

TITLE CONDITIONS (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Real Burdens: General

Section 2: Affirmative, negative and ancillary burdens

28. *Section 2* is concerned with the *type* of obligation which can be created as a real burden. In future all real burdens will be either **affirmative** burdens, **negative** burdens or **ancillary** burdens.
29. *Subsections (1) and (2)* provide that in future new real burdens must be either obligations **to do** something (an affirmative burden), such as to use the property for a particular purpose, or to maintain a building, or obligations **to refrain** from doing something (a negative burden), such as to build on the property, or to use it for commercial purposes. It is rare under the current law for a real burden to take the form of any other type of obligation than affirmative or negative. It is possible under the current law, to create a real burden as a *self-standing* right to enter or make use of property. This could be to walk or drive over property, or to run a pipe through it. It is more usual for such rights to be constituted as positive servitudes. In future it will only be possible to create this sort of obligation as a positive servitude, and any existing real burdens in this form will be converted into positive servitudes by section 81.
30. *Subsection (3)* provides a *degree* of flexibility to the rule in subsection (1). It is sometimes necessary for a burden to reserve a right of access or use. This is not a right of access of itself: that would be a servitude. It is instead a right to enter or use a burdened property for a purpose ancillary to other obligations imposed by real burdens. For instance, a burden might oblige an owner to maintain property. An ancillary part to this burden could be to allow the benefited proprietor to access the property to inspect the maintenance work.
31. *Subsection (5)* prevents the rules set out in section 2 being avoided by labelling a burden as something that it is not. Whether an obligation falls within the permitted categories will be judged by the effect of the words rather than the words themselves.