

TITLE CONDITIONS (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 5: Real Burdens: Miscellaneous

Section 62: Real burdens of combined type

277. This section acknowledges the fact that the same obligation may be constituted as, for example, both a community burden and as a burden enforceable by someone outside the community. Other combinations are possible. Where it is necessary to do so, a combined burden is to be treated as two separate burdens. If, however, the benefited property is a unit in the community, the burden can only be enforced as a community burden or as one of the personal real burdens, for example, a conservation burden.
278. The issue is particularly relevant for community burdens. It is possible, for example, that a real burden may be enforceable by the owners of the units within the community against each other and also by the owner of nearby land which does not form part of the community. The owner of this land would be able to enforce the burden as a “neighbour burden”. If the community, for example using new discharge mechanisms provided by Part 2, were to discharge the burden the discharge would only affect the rights of the owners of the community to enforce the burden and would not affect the right of the nearby owner to enforce the burden as a neighbour burden.
279. *Subsection (2)* makes it clear, however, that the owner of a unit within the community cannot enforce an obligation set out in an ordinary real burden other than as a community burden. This avoids any possibility that an owner within the community may be able to claim dual rights to enforce the same obligation as “distinct” burdens. If however a person entitled to enforce a personal real burden (i.e. of the type described in section 1(3)), such as a conservation burden, is also an owner of a unit in the community that person would be able to enforce the obligation as a personal real burden independent of any right to enforce it as an ordinary community burden. Essentially where the right to enforce the burden is tied to a unit within the community the burden is only enforceable as a community burden and it is treated as a single obligation but where the right to enforce is either tied to land outwith the community or is not tied to land at all, then the obligation will be treated as both a community burden and as another distinct type of burden.