

TITLE CONDITIONS (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 10: Miscellaneous

Section 105: Alterations to Land Register consequential upon registering certain deeds

404. This section introduces Part 10, which is concerned with a number of miscellaneous topics. *Section 105* extends a power which is already conferred by section 5(1) of the Land Registration (Scotland) Act 1979.
405. Section 5(1) of the 1979 Act empowers the Keeper to make such consequential amendments in the Land Register as are necessary when carrying out a land registration process. This means that where a burden is discharged or varied, the Keeper may alter the title sheet of a **benefited** property to indicate that the enforcement rights have changed. The 1979 Act only allows the Keeper to do this where **both** the burdened and benefited property are on the Land Register (and each, as a consequence, has a title sheet). The effect of *subsection (1)* is to apply the same rule to the case where the initial registration process is in the Register of Sasines. In other words, the Keeper may now make consequential changes to the title sheet of a **benefited** property when burdens that were in its favour are discharged or varied, regardless of whether the **burdened** property is on the Land Register or the Register of Sasines. If the benefited property were also on the Register of Sasines, then no consequential amendments could be made, as there would be no title sheet to amend.
406. *Subsection (2)* imposes a duty on the Keeper to make consequential changes to the Land Register in limited circumstances. These circumstances arise when the document which effects the change requires to be dual registered, that is to be registered against both the benefited and the burdened property. The deeds or notices in all the sections mentioned in *subsection (2)* all require to be dual registered.
407. For the purposes of the present Act, this power to make consequential amendments is required only in the two circumstances set out in *subsection (3)*. The first concerns, mainly, deeds and other documents which vary or extinguish burdens (the reference in paragraph (a) to ‘renews, reallots, preserves or imposes’ refers back to the wording in other provisions, for example an order granted by the Lands Tribunal under section 90(1)(b) would renew a real burden whereas registration of a notice under section 18 of the 2000 act would “reallot” the right to enforce the burden. The second situation concerns division of the benefited or burdened property. If, as sometimes, division affects the distribution of rights or, as the case might be, liabilities in relation to real burdens (for which see sections 12 and 13), the Keeper might wish to note the change on the title sheet of property other than the one which is being conveyed.

Section 106: Extinction of real burdens and servitudes etc. on compulsory acquisition of land

408. This is the first of a group of provisions (sections 106, 107, 109 and 110) which are concerned with the effect of compulsory purchase on real burdens and servitudes. *Section 106* deals with the effect of a compulsory purchase order on real burdens and servitudes affecting the land acquired. Section 107 is concerned with the effect of an acquisition by agreement.
409. The effect of compulsory purchase on real burdens and servitudes is disputed under the current law. Section 106 provides a clear rule. In general (subsection (1)), all real burdens and servitudes are extinguished on registration of the conveyance (defined in subsection (5)). This applies to any conveyance which is registered on or after the appointed day, regardless of the date of the compulsory purchase order but not to a conveyance registered before the appointed day (section 119(9)). The term conveyance includes, but is not limited to, a statutory conveyance in the form set out in schedule A to the Lands Clauses Consolidation (Scotland) Act 1845 and a general vesting declaration made under the Town and Country Planning (Scotland) Act 1997.
410. A conveyance registered under subsection (1) would have the effect of disapplying a development management scheme which applied to the land. As with real burdens it is possible for either the compulsory purchase order or the conveyance to modify this extinctive effect.
411. *Section 106* will only apply to compulsory acquisition authorised by a compulsory purchase order. “Compulsory purchase order” is defined by subsection (5). It includes both an compulsory purchase order made under section 1(1) of the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 and also a compulsory purchase order made under the Forestry Act 1967.
412. Subsections (1) and (2) together allow the acquiring authority to disapply the extinctive effect of section 106(1) and to save or vary the burdens. It is in terms of subsection (1) possible for this to be done either by provision in a compulsory purchase order or in the conveyance (as defined in subsection 106(5)). It is possible in terms of subsection (2) to disapply section 106(1) for certain burdens only, or for parts of the burdened property only or in respect of the rights of certain benefited proprietors to enforce the burdens
413. It is not a necessary pre-requisite for the inclusion in the subsequent conveyance that a provision has been included in the compulsory purchase order to disapply section 106(1). The conveyance would not in terms of subsection (3), without the consent of the benefited proprietors, be registrable and so would not extinguish burdens under section 106(1) if section 106 had been disappplied in the compulsory purchase order.
414. Subsection (4) makes provision for compensation to be paid to the holders of personal real burdens extinguished under subsection (1). Compensation may be payable to the owner of a benefited property where a burden is extinguished but this is provided for not under the Act but rather under other rules of land compensation.
415. Subsection (5) gives a wide definition of “conveyance”. A conveyance includes both the familiar “schedule A” conveyance (or “statutory conveyance”) and general vesting declaration. In addition it includes an ordinary disposition which includes a reference to the application of section 106(1), or if the conveyance follows on an acquisition by agreement a reference to the application of section 107(1) - see the definition of conveyance in section 107(10). The effect of paragraph (a)(i) is that it will cease to be necessary to use a “statutory conveyance”, though such use will remain competent in order to extinguish real burdens. However, such a disposition etc is not in other respects the equivalent of a statutory conveyance.

