



EXPLANATORY NOTES

Long Leases (Scotland) Act 2012 (asp 9)

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LONG LEASES (SCOTLAND) ACT 2012

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Government to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Parliament.

2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

SUMMARY AND BACKGROUND

3. The Long Leases (Scotland) Act 2012 converts ultra-long leases into ownership. For the purposes of the Act, “ultra-long leases” are leases that were let for over 175 years and, for residential leases, have over 100 years left to run from the appointed day laid down in the Act and, for non-residential leases, have over 175 years left to run from the appointed day. Under the Act, compensatory and additional payments are payable by tenants to landlords. Some leasehold conditions are preserved and become real burdens in the title deeds. Landlords are also able to preserve sporting rights. The traditional name for a lease in Scotland is “tack”.

4. The Act follows a report by the Scottish Law Commission¹ published in December 2006 and a Scottish Government consultation² published in March 2010. The Government introduced a Long Leases (Scotland) Bill in the Parliamentary session 2010/11³ but this Bill fell when Parliament was dissolved for the Scottish parliamentary elections in May 2011.

¹ Scottish Law Commission Report 204, on the Conversion of Long Leases, can be found on the Commission’s website at http://www.scotlawcom.gov.uk/download_file/view/251/

² The Scottish Government consultation can be found at <http://www.scotland.gov.uk/Publications/2010/03/26131302/0> and the non-confidential responses at <http://scotland.gov.uk/Publications/2010/07/15143717/0>

³ The Bill introduced in the Parliamentary session 2010/11 can be found on the Scottish Parliament’s website at <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/22395.aspx>

OVERVIEW OF ACT

5. Part 1 of the Act covers conversion of long leases to ownership.
6. Part 2 covers conversion of certain leasehold conditions to real burdens.
7. Part 3 covers allocation of rents and renewal premiums.
8. Part 4 covers compensation for loss of landlord's rights.
9. Part 5 covers exemption from conversion and continuing leases.
10. Part 6 covers general and miscellaneous matters.

PART 1: CONVERSION OF LONG LEASE TO OWNERSHIP

Overview of Part 1 of the Act

11. Part 1 lays down which leases are eligible for conversion to ownership under the Act; which rights are extinguished and which continue and contains provisions enabling landlords to preserve sporting rights in relation to game and fishing.

Determination of “qualifying lease”

Section 1: Meaning of “qualifying lease”

12. This section provides a definition of “qualifying lease” for the purposes of converting to ownership. Under subsections (3) and (4), a lease is “qualifying” if:

- it is registered in the Sasines Register or the Land Register maintained by Registers of Scotland; and
- it was granted for more than 175 years; and
- if a residential lease, has more than 100 years left to run from the appointed day laid down in the Act; and
- if a non-residential lease, has more than 175 years left to run from the appointed day; and
- the annual rent does not exceed £100; and
- it does not include a harbour where there is a harbour authority; and
- it was not granted for the sole purpose of allowing the tenant to install and maintain pipes or cables; and
- it is not a lease of minerals or a lease containing minerals in which some payment is determined in relation to the exploitation of the minerals.

13. Provision is made in section 65 for the registration of unregistered ultra-long leases. These are then treated under the Act as “exempt leases” and provision is made in section 68 for the tenant to recall the exemption. Such leases then become eligible for conversion to ownership.

14. Subsection (5) provides that leases which have been divided are to be treated as separate leases.

15. Subsection (6) provides that “dwelling house” for the purposes of subsection 3(c)(i) includes any yard, garden, outbuilding or other pertinent. This ensures, for example, that a lease which consists of a small house with a large attached garden is still treated as wholly or mainly consisting of a private dwelling house for the purposes of subsection (3)(c)(i).

Section 2: Further provision about annual rent

16. This section makes provision relating to section 1(4)(a) to determine whether or not the annual rental under the lease exceeds £100.

17. Subsection (2) provides that the rent for the purposes of section 1(4)(a) is deemed to be the rent as set out in a document mentioned in subsection (3), subject to subsections (4) to (6).

18. The documents mentioned in subsection (3) are the lease, a registered assignment of the lease or a registered minute of variation or agreement in relation to the lease.

19. Subsection (4) disapplies subsection (2) in relation to *cumulo* rent. *Cumulo* rent is defined in section 38 of the Act and means a single rent payable in relation to two or more leases. Section 39 allows the landlord to allocate *cumulo* rent to individual leases before the appointed day, when leases covered by the Act convert to ownership. When *cumulo* rent is allocated in this way, it ceases to be *cumulo* rent.

20. Subsection (5) disapplies subsection (2) in relation to any non-monetary rent. Section 51(1)(a) makes provision for landlords to claim an additional payment in respect of any leases converting to ownership under the Act where there is any right to any rent expressed wholly or partly in non-monetary terms (such as six fat hens).

21. Subsection (6) disapplies subsection (2) in relation to any variable rent. Section 64 of the Act makes provision relating to the exemption of leases where the annual rental at any point during the period of 5 years before Royal Assent exceeded £100. Section 64 allows landlords to register an agreement with the tenant or, if agreement cannot be reached, to register an order made by the Lands Tribunal for Scotland.

Section 3: Only one lease is qualifying lease

22. This section sets out rules where land is subject to two or more leases which satisfy the requirements in section 1.

23. If land has been sublet, the sublease too might fulfil the criteria for conversion. The intention is that the last lease should qualify for conversion. If the sublease affects only part of the land originally leased, conversion would apply to this part and the head lease would be the qualifying lease for the remaining part. For example, if A, the owner of land, leases 10 hectares to B for 999 years and B in turn sublets 4 of these hectares to C for 920 years, C is the qualifying tenant in relation to the 4 hectares and B in relation to the remaining 6 hectares.

Conversion of right of lease to ownership

Section 4: Conversion of right of lease to right of ownership

24. Under this section, the conversion of qualifying leases to ownership is automatic, unless the tenant chooses to opt out under Part 5 of the Act. Conversion happens on the “appointed day”. The “appointed day” is defined in section 70 although this definition does not apply when a tenant of a lease recalls an exemption from conversion (see section 67(3)).

Consequences of conversion

Section 5: Extinction of certain rights and obligations

25. Subsection (1) extinguishes all rights and obligations arising from the qualifying lease and any superior lease. The rights and obligations may be set out expressly in a deed or be implied by virtue of the landlord and tenant relationship. There is a saving for any rights or obligations that survive the appointed day in one form or another under sections 6 and 7 and Part 2.

