforcement rights. Under the current law the deed imposing a burden may expressly state who can enforce the obligation. If it does not the law may operate to read in enforcement rights by implication. Section 49 extinguishes implied rights, other than those which may be preserved under section 50. Section 49(1) prevents enforcement rights arising by implication in the future. In their place sections 52 to 54 and 56 create a new body of statutory rights. With only one exception (section 53), the provisions are confined to real burdens created by deeds registered before the appointed day.

## **Section 49: Extinction**

219. *Subsection (1)* of section 49 abolishes, with effect from the appointed day, the common law rules by which the right to enforce real burdens may arise by implication. Other provisions of the Act deal with the consequences. Thus for **new** burdens (i.e. those created by deed registered on or after the appointed day) the benefited property *must* be **nominated** and **identified** in the constitutive deed (section 4(2)(c)), while for **existing** burdens (i.e. those created by deed registered before the appointed day) sections 52 to 54 and 56 provide **replacement** rules for identifying the benefited property. The meaning of ‘appointed day’ is given in section 122(1).

220. *Subsection (2)* postpones by ten years the abolition of implied rights in cases where the enforcement rights can be preserved under section 50. Ten years is the period allowed under section 50(1) (or section 80(2)) for registration of the appropriate notice. Section 80 deals with the conversion of negative servitudes into real burdens.

## **Section 50: Preservation**

221. Section 50 deals with implied rights *other* than those which arise in relation to a burden imposed under a common scheme affecting both burdened and benefited property (see subsection (6)). In effect this means that the notice of preservation procedure in *section 50* is available for what can informally be described as neighbour burdens. This is a convenient shorthand term, but not one used in the Act. A neighbour burden is a burden where the benefited property is not also subject to the burden and typically arises on the sale of part of a larger area of land. These burdens will appear in the title of the property which has been sold, the **burdened property**, but they may not specify what the **benefited property** is.

222. Section 50 allows an owner of land who benefits from a neighbour burden of this kind to save the right to enforce. Any owner (including a *pro indiviso* owner) of property, to which enforcement rights attach, may preserve those rights by registration of a notice of preservation during the ten years immediately following the appointed day. The notice would have to identify the benefited and the burdened property. If no notice is registered within that timescale, the right of enforcement would be extinguished by section 49 at the end of the ten year period.

223. *Subsection (1)* provides that, where a notice is duly registered, the enforcement rights are preserved, and the property retains its status as a benefited property at the end of the ten year period.

224. *Subsection (2)* specifies the content of a notice of preservation. A statutory form is given in schedule 7. As paragraphs (a), (b) and (d) make clear, a notice may be restricted to certain burdens only, or to a certain part of the benefited or burdened properties. A title completed by registration is not required (see the definition of ‘owner’ in section 123(1)), but in that case paragraph (c) requires that the midcouples be listed. The meaning of ‘midcouples’ is given in section 122(1). Paragraph (e) requires, in effect, an explanation of why the land is considered to be the benefited property under the current law.

225. Consistently with section 4(5) (for new burdens), *subsection (3)* requires dual registration against both the benefited and burdened properties.

226. *Subsection (4)* provides that the notice must be sworn or affirmed before a notary public. In the normal case this must be done by the owner personally, but subsection (5) sets out some exceptions. Subsection (5)(b) should be read with schedule 2 to the Requirements of Writing (Scotland) Act 1995, which identifies who may sign on behalf of companies and other juristic persons. 'Notary public' is given an extended meaning, in relation to overseas execution, by section 122(1).

227. *Subsection (6)* excludes from the section implied rights which have arisen in relation to common scheme burdens, for which separate provision is made by sections 52 to 54.

228. Section 115, referred to in *subsection (7)*, makes further provision as to notices of preservation (and of converted servitude).

### **Section 51: Duties of Keeper: amendments relating to unenforceable real burdens**

229. Burdens which are currently enforceable by virtue of an implied right (almost always under the rule in *J A Mactaggart & Co v Harrower* (1906) 8 F 1101) where no notice is registered under section 50 will cease to be enforceable by anyone under section 49. In that case the burdens fail, through want of a benefited property (see section 1(1)), and should be deleted from the Land Register. *Section 51* makes clear that this will not happen at once.

230. The section has two main purposes. First, it makes clear (in *subsections (1) and (2)*) that the Keeper has no immediate duty to delete failed burdens from the Land Register but can wait until deletion is requested or ordered by the court or Lands Tribunal.

231. Secondly, *subsection (2)* gives the Keeper temporary relief for a period of ten years after the appointed day. There is no obligation to delete burdens during this period, even on request; and *subsection (3)* enables the Keeper to deal with applications for registration of an interest in land without having to make a judgement as to whether or not a burden had been extinguished. After the end of the 10 year period, deletions can be requested at any time.

232. Although the Keeper will be entitled to remove extinguished burdens from the register at his discretion, *subsection (4) and (5)* make clear that he will not be able to do so when the burden in question is the subject of a notice which is before a court or the Lands Tribunal for a decision on its eligibility for registration. This would occur where a notice of preservation or converted servitude was rejected by the Keeper and the rejection is under challenge (see section 115(6)-(8)).

### **Section 52: Common schemes: general**

233. Rights to enforce implied by common law are abolished by section 49. Sections 52 to 54 and section 56 introduce a number of replacement enforcement rights in respect of existing burdens. The first three sections (sections 52 to 54) apply only to common scheme burdens, and so are a replacement for the common law rules. The new rules are based on, but simplify, the

old. Section 56 is concerned with burdens which provide for the maintenance and regulation of facilities. The new provisions are not mutually exclusive, and some real burdens will be subject to more than one provision. Further, they are additional to, and not in substitution for, enforcement rights expressly created (which are untouched by the Act). Sections 53 and 54 introduce special rules for related properties, (including housing estates and tenements) and for sheltered and retirement housing.

234. *Section 52* sets out a general rule which applies to all cases where burdens are imposed under a common scheme whether enforcement rights are conferred expressly or by implication. Common schemes exist where there are several burdened properties all subject to the same or similar burdens. Section 52 ensures that any unit which is before the appointed day entitled to enforce under the common law rules developed in cases such as *Hislop v MacRitchie's Trs* (1881) 8 R(HL) 95 will continue to be able to do so.

235. *Subsection (1)* of section 52 creates new enforcement rights which essentially replicate the current law. In relation to any particular unit, the burdens can be enforced by the owners of any other units subject to the same or similar burdens provided that it is evident from, or can be implied from, the deed setting out the burdens that it was the intention that the burdens were imposed on burdened properties with a common plan in mind. The requirement for an express reference to, or words implying the existence of a common scheme means that the section will only confer enforcement rights where there is notice in the title of the burdened property that a common scheme exists. It is not sufficient that the burdens imposed are the same or similar. This reflects the current law. The meaning of 'unit' is given in section 122(1).

236. *Subsection (2)* reflects the current law and prevents the creation of replacement enforcement rights in common schemes if there exists in the terms of the deeds imposing the burden a provision which indicates that there was no intention that third parties should be entitled to enforce the burdens. The example given is that most commonly found, namely a reservation of a right of waiver by a feudal superior.

237. *Subsection (1)* may have the effect of creating community burdens where there are four or more units subject to the common scheme. This will depend upon whether or not there is notice of the common scheme in the deed imposing the burdens (or in the constitutive deed imported into that deed – typically a deed of conditions) and whether or not there is any provision which negates the existence of implied rights.

238. In one respect section 52 represents a change to the existing common law. The change is that it will no longer be necessary for title to have been obtained from a common granter.

239. *Subsection (3)* ensures that no rights of pre-emption or redemption will be conferred under the section. These rights are only exercisable by one benefited proprietor and should not be conferred generally. There are provisions in both section 18 and section 18A of the 2000 Act (section 18A is inserted by section 114(2)) which allow a feudal superior to preserve rights of pre-emption or redemption.

240. The reference in subsection (4) to section 57(1) prevents the creation of enforcement rights by the section having the result that rights of enforcement which have been extinguished



before the appointed day are resurrected on the appointed day. Section 57(1) ensures that no lost rights revive as a result of sections 52 to 54 and section 56. Unlike sections 53, 54 and 56, section 52 is not subject to section 57(3). This is because, unlike these sections, section 52 does not create new rights of enforcement but rather recreates existing rights in a statutory form.

241. The reference to section 122(2)(ii) ensures that rights to enforce obligations to maintain or reinstate (typically public roads or sewers) assumed by a local or other public authority are not recreated by section 52.

### **Section 53: Common schemes: related properties**

242. The test in section 52 for new enforcement rights in common schemes in general required the existence of a common scheme combined with two additional requirements, first, express or implied notice of the scheme in the title deeds and, second, an absence of any contrary indicators. *Section 53* removes these two additional requirements and introduces a requirement for the units in question to form part of the same group of related properties. It is possible that in some cases there may not be sufficient notice in the titles of all the units of a common scheme of burdens to obtain enforcement rights under section 52. The test for section 53 is therefore twofold, first, there must be a common scheme, i.e. essentially the same burdens must exist in each unit's title deeds. Secondly the units must be related properties. No notice is required. If in terms of *subsection (1)* units in a group of related properties are subject to a common scheme they shall, on the appointed day, be benefited and burdened properties. The burdens will be mutually enforceable. In this case the burdens will be community burdens, unless the group has only three units or fewer (section 25(1)).

243. Enforcement rights are only conferred by subsection (1) where the burdens are imposed on at least one of the units within the same group of related properties before the appointed day. Section 53 will also confer enforcement rights on related properties which become subject to the same common scheme where burdens are imposed after the appointed day. This is the case howsoever the burdens are imposed, whether by a single constitutive deed on a number of properties, by individual constitutive deeds (typically individual dispositions) or by an individual deed importing the terms of the burdens by reference to a deed of conditions registered before the appointed day. Section 6 allows deeds imposing real burdens after the appointed day to do so by reference to a deed of conditions registered before the appointed day. "Deed of conditions" is defined in section 122(1). The definition of deed of conditions in section 122(1) makes it absolutely clear that this term is used only to refer to a deed executed under section 32 of the Conveyancing (Scotland) Act 1874 which is registered before the appointed day. Schedule 15 of the Bill repeals section 32. Section 119(3) makes it clear that the repeal of section 32 of the 1874 Act does not affect the construction of the expression "deed of conditions". Section 49 prevents enforcement rights arising by implication but section 53 will confer enforcement rights on related properties subject to the common scheme even if the deed imposing the burden registered after the appointed day does not make any express nomination of the benefited properties nor does the pre-appointed day deed of conditions. This is because of the effect of section 57(2). If there is no benefited property there is of course no enforceable burden. After the appointed day a benefited property can not arise by implication of law (section 49). Section 57(2) deems a burden to have been imposed if it would have been imposed had a benefited property been expressly nominated. This covers both the pre and post appointed day cases. Where a burden is deemed to have been imposed the effect is also to treat the related

property as being deemed to be subject to the common scheme. It is desirable, and in most cases necessary (section 4(2)(c)) for any deed imposing burdens **after** the appointed day to make such an express nomination, section 57(2) provides a limited safeguard where this is not done.

244. Subsection (1) will in some cases create enforcement rights where none currently exist. Where this occurs in many cases it will represent in effect a transfer of rights of enforcement from the feudal superior to the owners of the related properties. This prevents valuable amenity burdens from being inadvertently lost and provides essentially the same treatment in the future for groups of related properties governed by real burdens. A further result of this section is that it is possible for burdens to be mutually enforceable (and therefore to be community burdens) under a common scheme notwithstanding that some of the related properties are sold before and some after the appointed day. This allows the community to expand as units are sold (or otherwise become subject to the common scheme). The burdened related properties (if four or more) will form a community as defined in section 26(2) as, because the properties will also all be benefited properties, the burdens will be community burdens. It remains essential that at least one of the related properties became subject to the common scheme prior to the appointed day. It is however possible for a community of enforcement of mutual real burdens to arise even where burdens are imposed after the appointed day. Section 53 differs from sections 52, 54 and 56 in this respect. These sections all only apply to burdens imposed before the appointed day. In cases where a feudal superior, whether a developer or local authority, owns a number (perhaps a very large number) of related properties which are currently neither benefited nor burdened properties, section 53 provides a means to transfer enforcement rights without the need to register vast numbers of notices under section 18 of the 2000 Act.

245. Where there are four or more related properties subject to the common scheme, subsection (1) has the effect of creating community burdens.

246. Subsection (2) describes “related properties”. Given the many possible variations of groupings of properties which may be found to exist subsection (2) provides that whether or not properties are related ultimately is to be inferred from the particular circumstances. For example, properties on a residential housing estate or in a sheltered and retirement development would normally be related properties. In paragraphs (a) to (d) it then seeks to give some indicators, these do not form an exhaustive list. Paragraph (d) makes it clear that flats in the same tenement would be related properties. Tenements are defined by section 122(1). Paragraph (c) makes it clear that where a group of properties are subject to burdens set out in the same deed of conditions then they would be treated as related properties. The reference to deed of conditions is a reference only to deeds of condition registered before the appointed day (section 122(1)). This is because section 53 is a transitional provision. In the future new developments will not rely on section 53 for enforcement rights, these will be made clear on the face of the constitutive deed (section 4(2)(c)). There is also a description of “related properties” in section 66 for the purposes of sections 63 to 65. In most cases the two descriptions will provide the same result. The differences are however intentional. The indicator given in section 66(1)(b) would not be appropriate for section 53 which only operates where there are a number of units subject to the same common scheme of burdens. The reference in section 53(2)(c) to a pre appointed day deed of conditions is not appropriate for section 66 which relates to provisions which are not transitional but will apply to both existing groups of related properties and to those created in the future. It should be noted that while the manner in which the units are burdened is a factor, units can be related properties even though they are not subject to the common scheme.

While section 53 would not confer any enforcement rights on an unburdened related property (as it would not be subject to the common scheme) the same unit would be relevant for the operation of sections 63 to 65.

247. *Subsection (3)* ensures that no rights of pre-emption or redemption will be conferred under the section. These rights are only exercisable by one benefited proprietor and should not be conferred generally. There are provisions in both section 18 and section 18A of the 2000 Act (section 18A is inserted by section 114(2)) which allow a feudal superior to preserve rights of pre-emption or redemption.

248. The reference in *subsection (4)* to section 57 prevents the creation of enforcement rights by the section having the result that rights of enforcement which have been extinguished before the appointed day are resurrected on the appointed day. Section 57(1) ensures that no lost rights revive as a result of sections 52 to 54 and section 56. Section 53 is subject to section 57(3). This makes it clear that where section 53 confers a new right of enforcement on a benefited property which did not exist before the appointed day this will not confer a right to enforce the burden in respect of anything done or omitted to be done in contravention of the burden before the appointed day.

249. The reference to section 122(2)(ii) in *subsection (4)* ensures that obligations to maintain or reinstate assumed by a local or other public authority are not real burdens affected by section 53.

#### **Section 54: Sheltered housing**

250. This section creates enforcement rights in relation to burdens imposed on sheltered and retirement housing. It only applies where before the appointed day burdens have been imposed under a common scheme on all the units in a sheltered or retirement development (defined by *subsection (3)*) other than any unit used in 'some special way'. A unit used in a special way would typically be a unit used as a warden's flat, or a unit used for guest accommodation. Although not subject to the burdens, such units are given the status of benefited properties and, by section 26(2)(b), are part of the 'community'. Burdens falling under section 54 are specifically stated to be community burdens (section 25(2)). The section also makes special provision with regard to a number of core elements that give this sort of housing its special character. The provisions on community burdens will operate for sheltered or retirement housing if burdens have been imposed under a common scheme on all the units (other than any unit used in a special way) within a sheltered or retirement housing development. Where this is the case, each property in a scheme will be both a benefited and a burdened property in respect of the real burdens. This means that the same conditions will apply to each property and each owner will be able to enforce those conditions against other owners.

251. The reference to section 122(2)(ii) in *subsection (2)* ensures that obligations to maintain or reinstate assumed by a local or other public authority are not real burdens affected by section 54.

252. *Subsection (3)* defines sheltered or retirement housing developments. The definition places its emphasis on special facilities and features for the elderly, disabled or infirm.

253. *Subsection (4)* defines a core burden. This term is used in subsection (5). The “core burdens” in a sheltered or retirement housing development are burdens which regulate the use, maintenance, reinstatement or management of any facility or service which makes the sheltered or retirement housing development particularly suitable for occupation by elderly people (or by people who are disabled or infirm or in some other way vulnerable) or which regulate facilities substantially different from those of ordinary dwellinghouses. In practice these features and facilities are likely to include the provision of a warden service, an emergency alarm system and safety features such as grab rails and ramps. Burdens which regulate the provision of these services or facilities are given special protection.

254. *Subsection (5)* specifies the protections for core burdens. Paragraph (a) modifies section 28 of the Act. The relevant paragraphs referred to in section 28(1) allow a majority to confer powers on a manager (and to revoke those powers). For these powers to be used in a sheltered or retirement housing development will require a majority of two thirds of the units. Sub-paragraph (ii) ensures that it will not be possible to use section 28 to confer on a manager the power to discharge any burdens in a sheltered or retirement housing development and that the manager may only be given the authority to vary non-core burdens.

255. Paragraph (b) of subsection (5) provides that it will not be possible to remove the core burdens in sheltered or retirement housing by the default majority rule provisions in section 33 of the Act. The core burdens are protected by increasing the majority required to make changes to burdens affecting them. It is not possible to discharge any “core burden” by majority discharge under sections 33(2). The owners of a majority of two thirds of the units, as opposed to a bare majority, are required to sign any majority variation of a core burden under these provisions. Section 33(2)(a) generally provides that in the case where one person may own a sufficiently large number of units to be able to sign a deed of variation then the signature of the owners of at least one other unit must also be obtained. Before any deed of variation or discharge under section 33 is signed in respect of a sheltered or retirement housing development there must be consultation as provided for in section 55.

256. Paragraph (c) of subsection (5) stipulates that burdens relating to age restrictions should not be capable of majority discharge or variation under the provisions in section 33(2). Such a restriction might be to the effect that no person under the age of 60 could reside in the complex. This provision applies to burdens created in constitutive deeds registered after the appointed day as well as to those in constitutive deeds registered before the appointed day

257. *Subsection (6)* ensures that no rights of pre-emption or redemption will be conferred under the section. These rights are only exercisable by one benefited proprietor and should not be conferred generally. There are provisions in both section 18 and section 18A of the 2000 Act (section 18A is inserted by section 114(2)) which allow a feudal superior to preserve rights of pre-emption or redemption.