Section 107: Extinction of real burdens and servitudes etc. where land acquired by agreement

416. *Section 107* applies to cases of acquisition by agreement in circumstances where compulsory powers could have been used.
417. The effect of registration of a conveyance under section 107 is, unless the conveyance provides otherwise, to extinguish all burdens and servitudes and to disapply any development management scheme.
418. *Section 107(4)* imposes a notification requirement upon a person acquiring land under section 107 (“the acquiring authority”).
419. A benefited proprietor, the holder of a personal real burden or, in the case of a development management scheme, the owners association is entitled to make an application for renewal to the Lands Tribunal within 21 days of the notice. The notice will in terms of subsection (6) have to state the name of the acquiring authority, describe the land being acquired, the effect of the conveyance in extinguishing real burdens imposed on that land or in disapplying the development management scheme (and any modification of that effect) and that the benefited proprietor, holder or owners association, can take the matter to the Lands Tribunal within 21 days.
420. The notice given by the acquiring authority triggers a 21 day period in which the benefited proprietor, holder or owners association, could apply to the Lands Tribunal for renewal of the burden or preservation of the development management scheme.
421. The registration of the conveyance alone would not have the effect of extinguishing the burdens or of disapplying the development management scheme. For the conveyance to have this effect it would also be necessary to register a certificate from the Tribunal. The certificate would be received following an application made by the acquiring authority to the Tribunal.
422. The certificate would state, as with sections 23 and 24, that no objection had been timeously received or that all such objections had been withdrawn or, in the case of real burdens and servitudes (i.e. an application made under section 90(1)(b)(ii)) that objections only related to certain burdens or were only made by certain benefited proprietors.
423. It would be possible to register a conveyance notwithstanding that no certificate has been obtained from the Tribunal. The lack of a certificate would not prevent registration of the conveyance but only the extinguishment of the real burdens by the conveyance. It is not necessary to give notice before registering a conveyance without a relevant certificate. Subsection (4) only applies where registration is in accordance with section 107(1)(b), i.e. is registration of a conveyance with a certificate.
424. Burdens would be extinguished, as with sections 23 and 24, only in accordance with the terms of the certificate obtained from the Tribunal.
425. The certificate is a separate document obtained from the Lands Tribunal upon application. There is a prescribed form of application for a certificate in schedule 12.
426. To extinguish real burdens and servitude under section 107(1) the conveyance must be registered along with a relevant certificate (annexed to the conveyance). If the conveyance had already been registered then it would be possible to re-register the conveyance with a certificate and as with section 24(2) it would be possible to re-register the conveyance again with a further certificate. The burdens are extinguished from the date on which the conveyance with the annexed certificate is registered.

***Section 108: Amendment of Church of Scotland (Property and Endowments)
(Amendment) Act 1933***

427. Section 9(3) of the Church of Scotland (Property and Endowments) (Amendments) Act 1933 created a right of pre-emption in respect of Parliamentary Churches and manses. The section allowed the original granter of the site a right of pre-emption entitling them to first refusal if the church came up for sale. The granter only received such a right if they owned land adjoining the church or manse. If they subsequently sold on some of this adjoining land, then it is arguable that each sold off part would also receive a right of pre-emption. This creates difficulties as to who is entitled to the right of pre-emption, and raises the possibility that more than one nearby owner could try and exercise it. *Section 108* inserts three new subsections into the 1933 Act to resolve this problem.
428. Subsection (4) inserted by section 108 prevents further proliferation of the pre-emption right. It ensures that when part of a property which holds a right of pre-emption under section 9 of the 1933 Act is divided, only the property which is not sold off will have the right to enforce the pre-emption. The sold off land will not receive the pre-emption unless there is an agreement for it to receive it instead of the retained land. In any situation, the pre-emption will only be exercisable by one part of a property that is being subdivided – no two properties will be given the right at the same time. This only applies to future sales and subdivisions following the appointed day. Past subdivisions are dealt with by the new subsection (5).
429. Subsections (5) and (6) inserted by section 108 deal with the issue of who is entitled to the pre-emption right in all existing cases where there are multiple pre-emption holders. Scottish Ministers will be able to set out by statutory instrument the details of a procedure to determine to whom the right should be granted and how the price of the land is to be determined.

