

TENEMENTS (SCOTLAND) ACT 2004

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Miscellaneous and General

Schedule 4 – Amendments of Title Conditions (Scotland) Act 2003

183. *Section 25* of the Act stipulates that the Title Conditions Act will be amended in accordance with schedule 4.
184. Section 3(8) of the Title Conditions Act provides that a person other than “the” holder of a real burden may not waive compliance with it. The reference to “the” holder implies that a burden could only be waived, mitigated or varied by all of the persons entitled to enforce it. It should, however, be possible for the title deeds to provide that a burden may be varied by some of the persons entitled to enforce it and not just all the owners. Paragraph 2 of schedule 4 substitutes “a holder” for “the holder”.
185. *Paragraphs 3 and 14* correct a possible technical problem that could have hindered the operation of the Title Conditions Act in relation to groups of related properties such as housing estates. A change is made to relax the requirements for the creation of new burdens after the appointed day but only where the burden would be a burden to which section 53 would apply. Section 53 applies to burdens imposed on groups of related properties. The change is designed to avoid issues arising as to the validity of such burdens and to make sure that all of the properties within a community (the housing estate) will be able to enforce the burdens affecting each unit against the others.
186. *Paragraphs 4, 5 and 20* introduce into the Title Conditions Act the same policy on liability for incoming owners set out in *sections 12 and 13* of, and schedule 2 to, this Act. The Title Conditions Act applies to all types of property, which is why separate (but identical) provision is required. Section 10 of the Title Conditions Act deals with affirmative burdens and the continuing liability of former owners. It provides for certain obligations to be enforceable against both the current owner and the owner at the time the obligation arose – in other words, action may be taken against either for payment, though there is a right of relief for the buyer against the seller. These paragraphs introduce the same notice procedure for the Title Conditions Act as under the Tenements Act for purchasers who are unaware of an outstanding liability due by the seller and who, after taking entry, may be faced with a bill for a share of a cost of work already carried out.
187. *Paragraph 4* also provides that section 10 of the Title Conditions Act will not apply where *section 12* of this Act (the liability of owners and their successors) is applicable in tenement property.
188. *Paragraph 6* brings the Title Conditions Act into line with this Act in relation to the calculation of the floor area of a flat. In particular, it makes it clear that the internal walls or other internal dividing structure will be included in the calculation but that balconies, lofts or basements are not unless the loft or basement is used for purposes other than storage.

*These notes relate to the Tenements (Scotland) Act 2004
(asp 11) which received Royal Assent on 22 October 2004*

189. [Paragraph 7](#) extends the provisions of the Title Conditions Act on community burdens to situations where there are two rather than four units.
190. [Paragraph 8](#) makes changes to section 29 of the Title Conditions Act, which deals with the power of the majority to instruct common maintenance. The changes will replicate the provisions of rule 3 of the Tenement Management Scheme. Parts of rule 3 provide procedures for the deposit and retention of monies. Similar procedures are found in section 29 of the Title Conditions Act. Paragraph 8 provides that both procedures will be the same. Paragraph 8 also makes it clear that where a scheme decision gives authority to operate a maintenance account, the authorisation must be to a manager or at least two other persons.
191. [Paragraph 9](#) disapplies parts of section 28 and sections 29 and 31 of the Title Conditions Act (which relate to community burdens) in relation to a community consisting of one tenement or where the development management scheme applies to the tenement. These sections deal with the power of a majority to appoint a manager, the power of the majority to instruct common maintenance and remuneration of the manager and, as regards tenements, are superseded by this Act. If the community (i.e. a group of two or more properties all subject to the same or similar burdens which can be mutually enforced) consists of just one tenement, then this Act will provide appropriate rules if the title deeds do not do so.
192. [Paragraph 10](#) amends section 33(1) and (2) of the Title Conditions Act which relates to majority variation and discharge of community burdens. It ensures that section 33(2) will apply even where a constitutive deed may allow specified owners to grant a variation or discharge and also authorise a manager to do so.
193. [Paragraph 11](#) amends section 35 of the Title Conditions Act. Subsection (1) of that section provides that variation and discharge of community burdens by owners of adjacent units is only available “where no such provision as is mentioned in section 33(1)(a) is made”. Paragraph 11 will make both methods of variation and discharge available. In other words, it will be possible for adjacent owners to vary or discharge community burdens by using section 35 or by using provisions in the title deeds if these exist.
194. [Paragraph 12](#) relates to rural housing bodies. Section 43(5) of the Title Conditions Act enables Ministers to prescribe a list of bodies as rural housing bodies. These bodies will be able, when selling rural housing, to agree a right to repurchase the property in order to ensure that it remains within the rural housing stock. The former terms of section 43(6) specified that to be a rural housing body, an organisation must have as an object the provision of housing on rural land (or rural land for housing). This would have excluded bodies whose constitution is that they have a broad function of providing housing in any location but not a function specifically related to rural areas. Paragraph 12 will allow a wider range of housing body to be designated as rural housing bodies, but the provisions themselves may only be used over rural land (rural land is defined as for the Land Reform (Scotland) Act 2003, namely as land other than settlements with a population over 10,000).
195. [Paragraph 13](#) removes a definition of “local authority” which is rendered unnecessary by the insertion of a definition into section 122 by paragraph 19.
196. [Paragraph 15](#) simply makes it clear that the reference in section 90 of the Title Conditions Act should be to applications to the Lands Tribunal to disapply a development management scheme.
197. [Paragraphs 16 and 17](#) make it clear that when the courts are considering the best interests of the owners they must consider the interests of the owners as a whole.
198. [Paragraph 18](#) removes subsection (9) of section 119 of the Title Conditions Act. This subsection purports to delay the full effect of sections 106 and 107 of the Title

*These notes relate to the Tenements (Scotland) Act 2004
(asp 11) which received Royal Assent on 22 October 2004*

Conditions Act (which deal with the extinction of real burdens in situations involving compulsory purchase). These sections have been in force since 1 November 2003.

199. [Paragraph 19](#) changes the definition of “tenement” in section 122 of the Title Conditions Act to bring it into line with the definition in this Act. It also removes the definition of “flat” which will now be construed by reference to this Act. Other amendments to the 2003 Act extend the use of the term “local authority” and the definition in paragraph 19(b) is a consequence of this change.