258. The reference in *subsection (6)* to section 57 prevents the creation of enforcement rights by the section having the result that rights of enforcement which have been extinguished before the appointed day are resurrected on the appointed day. Section 57(1) ensures that no lost rights revive as a result of sections 52 to 54 and section 56. Section 54 is subject to section 57(3). This makes it clear that where section 54 confers a new right of enforcement on a benefited property

which did not exist before the appointed day this will not confer a right to enforce the burden in respect of anything done or omitted to be done in contravention of the burden before the appointed day.

### **Section 55: Grant of deed of variation or discharge of community burdens relating to sheltered or retirement housing: community consultation notice**

259. *Section 55* imposes a requirement for consultation before a deed of variation or discharge is granted under section 33 in relation to properties in sheltered or retirement housing. This applies to both deeds granted under section 33(1) and 33(2).

260. *Subsection (1)* requires the proposal to be intimated to all the owners of the units within the community. *Subsection (2)* states how intimation is to be given. A community consultation notice must be sent. There is a form for a community consultation notice given in schedule 8.

261. *Subsection (3)* provides that the deed of variation or discharge must not be granted before the consultation period expires. The consultation period must be at least three weeks. The date on which it expires must be given in the notice (see schedule 8) and the period does not start to run until the all owners have been given intimation of the proposal.

262. *Subsection (4)* means that before submitting the deed of variation or discharge for registration the person giving intimation of the proposal must swear or affirm before a notary public (and endorse the deed accordingly) as to the date on which the consultation period expires and that section 55 has been complied with.

263. *Subsection (5)* means that where the person giving intimation is unable to swear or affirm as required by subsection (4) due to legal disability or incapacity then a legal representative of that person may so swear or affirm and also that where the person is a legal persona rather than an individual that an authorised person may so swear or affirm.

### **Section 56: Facility burdens and service burdens**

264. This section is based on, and replaces, section 23 of the 2000 Act (which is repealed by schedule 15). It extends the rule introduced by section 23 of the 2000 Act from feudal to non-feudal burdens. The meaning of 'facility burden' and 'service burden' is given in section 122(1). The broad effect of section 56 is that facility and service burdens are enforceable by the owners of those properties which benefit from the facility or service in question. By contrast to sections 52 to 54, there is no requirement that the benefited properties be subject to like burdens. The burdens need not have been imposed under a common scheme.

265. The reference in subsection (2) to section 57 prevents the creation of enforcement rights by the section having the result that rights of enforcement which have been extinguished before the appointed day are resurrected on the appointed day. Section 57(1) ensures that no lost rights revive as a result of sections 52 to 54 and section 56. Section 56 is subject to section 57(3). This makes it clear that where section 56 confers a new right of enforcement on a benefited property which did not exist before the appointed day this will not confer a right to enforce the burden in respect of anything done or omitted to be done in contravention of the burden before the

appointed day. Subsection (2) also makes it clear that subsection (1) does not confer on any benefited property the right to enforce a manager burden. Manager burdens are personal real burdens and as such are not tied to individual properties. Furthermore by their nature they are exercisable by a specific individual rather than a number of benefited proprietors.

### **Section 57: Further provision as respects implied rights of enforcement**

266. *Section 57* makes a highly technical provision to ensure that sections 52 to 54 and 56 operate as intended. Essentially these sections will recreate enforcement rights which already exist. Sections 52 to 54 and 56 operate, with the sole exception of section 53, in cases where burdens have been imposed before the appointed day. For a burden to be imposed it must be enforceable by the owner of a benefited property. If there is no benefited property under the current law there is no burden imposed. If there is no burden imposed before the appointed day the provisions of sections 52 to 54 and 56 would, but for section 57(2) not operate. The section further ensures that rights of enforcement which have been lost are not revived and that where there are no rights to enforce a burden before the appointed day that no enforcement rights will be conferred by sections 53, 54 and 56 in respect of a pre-appointed day breach of the burden.

267. *Subsection (1)* ensures that where a right to enforce a burden has been lost before the appointed day it will not be revived by sections 52 to 54 or 56. If therefore a burden remains enforceable by some benefited proprietors but not by others and it is thus not extinguished those benefited proprietors who have lost the right to enforce will not once again become benefited proprietors.

268. *Subsection (2)* addresses a problem area under the current law which might have resulted in common schemes created by a non feudal deed being excluded from the creation of enforcement rights under sections 52 to 54 and 56. It ensures that for the purposes of these sections a burden will be treated as having been imposed and a property will be treated as being subject to a common scheme if this would have been the case had a benefited property been expressly nominated. The subsection applies those sections where a burden has not been successfully imposed because no benefited property was nominated at the time of creation. Under the current law, such a failure to nominate a benefited property means that no burden is in fact created. If for this reason no burden exists before the appointed day, subsection (2) provides for it to be created. Sections 52, 53, 54 and 56 would not by themselves achieve this. Aside from the express nomination of a benefited property, the old law will in certain circumstances by implication nevertheless treat a property as being the intended benefited property. Section 49 removes the possibility of such implied enforcement rights arising in common schemes after the appointed day. For feudal burdens the superiority forms an implied benefited property and therefore feudal burdens (as long as they meet the normal rules of validity) will always have been imposed as there will always have been a benefited property. The problem of there being no benefited property, which subsection (2) resolves, therefore only arises for non-feudal burdens. For non-feudal burdens where there is no express nomination of a benefited property it is possible that the requirements of the current law rules (as developed in cases such as *Hislop v MacRitchie Trs* (1881) 8 R(HL)) will not be met. The consequence would be that not all units in a common scheme of non-feudal burdens would be subject to the burdens as for at least the last unit to be sold there would be no benefited property. The rest of the units would be burdened, but only the owners of certain other properties would have enforcement rights, the identity of whom would depend upon the order in which the units were sold. This problem might arise, for

example, where a power to vary or waive reserved in favour of the disponent, or the absence of sufficient notice of the existence of a common scheme, may exclude the possibility that owners of other properties subject to the common scheme can obtain enforcement rights by implication. Subsection (2) treats the burdens as having been imposed under a common scheme for the purposes of sections 52 to 54 and sections 24 and 56 notwithstanding that before the appointed day the obligation may not have been enforceable as a real burden. This is, however, only the case if the reason why the burden may not have been enforceable is due to the absence of a benefited property and the reason why there was no benefited property is due to failure to nominate a benefited property. The subsection only has pre-appointed day application in cases where the common law does not fill the gap. The subsection has a limited application after the appointed day. This relates to section 53(1). Subsection (2) means that even where the constitutive deed fails to nominate a benefited property as is normally required by section 4(2)(c) then where the burdens are imposed under a common scheme on a unit which is one of a group of related properties and one of the group became subject to the common scheme before the appointed day the result is that the deed will have the effect of imposing burdens and making the related property subject to the common scheme. The better course is of course to nominate the benefited properties but subsection (2) provides, for transitional cases only, a limited safeguard where this is not done.

269. *Subsection (3)* makes it clear that sections 53, 54 and 56 do not confer enforcement rights in respect of anything done or omitted to be done by the burdened proprietor which contravened the terms of the real burdens before the appointed day. Section 52 is not referred to as section 52 will not confer enforcement rights were none previously existed. This is possible under sections 53, 54 and 56 and subsection (3) ensures that where enforcement rights derive solely from sections 53, 54 or 56 the new benefited proprietor cannot raise enforcement action in respect of a pre-appointed day breach. Sections 52 to 54 and (for common schemes) section 56 all are capable of overlapping effect. The fact therefore that a unit receives rights to enforce under, say section 54 as a unit within a sheltered or retirement housing development or under section 53 as a related property does not prevent the owner of that unit from enforcing a pre-appointed day breach if that unit was a benefited property before the appointed day.

### **Section 58: Duty of Keeper to enter on title sheet statement concerning enforcement rights**

270. This section is designed, so far as possible, to make the new enforcement rights apparent from the Land Register. This section imposes a duty on the Keeper of the Registers of Scotland where he has satisfactory information regarding enforcement rights created by Part 4 or of by section 60 of the 2000 Act to set out information on the Land Register.

## **PART 5: REAL BURDENS: MISCELLANEOUS**

### **Section 59: Effect of extinction etc. on court proceedings**

271. Part 5 contains provisions on a number of miscellaneous matters affecting real burdens. The first of those, *section 59*, provides that real burdens cannot be enforced after (or to the extent that) they have been extinguished even although the breach in question occurred prior to extinction. Paragraphs (a) and (b) prevent benefited proprietors from attempting to enforce burdens that have been extinguished. It makes no difference if the breach occurred before the appointed day. Paragraph (c) makes clear that an interdict, or order for specific implement, will

be deemed to have been reduced or recalled when the burden is extinguished. There is a partial exception for proceedings concluding for the payment of money, whether in relation to a debt or by way of damages. Decrees for payment of money (for example in relation to the cost of common repairs) obtained before the day on which the burden is discharged will continue to be enforceable thereafter.

### **Section 60: Grant of deed where title not completed: requirements**

272. *Section 60* introduces a requirement of deduction of title in cases where the owner granting some types of deed does not have a registered title. This means that the person's ownership must be traced back from the last owner whose title was registered, listing any other unregistered owners who held the property in the intervening period. *Subsection (1)* will require an unregistered owner who wishes to create, discharge or vary a real burden to establish ownership in this way. 'Owner' in this section does not include a heritable creditor in possession (section 123(3)(a)). Section 4 provides the rules for granting a constitutive deed and deeds of variation or discharge are granted in terms of sections 15, 33 and 35 (a deed of discharge under section 48 is not granted by an 'owner' and so does not come within section 60). The relevant land is the burdened property in the case of constitutive deeds, and the benefited property in the case of deeds of variation and discharge. The meaning of 'midcouple' is given in section 122(1), and deduction of title should in practice follow the style set out in schedule A form 1 to the Conveyancing (Scotland) Act 1924. Deduction is not necessary where the property is already on the Land Register (Land Registration (Scotland) Act 1979 section 15(3), as amended by schedule 14 paragraph 7(6) of this Act).

273. *Subsection (2)* makes clear that, if a deed of variation or discharge is granted by a manager, it does not matter if the owners (or some of them) do not have a completed title. No deduction of title is needed, nor, in Land Register cases, need midcouples be produced to the Keeper under section 15(3) of the 1979 Act.

### **Section 61: Contractual liability incidental to creation of real burden**

274. When a burden is created (whether as a feudal or a non-feudal burden) it also operates as a contract between the parties. *Section 61* prevents dual validity as both a contract and a real burden. In future an obligation will be either a burden or a contract, but it cannot be both. When the deed containing the obligation has been duly registered, the contractual liability will cease to the extent to which it is duplicated by the real burden. A disposition imposing burdens by reference to a deed of conditions is the leading example of a deed into which a constitutive deed is incorporated. The section does not apply in cases where, notwithstanding registration, no real burden is created (e.g. because the obligation does not comply with rules as to content of a real burden set out in section 3). Nor (section 119(7)) does the section apply to constitutive deeds registered before the appointed day, except where the burdens are community burdens.

275. Contractual effect will be extinguished for community burdens regardless of when they were created.



276. Schedule 13, paragraph 14 amends section 75 of the 2000 Act to put beyond doubt that contractual obligations which were incidental to feudal burdens should only remain enforceable between the original parties.

### **Section 62: Real burdens of combined type**

277. This section acknowledges the fact that the same obligation may be constituted as, for example, both a community burden and as a burden enforceable by someone outside the community. Other combinations are possible. Where it is necessary to do so, a combined burden is to be treated as two separate burdens. If, however, the benefited property is a unit in the community, the burden can only be enforced as a community burden or as one of the personal real burdens, for example, a conservation burden.

278. The issue is particularly relevant for community burdens. It is possible, for example, that a real burden may be enforceable by the owners of the units within the community against each other and also by the owner of nearby land which does not form part of the community. The owner of this land would be able to enforce the burden as a “neighbour burden”. If the community, for example using new discharge mechanisms provided by Part 2, were to discharge the burden the discharge would only affect the rights of the owners of the community to enforce the burden and would not affect the right of the nearby owner to enforce the burden as a neighbour burden.

279. *Subsection (2)* makes it clear, however, that the owner of a unit within the community cannot enforce an obligation set out in an ordinary real burden other than as a community burden. This avoids any possibility that an owner within the community may be able to claim dual rights to enforce the same obligation as “distinct” burdens. If however a person entitled to enforce a personal real burden (i.e. of the type described in section 1(3)), such as a conservation burden, is also an owner of a unit in the community that person would be able to enforce the obligation as a personal real burden independent of any right to enforce it as an ordinary community burden. Essentially where the right to enforce the burden is tied to a unit within the community the burden is only enforceable as a community burden and it is treated as a single obligation but where the right to enforce is either tied to land outwith the community or is not tied to land at all, then the obligation will be treated as both a community burden and as another distinct type of burden.

### **Section 63: Manager burdens**

280. Section 63 identifies a new category of real burden known as a manager burden. The category is new, but the burden itself is already familiar from current practice, and the section applies to existing real burdens as well as to those created after the section comes into force the day after Royal Assent (section 129(3)). A manager burden is typically used by a developer to appoint a manager in the initial years of a housing or other development. It stipulates who has the power to appoint or to act as the manager for the scheme and to administer and enforce the burdens imposed. This section confirms that this is a valid burden, and provides rules as to how it should operate.

281. *Subsection (1)* defines a ‘manager burden’ as one which confers the power to act as, or to appoint or dismiss, a manager. ‘Related properties’ is defined in section 66. *Subsection (1)* is a qualification of the rule, stated in section 3(7), that a real burden must not have the effect of creating a monopoly. The meaning of ‘manager’ is given in section 122(1). This section applies to both existing and new burdens. If an existing burden provides for the nomination of a manager in perpetuity, it will become subject to the limitations in subsections (2) and (4).

282. The duration of a manager burden is specified in subsections (4) and (5). But even during those time periods, the power cannot be exercised unless its holder owns at least one of the properties being managed. This is provided by *subsection (2)*. In some manager burdens the power to appoint may be tied to one of the properties in particular. Much more usually, however, the power will be conferred on a person without any reference to a benefited property. This is because typically developers will not know which of the properties on the estate will be the last to be sold. These manager burdens resemble other personal real burdens such as conservation burdens in that they are in favour of a person. But unlike conservation and maritime burdens, the benefited proprietor must still own a property within the scheme: it is just that no one unit need be singled out as benefiting from the manager burden. As a result the effect of *subsection (2)* is to provide what is virtually a floating benefited property. As with other personal real burdens there is a presumed right to enforce (section 47).

283. *Subsection (3)* makes clear that the holder of a manager burden may assign their right. Registration is not required, but there must be intimation to the owners of the rest of the scheme.

284. The normal rule under *subsections (4) and (5)* is that a manager burden comes to an end after five years but this is reduced to three years for sheltered or retirement housing. It would be possible to provide for a shorter period in the constitutive deed. Paragraph (a) of *subsection (5)* provides for a special period of thirty years for local authority housing.

285. *Subsection (6)* allows a duration of thirty years where the burden was imposed in a sale under the right-to-buy legislation for council houses.

286. *Subsection (7)* describes how the period of a manager burden is to be calculated. Where the manager burden is created in a deed of conditions affecting all of the related properties, the manager burden will be extinguished for all of them on the same day, three, five or thirty years after registration of the deed of conditions. If, however, the manager burden is created in a series of dispositions containing the same burdens, the duration of the burden will be calculated from the registration date of the first constitutive deed that created a manager burden in respect of one of those related properties, i.e. the first sale.

287. *Subsection (8)* prevents dismissal of the manager under the dismissal provisions in section 28, or for any other than right to buy properties, in section 64 of the Act as long as a manager burden is in operation. The note on section 64 explains the exception for right to buy properties. In theory the titles might confer an independent power of dismissal on the owners of the managed properties.

288. *Subsection (9)* makes clear that a manager burden imposed in a grant in feu is not extinguished with the abolition of the feudal system. Instead it will be extinguished in

accordance with subsection (4); and until that occurs the former superior will be able to exercise the power under the burden.

#### **Section 64: Overriding power to dismiss and appoint manager**

289. In the absence of any provision in the titles the manager may be dismissed by the owners of a majority of the units (section 28(1)(d)). But this rule can be altered in the titles, and a higher threshold imposed. *Section 64* restricts that threshold. Whatever the titles may say, the owners of two-thirds of units can always dismiss the manager once the manager burden has been extinguished. The meaning of ‘owner’ is given in section 122. The section is not confined to communities and community burdens, and applies to any group of related properties.

290. The rule in section 28 of the Act for dismissal of a manager by a simple majority will not come into play whilst a manager burden is still in effect. As a consequence, dismissal by a simple majority under section 28(1)(d) will not be possible until either the last unit is sold or the three, five or thirty year period has elapsed. In a similar way the two-thirds rule provided by section 64(1) could not be used until the time period has expired or the last unit is sold, with one exception. This exception is that the owners of two-thirds of the properties in estates subject to the thirty year period provided for in section 63(5) (purchasers in right-to-buy sales) can remove a manager at any time, i.e. before the expiry of the thirty year period. In all other schemes (those subject to the three or five year limit), the two-thirds dismissal rule would not be available while the manager burden was exercisable.

#### **Section 65: Manager: transitory provisions**

291. Not all management provisions in title deeds are valid. *Section 65*, as a transitional measure, ratifies any appointment made under such provisions. The manager will then be able to continue to act after the appointed day unless or until dismissed under sections 28(1)(d) or 64.

#### **Section 66: The expression “related properties”**

292. *Section 66* gives an indicative definition of related properties, that is those properties for which a manager might be appointed in terms of section 63. These are properties which might be conveniently managed together because of shared property or facilities or membership of a common scheme.

293. The effect of *subsection (2)* is to prevent the requirement of ownership of a managed property (imposed by section 63(2)) from being satisfied merely by ownership of a common facility or, in the case of a sheltered or retirement housing development, of a unit used in some special way (for example, the warden’s flat). This is where the warden’s flat is not subject to the same conditions as the rest of the community.

#### **Section 67: Discharge of rights of irritancy**

294. Irritancy in this context means confiscation of the (burdened) property as a penalty for non-compliance with a real burden. *Section 67* abolishes the remedy, with effect from the day after Royal Assent (section 129(3)).