***Section 109: Amendment of Acquisition of Land (Authorisation Procedure)
(Scotland) Act 1947***

430. This section extends the notification requirements under paragraph 3(b) of the First schedule to the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947. The effect of the amendment is to impose a duty on an acquiring authority, in the case of a compulsory purchase order, to notify a benefited proprietor, the holder of a personal real burden or, where a development management scheme applies to the land, the owners association that a compulsory purchase order has been made and is about to be submitted for confirmation.
431. Notification to benefited proprietors, holders of personal real burdens and the owners association is only be required to the extent that the compulsory purchase order could have the effect of either, as the case may be, extinguishing real burdens imposed on, or disapplying the development management scheme applying to, the land to be acquired. If section 106(1) were disapplied there would be no requirement to notify. A benefited proprietor or holder of a personal real burden or an owners association who objects will be treated as a “statutory objector” and will be entitled to be heard, usually, at a public local inquiry.

Section 110: Amendment of Forestry Act 1967

432. *Section 110* is concerned with the Forestry Act 1967. This Act confers powers of compulsory acquisition exercisable by means of a compulsory purchase order by the Scottish Ministers. The 1967 Act does not incorporate the compulsory purchase procedure of the 1947 Act but rather provides for its own procedure in schedule 5. The amendments in section 110 will bring schedule 5 to the 1967 Act in line with the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947. The amendment reflects the changes made by section 109 in relation to paragraph 3 of schedule 1 to the 1947 Act.

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433. The effect of the amendment inserted by *subsection (2)* is to impose a duty on the Scottish Ministers when making a compulsory purchase order to notify a benefited proprietor or the holder of a personal real burden or, where a development management scheme applies, the owners association that a compulsory purchase order has been made and is about to be submitted for confirmation.
434. Paragraph 3(2) of schedule 5 to the 1967 Act imposes a duty on the confirming authority to cause a local inquiry to be held. *Subsection (3)* ensures that this will not apply where the acquiring authority gives an undertaking in the form of paragraph 6B as inserted by subsection (4). Similarly, the special parliamentary procedure requirement contained in paragraph 4 of schedule 5 will not apply when an undertaking is given.
435. The procedure in paragraphs 3 to 6 of schedule 5 to the 1967 Act is different from the procedure in paragraph 4 of schedule 1 of the 1947 Act. *Subsection (4)* provides the procedure to be followed when objections to a compulsory purchase order are received in the context of section 110 in terms of form, content and procedure (including the registering, effect and operation of the undertaking and the requesting of information from objectors about benefited property). These are the equivalent to those in section 109.

Section 111: Amendment of Conveyancing and Feudal Reform (Scotland) Act 1970

436. *Section 111* amends section 13 of the Conveyancing and Feudal Reform (Scotland) Act 1970 which regulates the ranking of standard securities following service of a notice by a subsequent security holder. Under the existing law, it is possible that when a later creditor gives notice under section 13, their debt will gain precedence over the possible claim to be made by the seller under a clawback agreement secured by a standard security. Typically a clawback agreement may provide that if a certain event occurs (such as planning permission for change of use) the seller will get a further financial payment. This is because the 1970 Act stipulates that security holders will only be ranked in respect of ‘advances’ made before subsequent securities. In the case of a clawback agreement, the standard security does not secure ‘advances’ but rather a future debt.
437. By replacing ‘advances’ with a wider term, ‘debt’, the amendment makes clear that section 13 applies to debts of all kinds (including, for example, clawback). The amendment takes effect on the day following Royal Assent (section 129(3)).

