

# TITLE CONDITIONS (SCOTLAND) ACT 2003

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **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.