26. Subsection (2) provides an exception for personal rights and obligations.

27. Subsection (3) makes it clear that the obligation to pay rent for any period before the appointed day remains enforceable.

28. Subsection (4) prevents any proceedings being raised or continued after the appointed day for the enforcement of any rights and obligations extinguished by subsection (1). It does not matter that the breach occurred before the appointed day. Any decree or interlocutor already pronounced does not survive the appointed day. For instance, an interdict enforcing a use restriction would cease to apply.

29. Subsection (5) provides that subsection (4) does not apply to rights and obligations which survive the appointed day under sections 6 and 7 and Part 2. It will also remain possible after the appointed day to enforce a right to recover damages or a right to the payment of money (such as unpaid rent due before the appointed day). Subsection (5) further provides that subsection (4) does not apply to a right of irritancy. (“Irritancy”

means a landlord's right to terminate a lease). Section 73 contains specific provision on the extinction of right of irritancy in certain leases.

Section 6: Subordinate real rights, reservations and pertinents

30. This section sets out the subordinate real rights and encumbrances that burden the right of ownership of the converted land from the appointed day. It also makes provision in respect of pertinents (matters belonging to the lease) and reservations (matters excluded from the lease). In this section, "converted land" is the land in which a right of ownership is created through the conversion of a qualifying lease under section 4(1)(a).

31. Subsection (2) lays down that on the appointed day subordinate real rights over the qualifying lease (such as a standard security or a mortgage) become subordinate real rights over the right of ownership.

32. Subsections (3) and (4) provide that the right of ownership created under section 4 is subject to any encumbrances and subordinate real rights, other than heritable securities, proper liferents (a right to use and enjoy a thing during life) or any superior leases, which burdened the head landlord's ownership immediately before the appointed day. Servitudes, real burdens, and public rights of way, for example, will all continue. Subsection (4) does not affect the personal obligation of the debtor under the heritable security.

33. Subsection (5) defines the extent of the converted land by reference to pertinents and reservations of the lease. On the appointed day, a pertinent of the qualifying lease becomes a pertinent of the converted land provided that it is of a type that is recognised as a pertinent of land. Excluded from the converted land is anything reserved from the qualifying lease (or any superior lease), provided that it is capable of being held as a separate tenement in land (i.e. capable of being owned separately). If the reservation is not capable of being held as a separate tenement, it is disregarded on conversion and forms part of the converted land.

34. The main example of a reservation is a minerals reservation. Where the minerals are not already separate tenements, they become separate tenements on the appointed day when ownership of the surface is separated from ownership of the minerals. The reservation clause will continue to regulate the relationship between the owner of the minerals (the former landlord) and the owner of the surface (the former tenant).

35. Subsection (5) interacts with section 8. Under section 8 a notice may be registered converting reserved sporting rights into a separate tenement. If a notice is registered, the sporting rights will not form part of the converted land. If a notice is not registered, the converted land will include the sporting rights. If such rights have been leased out separately, the lease in question is not affected by conversion of the qualifying lease but there would be a change of landlord.

Section 7: Creation of servitudes on conversion

36. The effect of this section is to create those servitudes (e.g. rights of access over neighbouring land to maintain a water supply or a drainage pipe) which would have been created (whether expressly, impliedly or by positive prescription) had the deeds referred to been a conveyance of land leading to separation of ownership.

37. The deeds referred to are the qualifying lease, any lease higher in the hierarchy of leases (where there is such a hierarchy), or any partial assignation relating to the qualifying lease. The latter, for example, covers the case where a single lease is divided into two by assignation. The assignation may include rights and obligations which affect the part of the lease that is assigned and also the part that is retained.

Section 8: Conversion of reserved sporting rights

38. This section provides for landlords to preserve sporting rights: i.e. rights to game and to fish.

39. Section 8 does not apply to exclusive rights to fish for salmon. Exclusive rights to fish for salmon are separate tenements in land: i.e. they are capable of being owned separately from the land or river in which they subsist. This means that either exclusive rights to fish for salmon are included in the qualifying lease or they are not. Given this, no special provisions are required for exclusive rights to fish salmon.

40. Subsection (2) provides for the execution and registration of a notice by the landlord.

41. Subsection (3) sets out requirements as to the content of the notice. This includes the terms of any counter-obligation to the right.

42. Under subsection (4), registration can be either against the interest of the landlord (i.e. the owner of the land) or the tenant of the qualifying lease.

43. Subsections (5) and (6) provide that the notice must be sworn or affirmed before a notary public. In the normal case this must be done personally by the landlord but some exceptions are set out in subsection (6).

44. Subsection (7) converts the sporting right into a separate tenement on the appointed day provided that the requirements of the section have been complied with and the right is still enforceable. It also prescribes the content of the separate tenement.

45. Where the right has been expressly reserved in the lease, the operation of subsection (7) clarifies the types of game which may be included in the right to take game. First of all, it comprises the rights and obligations set out in the lease in question. Secondly, insofar as consistent with those express rights etc. it comprises, in the case of game, an exclusive right to take hares, pheasants, partridges, grouse and ptarmigan, and, in the case of fishing, an exclusive right to fish for freshwater fish. Freshwater fish is

defined in section 80. The definition mirrors that in section 69(1) of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003.

46. Subsection (8) qualifies subsection (7) by providing that any exclusive right to game is subject to the right of the occupier under the Ground Game Act 1880 to take or kill hares and rabbits.

47. Subsection (9) provides that the separate tenement continues to be subject to any existing counter-obligation. It also provides that a counter-obligation is extinguished on the extinction of the right.

48. Subsection (10), as read with the definition of landlord in section 80, makes clear that only the owner of the land can serve a notice converting the right into a separate tenement. Where the right is held in common each co-owner must sign the notice.

49. The section is subject to section 75 which deals with pre-registration requirements for notices.

Section 9: Further provision for section 8

50. Subsection (1) provides that where a right affects more than one qualifying lease a landlord has to register a separate notice in respect of each lease. However, where the same qualifying lease is affected by different rights subsection (2) allows one notice to be used.

PART 2: CONVERSION OF CERTAIN LEASEHOLD CONDITIONS TO REAL BURDENS

Overview of Part 2 of the Act

51. Part 2 provides a scheme for the conversion of certain leasehold conditions into real burdens. Once the conditions have been converted they become subject to the law on real burdens. The law on real burdens is primarily contained in the Title Conditions (Scotland) Act 2003. Section 1 of the 2003 Act outlines what real burdens are. Generally, a real burden is an encumbrance on land constituted in favour of the owner of other land in that person's capacity as owner of that other land. However, personal real burdens are burdens constituted in favour of a person other than by reference to the person's capacity as owner of any land.