Section 112: Amendment of Land Registration (Scotland) Act 1979

438. *Section 112* makes amendments to the Land Registration (Scotland) Act 1979. *Subsection (2)* amends the duties given to the Keeper by section 6 of the 1979 Act regarding the information to be shown on a title sheet. Essentially this requires the Keeper to dual enter information in those cases where notices or deeds have to be dual registered. The new paragraph (e) to section 6(1) of the 1979 Act in addition to requiring, as at present, the Keeper to disclose the terms of real burdens and conditions affecting the land on the title sheet of the burdened property also requires the Keeper in some cases to identify the benefited property. This latter duty only arises where the burdened property is affected by a notice or deed registered under one of the listed sections.
439. The new paragraph (ee) requires the Keeper to disclose the identity of a burdened property on the title sheet of a benefited property when the right to enforce arises as a consequence of a notice or deed registered under one of the listed sections.
440. The amendment made by *subsection (3)* presupposes the amendment which is made to section 9 of the 1979 Act by section 3 of the 2000 Act. Both amendments come into force on the appointed day. Section 3 of the 2000 Act makes some technical amendments designed to ensure that obsolete material left on the Land Register as a result of feudal abolition will be safely eliminated over time.

441. The effect of *section 112* is substantially the same as that of section 3 of the 2000 Act, but in a different context. It allows the Keeper to rectify the Land Register to take account of the listed provisions, and also in respect of things done (such as the registration of notices) in response to those provisions. No indemnity is then payable. The listed provisions are concerned only with transitional matters (such as implied rights of enforcement).

Section 113: Amendment of Enterprise and New Towns (Scotland) Act 1990

442. The effect of this amendment is to remove a possible repugnancy between sections 8(6) and 32 of the 1990 Act. Section 32 allows Scottish Enterprise or Highlands and Islands Enterprise to enter into an agreement analogous to a real burden that will run with the land and bind it. There was a measure of uncertainty whether the agreement could be made with merely 'a person having such interest as to bind the land' (in practice, the owner) or whether *all* those with such interest had to agree (e.g. including heritable creditors). The amendment makes it clear that the first position is to apply: that it can be with *any* person with an interest in the land. The amendment takes effect on the day after Royal Assent (section 129(3)). The new version of section 32(1) is based on section 75 of the Town and Country Planning (Scotland) Act 1997.

Section 114: Amendment of Abolition of Feudal Tenure etc. (Scotland) Act 2000

443. *Section 114* introduces 6 new sections to be inserted into the Abolition of Feudal Tenure etc. (Scotland) Act 2000. The underlying policy of the 2000 Act was to allow feudal superiors the opportunity to save valuable rights. This was generally achieved by requiring the superior to register a notice in the property register prior to the appointed day. These new sections add to mechanisms already in the 2000 Act to allow superiors to preserve certain feudal rights as personal real burdens after the appointed day (i.e. as burdens without a benefited property). In the case of sporting rights (section 65A) existing rights will be converted into a separate tenement in land.
444. *Subsection (2)* introduces the new **section 18A** into the 2000 Act. This is concerned with personal pre-emption burdens and personal redemption burdens. The explanatory notes on Part 8 of the Act offer an explanation of rights of pre-emption and redemption. Section 18 of the 2000 Act allowed a superior to preserve a right of pre-emption or redemption by registering a notice that nominated specific land owned by the superior as a new benefited property. Section 18A offers an alternative route for superiors to preserve rights to pre-emptions and reversions. It will allow superiors to convert all rights of pre-emption or redemption which they could enforce prior to the appointed day into personal real burdens by the registration of a notice. This would avoid the requirement in section 18 of having to nominate land owned by the superior as the benefited property.
445. Subsection (1) of section 18A makes it clear that the superior may choose to preserve their right to a pre-emption or redemption by either section 18 or 18A. A superior who owned land and wished to fix the right of enforcement to that land (rather than risk the ownership of the right and the land becoming separated at some point in the future) might wish to use the section 18 notice procedure. The subsection allows a superior to register a notice in the form contained in schedule 5A of the 2000 Act (inserted by schedule 13 of the Act) to convert a right of pre-emption or redemption into a personal pre-emption or redemption burden. The right of pre-emption or redemption must be valid before the appointed day in order to be converted. Registration must occur before the appointed day.
446. Subsection (2) provides for the content of the notice of conversion.
447. Subsection (3) adopts the requirement in section 18(4) of the 2000 Act for the superior to swear or affirm before a notary public that to the best of their knowledge all of the information contained in the notice is true. The sanctions of the False Oaths (Scotland)

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Act 1933 would apply in the event that the oath or affirmation was known to be false or not believed to be true.