### **Section 68: Requirement for repetition etc. of terms of real burden in future deed**

295. In imposing real burdens there is sometimes added a requirement that the burdens be repeated in all future transmissions of the land on pain of nullity. The enforceability of this requirement is open to question; but special statutory provision (section 9(3) and (4) of the Conveyancing (Scotland) Act 1924) has been made for curing a failure to comply. *Section 68* dispenses with any requirement to repeat burdens. The opportunity is also taken, in schedule 15, to repeal section 9(3) and (4) of the 1924 Act. This is a technical change only, and no change of practice is envisaged. In Sasine transactions and first registrations, dispositions will continue to list the burdens writs in order to avoid a claim in warrandice in respect of latent burdens.

### **Section 69: Further provision as respects deeds of variation and of discharge**

296. This section makes additional provision in respect of extinctive deeds.

297. *Subsection (1)* makes clear that such a deed need not be granted in favour of any particular person. This removes the current uncertainty in the law. However, there would be no objection if a grantee were named.

298. *Subsection (2)* allows anyone who is subject to a real burden — including a tenant or other temporary possessor (see section 9(2)) — to procure a discharge or other extinctive deed and to register it in the property register.

299. The normal rule is that only a grantee can register: see the Abolition of Feudal Tenure etc. (Scotland) Act 2000 section 5(1) (Register of Sasines), and rule 9(1) of the Land Registration (Scotland) Rules 1980 (Land Register). *Subsection (3)* allows registration by a granter in cases where the deed is granted by a majority of owners, or by a manager. In at least some of these cases the grantee might oppose the deed and would not therefore be willing to register. In other cases allowing a manager to register is administratively convenient.

### **Section 70: Duty to disclose identity of owner**

300. Usually, affirmative burdens are enforceable only against the owner of the burdened property (section 9(1)); but since an ‘owner’ includes a person whose title has not been completed by registration (section 123(1)), the identification of the current owner may not always be easy. *Section 70* assists the enforcer by requiring any previous owner to pass on information. See section 8(2) and (4) for a list of those who have title to enforce a real burden.

## **PART 6: DEVELOPMENT MANAGEMENT SCHEME**

301. Part 6 of the Act reintroduces the Development Management Scheme which formed part of the recommendations made by the Scottish Law Commission. The Scheme proposed by the Commission can be found in schedule 3 to the draft Bill attached both to the Commission’s Report on Real Burdens and the Executive’s Consultation Paper on the draft Bill [<http://www.scotland.gov.uk/consultations/justice/dtcb-00.asp>]. The Commission’s Scheme recommended the creation of a new form of corporate body to form the Owners Association to run a development in accordance with the terms of the Scheme. As the creation and regulation

of such a corporate body is in terms of the Scotland Act 1998 reserved to the Westminster Parliament, the Scheme itself does not form part of the Act. The Scheme will be set out in a statutory instrument made by the Secretary of State under section 104 of the Scotland Act 1998. Part 6 provides for the manner in which the Scheme can be applied and disapplied. As the Scheme is made up of rules rather than real burdens section 72 applies various of the provisions relating to real burdens to the rules in the same manner to the way the provisions apply to community burdens.

### **Section 71: Development management scheme**

302. *Subsection (1) of section 71* allows the owner or owners of land to apply the Development Management Scheme to that land. The Development Management Scheme is applied by the registration of a deed of application. The Scheme only applies if a deed of application is registered: it has no automatic application. There is no special form of deed of application. It must be granted by the owner of the property in question. “Owner” includes a person who has right to the property but has not completed title by registration (section 123(1)(a), but (section 60 applied by section 72) there then must, unless the land is already registered on the Land Register, be a deduction of title. An owner “grants” a deed by subscribing it in accordance with section 2 of the Requirements of Writing (Scotland) Act 1995, and in practice the deed will also be witnessed under section 3 of that Act. The Scheme takes effect, either immediately on registration, or on a date identified in terms of paragraph (a) or (b). This follows the pattern of section 4(1). The Scheme is defined in subsection (3). The Scheme is to be set out in an order made under section 104 of the Scotland Act 1998. Insofar as that order permits the Scheme may be applied with variations to a particular development. All the rules of the Scheme for any particular development will therefore be set out in the order or in the deed of application itself. For ease of reference and drafting the rules set out in the order may be repeated in full in the deed of application. Variations to the rules set out in the order may include additional rules as well as changes (to the extent permitted) to the rules in the order.

303. *Subsection (2)* requires the deed of application to include certain information. The deed of application must describe the development, define Scheme property and unit for the purposes of the particular Scheme and give the name of the owners association to be established by the Scheme. The name of the owners association must begin or end with the words “Owners Association” in order to ensure that any party dealing with the body can be made aware of its status. The deed of application must also name the first manager of the owners association.

304. *Subsection (3)* defines the Development Management Scheme by reference to the order to be made under the Scotland Act 1998. The definition also takes account of the fact that the Scheme is likely to be applied with variations to any particular development with the result that there may be many different versions of the Scheme. While, therefore, it is only possible to apply the Scheme set out in the order (with variations), once applied each different version of the Scheme is included within the definition of the Development Management Scheme. The need for this distinction is clear from section 73 which makes provision for the particular Scheme applied to a development to be disapplied.

## **Section 72: Application of other provisions of this Act to rules of scheme**

305. Although the rules of the Scheme are not real burdens, they have a close functional resemblance, particularly to community burdens. This is acknowledged by *section 72*, which applies a number of provisions from parts of the Act concerned with real burdens. Scheme rules are not covered by the definition of “title condition” in *section 122(1)* but it is possible for an order to be made under *section 122(1)* to prescribe as title conditions other conditions relating to land, such as the rules of a Development Management Scheme.

## **Section 73: Disapplication**

306. Once applied to a development by a deed of application under *section 71*, the Scheme continues to apply unless or until it is formally disappplied. Disapplication means removing the Scheme completely so that it no longer affects all or part of the development. Disapplication is to be distinguished from the discharge or variation of individual rules of the Scheme. *Subsection (1)* provides a mechanism to disapply the Scheme. Essentially a Development Management Scheme is disappplied by registering a deed of disapplication against the development. There is no special form of deed required. The deed is granted by the owners association for the development in accordance with the Scheme. For example the Scheme may provide for the Scheme only to be disappplied following a special majority of owners at a general meeting.

307. *Subsection (2)* enables the deed of disapplication not only to disapply the Development Management Scheme but to impose real burdens to replace the Scheme. The deed of disapplication is a constitutive deed but the normal requirements of *section 4* are relaxed to allow the owners association rather than all the owners of the individual parts of the development to grant the deed.

308. *Section 74* requires the owners association to intimate a proposal to disapply the Development Management Scheme to all the owners of the individual units in the development. In terms of *section 74(3)* each owner has 8 weeks in which to object to the disapplication of the Scheme by making an application for preservation of the Scheme to the Lands Tribunal. *Subsection (3)* introduces safeguards for the owners of units who may not wish to see the Development Management Scheme disappplied. Registration of a deed of disapplication will not either disapply the Scheme nor create real burdens unless it is endorsed with a certificate from the Lands Tribunal stating either that no applications for preservation of the Scheme have been received by the Tribunal or any such application has been withdrawn. If an application is made to the Tribunal for preservation of the Scheme then it is granted as of right if not opposed (*section 99*). If the application for preservation fails then the Scheme is disappplied not by registration of the deed of disapplication but by registration of the order of the Tribunal.

309. *Subsection (4)* means that before submitting the deed of disapplication for registration the owners association must swear or affirm before a notary public (and endorse the deed accordingly) as to the date on which the objection period expires and that *section 74* has been complied with. *Subsection (5)* means that an authorised person may so swear or affirm for the owners association.

#### **Section 74: Intimation of proposal to register deed of disapplication**

310. *Subsection (1)* requires the owners association to intimate any proposal to disapply the Development Management Scheme to all the owners of the units in the development.

311. *Subsection (2)* provides that intimation is to be given by “sending” a copy of the deed along with a notice. There is no prescribed form of notice but the notice must both state the effect of registration of the deed of disapplication and inform the owner of the right to object to the disapplication of the Scheme by making an application for preservation of the Scheme to the Lands Tribunal. It must also state the date by which an application to the Tribunal has to be made.

312. *Subsection (3)* provides that an owner who has not already agreed (perhaps because they were not present at a general meeting) may apply for preservation of the Scheme during the period of 8 weeks following the last date of intimation to the owners. While intimation must be given to all owners not all owners will therefore have a right to object.

#### **PART 7: SERVITUDES**

313. Part 7 of the Act does not attempt to rewrite the common law on servitudes: the provisions of the part are narrow and focused. However, the Act does provide a number of changes to align the law of servitudes with the reformed law of real burdens. Under the existing law servitudes can exist in two categories: positive and negative. A positive servitude permits limited use of a property, such as a right of access or the running of a pipeline. In theory it may also have been possible to create this type of servitude as a real burden. Negative servitudes are uncommon and thought to be confined to restrictions on building, especially for the protection of light or prospect. Section 79 provides that it should no longer be possible to create negative servitudes. Obligations of this type will have to be created as real burdens in the future. The terminology employed reflects the more modern language used in the rest of the Act: ‘benefited property’ and ‘burdened property’ rather than the traditional ‘dominant tenement’ and ‘servient tenement’.

#### **Section 75: Creation of positive servitude by writing: deed to be registered**

314. Servitudes are similar to real burdens, in that they require both a benefited and a burdened property and they are obligations that run with the land. Unlike burdens, servitudes do not currently have to be registered.

315. *Section 75* provides that in future a deed that creates a positive servitude will always have to be registered against both the benefited and burdened properties. Under the present law, the right to a servitude created in a deed can be completed by either possession or registration against either property. *Subsection (1)* requires registration against both properties, in a similar way to the new requirement for real burdens (for which see section 4(5)). Section 120 will apply; therefore a disposition which includes a grant of servitude cannot be registered against only the property being conveyed. Possession is no longer sufficient. By section 122(1) ‘registration’ means registration of the servitude in the Land Register or recording of the deed in the Register of Sasines. The requirement is expressed negatively, and no rule is given as to the time of creation. The subsection does not provide rules for the constitution of the deed, though both

properties will have to be sufficiently described for registration to occur. Subsection (1) has no effect on servitudes created by other means, such as by positive prescription (for which see subsection (3)), or by implication in a deed. Nor (section 119(8)) does it apply to deeds executed before the appointed day.

316. *Subsection (2)* removes the common law rule that benefited and burdened properties must be in separate ownership at the time of registration. In future the servitude will not necessarily be created at registration: it will lie dormant until the burdened and benefited properties come into separate ownership (contrary, in Land Register cases, to section 3(4) of the Land Registration (Scotland) Act 1979).

317. *Subsection (3)* makes two qualifications to the requirement of dual registration set out in subsection (1). Section (3)(1) of the Prescription and Limitation (Scotland) Act 1973, referred to in paragraph (a), allows a servitude to be created by unregistered deed followed by twenty years possession. Paragraph (a) ensures that section 75 will not preclude the creation of servitudes by prescription. Paragraph (b) exempts pipeline servitudes from the registration requirement on the basis that such servitudes may affect a substantial number of properties.

### **Section 76: Disapplication of requirement that positive servitude created in writing be of a known type**

318. Unlike burdens, servitudes do not under the current law have to be recorded, and it is possible for them to arise by implication or prescription. To regulate their use, servitudes are restricted into certain types and categories by a fixed list (*numerus clausus*) that has been derived from Roman law. Because registration is not currently required, the list offers some assurance that any possible servitudes on land are limited in type. As registration will now be required for servitudes created by deed, *section 76* provides that these servitudes will not have to fit into the list. The fixed list remains in place for deeds not created by registered deed.

319. Even without the fixed list, the question of what may constitute a valid servitude is subject to a number of limitations. *Subsection (2)* prohibits the creation of a servitude that is repugnant with ownership. This mirrors the provision for real burdens contained in section 3(6).

### **Section 77: Positive servitude of leading pipes etc. over or under land**

320. There has been a doubt over whether a right to lead a pipe, cable, wire or other such enclosed unit over land could be constituted as a positive servitude. *Section 77* deems this always to have been the case. Pipeline servitude is to be included in the fixed list of servitudes.

### **Section 78: Discharge of positive servitude**

321. Under the present law a deed discharging a servitude does not have to be registered. *Section 78* introduces a requirement of registration where the servitude appears on the register against the *burdened* property. The discharge need not be registered against the benefited property, but section 105 gives the Keeper discretion to make consequential amendments to the benefited property's title sheet. Registration will be required for any servitude that appeared on the title sheet of a burdened property, regardless of how the servitude had come to be entered on



the title sheet (i.e. if it had been noted in the title sheet as anticipated by paragraph (b) of the section). Section 78 does not apply to discharges executed before the appointed day (section 119(8)). Further, it does not affect other methods of extinguishing a servitude, such as negative prescription or confusion.

### **Section 79: Prohibition on creation of negative servitude**

322. Negative servitudes are uncommon and thought to be confined to restrictions on building, especially for the protection of light or prospect. This sort of obligation is more typically imposed as a real burden. *Section 79* prevents the creation of negative servitudes on or after the appointed day. Obligations of this type will have to be created as (negative) real burdens in the future: see section 2(1)(b). All servitudes in the future will therefore be positive in nature.

### **Section 80: Negative servitudes to become real burdens**

323. This is the first of two transitional provisions consequential on the realignment of the boundary between real burdens and servitudes. *Section 80* provides for the conversion of all existing negative servitudes into real burdens.

324. *Subsection (1)* provides for the automatic conversion of negative servitudes into negative burdens (section 2(2)(b) defines a negative burden as an obligation to refrain from doing something). This real burden is referred to as a 'converted servitude' in section 80.

325. *Subsections (2) and (3)* provide for the extinction after ten years of all negative servitudes (now negative burdens) which were not, before the appointed day, registered against the burdened property. The delayed extinction is to give the opportunity to register a notice under subsection (4).

326. *Subsection (4)* provides the mechanism to preserve a converted servitude during the ten years beginning with the appointed day. This is achieved by the owner of the benefited property registering a notice of converted servitude in approximately the same form as contained in schedule 9. Registration of this notice means that the converted servitude is not extinguished under subsection (2). Any owner, including a *pro indiviso* owner, may register. This procedure is used where the converted servitude is not already registered against the burdened property at the appointed day. Where the servitude is already registered, subsection (3) will apply to preserve it.

327. *Subsection (5)* specifies the content of a notice of converted servitude. A statutory form is given in schedule 9. The notice may be restricted to a part only of the benefited or burdened properties (see paragraphs (a) and (b)). A title completed by registration is not required (see the definition of 'owner' in section 123(1)), but in that case paragraph (c) requires that the midcouples be listed. In Land Register cases the Keeper will no doubt wish to inspect the midcouples. The meaning of 'midcouples' is given in section 122(1) (as a link in title used in a deduction of title under the Conveyancing (Scotland) Act 1924). Paragraph (f) is the equivalent of section 50(2)(e) and avoids the need for a separate notice of preservation under that provision.

328. Consistent with section 4(5) (for new real burdens), *subsection (6)* requires dual registration of a notice against both the burdened and benefited property.

329. *Subsection (7)* imports the requirement of section 50(4) and (5) that the notice be sworn or affirmed before a notary public.

330. Section 115, referred to in *subsection (8)*, makes further provision as to notices of converted servitude (and of preservation).

### **Section 81: Certain real burdens to become positive servitudes**

331. In general obligations allowing limited use of the burdened property are positive servitudes. *Subsection (1)* converts real burdens consisting of a right to enter or make use of the burdened property into positive servitudes after the appointed day. This is the partner to the conversion of negative servitudes into burdens in section 80. Section 2(1) prevents the creation in future of rights to enter or use property as real burdens other than where they are ancillary burdens (see section 2(3) and (4)).

332. Paragraph (a) of *subsection (2)* makes clear that section 81 does not apply to feudal burdens which are extinguished on the appointed day by section 17(1) of the 2000 Act. Paragraph (b) excludes by far the most common case of real burdens of entry and use, namely those burdens ('ancillary burdens': see section 2(4)) whose purpose is ancillary to some other type of real burden. The exclusion is made necessary by the fact that ancillary burdens are permitted in the future by section 2(3). These ancillary rights exist where the right to enter or use the burdened property is incidental to another condition.

### **PART 8: PRE-EMPTION AND REVERSION**

333. Part 8 of the Act is concerned with rights of pre-emption imposed as real burdens. Sections 86 and 87 also deal with specific forms of reversion created under two pieces of 19<sup>th</sup> century legislation. Section 8(4) states that only the owner of a benefited property may enforce a right of pre-emption, redemption or reversion constituted as a real burden but this does not apply where the right of pre-emption is a personal real burden such as a rural housing burden.

### **Section 82: Application and interpretation of sections 83 and 84**

334. The effect of *section 82* is to apply the provisions of section 83 and 84 to the same types of pre-emption that are covered by section 9 of the Conveyancing Amendment (Scotland) Act 1938. These are the pre-emptions that are restricted to a single opportunity to accept or refuse an offer to sell. This restriction applies to all pre-emptions ever created in feudal burdens and all other pre-emptions created after 1 September 1974 with the exception of rural housing burdens. Either the holder of the right of pre-emption must accept the offer (normally mirroring the terms of a bid from a third party) or the pre-emption is lost.

335. 'Title condition' is defined in section 122(1). It is wider than real burden and includes, for example, pre-emptions created in long leases.

336. The scope of paragraph (a) is likely to be limited. Many feudal pre-emptions have already been extinguished under section 9 of the 1938 Act. Those which remain will be extinguished on the appointed day by section 17(1) of the 2000 Act unless reallocated under sections 18, 18A, 19 or 20 of that Act.

### **Section 83: Extinction following pre-sale undertaking**

337. *Subsection (1)* allows the owner of the burdened property to obtain, in advance of a sale, an undertaking that a right of pre-emption will not be exercised for a specified period and subject (if desired) to specified conditions. The 'holder' of a right of pre-emption is the person last registered as having title to the burden (section 82). Generally this will be the owner of the benefited property (section 8(4)), the holder of the personal real burden, or, in the case of a pre-emption in a lease, the landlord. A statutory form of undertaking is set out in schedule 10. If the sale then takes place within the specified period, and if the other conditions are met, the pre-emption is extinguished on registration of the conveyance except for rural housing burdens. If the sale does not occur, then the pre-emption would revive after the specified period.

