

TITLE CONDITIONS (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Real Burdens: General

Section 15: Discharge

88. The remaining provisions of Part 1 are concerned with the manner in which real burdens are extinguished.
89. The standard method of discharging or varying real burdens is by obtaining a minute of waiver from the benefited proprietor(s) and registering it in the Land Register or Register of Sasines. *Section 15* re-states the current rules for this voluntary discharge mechanism.
90. *Section 15* provides that a real burden is discharged by registration of an appropriate deed granted by or on behalf of the owner of the benefited property. As *subsection (1)* makes clear, the discharge is effective only in respect of the benefited property whose owner has granted it. As a result, any *other* benefited properties are unaffected. An owner can only discharge a burden in relation to their own property: the effect of a benefited proprietor discharging their enforcement rights means that the burden no longer benefits their property. It does not mean that the rights of the owner of any other benefited property are affected. A burden is not completely ‘extinguished’ until the owner of every benefited property has discharged their enforcement rights. Even though section 8 will extend enforcement rights beyond owners (to tenants etc.), a discharge by the owner will remove the right of these parties to enforce. The Act makes separate provision in section 48 for personal real burdens.
91. This discharge procedure has to be carried out by or on behalf of the owner. Unlike under the present law, ‘owner’ includes a person who has right to the property but has not completed title by registration (section 123(1)(a)). Where property is owned in common, all *pro indiviso* owners must grant a deed (subsection (1) refers to ‘the’ owner). The owner ‘grants’ a deed by subscribing it in accordance with section 2 of the Requirements of Writing (Scotland) Act 1995, and in practice the deed will also be witnessed under section 3 of that Act. There is no requirement for a grantee (the owner of the burdened property) to be specified (section 69(1)). By section 122(1) ‘registration’ means registration of the discharge in the Land Register or recording of the deed of discharge in the Register of Sasines; and while registration is required only against the burdened property, the Keeper has power, and in some cases a duty, to make a corresponding entry against the title sheet of the benefited property (section 105). No particular deed or form of deed is specified.
92. *Subsection (2)* makes clear that partial discharge is included. If a burden is discharged wholly or in part then the discharge only needs to be registered against the burdened property. If, however, a burden is discharged and a replacement burden created the deed would then be both a discharge and a constitutive deed. It would then become necessary to register the deed against the burdened property and the benefited property in terms of section 4(5).