

GLASGOW AIRPORT RAIL LINK ACT 2007

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 – Miscellaneous and general

Section 42 – Registration of new rights

198. **Section 42** addresses two issues in relation to positive servitudes that is, rights relating to the doing of some positive thing in relation to property (“burdened property”) for the benefit of other property (“benefited property”). Subsection (1) provides that a servitude or other right acquired compulsorily under the powers to be conferred by the Act benefits all the land held by the authorised undertaker for the purposes of the authorised works. In the case of a linear work such as a railway, the benefit of a positive servitude (such as a right of access to the railway) may be capable of benefiting significant parts of the railway system, considerably more than the land immediately adjoining the burdened property. It is a principal of Scottish land law that a servitude is construed restrictively. This means that the servitude must be clear and precise. If the deed creating a servitude does not define land as being benefited by the servitude then the servitude cannot be used to benefit that land. In the context of the Act, an access servitude that defines the benefited property as being only some of the land comprised within the railway could not be used to access other land belonging to the authorised undertaker further down the route. Subsection (1) ensures that statutory servitudes acquired under the powers in the Act for the benefit of the railway will have that effect and are not reduced in scope by this principle of general Scots property law.
199. Subsection (2) provides that such a servitude is effective whether or not the deed creating it is registered against both the benefited property and the burdened property. Section 75 of the **Title Conditions (Scotland) Act 2003 (asp 9)** requires that a deed creating a positive servitude must be registered against both the burdened and the benefited property. An ordinary reading of section 75 leads to the conclusion that if registration is against only some of the benefited property, the deed will not be enforceable for the benefit of the remainder of the benefited property, against which it has not been registered. This subsection therefore ensures that statutory servitudes acquired under the powers in the Act for the benefit of the railway will have that effect in relation to all the land occupied by the authorised works, whether or not they are registered against all that land. Servitudes must still be registered against the burdened property.