338. *Subsection (2)* makes clear that successors of the holder are bound by the undertaking if it is registered. There is no requirement to register the undertaking. If it is not registered, it will be necessary in Sasine cases to retain the undertaking as evidence of its terms. For land registered in the Land Register, the Keeper is likely to need a copy of an unregistered undertaking before being able to remove the burden from the title sheet.

### **Section 84: Extinction following offer to sell**

339. This provision is based on, and replaces, section 9 of the Conveyancing Amendment (Scotland) Act 1938 (which is repealed by schedule 15). It applies to the pre-emptions mentioned in section 82 (i.e. all feudal pre-emptions and all other pre-emptions created after 1 September 1974).

340. *Subsection (1)* provides that a pre-emption is extinguished if, on sale or other trigger event, the property is offered back to the pre-emption holder. It makes no difference whether the offer is accepted or rejected. As with section 9 of the 1938 Act the extinction is for all time. The constitutive deed might specify a trigger event other than sale. For rural housing burdens subsection (1) applies not to extinguish the burden but rather to satisfy the requirements of the burden in the instant case.

341. *Subsection (2)* specifies the form the offer must take for the pre-emption to be extinguished. This does no more than give effect to section 1(2)(a)(i) of the Requirements of Writing (Scotland) Act 1995, which requires a grantor to subscribe the relevant deed. A verbal offer, therefore, would be insufficient.

342. *Subsection (3)* provides that the offer lapses after a maximum period of 21 days from the date on which it is sent. For rural housing burdens, however, the period is 42 days. An offer which is posted or transmitted by electronic means is taken to be sent on the day of posting or transmission (section 124(3)). If the constitutive deed provides for a period of less than 21 days, then that period will apply.

343. If the constitutive deed sets out terms under which the land would be sold to the pre-emption holder, then these will be applied. It is, however, more usual for the constitutive deed to provide for the offer back to be made on the same terms as any offer received from a third party which the owner wishes to accept. These are terms ‘provided for’ in the sense of *subsection (4)*.

344. Where no terms are set out in the constitutive deed the terms of the offer must be reasonable, and unreasonable terms should not be included in the offer back. It is not necessarily sufficient to repeat the terms agreed with a third party; these are the terms “provided for”. The offer to the holder must itself be on reasonable terms. The subsection also allows additional terms to be inserted.

345. *Subsection (5)* provides that if the pre-emption holder does not indicate within 21 days that the offer is unreasonable then the offer is deemed to be reasonable. An offer which was found to be unreasonable would not extinguish the right of pre-emption. The pre-emption holder will have to give reasons why the offer is unreasonable.

346. *Subsection (6)* makes provision for the case where the pre-emption holder cannot be identified.

### **Section 85: Ending of council’s right of pre-emption as respects certain churches**

347. Schemes for burgh churches made under section 22(1) of the Church of Scotland (Property and Endowments) Act 1925 may, by section 22(2)(h) of that Act, include a right of pre-emption in favour of local authorities in the event that the church is to be sold. The effect of section 85 is to extinguish any such pre-emptions. Section 22(2)(h) of the 1925 Act is repealed by schedule 15 of the Act.

### **Section 86: Reversions under School Sites Act 1841**

348. The School Sites Act 1841 created a right of reversion in favour of persons (or their successors) who granted land for the building of schools and schoolhouses. The existence of the reversion has caused difficulties in practice.

349. The Act converts all rights of reversion created by the School Sites Act 1841 in existence when this provision comes into force on the day after Royal Assent (see section 129(3)) into rights available under section 86 except where the reversion holder has already completed title to the land. In all other cases the provisions of subsections (2) to (9) apply to replace the right of reversion with the rights available under those provisions.

350. Under the existing law the reversion holder is entitled to the property when it ceases to be used for the purposes mentioned in the 1841 Act. *Subsection (2)* provides that where a third party has already purchased the property from the local authority, the authority shall pay to the reversion holder the open market value of the land as at the day after Royal Assent. If the closing of the school takes place after this provision comes into force, ‘improvement value’ as defined in subsection (6) will be deducted.

351. *Subsection (3)* provides that where the education authority has not sold the property on, the reversion holder may require the education authority to perform one of the obligations detailed in subsection (4). Essentially, the holder may choose to ask for the land to be conveyed (reflecting the entitlement under the original reversion) or for payment of compensation. Paragraph (b) places a restriction on this: if the holder wishes a conveyance of the land rather than compensation, then the authority can choose to keep the land and instead pay compensation under subsection (4)(a)(ii) or (b)(ii). The authority's choice would have to be 'timeous', which is defined in subsection (8) as notified to the holder no longer than 3 months after the holder requested a conveyance of the land under subsection (3).

352. *Subsection (4)* details the options available to the reversion holder. A distinction is made depending on whether the event which gives rise to the reversion, usually the closure of the school, occurs before or after this section comes into force. If it occurs before this provision comes into force then either the land is conveyed to the holder or the authority pays the holder the open market value of the land as at the date of coming into force without deduction for improvement value. Otherwise improvement value is deducted from the open market value as at the date of cessation of use either by reducing the compensation payable or by requiring payment from the holder of the improvement value when a conveyance is made to the holder. 'Improvement value' is defined in subsection (6).

353. *Subsection (5)* confers jurisdiction on the Lands Tribunal to settle disputes in relation to the valuation of lands and buildings.

354. *Subsection (6)* defines 'improvement value'. The definition classifies improvements as structures erected on the land, excluding those made before the property was originally conveyed under the School Sites Act for educational purposes.

355. The proviso in the School Sites Act giving rise to the reversion was applied by the School Sites Act 1852. *Subsection (7)* construes references to the School Sites Act 1841 as including other enactments which apply it.

356. *Subsection (9)* disapplies the statutory compensation provisions where compensation or a conveyance of the land to the reversion holder has already been agreed.

357. *Subsection (10)* provides that any proceedings already commenced and arising out of the right of reversion created by the 1841 Act are to be deemed abandoned unless a final decree has been granted.

### **Section 87: Right to petition under section 7 of the Entail Sites Act 1840**

358. *Section 87* adopts the provisions of section 86 for claims under the Entail Sites Act 1840. This Act permitted the granting of small areas of land out of entailed sites for public spirited purposes. The heir of entail in possession could reclaim the land by petitioning the sheriff court if it was not used for these purposes.

359. The 1840 Act is repealed by the Abolition of Feudal Tenure etc. (Scotland) Act 2000, which also automatically disentails any remaining entailed land on the appointed day (section 50). This means that heirs of entail in possession lose that status *involuntarily* on the appointed day and would be prevented from petitioning for the return of land conveyed under the 1840 Act. If owners of previously entailed estates would have had a right to claim back the site but for the provisions of the 2000 Act, then subsection (1) gives them a right to a claim under section 86. Rights arising under the 1840 Act will be treated in the same way as reversions arising from the School Sites Act. The compensation regime of section 86 of the Act applies to claims which would have arisen under the 1840 Act. Paragraph (b) of subsection (1) excludes any claimant who had accepted an offer of compensation by the appointed day.

360. *Subsection (2)* provides for some modifications to the school sites procedure that was adopted by subsection (1). Paragraph (a) accounts for the fact that the Entail Sites Act allowed land to be conveyed or leased to a wider range of bodies than merely education authorities.

361. The repeal of the 1840 Act does not affect the trust in which the land is currently held. *Subsection (3)* provides that the land need no longer be held for the trust purposes referred to in the 1840 Act after a claim has been paid or any claim has prescribed.

362. *Subsection (4)* provides that any petition already commenced under the 1840 Act is to be deemed abandoned unless a final decree has been granted.

### **Section 88: Prescriptive period for obligations arising by virtue of 1841 or 1840 Act**

363. This section applies the five year negative prescription to obligations arising by virtue of the rights of reversion under the School Sites Act 1841 or right to petition for forfeiture under the Entail Sites Act 1840. Time occurring before this provision comes into force (which is the day after Royal Assent in respect of the School Sites Act and the appointed day in respect of the Entail Sites Act) does not count towards the prescriptive period. Its effect is that, following the coming into force of sections 86 and 87, if a right lies unclaimed for five years after the event which led to its becoming due no claim can be made under section 86(1) or 87(1). See the note on section 18 for prescription in general.

### **Section 89: Repeal of Reversion Act 1469**

364. This section repeals the Reversion Act 1469. This Act, together with the Registration Act 1617 meant that reversions run with the land provided that they have been registered under the 1617 Act. Any rights of reversion which still survive are preserved by *subsection (2)*.

## **PART 9: POWERS OF THE LANDS TRIBUNAL**

### **Section 90: Powers of Lands Tribunal as respects title conditions**

365. Part 9 introduces a revised jurisdiction for the Lands Tribunal in relation to the discharge of real burdens, servitudes, and other title conditions. The Lands Tribunal is responsible for hearing applications for the variation or discharge of title conditions. Its powers to discharge are currently set out in the Conveyancing and Feudal Reform (Scotland) Act 1970. *Section 90* of the

Act restates these powers and makes some additions and alterations to them. The main changes to the existing law are to allow the Tribunal to determine the validity of a burden, and to extend its jurisdiction so that it can deal with the new termination procedures in the Act. Part 9 replaces sections 1 and 2 of the 1970 Act (which are repealed by schedule 15 of the Act). Section 90 sets out the revised jurisdiction of the Lands Tribunal.

366. *Subsection (1)* confers an extended jurisdiction on the Lands Tribunal. Only the first provision is familiar from the current law. Under paragraph (a)(i) the Tribunal can discharge or vary a real burden, servitude, or other title condition. Under paragraph (a)(ii), it can pronounce on the validity and enforceability or interpretation of a real burden or a rule of a Development Management Scheme. Under paragraph (b) it can deal with applications to renew or vary a right to enforce a burden, following intimation of a proposal under section 20 to execute and register a notice of termination, or section 107(4) to register a conveyance. Under paragraph (c) it can deal with applications to preserve a community burden following intimation of a proposal to register a deed of variation or discharge under sections 33 or 35. Under paragraph (d) it can deal with applications to preserve a Development Management Scheme following intimation of a proposal to register a deed of disapplication under section 74(1). Under paragraph (e) it can deal with applications to preserve a Development Management Scheme following intimation of a proposal to register a conveyance under section 107(4).

367. Paragraph (a)(i) of subsection (1) permits the Tribunal to rule in favour of a burdened proprietor (or anyone else against whom the burden is enforceable) who applies for the discharge or variation of a title condition in relation to the burdened property. The meanings of ‘benefited property’, ‘burdened property’, ‘title condition’ and ‘variation’ are given in section 122(1). Paragraph (a) extends the jurisdiction to ‘purported’ title conditions, i.e. to obligations which bear to be (but may in fact not be) valid title conditions. This means that the Tribunal can grant a discharge without having first to determine the validity of the condition. Section 104(4) deals with any effect on contractual matters that might arise from this. See also section 61. Paragraph (a)(ii), which allows the Tribunal to rule on the validity, applicability, enforceability or construction of a title condition is qualified by subsection (12).

368. Paragraph (b) permits the Tribunal to give effect to an application for renewal or variation of a burden which is threatened by either the ‘sunset rule’ termination procedure under section 20 or by extinction under section 107(1). Paragraph (c) permits the Tribunal to give effect to an application to preserve a right to enforce a burden under threat from a deed of discharge or variation granted under sections 33 and 35. Paragraph (c) also permits the Tribunal to prevent the variation of a burden or the imposition of a new burden by a deed of variation granted under section 33.

369. Paragraph (d) permits the Tribunal to give effect to an application by the owner of a unit in a Development Management Scheme for preservation of the Scheme where there has been intimation of a proposal under section 74(1) to disapply the Scheme.

370. Paragraph (e) permits the Tribunal to give effect to an application by an owners’ association to preserve a Development Management Scheme where there has been intimation of a proposal under section 107(4) to disapply the Scheme.

371. An application under paragraph (a) may be brought by anyone against whom a title condition is enforceable (for which see section 9). By contrast, an application under paragraph (b) or (c) may be brought only by an owner of the benefited property, or in the case of (b), a holder of a personal real burden (and so not by those holding subsidiary enforcement rights under section 8(2)(a) and (b)). ‘An’ owner includes individual *pro indiviso* owners. The effect of a discharge or renewal is confined to the particular property in respect of which the application was brought. A successful application for preservation preserves the community burdens for every unit whose owners did not sign the deed at all or did not *all* sign the deed. When an application for preservation is refused, the burden is varied or discharged by the Lands Tribunal in respect of all such units. By registering the deed of variation or discharge **and** the Lands Tribunal order in these cases, the burden will be varied or discharged for the whole community.

372. *Subsection (2)* confirms that the holder of a personal real burden (as listed in section 1(3)) can also apply for renewal or variation under section 90(1)(b) where the burden is threatened with termination under section 20 or extinction under section 107(1).

373. *Subsection (3)* excludes certain title conditions. These are currently excluded from the jurisdiction of the Tribunal by the 1970 Act. These are specified in full in schedule 11 and (in brief) include obligations relating to minerals; obligations created for naval, military or air force purposes; obligations created or imposed for civil aviation purposes or in connection with the use of land as an aerodrome; obligations created in relation to a lease of an agricultural holding, a holding within the meaning of the Small Landholders (Scotland) Acts 1886 to 1931, or a croft.

374. *Subsection (4)* imposes time limits in respect of applications for renewal or preservation.

375. *Subsection (5)* prevents a new obligation being imposed on a burdened property or a new property becoming benefited in any application for variation under section 90(1)(b). An existing obligation could however be partially discharged. In any application for variation under section 90(1)(a)(i) (which could be made, for example, by a tenant), the owner’s consent will be required before a new obligation is imposed on a burdened property or a new property becomes benefited.

376. Subsections (6) to (11) allow the Tribunal to pronounce certain ancillary orders. The provisions are based on section 1(4) and (5) of the 1970 Act.

377. *Subsections (6) and (7)* concern compensation for discharge. Only the owner of the benefited property or holder of the personal real burden is eligible for compensation, and not those holding subsidiary enforcement rights. The grounds on which compensation may be awarded are set out in subsection (7) and are the same as under the current legislation. *Subsection (9)* ensures that compensation can be awarded only if the person who is to pay agrees; but if he does not agree the Tribunal may decide not to grant the discharge. Compensation cannot be awarded if the application for discharge is unopposed (section 97(1)).

378. *Subsection (8)* concerns the imposition of replacement title conditions. There is no requirement that the replacement condition be of the same type as the condition which is being discharged. *Subsection (11)* requires the consent of the owner of the burdened property If



consent is not given, the Tribunal may decide not to grant the discharge. Replacement conditions cannot be imposed if the application for discharge is unopposed (section 97(1)).

379. The law already provides compensation for landowners whose property is affected when land is acquired in circumstances where compulsory purchase powers could have been used. There is no such provision for personal real burden holders. *Subsection (10)* allows the Lands Tribunal to make an award of compensation in these circumstances.

380. Applications under paragraph (a)(ii) of subsection (1) (for a ruling on validity etc) will often be accompanied by applications under paragraph (a)(i) (for discharge). Where they are not, the matter could as well be disposed of by the ordinary courts, and the Tribunal is given a discretion, by *subsection (12)*, to decline jurisdiction.

### **Section 91: Special provision as to variation or discharge of community burdens**

381. *Section 91* of the Act allows owners of 25% of the units in a community to apply to the Lands Tribunal to vary or discharge a community burden or the community burdens as they affect all or part of a community. Not all owners of each unit need apply and *subsection (2)* makes clear that owners may apply in respect of units that they do not own. The meaning of 'community burdens' is given in section 25, and of 'unit' in section 122(1). 'Vary' includes the imposition of new burdens and, in terms of section 122(1) also includes changes to existing burdens to impose new obligations .

382. *Subsection (3)* enables the Tribunal to award compensation, on the same basis as under section 90.

### **Section 92: Early application for discharge: restrictive provisions**

383. This section allows the constitutive deed to provide for a moratorium of up to five years on Lands Tribunal applications. It replaces the fixed two year period contained in the current legislation (Conveyancing and Feudal Reform (Scotland) Act 1970 section 2(5)).

### **Section 93: Notification of application**

384. Once an application has been received, the Lands Tribunal must notify interested parties. *Section 93* sets out the list of those who are to be notified and the means by which notification should be given. The meaning of 'send' is given in section 124. Section 94 prescribes the content of the notice.

385. *Subsection (1)* sets out the list of those who are to be notified by the Lands Tribunal. Paragraph (a) deals with applications to discharge or vary or establish the validity of a burden under section 90(1)(a) and applications by owners of 25% of the units in a community under section 91. In these cases, any owner of the burdened property who is not an applicant, and if there is one, the owner of the benefited property, must receive notification. The holder of the title condition must be notified. Paragraph (b) provides that in an application under section 90(1)(b) to renew or vary a burden threatened by the sunset rule in section 20 or acquisition under section 107, the Tribunal must notify the owner of the burdened property and the

terminator (who may not be the owner) or acquiring authority (i.e. the person proposing to register the conveyance), as the case may be. In other cases the party who initiated the procedure which gave rise to the application must be notified.

386. Usually notice must be sent individually, but this requirement is waived in the cases mentioned in *subsection (2)*, which provides that notification can be given by advertisement or any other method the Tribunal thinks appropriate. These cases are where the relevant person cannot by reasonable enquiry be identified, appears to lack interest to enforce, or the Tribunal feels that individual notification is impracticable.

387. As a general rule, notification is restricted to owners and does not extend to those holding subsidiary enforcement rights (for which see section 8(2)(a) and (b)). However, *subsection (3)* adds a discretion to notify others.

#### **Section 94: Content of notice**

388. Whether the notice under section 93 is given individually or in some other way, it requires to contain the information set out in *section 94*. These requirements include a summary of the application, the date by which representations are to be made, the fee and, if appropriate, a statement that if unopposed the application may be granted without further inquiry. Where the Tribunal is giving written notice, such notice should in terms of paragraph (b), give the names and addresses of the other parties who are receiving that notice so that, if desired, they can join forces to make representations. The requirement to state in the notice what fee should accompany any representations (sub-paragraph (iii)) is new. Sub-paragraph (iv) refers to section 97.

#### **Section 95: Persons entitled to make representations**

389. The class of those entitled to make representations, set out in *section 95*, is wider than the class of those to whom notice must be given under section 93. In principle those entitled to make representations should be any person with title to enforce the title condition or against whom the condition could be enforced. Depending on the circumstances, this could include owners or holders of personal real burdens who have yet to register their title, tenants, liferenters, pre-emption holders, heritable creditors in possession, and non-entitled spouses under the Matrimonial Homes (Family Protection) (Scotland) Act 1981.