448. Subsection (4) adopts the provisions in section 18(5) of the 2000 Act to allow a legal representative of the superior to sign on their behalf if by reason of legal disability or incapacity they are unable to swear or affirm for the purposes of subsection (3). Similarly, the subsection also adopts the provision of the 2000 Act allowing an authorised person to sign on behalf of a superior who is not an individual (e.g. a company).
449. Subsection (5) stipulates that if the requirements of subsections (1) to (3) are complied with and the burden is enforceable by the superior immediately prior to the appointed day, the burden shall be converted into a personal pre-emption burden or personal redemption burden on the appointed day. The *dominium utile* is the burdened property in respect of the obligation.
450. Subsection (7) provides that the new personal real burdens should be capable of assignation or transfer. The assignation to be effective would have to be registered. It should be noted that it will not be possible after the appointed day to create a right of pre-emption as a personal real burden. New pre-emption rights, other than those created as rural housing burdens under section 43, will require a benefited property. Section 3(5) of the Act prevents a right of redemption being created even as a real burden after the appointed day.
451. Subsection (8) provides for deduction of title where the holder of the burden does not have completed title (i.e. it is not registered). No deduction of title would be required once the burden was registered in the Land Register. 'Midcouple' is defined in section 122.
452. Subsection (9) makes section 18A subject to sections 41 and 42 of the 2000 Act on registration of a notice. Section 41 requires the superior to give notice to the burdened proprietor of the attempt to reallocate the burden. Section 42 stipulates that where a superior has a choice of several of the procedures under the 2000 Act that may be used to save a burden, the various courses open to the superior are mutually exclusive. A choice must be made as to which mechanism would be used though this would not necessarily be final. A different option could be pursued later, before feudal abolition, provided the appropriate steps are taken to deal with the notice or agreement first sent. In other words it would not be possible to save a pre-emption as a personal real burden under section 18A and then save it again under section 18.
453. *Subsection (2)* introduces two new sections into the 2000 Act, sections 18B and 18C. The new **section 18B**. This is concerned with economic development burdens. Section 18B enables a local authority or the Scottish Ministers to preserve rights to enforce certain real burdens by converting those burdens into economic development burdens. This is only possible where the burden was imposed for the purpose of promoting economic development.
454. Subsection (1) allows a local authority or the Scottish Ministers as superior to register a notice in the form contained in schedule 5B of the 2000 Act (inserted by schedule 13 of the Act) to convert a feudal burden into an economic development burden. The local authority or the Scottish Ministers, as the case may be, must be able to enforce the burden before the appointed day in order for it to be converted. Registration must occur before the appointed day.
455. Subsection (2) provides for the content of the notice of conversion.
456. Subsection (3) stipulates that if the requirements of subsections (1) and (2) are complied with and the burden is enforceable by the superior immediately prior to the appointed day, the burden shall be converted into an economic development burden on the appointed day. The *dominium utile* is the burdened property in respect of the obligation.