Determination of "qualifying conditions"

Section 10: Qualifying conditions

52. This section identifies the criteria that must be met for a leasehold condition to qualify for conversion to a real burden. The section should be read with section 11. The effect of the two sections is that the leasehold condition must be capable of being constituted as a real burden under the Title Conditions (Scotland) Act 2003.

53. Subsection (1)(a), along with subsection (2), requires the condition to be set out in certain deeds. An interposed lease is specifically excluded from the list of constitutive deeds. An interposed lease may be granted under section 17 of the Land Tenure Reform (Scotland) Act 1974 by the original landlord to another party. The tenants of the original lease then become responsible to the new party, who is their new landlord. Interposed leases may, for example, be granted when the original landlord wishes to retain an interest in the property but does not wish to carry out the day to day management.

54. Subsection (1)(b) requires the condition to be binding on successors.

55. Subsection (1)(c), along with subsection (3), sets out certain requirements as to the content of the condition. Subsection (4) is an aid to interpretation. Whether a leasehold condition complies with subsection (3) will be judged by the effect of the words and not merely by their form.

56. Subsection (5) sets out some exclusions. Obligations to pay rent and restrictions on assignation and subletting are based on the relationship of landlord and tenant and therefore cannot be converted. Rights of irritancy (to terminate a lease) and penalty clauses (monetary penalties if lease conditions are not complied with) are also excluded. However, rights of pre-emption (a right to acquire certain property in preference to any other person), redemption (a right to buy back) or reversion (right to retake possession) may be capable of conversion.

Section 11: Restriction on conversion of qualifying conditions

57. The effect of this section is that a condition which becomes a qualifying condition must comply with section 3 of the Title Conditions (Scotland) Act 2003 for it to be validly converted into a real burden. Section 3 of the 2003 Act provides rules as to the content of a real burden. It must, for instance, relate directly or indirectly to the burdened property and it must not be contrary to public policy.

58. Section 3(5) of the 2003 Act which prohibits the creation of new rights of redemption is excluded as it would otherwise prevent the conversion of a qualifying condition having the effect of a redemption or reversion.

Meaning of “qualifying land”

Section 12: Meaning of “qualifying land”

59. This section defines the term “qualifying land”.

Entitlement to enforce qualifying conditions

Section 13: Determination of who may enforce condition

60. The notice procedure introduced by sections 14 to 28 for converting a qualifying condition into a real burden can only be used by a person who has the right to enforce the qualifying condition. Section 13 sets out some rules on who can enforce a qualifying condition.

61. Subsection (2) provides that a person who has not completed title to the property to which the right to enforce a qualifying condition attaches has the right to enforce the condition. Where more than one person comes within that description then only the person with the latest right to the property may enforce it.

62. Subsection (3) provides that where a lease has been partially assigned, the tenant or subtenant of the retained part of the lease can enforce conditions imposed in the assignation or related deed. Such a person can then serve a notice under sections 14, 17, and 23 to 28. The reference to a deed registered under section 3 of the Registration of Leases (Scotland) Act 1857 includes a deed of conditions registered under the old section 3(5) of the 1857 Act which was repealed and replaced by the Title Conditions (Scotland) Act 2003 (section 128, schedule 14 paragraph 1, and schedule 15).

63. Subsection (4) defines “entitled person” for the purposes of sections 14 to 21. The definition recognises that third parties may have a right to enforce a qualifying condition.

64. Subsection (5) sets out rules, for the purposes of sections 14 to 21, for the situation where a right to enforce is held by more than one person *pro indiviso* (*pro indiviso* property or land is owned by several persons in common). If the right to enforce is held in the capacity of landlord, all *pro indiviso* landlords have to act together. In a section 14 case, for example, they must all be parties to the notice and they must all own the land to be nominated as a benefited property. If the right to enforce is held by a third party, a *pro indiviso* holder of the right can act alone but the effect is to convert the condition into a real burden for the benefit of all *pro indiviso* holders.

Conversion of conditions to burdens

Section 14: Conversion by nomination of benefited property

65. This section allows a person with a right to enforce a qualifying condition (the “entitled person”) to convert the condition into a real burden in favour of neighbouring land. “Entitled person” is defined in section 13(4). The entitled person is usually the landlord (of the qualifying lease or a superior lease) but in some circumstances is a neighbour.

66. Subsections (1) and (2) provide that where a conversion condition set out in subsection (4) is met, or the Lands Tribunal for Scotland makes an order under section 21, an entitled person may prospectively convert a qualifying condition into a real burden by executing and registering a notice.

67. Subsection (3) sets out the content of the notice. Further provision as to counter-obligations (paragraph (h)) is made in section 34.

68. Subsections (5) and (6) determine what land may be nominated by an entitled person as a benefited property. In the majority of cases the entitled person is the landlord. In such a case, the land to be nominated as the benefited property is land which either:

- the landlord owns and which is not subject to a qualifying or exempt lease; or

- land which the landlord is tenant of under a qualifying or exempt lease.

69. In the case of third parties, the land which may be nominated as a benefited property is that land to which the right to enforce attaches (whether to the ownership of that land or to the tenant's interest under a lease of that land).

70. For example, A is the tenant of a qualifying lease and has assigned the lease in part to B, imposing a qualifying condition. Section 13(3) makes it clear that A has the right to enforce that condition and section 13(4) provides that A is an entitled person for the purposes of section 14.

71. To convert the qualifying condition, A has to serve a notice nominating land as the prospective benefited property. The land to be nominated as the benefited property has to satisfy section 14(5) as read with section 14(6) given that A is not a landlord. In other words, if the land to be nominated is subject to a qualifying or exempt lease, the entitled person has not only to be the tenant of that lease (subsection (5)) but also that lease has to be the lease to which the entitlement to enforce the condition attaches (by virtue of subsection (6)).

72. Section 32 deals with cases where a qualifying condition is expressly enforceable by the owner or tenant of land other than the qualifying land.

Section 15: Conversion by nomination: registration

73. Subsection (1) requires dual registration of the notice against both the burdened and the benefited property. Under subsection (2), there is a choice in both cases of registering against the title of the owner or (where applicable) the title of the tenant.