#### **Section 96: Representations**

390. *Section 96* explains how representations are to be made. In general, representations must be made within the 21 day (or other) period specified in the Tribunal's notice (section 94(a)(ii)). Representations are 'made' by being sent with the requisite fee (subsection (2)); and a document, if sent by post or electronic means, is treated as sent on the day of posting or transmission (section 124(3)). Nonetheless the Tribunal has a discretion — as it has at present — to accept late representations (subsection (3)). Representations must be made in writing and an ordinary letter is sufficient.

## **Section 97: Granting unopposed application for discharge or renewal of real burden**

391. Under the existing law, all applications must be considered on their merits, whether opposed or not. *Section 97* provides a new procedure for certain applications to the Lands Tribunal if not opposed. Unopposed applications for the discharge, variation, renewal or preservation of certain real burdens (only) are to be granted without further inquiry. The Tribunal will retain a role in receiving the application, notifying the appropriate owners, checking that it had been properly made, checking that it does not relate to an excepted type of burden such as are described in subsection (2) and granting the appropriate order. It is not competent to award compensation in a case where a burden is being discharged unopposed or to impose a substitute real burden. Where the burden is being renewed or preserved there is no need for such an award or substitution.

392. Under the current law, the Tribunal can only grant an order to vary or discharge a burden if it is satisfied that the statutory grounds are satisfied, even if an application is unopposed. *Subsection (1)* provides that if an application is not opposed and does not relate to an excepted type of burden, the Tribunal *must* grant it, and makes clear that no ancillary orders under section 90(6)(a) or (8) (for compensation or a replacement title condition) may be made where an application for discharge or variation under section 90(1)(a) or 91(1) is unopposed. An application is ‘duly made’ if it complies with section 90 (or section 91). The reference in paragraph (b) to a renewal or variation is to a renewal application under the sunset rule in section 20 (an application under section 90(1)(b)(i)), or in response to notification of a proposal to register a section 107 conveyance (an application under section 90(1)(b)(ii)). The reference in paragraph (c) to preservation is to an application under section 90(1)(c) to preserve a community burdens in response to notification of a proposal to register a deed of variation or discharge under section 34(3) or 37(1).

393. *Subsection (2)* excepts facility and service burdens (defined in section 122). Subsection (2) also excepts an application made under section 91 (i.e. by the owners of 25% or more of the units in a community) if that application relates to a burden imposed on a sheltered or retirement housing development.

394. *Subsection (3)* explains what is meant by ‘unopposed’. Representations must comply with section 96. Only representations by owners of benefited properties or holders of a personal real burden would be treated as opposition to an application for discharge. Only representations by the terminator or the acquiring authority (i.e. the person proposing to register the conveyance) would be treated as opposition to an application for renewal and only representations by the person proposing to register a deed of variation or discharge under sections 33 or 35 would be treated as opposition to an application for preservation under section 91(1)(c). A representation accepted late under section 96(3) would qualify as opposition. An application would count as unopposed if representations were subsequently withdrawn.

395. Expenses, for the most part, are dealt with in section 103. The purpose of *subsection (4)* is to allow the Tribunal to award expenses against a terminator or person seeking to register a discharge under sections 33 or 35 or conveyance under section 107 who does not oppose an application for renewal or preservation made under section 90(1)(b) or (c). Such a person is not a party to the application, but their actions have resulted in the benefited proprietor making the application for renewal or preservation. The subsection operates to stop such a person avoiding

an award of expenses by failing to become a party to the application: the Tribunal will have a discretion to award expenses against them.

### **Section 98: Granting any other application for variation, discharge, renewal or preservation of title condition**

396. Apart from certain categories of unopposed application (section 97), the Tribunal must consider applications for variation, discharge, preservation or renewal on their merits. *Section 98(a)* imposes a test of reasonableness. The Tribunal must consider the factors set out in section 100. These factors are also relevant to paragraph (b) which provides for a different test for applications under sections 34(3) or 37(1) to preserve a right to enforce a burden in the face of a proposal to register a deed of variation or discharge. In these cases the deed has already been signed either by a majority in the community or by all of the adjacent proprietors. Where an application is made under section 37(1) the deed must have been signed by the owners of adjacent units (if any) and by the owner of the affected unit for the paragraph (b) test to apply. If there are no adjacent units the deed under section 35 may be signed by the owner of the affected unit alone. In this case the test in paragraph (a) applies. As there are no other signatories there are no special circumstances to distinguish this case from that of an ordinary application under section 90(1)(a).

### **Section 99: Granting applications as respects development management schemes**

397. This section makes similar provisions to those made in section 97 and 98 for applications to preserve Development Management Schemes. Such applications under section 90(1)(d) or (e) result from a proposal by an owners' association to disapply the Scheme under section 74(1) or a proposal to register a conveyance under section 107 in circumstances where land is being acquired by agreement that could have been acquired compulsorily.

398. *Subsection (1)* directs unopposed applications to be granted as of right. Expenses may be awarded against an owners' association which does not make representations (*subsection (3)*). *Subsection (4)* contains the tests for granting the applications if they are opposed.

### **Section 100: Factors to which the Lands Tribunal are to have regard in determining applications etc.**

399. In considering the reasonableness of an application in terms of section 98, the Tribunal must have regard to the factors set out in *section 100*. This is an innovation on the previous law where the grounds for a ruling by the Tribunal were distinct and one ground could be considered in isolation. Section 100 amends the grounds used under the Conveyancing and Feudal Reform (Scotland) Act 1970 and treats them as a series of indicators as to whether or not an application should be granted. For most types of application there is a test of reasonableness (see section 98) which would be assessed by reference to a number of specific factors. The Tribunal will evaluate all of the relevant factors to determine whether it is reasonable to discharge, vary, preserve or renew a title condition. Not all factors will be relevant to every application. Nor — see factor (j) — are they intended to be exhaustive.

## **Section 102: Referral to Lands Tribunal of notice dispute**

400. This section gives the Lands Tribunal jurisdiction to resolve disputes in relation to notices which may be registered under section 50 (Preservation) and section 80 (Negative servitudes to become real burdens). The Tribunal will therefore be able to adjudicate in circumstances where it is desired to preserve rights to enforce burdens using these provisions. The Tribunal will be able to make an order discharging or restricting the effect of a disputed notice.

## **Section 103: Expenses**

401. This section reaffirms the rule that the Lands Tribunal has a discretion as to expenses, but directs the Tribunal to have some regard to the principle that expenses follow success (i.e. that the successful party should not bear the expenses). Where one of the new procedures for extinguishing burdens or disapplying a Development Management Scheme gives rise to an application to the Tribunal which is unopposed, sections 97(4) and 99(3) allow the Tribunal in some cases to award expenses against the party who initiated the procedure.

## **Section 104: Taking effect of orders of Lands Tribunal etc.**

402. Once a Tribunal order has taken effect (other than an order under section 90(1)(a)(ii) in relation to validity etc), the order may be registered. It is only on registration that the title condition is affected in the manner provided for in the order. An order declaring whether a condition is valid under section 90(1)(a)(ii) is not registrable.

403. Section 90 permits the Lands Tribunal to vary or discharge a 'purported title condition' so that it will be possible for an applicant to remove an invalid burden. This enables the Tribunal to discharge an obligation without first having to determine whether or not it is a valid real burden. If a burden was not valid (i.e. it is a purported burden) it could still be valid and enforceable as a contract. The contractual relationship would only cease when the property changed hands. *Subsection (4)* makes clear that a discharge by the Tribunal of a purported real burden has no effect as regards any incidental contractual liability even if the basis for the contractual liability is not set out in any other document.

## **PART 10: MISCELLANEOUS**

### **Section 105: Alterations to Land Register consequential upon registering certain deeds**

404. This section introduces Part 10, which is concerned with a number of miscellaneous topics. *Section 105* extends a power which is already conferred by section 5(1) of the Land Registration (Scotland) Act 1979.

405. Section 5(1) of the 1979 Act empowers the Keeper to make such consequential amendments in the Land Register as are necessary when carrying out a land registration process. This means that where a burden is discharged or varied, the Keeper may alter the title sheet of a **benefited** property to indicate that the enforcement rights have changed. The 1979 Act only allows the Keeper to do this where **both** the burdened and benefited property are on the Land Register (and each, as a consequence, has a title sheet). The effect of *subsection (1)* is to apply the same rule to the case where the initial registration process is in the Register of Sasines. In

other words, the Keeper may now make consequential changes to the title sheet of a **benefited** property when burdens that were in its favour are discharged or varied, regardless of whether the **burdened** property is on the Land Register or the Register of Sasines. If the benefited property were also on the Register of Sasines, then no consequential amendments could be made, as there would be no title sheet to amend.

406. *Subsection (2)* imposes a duty on the Keeper to make consequential changes to the Land Register in limited circumstances. These circumstances arise when the document which effects the change requires to be dual registered, that is to be registered against both the benefited and the burdened property. The deeds or notices in all the sections mentioned in subsection (2) all require to be dual registered.

407. For the purposes of the present Act, this power to make consequential amendments is required only in the two circumstances set out in *subsection (3)*. The first concerns, mainly, deeds and other documents which vary or extinguish burdens (the reference in paragraph (a) to ‘renews, reallots, preserves or imposes’ refers back to the wording in other provisions, for example an order granted by the Lands Tribunal under section 90(1)(b) would renew a real burden whereas registration of a notice under section 18 of the 2000 act would “reallot” the right to enforce the burden. The second situation concerns division of the benefited or burdened property. If, as sometimes, division affects the distribution of rights or, as the case might be, liabilities in relation to real burdens (for which see sections 12 and 13), the Keeper might wish to note the change on the title sheet of property other than the one which is being conveyed.

### **Section 106: Extinction of real burdens and servitudes etc. on compulsory acquisition of land**

408. This is the first of a group of provisions (sections 106, 107, 109 and 110) which are concerned with the effect of compulsory purchase on real burdens and servitudes. *Section 106* deals with the effect of a compulsory purchase order on real burdens and servitudes affecting the land acquired. *Section 107* is concerned with the effect of an acquisition by agreement.

409. The effect of compulsory purchase on real burdens and servitudes is disputed under the current law. *Section 106* provides a clear rule. In general (*subsection (1)*), all real burdens and servitudes are extinguished on registration of the conveyance (defined in *subsection (5)*). This applies to any conveyance which is registered on or after the appointed day, regardless of the date of the compulsory purchase order but not to a conveyance registered before the appointed day (*section 119(9)*). The term conveyance includes, but is not limited to, a statutory conveyance in the form set out in schedule A to the Lands Clauses Consolidation (Scotland) Act 1845 and a general vesting declaration made under the Town and Country Planning (Scotland) Act 1997.

410. A conveyance registered under *subsection (1)* would have the effect of disapplying a development management scheme which applied to the land. As with real burdens it is possible for either the compulsory purchase order or the conveyance to modify this extinctive effect.

411. *Section 106* will only apply to compulsory acquisition authorised by a compulsory purchase order. “Compulsory purchase order” is defined by *subsection (5)*. It includes both an compulsory purchase order made under *section 1(1)* of the Acquisition of Land (Authorisation

Procedure) (Scotland) Act 1947 and also a compulsory purchase order made under the Forestry Act 1967.

412. Subsections (1) and (2) together allow the acquiring authority to disapply the extinctive effect of section 106(1) and to save or vary the burdens. It is in terms of subsection (1) possible for this to be done either by provision in a compulsory purchase order or in the conveyance (as defined in subsection 106(5)). It is possible in terms of subsection (2) to disapply section 106(1) for certain burdens only, or for parts of the burdened property only or in respect of the rights of certain benefited proprietors to enforce the burdens

413. It is not a necessary pre-requisite for the inclusion in the subsequent conveyance that a provision has been included in the compulsory purchase order to disapply section 106(1). The conveyance would not in terms of subsection (3), without the consent of the benefited proprietors, be registrable and so would not extinguish burdens under section 106(1) if section 106 had been disapplied in the compulsory purchase order.

414. Subsection (4) makes provision for compensation to be paid to the holders of personal real burdens extinguished under subsection (1). Compensation may be payable to the owner of a benefited property where a burden is extinguished but this is provided for not under the Act but rather under other rules of land compensation.

415. Subsection (5) gives a wide definition of “conveyance”. A conveyance includes both the familiar “schedule A” conveyance (or “statutory conveyance”) and general vesting declaration. In addition it includes an ordinary disposition which includes a reference to the application of section 106(1), or if the conveyance follows on an acquisition by agreement a reference to the application of section 107(1) - see the definition of conveyance in section 107(10). The effect of paragraph (a)(i) is that it will cease to be necessary to use a “statutory conveyance”, though such use will remain competent in order to extinguish real burdens. However, such a disposition etc is not in other respects the equivalent of a statutory conveyance.

### **Section 107: Extinction of real burdens and servitudes etc. where land acquired by agreement**

416. *Section 107* applies to cases of acquisition by agreement in circumstances where compulsory powers could have been used.

417. The effect of registration of a conveyance under section 107 is, unless the conveyance provides otherwise, to extinguish all burdens and servitudes and to disapply any development management scheme.

418. Section 107(4) imposes a notification requirement upon a person acquiring land under section 107 (“the acquiring authority”).

419. A benefited proprietor, the holder of a personal real burden or, in the case of a development management scheme, the owners association is entitled to make an application for renewal to the Lands Tribunal within 21 days of the notice. The notice will in terms of

subsection (6) have to state the name of the acquiring authority, describe the land being acquired, the effect of the conveyance in extinguishing real burdens imposed on that land or in disapplying the development management scheme (and any modification of that effect) and that the benefited proprietor, holder or owners association, can take the matter to the Lands Tribunal within 21 days.

420. The notice given by the acquiring authority triggers a 21 day period in which the benefited proprietor, holder or owners association, could apply to the Lands Tribunal for renewal of the burden or preservation of the development management scheme.

421. The registration of the conveyance alone would not have the effect of extinguishing the burdens or of disapplying the development management scheme. For the conveyance to have this effect it would also be necessary to register a certificate from the Tribunal. The certificate would be received following an application made by the acquiring authority to the Tribunal.

422. The certificate would state, as with sections 23 and 24, that no objection had been timeously received or that all such objections had been withdrawn or, in the case of real burdens and servitudes (i.e. an application made under section 90(1)(b)(ii)) that objections only related to certain burdens or were only made by certain benefited proprietors.

423. It would be possible to register a conveyance notwithstanding that no certificate has been obtained from the Tribunal. The lack of a certificate would not prevent registration of the conveyance but only the extinguishment of the real burdens by the conveyance. It is not necessary to give notice before registering a conveyance without a relevant certificate. Subsection (4) only applies where registration is in accordance with section 107(1)(b), i.e. is registration of a conveyance with a certificate.

424. Burdens would be extinguished, as with sections 23 and 24, only in accordance with the terms of the certificate obtained from the Tribunal.

425. The certificate is a separate document obtained from the Lands Tribunal upon application. There is a prescribed form of application for a certificate in schedule 12.

426. To extinguish real burdens and servitude under section 107(1) the conveyance must be registered along with a relevant certificate (annexed to the conveyance). If the conveyance had already been registered then it would be possible to re-register the conveyance with a certificate and as with section 24(2) it would be possible to re-register the conveyance again with a further certificate. The burdens are extinguished from the date on which the conveyance with the annexed certificate is registered.

### **Section 108: Amendment of Church of Scotland (Property and Endowments) (Amendment) Act 1933**

427. Section 9(3) of the Church of Scotland (Property and Endowments) (Amendments) Act 1933 created a right of pre-emption in respect of Parliamentary Churches and manses. The section allowed the original granter of the site a right of pre-emption entitling them to first



refusal if the church came up for sale. The granter only received such a right if they owned land adjoining the church or manse. If they subsequently sold on some of this adjoining land, then it is arguable that each sold off part would also receive a right of pre-emption. This creates difficulties as to who is entitled to the right of pre-emption, and raises the possibility that more than one nearby owner could try and exercise it. *Section 108* inserts three new subsections into the 1933 Act to resolve this problem.

428. Subsection (4) inserted by section 108 prevents further proliferation of the pre-emption right. It ensures that when part of a property which holds a right of pre-emption under section 9 of the 1933 Act is divided, only the property which is not sold off will have the right to enforce the pre-emption. The sold off land will not receive the pre-emption unless there is an agreement for it to receive it instead of the retained land. In any situation, the pre-emption will only be exercisable by one part of a property that is being subdivided – no two properties will be given the right at the same time. This only applies to future sales and subdivisions following the appointed day. Past subdivisions are dealt with by the new subsection (5).

429. Subsections (5) and (6) inserted by section 108 deal with the issue of who is entitled to the pre-emption right in all existing cases where there are multiple pre-emption holders. Scottish Ministers will be able to set out by statutory instrument the details of a procedure to determine to whom the right should be granted and how the price of the land is to be determined.

### **Section 109: Amendment of Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947**

430. This section extends the notification requirements under paragraph 3(b) of the First schedule to the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947. The effect of the amendment is to impose a duty on an acquiring authority, in the case of a compulsory purchase order, to notify a benefited proprietor, the holder of a personal real burden or, where a development management scheme applies to the land, the owners association that a compulsory purchase order has been made and is about to be submitted for confirmation.

431. Notification to benefited proprietors, holders of personal real burdens and the owners association is only be required to the extent that the compulsory purchase order could have the effect of either, as the case may be, extinguishing real burdens imposed on, or disapplying the development management scheme applying to, the land to be acquired. If section 106(1) were disappplied there would be no requirement to notify. A benefited proprietor or holder of a personal real burden or an owners association who objects will be treated as a “statutory objector” and will be entitled to be heard, usually, at a public local inquiry.

### **Section 110: Amendment of Forestry Act 1967**

432. *Section 110* is concerned with the Forestry Act 1967. This Act confers powers of compulsory acquisition exercisable by means of a compulsory purchase order by the Scottish Ministers. The 1967 Act does not incorporate the compulsory purchase procedure of the 1947 Act but rather provides for its own procedure in schedule 5. The amendments in section 110 will bring schedule 5 to the 1967 Act in line with the Acquisition of Land (Authorisation Procedure)

(Scotland) Act 1947. The amendment reflects the changes made by section 109 in relation to paragraph 3 of schedule 1 to the 1947 Act.

433. The effect of the amendment inserted by *subsection (2)* is to impose a duty on the Scottish Ministers when making a compulsory purchase order to notify a benefited proprietor or the holder of a personal real burden or, where a development management scheme applies, the owners association that a compulsory purchase order has been made and is about to be submitted for confirmation.