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457. Subsection (4) provides that the right to enforce a burden converted into an economic development burden is subject to any counter obligation due by the local authority, or as the case may be, the Scottish Ministers.
458. Subsection (5) makes section 18B subject to sections 41 and 42 of the 2000 Act on registration of a notice. These sections are discussed above in relation to the new section 18A(9).
459. The new **section 18C** introduced by subsection (2) into the 2000 Act is concerned with health care burdens. Section 18C enables a National Health Service trust or the Scottish Ministers to preserve rights to enforce certain real burdens by converting those burdens into health care burdens. This is only possible where the burden was imposed for the purpose of promoting the provision of facilities for health care. National Health Service trusts are bodies established by order under section 12A of the National Health Service (Scotland) Act 1978.
460. Subsection (1) allows a National Health Service trust or the Scottish Ministers as superior to register a notice in the form contained in schedule 5C of the 2000 Act (inserted by schedule 13 of the Act) to convert a feudal burden into a health care burden. The National Health Service trust or the Scottish Ministers, as the case may be, must be able to enforce the burden before the appointed day in order for it to be converted. Registration must occur before the appointed day.
461. Subsection (2) provides for the content of the notice of conversion.
462. Subsection (3) stipulates that if the requirements of subsections (1) and (2) are complied with and the burden is enforceable by the superior immediately prior to the appointed day, the burden shall be converted into a health care burden on the appointed day. The *dominium utile* is the burdened property in respect of the obligation.
463. Subsection (4) provides that the right to enforce a burden converted into a health care burden is subject to any counter obligation due by the trust, or as the case may be, the Scottish Ministers.
464. Subsection (6) makes section 18C subject to sections 41 and 42 of the 2000 Act on registration of a notice. These sections are discussed above in relation to the new section 18A(9).
465. *Subsection (3)* of section 114 provides for the new **section 27A** of the 2000 Act.
466. Subsection (1) of section 27A enables superiors who are not prescribed as conservation bodies to transfer the right to enforce a burden which meets the criteria for conservation burdens in section 27 of the 2000 Act to a conservation body or the Scottish Ministers. The definition of conservation burdens in section 27(2) of the 2000 Act is repeated in section 38(1) of this Act. The superior would have to register a notice in the form contained in schedule 8A of the 2000 Act (inserted by schedule 13 of the Act).
467. Subsection (2) requires the consent of the conservation body (or, where the nominee is the Scottish Ministers, the consent of the Scottish Ministers) that is being nominated before the nomination can become effective.
468. Subsection (3) states that the notice must comply with section 27(3) of the 2000 Act. This requires the notice to set out the title of the superior; describe the land subject to the real burden (or any part of that land); the terms of the real burden; and any counter-obligation to the real burden enforceable against the superior.
469. Subsection (4) incorporates the terms of sections 41 and 42 of the 2000 Act on registration of a notice.
470. *Subsection (4)* of section 114 provides for the new **section 28A** of the 2000 Act. This section is similar to section 28(1) of the 2000 Act. It ensures that the conservation body being nominated under section 27A will have title to enforce the re-allotted burden and

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will be presumed to have interest to enforce it. The section requires that the burden being transferred by the superior would have been enforceable by the superior immediately before the appointed day.

471. Subsection (5) of section 114 provides for the new **section 65A** of the 2000 Act. This section is concerned with sporting rights. These are fishing and game rights that the superior has reserved when feuing the land to the vassal. This section permits sporting rights which are enforceable by a superior prior to the appointed day to be converted into separate tenements in land by the registration of a notice.
472. Subsection (1) of section 65A allows a superior to register a notice in the form contained in schedule 11A of the 2000 Act (inserted by schedule 13 of the Act) to convert sporting rights enforceable by a superior into a separate tenement in land. This tenement is not the same as a real burden in favour of a benefited property, or even a personal real burden such as a conservation burden. As a separate tenement it would be regarded as an independent, self-standing property right. The sporting right must be valid before the appointed day in order to be converted. Registration must occur before the appointed day.
473. Subsection (2) provides for the content of the notice of conversion.
474. Subsection (3) adopts the requirement in section 18(4) of the 2000 Act for the superior to swear or affirm before a notary public that to the best of their knowledge all of the information contained in the notice is true. The sanctions of the False Oaths (Scotland) Act 1933 would apply in the event that the oath or affirmation was known to be false or not believed to be true.
475. Subsection (4) adopts the provisions in section 18(5) of the 2000 Act to allow a legal representative of the superior to sign on their behalf if by reason of legal disability or incapacity they are unable to swear or affirm for the purposes of subsection (3). Similarly, the subsection also adopts the provision of the 2000 Act allowing an authorised person to sign on behalf of a superior who is not an individual (e.g. a company).
476. Subsection (5) stipulates that if the requirements of subsections (1) to (3) are complied with and the sporting right is enforceable by the superior immediately prior to the appointed day, then it shall be converted into a tenement in land on the appointed day. The *dominium directum* is the superiority interest of the superior.
477. Subsection (6) makes clear that nothing in the new provisions confers an exclusive right to sporting rights on the former superior. The section will not give a former superior an improved right to the one that existed before feudal abolition. A non-exclusive right would remain non-exclusive.
478. Subsection (7) treats each part of the *dominium utile* that is in different ownership as a separate unit. For example, where the original *dominium utile* had been split into 5 different units, 5 separate notices would be required and 5 separate tenements of sporting rights would be created.
479. Subsection (8) ensures that any counter-obligation that the superior was obliged to perform prior to the appointed day as a consequence of the sporting right shall continue. The reference to section 47 of the 2000 Act entails that on the extinction of a sporting right, any counter-obligation which is a counterpart of the right is also extinguished.
480. Subsection (9) provides a simple definition of sporting rights, superseding that in the definition of “real burden” in section 49 of the 2000 Act, which is repealed by schedule 15. Paragraph 10(e) of schedule 13 amends section 49 of the 2000 Act to make it clear that sporting rights are not real burdens for the purposes of Part 4 of the 2000 Act. This ensures that it is not possible to preserve sporting rights by registration of notices under Part 4 but only by a notice registered under section 65A. Paragraph 11(a)(ii)

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makes it clear that if no notice is registered under section 65A then sporting rights are extinguished under section 54 of the 2000 Act.