74. Subsection (3) provides that the notice must be sworn or affirmed before a notary public. In the normal case this must be done personally but some exceptions are set out in subsection (4).

Section 16: Conversion by nomination: effect

75. This section converts the qualifying condition into a real burden on the appointed day provided that the requirements of the section have been complied with and immediately before the appointed day the qualifying condition is still enforceable by the entitled person or a successor of that person.

Section 17: Conversion by agreement

76. This section allows the "entitled person" (as defined in section 13(4)) to enter into an agreement with the tenant of the qualifying lease for the purpose of converting a qualifying condition into a real burden in favour of neighbouring land. The entitled person is usually the landlord (of the qualifying lease or a superior lease) but in some circumstances is a neighbour. An attempt to reach agreement is a prerequisite to an

application under section 21 for an order from the Lands Tribunal dispensing with the need for any of the conversion conditions set out in section 14(4) to be satisfied.

77. Subsection (1) requires a notice to be served on the tenant under the qualifying lease as a preliminary to the agreement.

78. Subsections (2) and (3) determine what land may be nominated as a benefited property.

79. Subsection (4) sets out the content of the notice. Further provision as to counter-obligations (paragraph (f)) is made in section 34.

80. Subsection (5) allows the parties to the agreement to modify the terms of the qualifying condition or any counter-obligation.

81. Subsection (6) regulates the form and content of the agreement.

82. Subsection (7) provides that this section is subject to section 36, which lays down further provision for notices and agreements.

Section 18: Conversion by agreement: registration

83. Subsection (1) requires dual registration of the agreement against both the burdened and the benefited property. Under subsection (2), there is a choice in both cases of registering against the title of the owner or (where applicable) the title of the tenant.

Section 19: Conversion by agreement: effect

84. This section converts the qualifying condition into a real burden on the appointed day if the requirements have been met and immediately before the appointed day the qualifying condition is still enforceable by the entitled person or a successor of that person.

Section 20: Conversion by agreement: title not completed

85. This section provides the method for deduction of title in cases where under the general law deduction of title would be required.

Applications relating to section 14

Section 21: Lands Tribunal order

86. This section allows an “entitled person” (as defined in section 13(4)) to apply to the Lands Tribunal for an order dispensing with the need to satisfy any of the conversion conditions set out in section 14(4). The entitled person is usually the landlord (of the qualifying lease or a superior lease) but in some circumstances is a neighbour.

87. Subsection (3) prevents an application being made unless there has first been an attempt to reach agreement under section 17.

88. Subsection (4) requires the application to be made within a year of the section coming into force. The application has also to include a description of the attempt to reach agreement.

89. Subsection (5) provides that the Lands Tribunal can make an order if it is satisfied that there would be material detriment to the value or enjoyment of the entitled person's ownership (taking such person to have ownership) of the prospective benefited property were the qualifying condition in question to be extinguished. If an order is granted, the entitled person can then proceed to register a notice under section 14 converting the qualifying condition into a real burden.

90. Subsection (6) provides that the decision of the Lands Tribunal is final.

91. Subsection (7) makes provision for expenses in the case of a person opposing an application.

Section 22: Dealing with application under section 21

92. This section makes provision for the procedure in the Lands Tribunal in respect of applications under section 21.

93. The Scottish Ministers also have powers to make rules in respect of Lands Tribunal procedures under section 3 of the Lands Tribunal Act 1949.

Personal real burdens

Section 23: Conversion to personal pre-emption or redemption burden

94. This section allows a person with the right to enforce a qualifying condition which confers a right of pre-emption or redemption to convert that condition into a real burden to be known as a personal pre-emption burden or a personal redemption burden.

95. The entitled person is usually the landlord (of the qualifying lease or a superior lease) but in some circumstances is a neighbour.

96. Subsection (1) provides for the execution and registration of a notice. This must be done by the person with the right to enforce the qualifying condition. All *pro indiviso* landlords, for example, have to be parties to the notice.

97. Subsection (2) identifies the type of qualifying condition which may be converted.

98. Subsection (3) sets out the content of the notice. Further provision as to counter-obligations (paragraph (e)) is made in section 34.

99. Subsection (4) provides for registration of the notice against the burdened property. Registration can be against either the title of the owner or the title of the tenant.

100. Subsection (5) provides that the notice must be sworn or affirmed before a notary public. In the normal case this must be done personally but some exceptions are set out in subsection (6).

101. Subsection (7) converts the qualifying condition on the appointed day into a personal pre-emption burden or a personal redemption burden in favour of the person with the right to enforce (or that person's successor) provided that the requirements of the section have been complied with and that immediately before the appointed day the qualifying condition is still enforceable.

102. Subsection (8) makes clear that the benefit of the burden in question can be assigned or otherwise transferred to any person.

103. Subsection (9) lays down that the assignation is completed by registration.

104. Subsection (11) provides the method for deduction of title in cases where under the general law deduction of title would be required.

105. The section is subject to section 36, which makes further provision in relation to notices, and section 75, which deals with pre-registration requirements for notices.

Section 24: Conversion to economic development burden

106. This section allows a local authority, or the Scottish Ministers, with the right to enforce a qualifying condition which was imposed for the purpose of promoting economic development to convert that condition into an economic development burden in their favour. An economic development burden may lay down how the property should be used or may require money to be paid to the local authority or the Scottish Ministers. The relevant provision in the Title Conditions (Scotland) Act 2003 is section 45.

107. Subsection (1) provides for the execution and registration of a notice.

108. Subsection (2) sets out the content of the notice. Further provision as to counter-obligations (paragraph (f)) is made in section 34.

109. Subsection (3) provides for registration of the notice against the burdened property. Registration can be against either the title of the owner or the title of the tenant.

110. Subsection (4) converts the qualifying condition on the appointed day into an economic development burden in favour of the local authority or the Scottish Ministers provided that the requirements of the section have been complied with and that immediately before the appointed day the qualifying condition is still enforceable.

111. The section is subject to section 36, which makes further provision in relation to notices, and section 75, which deals with pre-registration requirements for notices.

Section 25: Conversion to health care burden

112. This section allows the Scottish Ministers when they have the right to enforce a qualifying condition which was imposed for the purpose of promoting the provision of facilities for health care to convert that condition into a health care burden in their favour.

113. Subsection (1) provides for the execution and registration of a notice.

114. Subsection (2) sets out the content of the notice. Further provision as to counter-obligations (paragraph (e)) is made in section 34.

