

# TITLE CONDITIONS (SCOTLAND) ACT 2003

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part 1: Real Burdens: General

##### *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

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

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).