481. Subsection (10) makes section 65A subject to section 41 of the 2000 Act on registration of a notice. This will require the superior to give notice to the owner of the servient tenement of the attempt to reallocate the sporting right.
482. Subsection (11) applies subsections (1) and (2)(a) of section 43 of the 2000 Act to a notice made under section 65A. Section 43(1) provides that the Keeper of the Registers need not determine whether the superior has notified the owner of the dominium utile as required by section 41(3). Subsection (2)(a) of section 43 states that the Keeper will not be required to determine if the Superior had the ability to enforce the right in question. Subsection (5) of section 65A requires the sporting right to be enforceable by the superior immediately before the appointed day. The reference to section 43(3)(a) of the 2000 Act means that the Keeper need not make this determination.
483. As the 2000 Act will no longer treat sporting rights as real burdens they will not be extinguished by section 17 but rather by section 54 if no notice is registered before the appointed day. The adoption of section 46(1), (3) and (4) of the 2000 Act by subsection 12 means that the Keeper need not remove sporting rights extinguished by section 54 from the register unless there is an application for registration or rectification or the Keeper is ordered to remove it by the Lands Tribunal or a court. The Keeper also cannot remove a sporting right which is subject to proceedings in a court or the Lands Tribunal.
484. *Subsection (6)* of section 114 introduces some minor amendments to the 2000 Act, detailed in schedule 13. The amendments take effect on the day after Royal Assent (section 129(3)), and hence before the relevant provisions of the 2000 Act come into force.

Section 115: Further provision as respects notices of preservation or of converted servitude

485. This section contains some supplementary rules in relation to notices of preservation (section 50) and of converted servitude (section 80).
486. *Subsections (2)* and *(3)* are based on section 41(3) and (4) of the 2000 Act. They impose a duty, in the normal case, to send a copy of the notice (and explanatory note) to the owner of the burdened property. Normal service will be by post and must precede registration. The notice must contain a statement about service, or an explanation as to why service was not reasonably practicable. Further provisions about sending are contained in section 124.
487. *Subsection (4)* allows all real burdens or servitudes contained in any particular constitutive deed to be included in a single notice.
488. *Subsection (5)* is based on section 43(1) of the 2000 Act and relieves the Keeper from having to verify that the notice was duly sent to the owner of the burdened property.
489. A notice which is incomplete or inaccurate may be rejected by the Keeper. Such a rejection might be challenged in the Lands Tribunal or the courts. *Subsections (6)* to *(8)* are based on section 45 of the 2000 Act. They allow registration outwith the ten year period in circumstances where a notice has been wrongly rejected by the Keeper. The notice would have to be registered within two months of the determination that the notice was in actual fact registrable.

Section 116: Benefited property outwith Scotland

490. This section reaffirms the common law rule that a benefited property (but not a burdened property) can be outside Scotland. It also makes clear that, in such a case, there is to

be no requirement of registration against the benefited property (for example, under sections 4(5), 50(3) and 80(6)).

Section 117: Pecuniary real burdens

491. A pecuniary real burden is a heritable security constituted by reservation in a conveyance. Where property was being conveyed, a right in security in respect of an existing obligation could be reserved. It is unclear whether it is still competent to create pecuniary real burdens. *Section 117* removes the doubt by disallowing new pecuniary burdens. The provision comes into force on the day after Royal Assent (section 129(3)).

Section 118: Common interest

492. Common interest comprises rights and obligations arising by operation of law between owners of certain properties typically flats in a tenement. The right of common interest bears a resemblance to real burdens as it runs with the land. Normally common interest arises simply by force of law: it is implied and it is open to question whether such a right can be created by express agreement. If express creation were possible, common interest could be used as a substitute for real burdens and hence as a means of avoiding the provisions of this Act. Accordingly, *section 118* makes clear that common interest cannot be expressly created. Section 118 comes into force on the day after Royal Assent (section 129(3)).