115. Subsection (3) provides for registration of the notice against the burdened property. Registration can be against either the title of the owner or the title of the tenant.

116. Subsection (4) converts the qualifying condition on the appointed day into a health care burden in favour of the Scottish Ministers provided that the requirements of the section have been complied with and that immediately before the appointed day the qualifying condition is still enforceable.

117. The section is subject to section 36, which makes further provision in relation to notices, and section 75, which deals with pre-registration requirements for notices.

Section 26: Conversion to climate change burden

118. This section allows a public body (defined in subsection (5)) or trust or the Scottish Ministers with the right to enforce a qualifying condition which was imposed for the purpose of reducing greenhouse gas emissions (defined in subsection (5)) to convert that condition into a climate change burden in their favour. Climate change burdens were introduced by the Climate Change (Scotland) Act 2009. Section 68 of the 2009 Act inserted section 46A into the Title Conditions (Scotland) Act 2003.

119. Subsection (2) sets out the content of the notice. Further provision as to counter-obligations (paragraph (f)) is made in section 34.

120. Subsection (3) provides for registration of the notice against the burdened property. Registration can be against either the title of the owner or the title of the tenant.

121. Subsection (4) converts the qualifying condition on the appointed day into a climate change burden in favour of the public body, trust or the Scottish Ministers provided that the requirements of the section have been complied with and that immediately before the appointed day the qualifying condition is still enforceable.

122. Subsection (5) lays down various definitions. The definitions of “emissions” and “greenhouse gas” are taken from the Climate Change (Scotland) Act 2009. The definition of “public body” is taken from an order made by the Scottish Ministers under section 38(4) of the Title Conditions (Scotland) Act 2003.

123. The section is subject to section 36, which makes further provision in relation to notices, and section 75, which deals with pre-registration requirements for notices.

Section 27: Conversion to conservation burden: rule one

124. This section allows a conservation body, or the Scottish Ministers, with the right to enforce a qualifying condition which promotes conservation to convert that condition into a conservation burden in their favour. “Conservation burden” is defined in section 38(1) of the Title Conditions (Scotland) Act 2003. “Conservation body” is defined in section 122(1) of the 2003 Act and refers to any body prescribed by an order made by the Scottish Ministers under section 38(4) of the 2003 Act.

125. Subsection (1) provides for the execution and registration of a notice.

126. Subsection (2) identifies the type of qualifying condition which may be converted. This mirrors the definition of conservation burden in section 38(1) of the 2003 Act.

127. Subsection (3) sets out the content of the notice. Further provision as to counter-obligations (paragraph (f)) is made in section 34.

128. Subsection (4) provides for registration of the notice against the burdened property. Registration can be against either the title of the owner or the title of the tenant.

129. Subsection (5) converts the qualifying condition on the appointed day into a conservation burden for the benefit of the public in favour of the conservation body or the Scottish Ministers provided that the requirements of the section have been complied with and that immediately before the appointed day the qualifying condition is still enforceable.

130. Subsection (6) qualifies the reference in subsection (5) to a conservation body or the Scottish Ministers so as to include successors provided that they are either a conservation body or the Scottish Ministers. In any other case the notice falls and the condition is extinguished on the appointed day.

131. The section is subject to section 36, which makes further provision in relation to notices, and section 75, which deals with pre-registration requirements for notices.

Section 28: Conversion to conservation burden: rule two

132. This section allows a person with the right to enforce a qualifying condition which promotes conservation to convert that condition into a conservation burden in favour of a conservation body or the Scottish Ministers. The entitled person is usually the landlord (of the qualifying lease or a superior lease) but in some circumstances is a neighbour.

“Conservation burden” is defined in section 38(1) of the Title Conditions (Scotland) Act 2003. “Conservation body” is defined in section 122(1) of the 2003 Act and refers to any body prescribed by an order made by the Scottish Ministers under section 38(4) of the 2003 Act.

133. Subsection (1) provides for the execution and registration of a notice. This must be done by the person with the right to enforce the qualifying condition. All *pro indiviso* landlords, for example, have to be parties to the notice.

134. Subsection (2) requires the consent of the nominee to be obtained before a copy of the notice is sent to the tenant under the qualifying lease under section 75(2) or in other cases before the notice is executed. The nominee is required to sign the notice by way of indicating consent.

135. Subsection (3) sets out the content of the notice. Further provision as to counter-obligations is made in section 34.

136. Subsection (4) provides for registration of the notice against the burdened property. Registration can be against either the title of the owner or the title of the tenant.

137. Subsection (5) converts the qualifying condition on the appointed day into a conservation burden for the benefit of the public in favour of the nominated conservation body or the Scottish Ministers provided that the requirements of the section have been complied with and that immediately before the appointed day the qualifying condition is still enforceable by the person with the right to enforce or that person’s successor.

138. The section is subject to section 36, which makes further provision in relation to notices, and section 75, which deals with pre-registration requirements for notices. The adjustment to section 36(3)(b) makes clear that a discharge of a section 28 notice also requires the consent of the nominated person.

Other real burdens

Section 29: Conversion to facility or service burden

139. Subsection (1) provides for the automatic conversion of qualifying conditions concerned with the maintenance, management, reinstatement or use of facilities into facility burdens. Typical examples of facilities are given in subsection (3). “Facility burden” is defined in section 122(1) of the Title Conditions (Scotland) Act 2003.

140. Obligations to maintain or reinstate which have been taken over by a local or other public authority are excluded (see section 33).

141. Subsection (2) provides for the automatic conversion of qualifying conditions concerned with the provision of services to other land into service burdens. “Service burden” is defined in section 122(1) of the Title Conditions (Scotland) Act 2003.

Section 30: Conversion to manager burden

142. This section provides for the automatic conversion of a qualifying condition which confers a power of management over a group of related properties into a real burden known as a manager burden. “Manager burden” is defined in section 63(1) of the Title Conditions (Scotland) Act 2003. Such burdens are time limited, usually to five years from creation (section 63(4) to (7) of the 2003 Act), which in the case of converted conditions is the date of registration of the qualifying lease or other constitutive deed.

143. Subsections (3) and (4) provide that whether properties are related depends on the circumstances of each case and gives a list of indicators. They are modelled on section 66(1) of the Title Conditions (Scotland) Act 2003.

