

TITLE CONDITIONS (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 10: Miscellaneous

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

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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.
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.

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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 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.

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

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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.