

TITLE CONDITIONS (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Real Burdens: General

Section 4: Creation

40. *Section 4* explains how a real burden is created after the appointed day. In summary, a burden is created by a deed (known as a ‘**constitutive deed**’) granted by the owner of the burdened property and registered in the Land Register or Register of Sasines against both the benefited and the burdened properties.
41. *Subsection (1)* restates the current law that a real burden is created by registration of a constitutive deed. By section 122(1) “registration” means registration of the real burden in the Land Register or recording of the constitutive deed in the Register of Sasines. These property registers record ownership of land in Scotland. The time of creation is usually the time of registration, but where the constitutive deed is a deed of conditions, it is permissible under the present law to prevent the creation of burdens on registration of the deed of conditions by disapplying section 17 of the Land Registration (Scotland) Act 1979 (section 17 is repealed by schedule 15 to the Act). In this case the burdens are created on the date of registration of a subsequent conveyance into which the deed of conditions is incorporated. For instance, a builder might create a deed of conditions over an entire development, but choose to postpone the activation of the real burdens on each unit until it is sold. The sale of the unit is the subsequent conveyance: that is the point at which the burdens will affect that part of the development. Subsection (1) allows the continuation of this practice (by *paragraph (b)*) but by different means and also allows (by *paragraph (a)*) a more straightforward postponement to a specifically specified date. After the appointed day the constitutive deed must itself provide for a delay in the effectiveness of a real burden. The postponement must be in accordance with subsection (1). If the deed is silent, the burden will take effect immediately upon registration.
42. Under the current law the terms of a real burden must be set out either in a conveyance or a deed of conditions. *Subsection (2)* abandons this limitation. In future it will be possible to create a real burden using any deed, provided that the deed complies with the three conditions set out in paragraphs (a) to (c).
43. Paragraph (a) of subsection (2) should be read together with section 5 (which qualifies the rule that the terms of the burden must be set out in full). The requirement that the term “real burden” (or “community burden” etc.) be used is new.
44. Paragraph (b) of subsection (2) restates the rule that only an owner can burden land. “Owner” includes a person who has right to the property but has not completed title by registration (section 123(1)(a)). Where title has not been completed and the land is not already on the Land Register, there must be a deduction of title. This is further explained in the note on section 60. Where property is owned in common, both (or all) *pro indiviso* owners must grant. This is indicated by the use of the definite article (“the” owner). If the constitutive deed is a conveyance of the burdened property, the

granter satisfies paragraph (b) on the basis that he continues to own until the time of registration, and in such a case transfer of ownership and creation of the real burden occur simultaneously. An 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.

45. Paragraph (c) of subsection (2) requires nomination and identification of both the benefited and the burdened property. With personal real burdens, there is no benefited property, and the requirement is merely to identify the person in whose favour the burden is created. Subsection (4) contains an exception in respect of community burdens where it is only necessary to identify the community. Where this is done section 27 provides that each unit in the community is both a burdened and benefited property.
46. Many burdens are given special names by the Act. *Subsection (3)* makes clear that such special names can be used in the constitutive deed instead of “real burden”. Examples of these include community burdens, facility burdens, conservation burdens, maritime burdens and manager burdens. The word “purports” ensures that where a constitutive deed states that it creates a nameable type of real burden but does not in fact do so that the real burden is not invalid. This situation may typically arise where community burdens are created on the sequential sale of units. The burdens will not in fact be community burdens in terms of section 25 until at least four units are both burdened and benefited properties.
47. In community burdens, each benefited property is also a burdened property. Taken together, each of these units forms the “community” which is being regulated by the burdens (section 26(2) defines ‘community’ as any units subject to community burdens). Since it would be pointless to describe the same land twice, *subsection (4)* modifies subsection (2)(c) by requiring merely that there is nomination and identification of the community to which the burdens are to apply.
48. *Subsection (5)* provides for dual registration of the constitutive deed. At present registration is required against only the burdened property. It will now be required that registration occurs against both the burdened and the benefited property (or properties). Registration against the benefited property is excused where there is no such property (as with personal real burdens) or where the property is not in Scotland (for which see section 116). This subsection should be read in conjunction with section 120, which makes it clear that in future a deed creating a new burden cannot be registered against one property only: it will have to be registered against both properties.
49. It is unclear at present whether a real burden can be created over, or in favour of, a mere *pro indiviso* right to land that is where land is undivided but held in common by more than one owner. *Subsection (6)* puts the position beyond doubt by disallowing such burdens.
50. In certain circumstances real burdens can be created by the Lands Tribunal (section 90(8)). Section 4 does not then apply. Section 73(2) permits the creation of real burdens in a deed of disapplication of a Development Management Scheme. In this case section 4 would generally apply other than the requirement for the deed to be signed by all the owners of the burdened properties. Section 73(2) permits the deed to be signed by the owners association. These exceptions are acknowledged by *subsection (7)*.