

# TITLE CONDITIONS (SCOTLAND) ACT 2003

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 9: Powers of the Lands Tribunal**

##### *Section 90: Powers of Lands Tribunal as respects title conditions*

365. **Part 9** introduces a revised jurisdiction for the Lands Tribunal in relation to the discharge of real burdens, servitudes, and other title conditions. The Lands Tribunal is responsible for hearing applications for the variation or discharge of title conditions. Its powers to discharge are currently set out in the Conveyancing and Feudal Reform (Scotland) Act 1970. *Section 90* of the Act restates these powers and makes some additions and alterations to them. The main changes to the existing law are to allow the Tribunal to determine the validity of a burden, and to extend its jurisdiction so that it can deal with the new termination procedures in the Act. Part 9 replaces sections 1 and 2 of the 1970 Act (which are repealed by schedule 15 of the Act). Section 90 sets out the revised jurisdiction of the Lands Tribunal.
366. *Subsection (1)* confers an extended jurisdiction on the Lands Tribunal. Only the first provision is familiar from the current law. Under paragraph (a)(i) the Tribunal can discharge or vary a real burden, servitude, or other title condition. Under paragraph (a) (ii), it can pronounce on the validity and enforceability or interpretation of a real burden or a rule of a Development Management Scheme. Under paragraph (b) it can deal with applications to renew or vary a right to enforce a burden, following intimation of a proposal under section 20 to execute and register a notice of termination, or section 107(4) to register a conveyance. Under paragraph (c) it can deal with applications to preserve a community burden following intimation of a proposal to register a deed of variation or discharge under sections 33 or 35. Under paragraph (d) it can deal with applications to preserve a Development Management Scheme following intimation of a proposal to register a deed of disapplication under section 74(1). Under paragraph (e) it can deal with applications to preserve a Development Management Scheme following intimation of a proposal to register a conveyance under section 107(4).
367. Paragraph (a)(i) of subsection (1) permits the Tribunal to rule in favour of a burdened proprietor (or anyone else against whom the burden is enforceable) who applies for the discharge or variation of a title condition in relation to the burdened property. The meanings of ‘benefited property’, ‘burdened property’, ‘title condition’ and ‘variation’ are given in section 122(1). Paragraph (a) extends the jurisdiction to ‘purported’ title conditions, i.e. to obligations which bear to be (but may in fact not be) valid title conditions. This means that the Tribunal can grant a discharge without having first to determine the validity of the condition. Section 104(4) deals with any effect on contractual matters that might arise from this. See also section 61. Paragraph (a) (ii), which allows the Tribunal to rule on the validity, applicability, enforceability or construction of a title condition is qualified by subsection (12).

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368. Paragraph (b) permits the Tribunal to give effect to an application for renewal or variation of a burden which is threatened by either the ‘sunset rule’ termination procedure under section 20 or by extinction under section 107(1). Paragraph (c) permits the Tribunal to give effect to an application to preserve a right to enforce a burden under threat from a deed of discharge or variation granted under sections 33 and 35. Paragraph (c) also permits the Tribunal to prevent the variation of a burden or the imposition of a new burden by a deed of variation granted under section 33.
369. Paragraph (d) permits the Tribunal to give effect to an application by the owner of a unit in a Development Management Scheme for preservation of the Scheme where there has been intimation of a proposal under section 74(1) to disapply the Scheme.
370. Paragraph (e) permits the Tribunal to give effect to an application by an owners’ association to preserve a Development Management Scheme where there has been intimation of a proposal under section 107(4) to disapply the Scheme.
371. An application under paragraph (a) may be brought by anyone against whom a title condition is enforceable (for which see section 9). By contrast, an application under paragraph (b) or (c) may be brought only by an owner of the benefited property, or in the case of (b), a holder of a personal real burden (and so not by those holding subsidiary enforcement rights under section 8(2)(a) and (b)). ‘An’ owner includes individual *pro indiviso* owners. The effect of a discharge or renewal is confined to the particular property in respect of which the application was brought. A successful application for preservation preserves the community burdens for every unit whose owners did not sign the deed at all or did not *all* sign the deed. When an application for preservation is refused, the burden is varied or discharged by the Lands Tribunal in respect of all such units. By registering the deed of variation or discharge **and** the Lands Tribunal order in these cases, the burden will be varied or discharged for the whole community.
372. *Subsection (2)* confirms that the holder of a personal real burden (as listed in section 1(3)) can also apply for renewal or variation under section 90(1)(b) where the burden is threatened with termination under section 20 or extinction under section 107(1).
373. *Subsection (3)* excludes certain title conditions. These are currently excluded from the jurisdiction of the Tribunal by the 1970 Act. These are specified in full in schedule 11 and (in brief) include obligations relating to minerals; obligations created for naval, military or air force purposes; obligations created or imposed for civil aviation purposes or in connection with the use of land as an aerodrome; obligations created in relation to a lease of an agricultural holding, a holding within the meaning of the Small Landholders (Scotland) Acts 1886 to 1931, or a croft.
374. *Subsection (4)* imposes time limits in respect of applications for renewal or preservation.
375. *Subsection (5)* prevents a new obligation being imposed on a burdened property or a new property becoming benefited in any application for variation under section 90(1)(b). An existing obligation could however be partially discharged. In any application for variation under section 90(1)(a)(i) (which could be made, for example, by a tenant), the owner’s consent will be required before a new obligation is imposed on a burdened property or a new property becomes benefited.
376. Subsections (6) to (11) allow the Tribunal to pronounce certain ancillary orders. The provisions are based on section 1(4) and (5) of the 1970 Act.
377. *Subsections (6) and (7)* concern compensation for discharge. Only the owner of the benefited property or holder of the personal real burden is eligible for compensation, and not those holding subsidiary enforcement rights. The grounds on which compensation may be awarded are set out in subsection (7) and are the same as under the current legislation. *Subsection (9)* ensures that compensation can be awarded only if the person who is to pay agrees; but if he does not agree the Tribunal may decide not to grant

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the discharge. Compensation cannot be awarded if the application for discharge is unopposed (section 97(1)).

378. *Subsection (8)* concerns the imposition of replacement title conditions. There is no requirement that the replacement condition be of the same type as the condition which is being discharged. *Subsection (11)* requires the consent of the owner of the burdened property. If consent is not given, the Tribunal may decide not to grant the discharge. Replacement conditions cannot be imposed if the application for discharge is unopposed (section 97(1)).
379. The law already provides compensation for landowners whose property is affected when land is acquired in circumstances where compulsory purchase powers could have been used. There is no such provision for personal real burden holders. *Subsection (10)* allows the Lands Tribunal to make an award of compensation in these circumstances.
380. Applications under paragraph (a)(ii) of subsection (1) (for a ruling on validity etc) will often be accompanied by applications under paragraph (a)(i) (for discharge). Where they are not, the matter could as well be disposed of by the ordinary courts, and the Tribunal is given a discretion, by *subsection (12)*, to decline jurisdiction.