434. Paragraph 3(2) of schedule 5 to the 1967 Act imposes a duty on the confirming authority to cause a local inquiry to be held. *Subsection (3)* ensures that this will not apply where the acquiring authority gives an undertaking in the form of paragraph 6B as inserted by subsection (4). Similarly, the special parliamentary procedure requirement contained in paragraph 4 of schedule 5 will not apply when an undertaking is given.

435. The procedure in paragraphs 3 to 6 of schedule 5 to the 1967 Act is different from the procedure in paragraph 4 of schedule 1 of the 1947 Act. *Subsection (4)* provides the procedure to be followed when objections to a compulsory purchase order are received in the context of section 110 in terms of form, content and procedure (including the registering, effect and operation of the undertaking and the requesting of information from objectors about benefited property). These are the equivalent to those in section 109.

### **Section 111: Amendment of Conveyancing and Feudal Reform (Scotland) Act 1970**

436. *Section 111* amends section 13 of the Conveyancing and Feudal Reform (Scotland) Act 1970 which regulates the ranking of standard securities following service of a notice by a subsequent security holder. Under the existing law, it is possible that when a later creditor gives notice under section 13, their debt will gain precedence over the possible claim to be made by the seller under a clawback agreement secured by a standard security. Typically a clawback agreement may provide that if a certain event occurs (such as planning permission for change of use) the seller will get a further financial payment. This is because the 1970 Act stipulates that security holders will only be ranked in respect of ‘advances’ made before subsequent securities. In the case of a clawback agreement, the standard security does not secure ‘advances’ but rather a future debt.

437. By replacing ‘advances’ with a wider term, ‘debt’, the amendment makes clear that section 13 applies to debts of all kinds (including, for example, clawback). The amendment takes effect on the day following Royal Assent (section 129(3)).

### **Section 112: Amendment of Land Registration (Scotland) Act 1979**

438. *Section 112* makes amendments to the Land Registration (Scotland) Act 1979. *Subsection (2)* amends the duties given to the Keeper by section 6 of the 1979 Act regarding the information to be shown on a title sheet. Essentially this requires the Keeper to dual enter information in those cases where notices or deeds have to be dual registered. The new paragraph (e) to section 6(1) of the 1979 Act in addition to requiring, as at present, the Keeper to disclose the terms of real burdens and conditions affecting the land on the title sheet of the burdened

property also requires the Keeper in some cases to identify the benefited property. This latter duty only arises where the burdened property is affected by a notice or deed registered under one of the listed sections.

439. The new paragraph (ee) requires the Keeper to disclose the identity of a burdened property on the title sheet of a benefited property when the right to enforce arises as a consequence of a notice or deed registered under one of the listed sections.

440. The amendment made by *subsection (3)* presupposes the amendment which is made to section 9 of the 1979 Act by section 3 of the 2000 Act. Both amendments come into force on the appointed day. Section 3 of the 2000 Act makes some technical amendments designed to ensure that obsolete material left on the Land Register as a result of feudal abolition will be safely eliminated over time.

441. The effect of *section 112* is substantially the same as that of section 3 of the 2000 Act, but in a different context. It allows the Keeper to rectify the Land Register to take account of the listed provisions, and also in respect of things done (such as the registration of notices) in response to those provisions. No indemnity is then payable. The listed provisions are concerned only with transitional matters (such as implied rights of enforcement).

### **Section 113: Amendment of Enterprise and New Towns (Scotland) Act 1990**

442. The effect of this amendment is to remove a possible repugnancy between sections 8(6) and 32 of the 1990 Act. Section 32 allows Scottish Enterprise or Highlands and Islands Enterprise to enter into an agreement analogous to a real burden that will run with the land and bind it. There was a measure of uncertainty whether the agreement could be made with merely 'a person having such interest as to bind the land' (in practice, the owner) or whether *all* those with such interest had to agree (e.g. including heritable creditors). The amendment makes it clear that the first position is to apply: that it can be with *any* person with an interest in the land. The amendment takes effect on the day after Royal Assent (section 129(3)). The new version of section 32(1) is based on section 75 of the Town and Country Planning (Scotland) Act 1997.

### **Section 114: Amendment of Abolition of Feudal Tenure etc. (Scotland) Act 2000**

443. *Section 114* introduces 6 new sections to be inserted into the Abolition of Feudal Tenure etc. (Scotland) Act 2000. The underlying policy of the 2000 Act was to allow feudal superiors the opportunity to save valuable rights. This was generally achieved by requiring the superior to register a notice in the property register prior to the appointed day. These new sections add to mechanisms already in the 2000 Act to allow superiors to preserve certain feudal rights as personal real burdens after the appointed day (i.e. as burdens without a benefited property). In the case of sporting rights (section 65A) existing rights will be converted into a separate tenement in land.

444. *Subsection (2)* introduces the new **section 18A** into the 2000 Act. This is concerned with personal pre-emption burdens and personal redemption burdens. The explanatory notes on Part 8 of the Act offer an explanation of rights of pre-emption and redemption. Section 18 of the 2000 Act allowed a superior to preserve a right of pre-emption or redemption by registering a notice

that nominated specific land owned by the superior as a new benefited property. Section 18A offers an alternative route for superiors to preserve rights to pre-emptions and reversions. It will allow superiors to convert all rights of pre-emption or redemption which they could enforce prior to the appointed day into personal real burdens by the registration of a notice. This would avoid the requirement in section 18 of having to nominate land owned by the superior as the benefited property.

445. Subsection (1) of section 18A makes it clear that the superior may choose to preserve their right to a pre-emption or redemption by either section 18 or 18A. A superior who owned land and wished to fix the right of enforcement to that land (rather than risk the ownership of the right and the land becoming separated at some point in the future) might wish to use the section 18 notice procedure. The subsection allows a superior to register a notice in the form contained in schedule 5A of the 2000 Act (inserted by schedule 13 of the Act) to convert a right of pre-emption or redemption into a personal pre-emption or redemption burden. The right of pre-emption or redemption must be valid before the appointed day in order to be converted. Registration must occur before the appointed day.

446. Subsection (2) provides for the content of the notice of conversion.

447. Subsection (3) adopts the requirement in section 18(4) of the 2000 Act for the superior to swear or affirm before a notary public that to the best of their knowledge all of the information contained in the notice is true. The sanctions of the False Oaths (Scotland) Act 1933 would apply in the event that the oath or affirmation was known to be false or not believed to be true.

448. Subsection (4) adopts the provisions in section 18(5) of the 2000 Act to allow a legal representative of the superior to sign on their behalf if by reason of legal disability or incapacity they are unable to swear or affirm for the purposes of subsection (3). Similarly, the subsection also adopts the provision of the 2000 Act allowing an authorised person to sign on behalf of a superior who is not an individual (e.g. a company).

449. Subsection (5) stipulates that if the requirements of subsections (1) to (3) are complied with and the burden is enforceable by the superior immediately prior to the appointed day, the burden shall be converted into a personal pre-emption burden or personal redemption burden on the appointed day. The *dominium utile* is the burdened property in respect of the obligation.

450. Subsection (7) provides that the new personal real burdens should be capable of assignation or transfer. The assignation to be effective would have to be registered. It should be noted that it will not be possible after the appointed day to create a right of pre-emption as a personal real burden. New pre-emption rights, other than those created as rural housing burdens under section 43, will require a benefited property. Section 3(5) of the Act prevents a right of redemption being created even as a real burden after the appointed day.

451. Subsection (8) provides for deduction of title where the holder of the burden does not have completed title (i.e. it is not registered). No deduction of title would be required once the burden was registered in the Land Register. 'Midcouple' is defined in section 122.

452. Subsection (9) makes section 18A subject to sections 41 and 42 of the 2000 Act on registration of a notice. Section 41 requires the superior to give notice to the burdened proprietor of the attempt to reallocate the burden. Section 42 stipulates that where a superior has a choice of several of the procedures under the 2000 Act that may be used to save a burden, the various courses open to the superior are mutually exclusive. A choice must be made as to which mechanism would be used though this would not necessarily be final. A different option could be pursued later, before feudal abolition, provided the appropriate steps are taken to deal with the notice or agreement first sent. In other words it would not be possible to save a pre-emption as a personal real burden under section 18A and then save it again under section 18.

453. Subsection (2) introduces two new sections into the 2000 Act, sections 18B and 18C. The new **section 18B**. This is concerned with economic development burdens. Section 18B enables a local authority or the Scottish Ministers to preserve rights to enforce certain real burdens by converting those burdens into economic development burdens. This is only possible where the burden was imposed for the purpose of promoting economic development.

454. Subsection (1) allows a local authority or the Scottish Ministers as superior to register a notice in the form contained in schedule 5B of the 2000 Act (inserted by schedule 13 of the Act) to convert a feudal burden into an economic development burden. The local authority or the Scottish Ministers, as the case may be, must be able to enforce the burden before the appointed day in order for it to be converted. Registration must occur before the appointed day.

455. Subsection (2) provides for the content of the notice of conversion.

456. Subsection (3) stipulates that if the requirements of subsections (1) and (2) are complied with and the burden is enforceable by the superior immediately prior to the appointed day, the burden shall be converted into an economic development burden on the appointed day. The *dominium utile* is the burdened property in respect of the obligation.

457. Subsection (4) provides that the right to enforce a burden converted into an economic development burden is subject to any counter obligation due by the local authority, or as the case may be, the Scottish Ministers.

458. Subsection (5) makes section 18B subject to sections 41 and 42 of the 2000 Act on registration of a notice. These sections are discussed above in relation to the new section 18A(9).

459. The new **section 18C** introduced by subsection (2) into the 2000 Act is concerned with health care burdens. Section 18C enables a National Health Service trust or the Scottish Ministers to preserve rights to enforce certain real burdens by converting those burdens into health care burdens. This is only possible where the burden was imposed for the purpose of promoting the provision of facilities for health care. National Health Service trusts are bodies established by order under section 12A of the National Health Service (Scotland) Act 1978.

460. Subsection (1) allows a National Health Service trust or the Scottish Ministers as superior to register a notice in the form contained in schedule 5C of the 2000 Act (inserted by schedule 13

of the Act) to convert a feudal burden into a health care burden. The National Health Service trust or the Scottish Ministers, as the case may be, must be able to enforce the burden before the appointed day in order for it to be converted. Registration must occur before the appointed day.

461. Subsection (2) provides for the content of the notice of conversion.

462. Subsection (3) stipulates that if the requirements of subsections (1) and (2) are complied with and the burden is enforceable by the superior immediately prior to the appointed day, the burden shall be converted into a health care burden on the appointed day. The *dominium utile* is the burdened property in respect of the obligation.

463. Subsection (4) provides that the right to enforce a burden converted into a health care burden is subject to any counter obligation due by the trust, or as the case may be, the Scottish Ministers.

464. Subsection (6) makes section 18C subject to sections 41 and 42 of the 2000 Act on registration of a notice. These sections are discussed above in relation to the new section 18A(9).

465. *Subsection (3)* of section 114 provides for the new **section 27A** of the 2000 Act.

466. Subsection (1) of section 27A enables superiors who are not prescribed as conservation bodies to transfer the right to enforce a burden which meets the criteria for conservation burdens in section 27 of the 2000 Act to a conservation body or the Scottish Ministers. The definition of conservation burdens in section 27(2) of the 2000 Act is repeated in section 38(1) of this Act. The superior would have to register a notice in the form contained in schedule 8A of the 2000 Act (inserted by schedule 13 of the Act).

467. Subsection (2) requires the consent of the conservation body (or, where the nominee is the Scottish Ministers, the consent of the Scottish Ministers) that is being nominated before the nomination can become effective.

468. Subsection (3) states that the notice must comply with section 27(3) of the 2000 Act. This requires the notice to set out the title of the superior; describe the land subject to the real burden (or any part of that land); the terms of the real burden; and any counter-obligation to the real burden enforceable against the superior.

469. Subsection (4) incorporates the terms of sections 41 and 42 of the 2000 Act on registration of a notice.

470. *Subsection (4)* of section 114 provides for the new **section 28A** of the 2000 Act. This section is similar to section 28(1) of the 2000 Act. It ensures that the conservation body being nominated under section 27A will have title to enforce the re-allotted burden and will be presumed to have interest to enforce it. The section requires that the burden being transferred by the superior would have been enforceable by the superior immediately before the appointed day.

471. *Subsection (5)* of section 114 provides for the new **section 65A** of the 2000 Act. This section is concerned with sporting rights. These are fishing and game rights that the superior has reserved when feuing the land to the vassal. This section permits sporting rights which are enforceable by a superior prior to the appointed day to be converted into separate tenements in land by the registration of a notice.

472. *Subsection (1)* of section 65A allows a superior to register a notice in the form contained in schedule 11A of the 2000 Act (inserted by schedule 13 of the Act) to convert sporting rights enforceable by a superior into a separate tenement in land. This tenement is not the same as a real burden in favour of a benefited property, or even a personal real burden such as a conservation burden. As a separate tenement it would be regarded as an independent, self-standing property right. The sporting right must be valid before the appointed day in order to be converted. Registration must occur before the appointed day.

473. *Subsection (2)* provides for the content of the notice of conversion.

474. *Subsection (3)* adopts the requirement in section 18(4) of the 2000 Act for the superior to swear or affirm before a notary public that to the best of their knowledge all of the information contained in the notice is true. The sanctions of the False Oaths (Scotland) Act 1933 would apply in the event that the oath or affirmation was known to be false or not believed to be true.

475. *Subsection (4)* adopts the provisions in section 18(5) of the 2000 Act to allow a legal representative of the superior to sign on their behalf if by reason of legal disability or incapacity they are unable to swear or affirm for the purposes of subsection (3). Similarly, the subsection also adopts the provision of the 2000 Act allowing an authorised person to sign on behalf of a superior who is not an individual (e.g. a company).

476. *Subsection (5)* stipulates that if the requirements of subsections (1) to (3) are complied with and the sporting right is enforceable by the superior immediately prior to the appointed day, then it shall be converted into a tenement in land on the appointed day. The *dominium directum* is the superiority interest of the superior.

477. *Subsection (6)* makes clear that nothing in the new provisions confers an exclusive right to sporting rights on the former superior. The section will not give a former superior an improved right to the one that existed before feudal abolition. A non-exclusive right would remain non-exclusive.

478. *Subsection (7)* treats each part of the *dominium utile* that is in different ownership as a separate unit. For example, where the original *dominium utile* had been split into 5 different units, 5 separate notices would be required and 5 separate tenements of sporting rights would be created.

479. *Subsection (8)* ensures that any counter-obligation that the superior was obliged to perform prior to the appointed day as a consequence of the sporting right shall continue. The reference to section 47 of the 2000 Act entails that on the extinction of a sporting right, any counter-obligation which is a counterpart of the right is also extinguished.

480. Subsection (9) provides a simple definition of sporting rights, superseding that in the definition of “real burden” in section 49 of the 2000 Act, which is repealed by schedule 15. Paragraph 10(e) of schedule 13 amends section 49 of the 2000 Act to make it clear that sporting rights are not real burdens for the purposes of Part 4 of the 2000 Act. This ensures that it is not possible to preserve sporting rights by registration of notices under Part 4 but only by a notice registered under section 65A. Paragraph 11(a)(ii) makes it clear that if no notice is registered under section 65A then sporting rights are extinguished under section 54 of the 2000 Act.

481. Subsection (10) makes section 65A subject to section 41 of the 2000 Act on registration of a notice. This will require the superior to give notice to the owner of the servient tenement of the attempt to reallocate the sporting right.

482. Subsection (11) applies subsections (1) and (2)(a) of section 43 of the 2000 Act to a notice made under section 65A. Section 43(1) provides that the Keeper of the Registers need not determine whether the superior has notified the owner of the dominium utile as required by section 41(3). Subsection (2)(a) of section 43 states that the Keeper will not be required to determine if the Superior had the ability to enforce the right in question. Subsection (5) of section 65A requires the sporting right to be enforceable by the superior immediately before the appointed day. The reference to section 43(3)(a) of the 2000 Act means that the Keeper need not make this determination.

483. As the 2000 Act will no longer treat sporting rights as real burdens they will not be extinguished by section 17 but rather by section 54 if no notice is registered before the appointed day. The adoption of section 46(1), (3) and (4) of the 2000 Act by subsection 12 means that the Keeper need not remove sporting rights extinguished by section 54 from the register unless there is an application for registration or rectification or the Keeper is ordered to remove it by the Lands Tribunal or a court. The Keeper also cannot remove a sporting right which is subject to proceedings in a court or the Lands Tribunal.

484. *Subsection (6)* of section 114 introduces some minor amendments to the 2000 Act, detailed in schedule 13. The amendments take effect on the day after Royal Assent (section 129(3)), and hence before the relevant provisions of the 2000 Act come into force.

### **Section 115: Further provision as respects notices of preservation or of converted servitude**

485. This section contains some supplementary rules in relation to notices of preservation (section 50) and of converted servitude (section 80).

486. *Subsections (2) and (3)* are based on section 41(3) and (4) of the 2000 Act. They impose a duty, in the normal case, to send a copy of the notice (and explanatory note) to the owner of the burdened property. Normal service will be by post and must precede registration. The notice must contain a statement about service, or an explanation as to why service was not reasonably practicable. Further provisions about sending are contained in section 124.

487. *Subsection (4)* allows all real burdens or servitudes contained in any particular constitutive deed to be included in a single notice.



488. *Subsection (5)* is based on section 43(1) of the 2000 Act and relieves the Keeper from having to verify that the notice was duly sent to the owner of the burdened property.

489. A notice which is incomplete or inaccurate may be rejected by the Keeper. Such a rejection might be challenged in the Lands Tribunal or the courts. *Subsections (6) to (8)* are based on section 45 of the 2000 Act. They allow registration outwith the ten year period in circumstances where a notice has been wrongly rejected by the Keeper. The notice would have to be registered within two months of the determination that the notice was in actual fact registrable.

### **Section 116: Benefited property outwith Scotland**

490. This section reaffirms the common law rule that a benefited property (but not a burdened property) can be outside Scotland. It also makes clear that, in such a case, there is to be no requirement of registration against the benefited property (for example, under sections 4(5), 50(3) and 80(6)).

### **Section 117: Pecuniary real burdens**

491. A pecuniary real burden is a heritable security constituted by reservation in a conveyance. Where property was being conveyed, a right in security in respect of an existing obligation could be reserved. It is unclear whether it is still competent to create pecuniary real burdens. *Section 117* removes the doubt by disallowing new pecuniary burdens. The provision comes into force on the day after Royal Assent (section 129(3)).

