

# TITLE CONDITIONS (SCOTLAND) ACT 2003

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part 7: Servitudes

##### *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.