

TITLE CONDITIONS (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Real Burdens: General

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.