### **Section 118: Common interest**

492. Common interest comprises rights and obligations arising by operation of law between owners of certain properties typically flats in a tenement. The right of common interest bears a resemblance to real burdens as it runs with the land. Normally common interest arises simply by force of law: it is implied and it is open to question whether such a right can be created by express agreement. If express creation were possible, common interest could be used as a substitute for real burdens and hence as a means of avoiding the provisions of this Act. Accordingly, *section 118* makes clear that common interest cannot be expressly created. Section 118 comes into force on the day after Royal Assent (section 129(3)).

## **PART 11: SAVINGS, TRANSITIONAL AND GENERAL**

### **Section 119: Savings and transitional provisions etc.**

493. The savings and transitional provisions contained in this section have, for the most part, already been discussed in the appropriate context. Only a few need be mentioned here.

494. As *subsection (1)* acknowledges, the division between the old law and the new is, usually, the time of registration of the deed in question. Burdens discharged, varied or created by deeds registered before the appointed day are governed by the old law. Deeds registered on or after the appointed day are governed by the provisions of the Act. Section 4(1), for example, provides that a real burden is created 'by duly registering' the constitutive deed. Similarly, section 15(1)

provides that a burden is discharged ‘by registering’ a deed of discharge. Sometimes, as with the creation of real burdens, the new law imposes more exacting standards than the old; but, as subsection (1) makes clear, the new standards are to apply only prospectively.

495. The Act, following the common law, requires the use of a deed for a number of juridical acts in relation to real burdens — most notably creation, variation and discharge. Strictly, section 3(1) of the 1979 Act does not: in other words, if a real burden is entered on (or deleted from) the Land Register, the entry or deletion is legally effective under that provision notwithstanding the absence of a valid underlying deed. The Register would then be inaccurate, however, and vulnerable to rectification under section 9 of the Act. The purpose of *subsection (2)* is to preserve this rule of land registration.

496. Section 10 provides for circumstances in which a former owner will retain liability in respect of an obligation due when that person ceased to be owner. *Subsection (5)* disapplies this new rule where the transfer of ownership took place before the appointed day.

497. *Subsection (6)* provides that a breach of a real burden occurring before the appointed day cannot be subject to the new provisions for acquiescence made by section 16.

498. By virtue of *subsection (7)*, contractual liability will continue to exist in parallel to the terms of a real burden created in a deed registered before the appointed day. However, community burdens are excepted from this: any incidental contractual liability that duplicates a community burden will cease, regardless of the date of creation.

### **Section 120: Requirement for dual registration**

499. This section prevents a deed which requires, under the Act, to be registered against both properties, from being registered against one property only. The provision is aimed particularly at dispositions containing new real burdens. If the disponee were able to register against the property being conveyed only (as under current practice), the effect would be to transfer the property free of the burdens.

### **Section 121: Crown application**

500. This section makes it clear that the Act applies to all land owned by the Crown in Scotland, including property belonging to Government Departments as well as the private estates of Her Majesty and His Royal Highness The Prince of Wales.

### **Section 122: Interpretation**

501. Only a small number of the definitions require explanation here.

- *appointed day*. This is the date on which most of the 2000 Act comes into force, and on which the feudal system is abolished. Section 129(2) provides that some of the Act will also come into force on this day. The day is to be fixed by the Scottish Ministers by order.

- *facility burden.* This definition substantially replicates the (unnamed) definition in section 23(1), (3) and (4) of the 2000 Act (which is repealed by schedule 15 of this Act). The purpose of *subsection (2)* is to exclude obligations, typically in relation to roads and sewers, which have been assumed by a local authority or other public body since the maintenance of the common facility is covered already without the need to transfer the right to enforce the burden. The list of facilities in *subsection (3)* is intended to be illustrative and not exhaustive.
- *holder.* The words ‘has right’ import the idea that the title might not have been completed by registration. See for example section 40.
- *land.* The definition includes separate tenements such as minerals and salmon fishings. The exclusion of *dominium directum* (feudal superiority) is to prevent any argument that, for example, a superiority could be the subject of a notice of preservation under section 50 (All superiorities will be extinguished on the appointed day under section 2(2) of the 2000 Act).
- *maintenance.* The definition ensures that maintenance includes repairs. This does not include out and out improvement, but there is a concept of ‘betterment’ in which a facility is replaced or repaired using a more modern technique. In their Report on the Law of the Tenement (Scot Law Com No. 162), the Scottish Law Commission express the opinion that “it is maintenance of a tenement to replace lead piping with copper, or to replace Victorian pull-bells with an entryphone system.” Converting a flat roof into a pitched one might be considered to be an improvement rather than maintenance or repair.
- *personal pre-emption burden* and *personal redemption burden.* Rights of pre-emption or redemption which were enforceable by a superior prior to the appointed day may by the registration of a notice be converted into personal real burdens (i.e. burdens without a benefited property). See the note on section 114.
- *service burden.* This definition substantially replicates the (unnamed) definition in section 23(2) of the 2000 Act (which is repealed by schedule 15 of this Act).
- *title condition.* This definition follows the substance, though not the form, of the definition of ‘land obligation’ given in section 1(2) of the Conveyancing and Feudal Reform (Scotland) Act 1970 (which is repealed by schedule 15 of this Act). ‘Title condition’ is the replacement term for ‘land obligation’. Paragraphs (c) and (f) are not currently covered by the term ‘land obligation’. Paragraph (g) allows the Scottish Ministers to add to the list.

### **Section 123: The expression ‘owner’**

502. This section defines ‘owner’. The first half of *subsection (1)* sets out the general rule. An owner is a person who ‘has right’ to property (a term familiar from sections 3 and 4 of the

Conveyancing (Scotland) Act 1924). A person ‘has right’ if he is grantee of a delivered conveyance (or equivalent). Registration is not required.

503. More than one person might be owner within this definition. If ownership is held concurrently, as with *pro indiviso* owners, this presents no particular difficulty. But the position is, or may be, different, with consecutive owners. The second half of subsection (1) deals with this problem. If two or more people acquiring rights consecutively are capable of falling within the definition, the ‘owner’ is to be the last of them (paragraph (b)) — except for the purposes of the provisions listed in paragraph (a) relating to the creation or discharge of burdens.

504. *Subsection (2)* introduces a special rule where a heritable creditor is in possession of the property. A heritable creditor in possession is to be the owner in substitution for the debtor except when burdens are being created, varied or discharged, where the heritable creditor is treated as one of the owners.

505. The effect of paragraph (a) of *subsection (3)* is to exclude heritable creditors in possession from section 60(1) (which is concerned with deduction of title).

#### **Section 124: Sending**

506. Paragraph (a) of *subsection (1)* makes clear that it is sufficient if the thing to be sent is sent to the person’s solicitor or other agent. Paragraph (b) provides a solution where the person’s name is unknown, and excuses the sender from attempts to discover it.

507. *Subsection (2)* explains how a thing may be sent.

508. *Subsection (3)* gives the rule as to when a thing is considered to have been sent.

#### **Section 125: References to distance**

509. This section explains how the four metre distance (see for example sections 21(3) and 32) is to be calculated. The distance is calculated on the horizontal plane. This means that all properties are treated as being on the same level. For instance in a tenement, the flats above or below would be treated as being zero metres away, regardless of the vertical distance between each property.

510. Paragraph (a) follows the rule for neighbour notification set out in article 2(1) of the Town and Country Planning (General Development Procedure) (Scotland) Order 1992, SI 1992/224 (paragraph (d) of definition of ‘neighbouring land’). ‘Road’ has the meaning given by section 151(1) of the Roads (Scotland) Act 1984 (section 122 (1)).

511. Paragraph (b) ensures that measurements are taken from the property itself and not from, for example, an access roadway in respect of which the property has, as a pertinent, a *pro indiviso* share. It is the ownership of pertinents not their dimensions which is to be disregarded so measurement is taken from the property *not* its pertinent.

### **Section 127: Orders, regulations and rules**

512. At various points the Act empowers the Scottish Ministers to make orders, regulations or rules. *Section 127* explains how this is to be done.

### **Section 129: Short title and commencement**

513. *Subsection (2)* provides that most of the Act is not to come into force until the appointed day, i.e. the day on which the feudal system is abolished (section 122(1)). See the explanatory note on the term 'appointed day' in section 122.

514. The provisions set out in *subsection (3)* come into force on the day after Royal Assent. The provisions in *subsection (4)* come into force on a day or days to be appointed by the Scottish Ministers which may be different from the appointed day referred to above. Part 3 deals with personal real burdens and Part 6 with the Development Management Scheme. Sections 106 to 110 mostly deal with compulsory purchase and land acquisition in the shadow of compulsory purchase powers.

### **Schedule 1: Form importing terms of title conditions**

515. This is the form of words referred to in section 6(2) for importing title conditions by reference to a deed of conditions. This replaces the form of words in schedule H to the Conveyancing (Scotland) Act 1874 which is repealed by schedule 15.

### **Schedule 2: Form of notice of termination**

516. This is the statutory form of notice prescribed by section 20(1) for the termination of real burdens which are at least 100 years old. The schedule includes an explanatory note and notes for completion of the notice. See further sections 20 to 24 of the Act on the termination procedure.

### **Schedule 3: Form of affixed notice relating to termination**

517. Section 21 provides 3 different mechanisms for the intimation of a 'sunset rule' application proceeding under section 20 of the Act (for the termination of real burdens that are at least 100 years old). The statutory form of intimation in schedule 3 is to be used with the mechanism outlined in paragraph (b) of subsection (2). The schedule includes notes for completion of the notice.

### **Schedule 4: Form of notice of proposal to register deed of variation or discharge**

518. This is the statutory form of notice for where a community burden is to be varied or discharged by the owners of a majority of units under section 33 in relation to one or more burdened properties. Under section 34(2) a notice in, or as near as may be in, the form of schedule 4 must be sent to the owners of the units that have not granted the deed. The schedule includes an explanatory note and notes for completion of the notice.

**Schedule 5: Further form of notice of proposal to register deed of variation or discharge of community burden: sent version**

519. This is one of the 2 statutory forms of notice for where a community burden is to be varied or discharged by a deed granted by the owners of the units adjacent to a burdened property under section 35. Under paragraph (a) of section 36(2) notice may be given in, or as near as may be in, the form of schedule 5 by sending it along with the deed to the owners of the other benefited properties in the community. The schedule includes an explanatory note and notes for completion of the notice.

**Schedule 6: Further form of notice of proposal to register deed of variation or discharge of community burden: affixed version**

520. This is the second statutory form of notice for where a community burden is to be varied or discharged by a deed granted by the owners of the units adjacent to a burdened property under section 35. Under paragraph (b) of section 36(2) notice may be given in, or as near as may be in, the form of schedule 6 by a conspicuous notice affixed to each affected unit and such lamp posts as may be required by the paragraph. The schedule includes notes for completion of the notice.

**Schedule 7: Form of notice of preservation**

521. This is the statutory form of notice prescribed by section 50(1) for the preservation of the status of benefited property in circumstances where that status is currently implied by common law. The schedule includes an explanatory note and notes for completion of the notice. See further sections 50 and 115 of the Act.

**Schedule 8: Community consultation notice**

522. This is the statutory form of notice for where a community burden is to be varied or discharged by the owners of a majority of units in a sheltered or retirement housing development under section 33. Under section 55 before a deed of variation or discharge is granted, a notice in, or as near as may be in, the form of schedule 8 must be sent to the owners of the units in the development. The schedule includes an explanatory note and notes for completion of the notice.

**Schedule 9: Form of notice of converted servitude**

523. This is the statutory form of notice prescribed by section 80(4) for the preservation of certain of the negative servitudes which were converted, on the appointed day, into real burdens. The schedule includes an explanatory note and notes for completion of the notice. See further sections 80(4) to (8) and 115 of the Act.

**Schedule 10: Form of undertaking**

524. This is the statutory form of undertaking not to exercise a right of pre-emption, prescribed by section 83(1)(a). A pre-emption holder who did not wish to exercise their right to purchase could be approached to sign this undertaking. The schedule includes notes for completion of the undertaking. See further sections 82 and 83 of the Act.

### **Schedule 11: Title Conditions not subject to discharge by Lands Tribunal**

525. This schedule lists those title conditions which are not subject to discharge by the Lands Tribunal under Part 9 of the Act. The list is based on the equivalent list in schedule 1 of the Conveyancing and Feudal Reform (Scotland) Act 1970 (which is repealed by schedule 15 of this Act). Paragraph 1 of that list (obligation to pay rent) has been incorporated directly into the definition of 'title condition' (for which see section 122(1)).

### **Schedule 12: Form of application for relevant certificate**

526. This schedule provides the form of certificate defined in section 107(11). The certificate is to provide for any title conditions that are not to be extinguished (or not to be extinguished in relation to a particular benefited property) where land has been acquired by agreement. The schedule includes notes for completion of the application.

### **Schedule 13: Amendment of Abolition of Feudal Tenure etc. (Scotland) Act 2000**

527. Schedule 13 contains amendments to the 2000 Act. The amendments come into force on the day after Royal Assent (section 129(3)).

#### *Paragraph 2.*

528. Section 17(1) of the 2000 Act extinguishes superiors' rights to enforce real burdens, subject to some savings. The amendments add further savings. Section 18A (on personal pre-emption burdens and personal redemption burdens), section 18B (on economic development burdens), section 18C (on health care burdens) and section 27A (on conservation burdens) are new sections inserted by section 114 of the Act. Sections 52 to 56 of the Act create new enforcement rights for existing burdens in place of the implied enforcement rights which are extinguished by section 49 of the Act. Section 56 replaces section 23 of the 2000 Act (which is repealed by schedule 15). The saving for manager burdens is the counterpart of section 63(10).

529. The change to paragraph (b) of section 17(1) is to ensure that it is only a person's right to enforce a burden as a feudal burden that is extinguished on the appointed day. If the same person can enforce a burden in another capacity, for example as the owner of nearby land or as the holder of a conservation burden, health care burden or economic development burden then this right to enforce is unaffected.

530. The introduction of the new paragraph (aa) into subsection (3) of section 17 ensures that where there is an ongoing action or an existing decree or interlocutor as at the appointed day in respect of a feudal burden then this will be unaffected if the right to enforce the burden is preserved under one of the provisions mentioned in section 17(1).

#### *Paragraph 3.*

531. Sub-paragraph (a) makes consequential reference to the new provisions inserted by section 114 of the Act. The insertion of subsection 6A by sub-paragraphs (b) and (c) ensures that registration of a notice to reallocate a feudal burden under section 18 of the 2000 Act does not

preserve a right to enforce a manager burden. Sub-paragraph (d) excludes sporting rights from the category of rights described as “rights to enter, or otherwise make use of, property” in section 18(7)(b)(i).

*Paragraph 4.*

532. This alters the test to be applied by the Lands Tribunal when determining whether a superior may preserve a right to enforce a feudal burden by converting it into an ordinary burden under section 20 of the 2000 Act. The test is derived from the test for interest to enforce in section 8(3) of the Act.

*Paragraph 5.*

533. Section 25 of the 2000 Act provides that on reallocation of a real burden the right to enforce is subject to any counter-obligation. The reference to reallocation under section 23 of the 2000 Act (to be repealed) is replaced by a reference to reallocation under section 56 of the Act. A reference to reallocation of manager burdens is added.

*Paragraph 6.*

534. The amendment to section 27(3)(a) of the 2000 Act is consequential on the repeal (by schedule 15 of the Act) of section 26 of the 2000 Act and its replacement by section 38 of the Act. Section 27A is a new section inserted by section 114 of the Act.

*Paragraph 7.*

535. The amendments to subsections (1), (3) and (4) are consequential to the introduction by section 114 of the Act of new sections 18A, 18B, 18C and 27A into the 2000 Act. Section 42 of the 2000 Act provided that where a superior has a choice of several of the procedures under the 2000 Act that may be used to save a burden the various options are mutually exclusive. The new subsection (5) mirrors section 116 of the Act and permits feudal burdens to be preserved in favour of land outwith Scotland.

*Paragraph 8.*

536. Section 43 of the 2000 Act provides that the Keeper of the Registers does not have responsibility for determining whether the superior has complied with the notification requirements of section 41(3) or if the superior had the ability to enforce the right in question. The amendments are consequential upon the introduction of new sections 18A, 18B, 18C and 27A by section 114 of the Act.

*Paragraph 10.*

537. Sub-paragraph (a) alters the definition of conservation body in consequence of the repeal (by schedule 15 of the Act) of section 26 of the 2000 Act and its replacement by section 38 of



*These notes relate to the Title Conditions (Scotland) Act 2003 (asp 9)  
which received Royal Assent on 3 April 2003*

the Act. Sub-paragraph (b) adds the new section 27A inserted by section 114 of the Act to the scope of section 49 of the 2000 Act. Sub-paragraphs (c) and (d) inserts definitions as a consequence of section 114. Sub-paragraph (e) ensures that sporting rights are not treated as real burdens for the purposes of Part 4 of the 2000 Act.

*Paragraph 11.*

538. This paragraph provides that where a holder of sporting rights has taken action to preserve them under section 65A of the 2000 Act, they will not be extinguished under section 54(1) of the 2000 Act.

*Paragraph 12.*

539. This amendment replaces the reference in section 56 of the 2000 Act to 'land obligation' with a reference to 'title condition'. The term 'land obligation' is used in sections 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970 to identify the rights which are capable of discharge by the Lands Tribunal. Sections 1 and 2 of the 1970 Act are repealed by schedule 15 of the Act. The replacement term in the Act is 'title condition' (defined in section 122(1)). The change is one of name rather than of substance.

*Paragraph 13.*

540. Section 73 of the 2000 Act makes provision for the automatic translation of certain feudal terms which might be found in deeds or enactments dating from before the appointed day but having to be applied after that date. The amendments make some minor changes to the timing of the provisions in section 73. The amendment in sub-paragraph (b)(iii) reflects the repeal of section 23 of the 2000 Act and its replacement by section 56 of the Act (which provides for the preservation and creation of rights to enforce facility burdens).

541. The new subsection (2A) inserted by sub-paragraph (c) provides that a provision in a document or in an entry in the Land Register which states that a real burden may be waived with the consent of a stated party shall be disregarded unless the reference in the document or entry is a reference to a superior and that reference is in terms of section 73(2) of the 2000 Act to be construed as a reference to the person entitled to enforce under one of the provisions listed in that subsection.