Section 31: Conversion where common scheme affects related properties

144. This section applies to a “qualifying condition” under this Act the regime provided by section 53 of the Title Conditions (Scotland) Act 2003 for real burdens. It draws on the concepts of “common scheme” and “related properties”, used in the 2003 Act. Essentially, qualifying conditions will be imposed under a common scheme insofar as they apply identical or equivalent conditions to each property.

145. The effect of subsection (1) is to convert automatically qualifying conditions which meet the criteria into real burdens in respect of which each property covered by the scheme will be both a benefited and a burdened property. The burdens created will be community burdens. Part 2 of the Title Conditions (Scotland) Act 2003 provides for community burdens and section 25 of the 2003 Act defines “community burdens”.

146. Subsections (2) and (3) provide that whether properties are related depends on the circumstances of each case and gives a list of indicators. A typical example would be flats in the same tenement.

147. Subsection (4) prevents rights of pre-emption, redemption or reversion being conferred by virtue of this section.

Section 32: Conversion where expressly enforceable by certain third parties

148. Sometimes the lease makes clear that, in addition to the landlord, the conditions (or some of them) are to be enforceable by neighbours, i.e. by the owners or tenants of other land. Without express provision the rights fall with the conditions themselves. This section therefore provides for the conversion of such conditions into real burdens.

Exclusions from conversion

Section 33: Qualifying condition where obligation assumed by public authority

149. This section provides that the automatic conversion of qualifying conditions involving roads, sewerage or other facilities into facility or service burdens (section 29) does not extend to obligations which have been taken over by a local or other public

authority. Obligations of this kind are spent. The provision also applies to obligations which are part of a common scheme (section 31).

Effect of conversion on counter-obligations

Section 34: Counter-obligations on conversion

150. This section makes clear that an obligation which is the counterpart of a qualifying condition converted into a real burden also survives and is binding on the former landlord or third party enforcer or any replacement enforcer. An example might be where a tenant is under an obligation to pay for maintenance which is then to be carried out by the landlord. The section does not provide a free-standing right to enforce the counter-obligation but it makes the right to enforce the burden subject to performance of the counter-obligation.

151. Subsection (2) sets out the relevant counter-obligations.

Prescription

Section 35: Prescriptive period for converted conditions

152. This is a transitional provision. The period of negative prescription (extinction of obligation) for a leasehold condition is presently twenty years. After conversion to a real burden, the period will be five years under section 18 of the Title Conditions (Scotland) Act 2003. The effect of this section is to make the prescriptive period for a breach of a qualifying condition that occurs before the appointed day for leasehold conversion the same as the period for a breach of a real burden that occurred before the day appointed for feudal abolition. That is to say, the prescriptive period for such a breach will be the shorter of 5 years from the appointed day or 20 years from the breach.

Notices and agreements under this Part

Section 36: Further provision for notices and agreements

153. Subsection (2) provides that the person with a right to enforce (whether landlord or third party) should not be able to preserve that right under separate heads of conversion. It should not, for example, be competent to convert a condition into a neighbour burden under section 14 and a conservation burden under section 27 or section 28. A choice has to be made but the choice is not final as subsection (3) allows an earlier agreement or notice to be discharged.

154. Subsections (4) and (5) regulate the number of notices that are required. Where the same qualifying condition enforceable by the same person affects more than one qualifying lease, a separate notice must be prepared for each lease but the same notice (or agreement) can be used for more than one condition.

155. Subsection (6) makes clear that there is no requirement of registration where the prospective benefited property is outwith Scotland.

PART 3: ALLOCATION OF RENTS AND RENEWAL PREMIUMS ETC.

Overview of Part 3 of the Act

156. Part 3 of the Act makes provision for the allocation of *cumulo* rent and *cumulo* renewal premium. “*Cumulo*” refers to a single payment made in relation to two or more leases.

Key terms

Section 37: Partially continuing leases and renewal obligations etc

157. This section defines certain terms.

Section 38: *Cumulo* rent and *cumulo* renewal premium

158. This section defines *cumulo* rent as a single rent payable under two or more leases and *cumulo* renewal premium as a single renewal premium payable in relation to two or more leases.

159. Subsection (2) qualifies the definitions of *cumulo* rent and *cumulo* renewal premium by providing that, where a rent or premium has been apportioned between the leases before the appointed day with the express or implied agreement of the parties, the rent or premium apportioned is to be the rent or premium payable under that lease.

160. The definition of *cumulo* renewal premium is qualified further by subsections (3) and (4). They provide that where a *cumulo* rent has been apportioned with the agreement of the parties but not the *cumulo* premium, the premium is allocated between the leases in the same proportions as the rent.

Allocation of rent

Section 39: Allocation of *cumulo* rent before appointed day

161. This section allows the landlord to allocate *cumulo* rent before the appointed day. This allows landlords to claim an exemption from the Act, if the annual rental for an individual lease after the *cumulo* rent has been allocated is over £100 (see section 64).

162. Subsection (1) and (2) provide that where two or more leases are subject to *cumulo* rent and one or more of the leases is a qualifying lease (defined in section 1), the landlord may allocate the *cumulo* rent.

163. Subsection (3) provides that the allocation must be reasonable and subsection (4) provides that the allocation is presumed to be reasonable if it accords with any apportionment that has already taken place. This presumption is relevant only in cases where an apportionment was made without the consent of the landlord. For example, where the rent is collected by a property manager or other third party and remitted to the landlord in a single sum. Subsection (5) provides that once the allocation by the landlord

has taken place the rental for each individual lease is the annual rental and is not *cumulo* rent for the purposes of this Act.

Section 40: Allocation of *cumulo* rent after appointed day

164. Where the annual rent payable under the lease is a *cumulo* rent, as defined in section 38, that rent requires to be allocated before the compensatory payment can be calculated under Part 4. This section sets out the rules for doing so.

165. Subsection (2) directs the landlord to allocate the *cumulo* rent between the leases within 2 years of the appointed day. The rent is to be allocated between all of the leases in respect of which *cumulo* rent was payable. The allocation must be in such proportions as are reasonable in the circumstances (subsection (3)).

166. Subsection (4) creates a presumption that the landlord's allocation is reasonable if it accords with an apportionment made before the appointed day. This presumption is relevant only in cases where an apportionment was made without the consent of the landlord. For example, where the rent is collected by a property manager or other third party and remitted to the landlord in a single sum. To assist the landlord, section 58 requires any third party collector to disclose to the landlord information about the tenants from whom the rent has been collected and the amount collected.