*Paragraph 14.*

542. The insertion of a subsection (2) into section 75 of the 2000 Act ensures that contractual obligations which were incidental to feudal burdens will only remain where the original vassal remains the owner of the property.

*Paragraph 15.*

*These notes relate to the Title Conditions (Scotland) Act 2003 (asp 9)  
which received Royal Assent on 3 April 2003*

543. This makes a minor change to the commencement provision to allow the Scottish Ministers to bring section 63 of the 2000 Act into force by order.

*Paragraph 16.*

544. This amendment inserts new schedules into the 2000 Act. Schedule 5A contains the form of notice to prospectively convert a real burden into a personal pre-emption burden or personal redemption burden. Schedules 5B and 5C contain the forms of notice to prospectively convert a real burden into an economic development burden or a health care burden respectively. The schedules include explanatory notes and notes for completion of the notice. See the new sections 18A, 18B and 18C of the 2000 Act as inserted by section 114 of the Act.

*Paragraph 17.*

545. This amendment substitutes note 1 in the notes for completion of the notice to schedule 8 to the 2000 Act (form of notice to preserve a conservation body or the Scottish Ministers' right to a real burden).

*Paragraph 18.*

546. This amendment inserts a new schedule 8A into the 2000 Act containing the form of notice nominating a conservation body or the Scottish Ministers to have title to enforce a real burden. The schedule includes an explanatory note and notes for completion of the notice. See the new section 27A of the 2000 Act as inserted by section 114 of the Act.

*Paragraph 19.*

547. This amendment inserts a new schedule 11A into the 2000 Act containing the form of notice to prospectively convert sporting rights into a tenement in land. The schedule includes an explanatory note and notes for completion of the notice. See the new section 65A of the 2000 Act as inserted by section 114 of the Act.

*Paragraph 20.*

548. This corrects a technical error.

**Schedule 14: Minor and consequential amendments**

*Registration of Leases (Scotland) Act 1857 (c.26).*

549. Following the repeal of section 32 of the Conveyancing (Scotland) Act 1874 and section 17 of the Land Registration (Scotland) Act 1979 by schedule 15 of the Act, this amendment provides an alternative mechanism for creating conditions or stipulations which may be specified in an assignation under section 3(2) of the 1857 Act and for postponing the date of effectiveness of such conditions or stipulations.

*These notes relate to the Title Conditions (Scotland) Act 2003 (asp 9)  
which received Royal Assent on 3 April 2003*

*Titles to Land Consolidation (Scotland) Act 1868 (c.101).*

550. This amendment ensures consistency with the amendment to section 8 of the 1868 Act made in schedule 12 paragraph 8(4)(a) of the 2000 Act.

*Conveyancing (Scotland) Act 1924 (c.27).*

551. Following the repeal of section 40(3) of this Act by schedule 15, this amendment to section 40(2) makes it clear that a heritable creditor can create real burdens after the appointed day by whatever methods may be competent.

*Conveyancing and Feudal Reform (Scotland) Act 1970 (c.35).*

552. This amendment is made necessary by (i) the repeal by schedule 15 of the Act of sections 1 and 2 of the 1970 Act, and (ii) the consequential repeal, also by schedule 15, of schedule 12 paragraph 30(6)(d)(ii) of the 2000 Act (which replaced the definition of ‘interest in land’ in section 9 of the 1970 Act with a definition of ‘real right in land’ as defined in sections 1 and 2 of the 1970 Act). The new definition is in substance the same as that introduced by the 2000 Act. The new subsection 2B is a consequence of the new section 18A introduced by section 114 of the Act. Sub-paragraphs (3) to (5) make consequential amendments to terminology.

*Prescription and Limitation (Scotland) Act 1973 (c.52).*

553. Sub-paragraph (2) amends section 1 of the 1973 Act in the version which is substituted, from the appointed day, by schedule 12 paragraph 33(2) of the 2000 Act. The purpose is to make clear that the right to a real burden cannot be acquired by positive prescription.

554. Sub-paragraph (3) replaces the reference to ‘land obligation’ with a reference to ‘title condition’. The term ‘land obligation’ is used in sections 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970 to identify the rights which are capable of discharge by the Lands Tribunal. Sections 1 and 2 of the 1970 Act are repealed by schedule 15 of the Act. The replacement term in the Act is ‘title condition’ (defined in section 122(1)) the change being one of name rather than of substance.

555. Sub-paragraph (4) makes an amendment of terminology which was overlooked by paragraph 33 of schedule 12 to the 2000 Act.

*Land Tenure Reform (Scotland) Act 1974 (c.38).*

556. This amendment replaces the reference to ‘land obligation’ with a reference to ‘title condition’. The term ‘land obligation’ is used in sections 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970 to identify the rights which are capable of discharge by the Lands Tribunal. Sections 1 and 2 of the 1970 Act are repealed by schedule 15 of the Act. The replacement term in the Act is ‘title condition’ (defined in section 122(1)). The change is one of name rather than of substance.

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*Land Registration (Scotland) Act 1979 (c.33).*

557. The amendments in sub-paragraph (2) are consequential on the repeal, in schedule 15, of sections 17 and 18 of the 1979 Act.

558. For the most part sub-paragraph (3) repeats an amendment made prospectively by schedule 12 paragraph 39(3)(c) of the 2000 Act (which is repealed by schedule 15 of the Act). This is necessary because the amendment is capable of relating to Part 3 of the Act. Sub-paragraph (3) comes into force on the day after Royal Assent (section 129(3)) — and not on the appointed day, as was the position under the 2000 Act. The only addition to the earlier version of the amendment is a reference to section 41(a) of the Act. This makes clear that it is not necessary to expedite a notice of title in the case of a conservation burden which is already on the Land Register.

559. Sub-paragraph (4) extends the meaning of “condition” in section 6 to include servitudes created by a deed registered under section 75(1) and rules of the development management scheme.

560. Sub-paragraph (5) amends section 12(3) of the 1979 Act to ensure that the provisions on the Keeper’s indemnity do not extend to the enforceability of sporting rights registered in the Land Register. It also extends the meaning of condition to include a rule of the development management scheme. Servitudes created under section 75 are already covered by section 12(3)(1) of the 1979 Act.

561. Sub-paragraph (6) repeats an amendment made prospectively by schedule 12 paragraph 39(6)(b) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (which is repealed by schedule 15 of the Act). This is necessary because the amendment is capable of relating to Part 3 of the Act. Sub-paragraph (4) comes into force on the day after Royal Assent (section 129(3)) — and not on the appointed day, as was the position under the 2000 Act.

562. Sub-paragraph (7) amends section 28(1) as a consequence of the treatment of sporting rights as separate tenements under section 65A of the 2000 Act (as inserted by section 114 of the Act). As a result, a sporting right registered in the Land Register will have its own title sheet.

*Ancient Monuments and Archaeological Areas Act 1979 (c.46).*

563. Section 17(7)(b), which provides that sections 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970 are not to apply to agreements made under section 17, is repealed as (i) sections 1 and 2 of the 1970 Act are repealed by schedule 15 of the Act, and (ii) a section 17 agreement would not fall within the successor provisions (i.e. Part 8 of the Act) because they are not ‘title conditions’ as defined in section 122(1).

*Health and Social Services and Social Security Adjudications Act 1983 (c.41).*

564. Section 23(1)(b) refers to an ‘interest in land’ as defined in section 9(8) of the Conveyancing and Feudal Reform (Scotland) Act 1970. That definition has now been replaced

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by a definition of ‘real right in land’ (see schedule 14, paragraph 4 of this Act). This amendment makes the necessary adjustment to section 23.

565. Feudal terminology is also replaced, following the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

*Further and Higher Education (Scotland) Act 1992 (c.37).*

566. This amendment replaces the reference to ‘land obligations’ with a reference to ‘title conditions’. The term ‘land obligation’ is used in sections 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970 to identify the rights which are capable of discharge by the Lands Tribunal. Sections 1 and 2 of the 1970 Act are repealed by schedule 15 of the Act. The replacement term in the Act is ‘title condition’ (defined in section 122(1)), the change being one of name rather than of substance.

*Crofters (Scotland) Act 1993 (c.44).*

567. This amendment to section 16(6) replaces the reference to ‘land obligations’ with a reference to ‘title conditions’. The term ‘land obligation’ is used in sections 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970 to identify the rights which are capable of discharge by the Lands Tribunal. Sections 1 and 2 of the 1970 Act are repealed by schedule 15 of the Act. The replacement term in the Act is ‘title condition’ (defined in section 122(1)), the change being one of name rather than of substance.

*Standards in Scotland’s Schools etc. Act 2000 (asp 6).*

568. This amendment to section 58(1) replaces the reference to ‘land obligations’ with a reference to ‘title conditions’. The term ‘land obligation’ is used in sections 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970 to identify the rights which are capable of discharge by the Lands Tribunal. Sections 1 and 2 of the 1970 Act are repealed by schedule 15 of the Act. The replacement term in the Act is ‘title condition’ (defined in section 122(1)), the change being one of name rather than of substance.

*Mortgage Rights (Scotland) Act 2001 (asp.11)*

569. This paragraph makes consequential changes to the terminology used by the Mortgage Rights (Scotland) Act 2001 to reflect the changes made by paragraph 4 of Schedule 14 to the Conveyancing and Feudal Reform (Scotland) Act 1970.

### **Schedule 15: Repeals**

570. This schedule deals with the repeals that are made necessary or possible as a result of the reform of the law of real burdens and related reforms.

*Registration Act 1617.*

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571. References to reversions and regresses are removed in consequence of the repeal of the Reversion Act 1469 by section 89 of the Act.

*Redemptions Act 1661.*

572. The Act is wholly obsolete and is repealed with the repeal of the Reversion Act 1469 by section 89 of the Act.

*Registration of Leases (Scotland) Act 1857: section 3.*

573. Section 3(5) falls in consequence of the repeal of section 32 of the Conveyancing (Scotland) Act 1874 and section 17 of the Land Registration (Scotland) Act 1979 by this schedule.

*Conveyancing (Scotland) Act 1874: section 32 and Schedule H.*

574. The first half of section 32 repeats a power that is already available at common law. The second half of section 32 (which permits the creation of a real burden in a deed of conditions) is repealed in consequence of section 4(2) of the Act. In future it will be possible to create a real burden using any deed which satisfies the conditions set out in section 4(2).

*Conveyancing (Scotland) Act 1924. Section 9, Schedule E.*

575. This section, which exempts heritable securities from having to contain burdens and provides a mechanism for other cases where burdens have been omitted, is repealed as a result of section 68 of the Act.

576. Section 40(3), which enables a heritable creditor to create real burdens by using a deed of conditions under section 32 of the Conveyancing (Scotland) Act 1874, is repealed following the repeal of section 32 itself. See also the note to paragraph 3 of schedule 13.

577. The repeal in schedule B is consequential on the repeal by this schedule of section 32 and schedule H of the Conveyancing (Scotland) Act 1874.

578. Schedule O: warrants of registration will in terms of section 5(1) of the 2000 Act no longer be required.

*Church of Scotland (Property and Endowments) Act 1925: section 22.*

579. This repeal should be read with section 85 of the Act.

*Church of Scotland (Property and Endowments)(Amendment) Act 1933 (c.24)*

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580. This repeal is to allow the order to be made under section 108 to make provisions relating to the setting and determination of price.

*Conveyancing Amendment (Scotland) Act 1938: section 9.*

581. This section, which limits the effect of certain rights of pre-emption, is replaced by section 84 of the Act.

*Conveyancing and Feudal Reform (Scotland) Act 1970.*

582. Sections 1, 2 and 7, schedule 1. Part 8 of the Act introduces a revised jurisdiction for the Lands Tribunal in relation to the discharge of real burdens, servitudes and other title conditions in place of the jurisdiction conferred by the provisions here repealed.

583. Section 53. The definition in section 53(4) is repealed in consequence of the repeal of those sections of the 1970 Act where the term 'prescribed' is found, namely section 2 (by this schedule) and section 4 (by schedule 13 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000).

*Land Tenure Reform (Scotland) Act 1974: section 19.*

584. This repeal is in consequence of the repeal, by this schedule, of section 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970.

*Land Registration (Scotland) Act 1979.*

585. Paragraph (a) of section 15(2) lists a number of provisions. Its repeal is consequential on the repeal, by this Act, of those provisions (Paragraph (a) is amended, prospectively, by schedule 12 paragraph 39(6)(a) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000, but that amendment now falls).

586. Section 17 provides that, except where the deed says otherwise, a deed of conditions under section 32 of the Conveyancing (Scotland) Act 1874 takes effect immediately on registration. It falls in consequence of the repeal of section 32 by this schedule.

587. Section 18, concerning the effect of registration of a discharge etc, is replaced by sections 15 and 48 of the Act.

*Aviation Security Act 1982: Schedule 1.*

588. This repeal is consequential on the abolition of feuduties and ground annuals by Part 3 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

*Housing (Scotland) Act 1987: section 72.*

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589. This repeal is consequential on the abolition of pecuniary real burdens by section 117 of the Act.

*Aviation and Maritime Security Act 1990: section 2.*

590. This repeal is consequential on the abolition of feuduties and ground annuals by Part 3 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

*Enterprise and New Towns (Scotland) Act 1990: section 32.*

591. This repeal is consequential on the amendments made to the Act by section 113 of the Act.

*Further and Higher Education (Scotland) Act 1992: Schedule 3.*

592. This repeal is consequential on the abolition of feuduties and stipends by Part 3 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

*Requirements of Writing (Scotland) Act 1995: section 13(2).*

593. The section is repealed as it referred to section 78 of the Titles to Land Consolidation (Scotland) Act 1868, which is to be repealed by the 2000 Act.

*Abolition of Feudal Tenure etc. (Scotland) Act 2000*

594. The repeal of provisions in this Act comes into force on the day after Royal Assent (section 129(4)).

595. The reference in section 17(1) falls with the repeal of section 23 of the Act.

596. Section 20(8)(b) and (c) are unnecessary because of the extinguishing of feudal burdens by section 17(1) of the 2000 Act.

597. Section 23 is replaced by section 56 of the Act.

598. Section 24: The reference falls with the repeal of section 23 of the Act.

599. Section 26 is replaced by section 38 of the Act.

600. Section 28: The reference falls in consequence of the repeal of section 31 of the Act.

601. Section 29 is replaced by section 39 of the Act.



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602. Section 30 is replaced by section 41 of the Act.
603. Section 31 is replaced by section 42 of the Act.
604. Section 32 is replaced by section 38(3) of the Act.
605. Section 49: This definition is replaced by subsection (9) of new section 65A of the 2000 Act as inserted by section 114 of the Act.
606. Section 60(2) is replaced by section 44(2) of the Act.
607. Section 77: This is consequential on the repeal, by this schedule, of section 15(2)(a) of the Land Registration (Scotland) Act 1979 and schedule 12 paragraph 39(6) of the 2000 Act.
608. Schedule 8: The words repealed would not have been a possible outcome of sections 27 and 28 of the 2000 Act.
609. Schedule 12 to the 2000 Act contains minor and consequential amendments resulting from feudal abolition and the other reforms dealt with in the Act. As the Act now replaces and (in this schedule) repeals some of the provisions referred to in schedule 12, the relevant paragraphs of schedule 12 fall to be repealed in turn. Of the repeals listed, only the following do not come into the category just described:
- Paragraph 7(6): As section 14 of the Land Registers (Scotland) Act 1868 does not relate to entails it should not cease to have effect.
  - Paragraph 9(4)(d)(ii): This is a minor drafting change.
  - Paragraph 30(6)(d)(ii): The words repealed are replaced by paragraph 4 of schedule 13 to the Act.
  - Paragraph 39(3)(c): The words repealed are replaced by paragraph 7(3) of schedule 13 to the Act.
  - Paragraph 39(6)(b): The words repealed are replaced by paragraph 7(5) of schedule 13 to the Act.
610. Schedule 13 to the 2000 Act contains repeals resulting from feudal abolition and the other reforms dealt with in the Act. As the Act now replaces and (in this schedule) repeals some of the provisions referred to in schedule 13, the relevant parts of schedule 13 fall to be repealed in turn. The only repeal not falling into this category is of words in section 3(6) of the Land Registration (Scotland) Act 1979. Section 3(6) is not repealed by the Act but it is re-cast by schedule 13 paragraph 7(3) in a way which supersedes the original repeal.

**PARLIAMENTARY HISTORY FOR THE TITLE CONDITIONS (SCOTLAND) ACT 2003**

The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which proceedings at that Stage took place, the references to the Official Report of those proceedings and the dates on which Committee Reports were published and the references to those Reports.

<b>Proceedings and Reports</b>	<b>Reference</b>
<b>Introduction</b> 6 June 2002	SP Bill 54 (Session 1)
<b>Stage 1</b>	
<i>(a) Justice 1 Committee</i>	
28 <sup>th</sup> Meeting, 2002 29 <sup>th</sup> Meeting, 2002 31 <sup>st</sup> Meeting, 2002 32 <sup>nd</sup> Meeting, 2002  9 <sup>th</sup> Report 2002 (12 November 2002): Stage 1 Report on the Title Conditions (Scotland) Bill	3 September 2002, cols 3913 - 3950 10 September 2002, cols 3959 - 4001 24 September 2002, cols 4006 - 4050 1 October 2002, cols 4054 - 4091  SP Paper 687 (Session 1)

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<i>(b) Subordinate Legislation Committee</i>	
27 <sup>th</sup> Meeting, 2002	1 October 2002, col 1045
28 <sup>th</sup> Meeting, 2002	8 October 2002, col 1049
<i>(c) Consideration by Parliament</i>	
21 November 2002	cols 5563-5605
<b>Stage 2</b>	
<i>Justice 1 Committee</i>	
42 <sup>nd</sup> Meeting, 2002	10 December 2002, cols 4355 - 4378
43 <sup>rd</sup> Meeting, 2002	17 December 2002, cols 4382 - 4419
1 <sup>st</sup> Meeting, 2003	14 January 2003, cols 4451 - 4480
Bill (as amended at Stage 2)	SP Bill 54A (Session 1)
<b>Stage 3</b>	
<i>(a) Subordinate Legislation Committee</i>	
6 <sup>th</sup> Meeting, 2003	11 February 2003, col 1207
<i>(b) Consideration by Parliament</i>	
26 February 2003	cols 8690 - 8766
Royal Assent- 3 April 2003	

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