167. Under subsection (5), the sum allocated to a lease that continues after the appointed day is the annual rent payable under that lease from the appointed day, subject to any allocation under section 41 in relation to partially continuing leases.

Section 41: Partially continuing leases: allocation of rent

168. Section 41 is concerned with a lease that is partly extinguished and partly continues on and after the appointed day. "Partially continuing lease" is defined in section 37. A lease is a partially continuing lease if, for example, there is a partial sublease further down the leasehold chain which is exempt from conversion under Part 5. Instead of being extinguished in full, the higher lease continues in force in relation to the subjects of the exempt lease.

169. Subsection (1) directs the landlord of a partially continuing lease to allocate the annual rent payable under the lease between the continuing part and the extinguished part (the "continuing subjects" and the "converted subjects"). Subsection (2)(b) provides that if the rent payable under the lease was a *cumulo* rent, as defined in section 38, the landlord must allocate the *cumulo* rent between the relevant leases, as outlined in section 40, before carrying out the allocation under this section.

170. Under subsection (4), the sum allocated to the continuing part of the lease is the annual rent payable under that lease from the appointed day.

Allocation of renewal premium

Section 42: Allocation of *cumulo* renewal premium

171. Where a *cumulo* renewal premium (as defined in section 38) is payable under more than one lease, a landlord, for the purposes of claiming a compensatory payment or an additional payment for the loss of the renewal premium, has first to allocate the premium.

172. If the premium allocated is more than £100, compensation can only be claimed under section 51(1)(d) as an additional payment.

173. The allocation must be in such proportions as are reasonable in the circumstances (subsection (3)). Subsection (4) creates a presumption that an allocation of a premium is reasonable if it accords with an apportionment effective immediately before the appointed day or, if there is no such apportionment, it follows any allocation of *cumulo* rent made under section 40.

174. Under subsection (5), the renewal premium allocated to a lease that continues after the appointed day is the renewal premium payable under that lease from the appointed day, subject to any allocation under section 43 in relation to partially continuing leases.

Section 43: Partially continuing leases: allocation of renewal premium

175. Where a renewal premium (as defined in section 37) is payable under a partially continuing lease, a landlord, for the purposes of claiming a compensatory payment or an additional payment for the loss of the renewal premium, must first allocate the premium between the converted subjects and the continuing subjects.

176. Subsection (3) provides that if the renewal premium payable under the lease is a *cumulo* renewal premium, as defined in section 38, the landlord must allocate the *cumulo* renewal premium between the relevant leases, as outlined in section 42, before carrying out the allocation under this section.

177. If the premium allocated is more than £100, compensation can only be claimed under section 51(1)(d) as an additional payment.

178. The allocation must be in such proportions as are reasonable in the circumstances (subsection (4)). Subsection (5) creates a presumption that an allocation of a premium is reasonable if it follows an allocation of rent under section 41.

179. Under subsection (6), the sum allocated to the continuing part of the lease is the renewal premium payable under the lease from the appointed day.

Allocation disputed or not made

Section 44: Allocation disputed or not made: reference to Lands Tribunal

180. Under subsection (1), the tenant under a continuing lease or the continuing part of a lease can apply to the Lands Tribunal to:

- challenge the allocation of *cumulo* rent under sections 39 or 40;
- challenge the allocation of *cumulo* renewal premium under section 42;
- challenge the allocation of rent in relation to partially continuing leases under section 41;
- challenge the allocation of renewal premium in relation to partially continuing leases under section 43;
- seek the allocation of *cumulo* rent or *cumulo* renewal premium, if the landlord has failed to carry out an allocation within two years from the appointed day; and
- seek the allocation of rent or renewal premium, where a lease is partially continuing, between the converted subjects and the continuing subjects, where the landlord has failed to do so within 2 years of the appointed day.

181. Where the landlord has made an allocation which is disputed, any application by the tenant to the Lands Tribunal must be made within 56 calendar days, beginning with the day on which notice of the allocation was given to the tenant. Where no allocation is made, the tenant may apply to the Tribunal at any time after the expiry of the two year period running from the appointed day.

182. This section does not give a former tenant of a lease, or part of a lease, extinguished on the appointed day, a right to challenge the amount of compensation claimed by the former landlord where an allocation has been made. However, it is a defence to a claim for compensation that the allocation was unreasonable.

PART 4: COMPENSATION FOR LOSS OF LANDLORD'S RIGHTS

Overview of Part 4 of the Act

183. Part 4 sets out a scheme under which the landlord of a lease converting to ownership under Part 1 may claim compensation. A landlord may claim a general payment for the loss of rights. This is termed a compensatory payment and is based on the capitalised value of the rent (see sections 45 to 49).

184. Exceptionally a compensatory payment may not be enough. In certain cases, therefore, a landlord may claim a further payment, termed an “additional payment”, for the loss of the right in question (see sections 50 to 55).

185. Part 4 also contains provisions in relation to the landlord serving a preliminary notice where a claim is likely to exceed £500 (see section 56); the tenant making payments by instalments when the amount due is £50 or more (see section 57) and the disclosure of information (see sections 58 and 59).

Compensatory payment

Section 45: Requiring compensatory payment

186. To claim a compensatory payment, the former landlord must serve on the former tenant a notice in the prescribed form within 2 years of the appointed day, accompanied by a copy of a prescribed explanatory note (subsection (4)).

187. The sum due by the tenant is calculated in accordance with section 47 and is an ordinary unsecured debt. The claim is against the immediate former tenant of the person making the claim.

188. If the sum being claimed is £50 or more, an instalment document has to be served along with the notice (subsection (5)). This gives the former tenant the option of paying by instalments in accordance with the scheme set out in section 57. If an instalment document is not served, the notice has no effect.

189. Subsection (6) provides that the section is subject to section 56, the effect of which is to restrict the amount of compensatory payment to no more than £500 unless a preliminary notice has been served.

Section 46: Making compensatory payment

190. If the landlord has followed the notice procedure correctly, the former tenant must, unless entitled to pay by instalments (see sections 45(5) and 57), make the compensatory payment within 56 calendar days beginning with the day on which notice is served.

Calculation of compensatory payment

Section 47: Calculation of the compensatory payment

191. This section sets out how the compensatory payment by tenants to landlords is to be calculated. The method of calculation is based on the compensation scheme under the Abolition of Feudal Tenure etc. (Scotland) Act 2000, which abolished feudal tenure. The compensation is designed to deliver the same economic benefit to the landlord as the ongoing income from rent paid under the ultra-long lease being converted to ownership. Additional payments may also be due – see sections 50 to 55.

192. The compensatory payment is first calculated by working out the Annual Income (AI). As outlined in Step 1, the AI is calculated by determining the annual rent, in accordance with section 48, and then, as outlined in Step 3, by adding any notional annual renewal premium (NARP) calculated under section 49. Under Step 2 and section 49, the NARP is any renewal premium of £100 or less, divided by the renewal period (RP) (see section 49). Renewal premiums of over £100 may give rise to a separate claim for an additional payment – see section 51(1)(d).

193. To give an example, if the annual rent is £2.50 and the renewal premium is £2.50, with a renewal period of 99 years, the AI is £2.50 plus 3p (£2.50 divided by 99, rounded to the nearest penny). Therefore, the AI is £2.53.

194. The next step, as outlined in Step 4, is to calculate the sum of money which would, if invested in 2.5% Consolidated Stock, produce an annual sum equal to AI. This sum is the compensatory payment.

195. The price of Consolidated Stock varies. At 2 November 2012 the price was £58.76 (to buy £100 of nominal stock yielding 2.5% interest). Therefore, the compensatory payment is £58.76 (price of stock yielding £2.50 a year) multiplied by £2.53 (AI) divided by £2.50 (annual sum produced by investing £58.76 in 2.5% consolidated stock). This gives a compensatory payment of £59.47.

196. To give another example, if the annual rent is £20 and there is no NARP, the compensatory payment is £58.76 (price of stock) multiplied by £20 (AI) divided by £2.50 (annual income from the stock). This gives a figure of £470.08

197. Another way of carrying out the calculation is to use a variable multiplier (variable as the price of 2.5% Consolidated Stock varies). Therefore, if the price of 2.5% Consolidated Stock is £58.76, the variable multiplier is 23.5 (£58.76 divided by £2.50). This variable multiplier can then be multiplied by the AI to produce the compensatory payment.

Annual rent

Section 48: Determination of the annual rent

198. This section lays down how the annual rent should be determined for the purposes of calculating the compensatory payment. In some cases, rent may be paid on a *cumulo* basis. *Cumulo* rent is defined in section 38 and refers to a single rent payable in relation to two or more leases. In these cases, the annual rent is allocated under section 40.

199. In other cases, a lease may be “partially continuing” (a definition of “partially continuing lease” is laid down in section 37). In these cases, the annual rent is allocated under section 41.

200. Where the lease does not involve *cumulo* rents or partially continuing leases, the annual rent is as laid down in the lease, excluding any non-monetary payments.

201. Subsection (2) provides that any rent expressed in non-monetary terms is to be excluded from the calculation of the compensatory payment. Provision is made for non-monetary rents to be the basis of a claim for an additional payment – see section 51(1)(a).

Renewal premiums

Section 49: Calculation of notional annual renewal premium

202. This section applies if a renewal premium of £100 or less is payable under the lease and it is necessary to include the renewal or more than one renewal in order to meet the durational requirements for conversion.

203. Subsection (2) directs the former landlord to divide the amount of the renewal premium by the number of years between each renewal. This gives a sum which represents the “notional annual renewal premium” or NARP. The NARP is added to the annual rent payable under the lease in order to calculate compensation under section 47.

204. Subsection (3) provides that that where there is a partially continuing lease, the renewal premium for leases converting to ownership is as allocated under section 43. Where there is not a partially continuing lease but there is a *cumulo* renewal premium, the renewal premium is as allocated under section 42. And in all other cases the renewal premium is the amount payable under the lease.

205. If a renewal premium of more than £100 is payable, the landlord can claim compensation under the additional payments regime set out in sections 50 to 55.

Additional payment

Section 50: Claiming additional payment

206. To claim an additional payment for the loss of a right, the former landlord must serve a notice in the prescribed form on the former tenant within two years of the appointed day (subsections (2) and (4)). The amount claimed is calculated in accordance with section 52. The claim is against the immediate former tenant of the person making the claim except in the circumstances set out in subsection (3).

207. Under subsection (3), where the right lost by the former landlord of a superior lease is one specified in section 51(1)(e) to (g), the former landlord is directed to serve the notice claiming an additional payment on the former tenant of the qualifying lease rather than on the former tenant of the superior lease.

208. Subsection (4) sets out various requirements for the form and content of the notice. The notice must be accompanied by a copy of the explanatory note.

209. Under subsection (5), if the sum being claimed is £50 or more an instalment document has to be served along with the notice. This gives the tenant the option of paying by instalments in accordance with the scheme set out in section 57. If an instalment document is not served the notice has no effect.

210. Subsection (6) provides that the section is subject to section 56 the effect of which, in the case of a qualifying lease, is to restrict the maximum amount that can be claimed by way of additional payment to £500 unless a preliminary notice has been served.

Section 51: Extinguished rights

211. This section identifies the rights the loss of which may found a claim for an additional payment. In the notice making the claim it will be for the landlord to nominate, and to justify, the particular ground of claim (see section 50(4)).

212. Subsection (1)(a) refers to a right to a non-monetary rent. Paragraph 6.29 of the Scottish Law Commission report indicated that in around 1% of the leases it surveyed it found non-monetary rents such as six fat hens, oat farm meal and the services of a labourer for three days to work on the roads in a town.

213. Subsection (1)(b) refers to a right to have the rent reviewed or increased. Paragraph 6.30 of the Scottish Law Commission report indicated that provision for rent reviews was rare in ultra-long leases but the possibility should be acknowledged. Paragraph 6.31 of the report indicated that it is possible for rent to increase by way of a fixed formula rather than by virtue of a review.

214. Subsection (1)(c) refers to a right to a rent to the extent that the amount payable is variable from year to year. This might, for example, be relevant where rent is based on the turnover of a business.

215. Subsection (1)(d) refers to a right to receive a renewal premium of more than £100 (rights to receive lesser amounts can be recovered under the compensatory payment regime (see sections 47 and 49)).

216. Subsection (1)(e) relates to a landlord's right of reversion, so long as the lease would expire no later than 200 years after the appointed day. Reversionary rights occasionally may have a value over and above the income stream from rent. Rights falling into this category are to be valued in accordance with section 52(3) and (4).

217. Subsection (1)(f) refers to a right to bring a lease to an end before its normal expiry. The right has to be within the full control of the landlord and exercisable within 200 years of the appointed day. A break clause exercisable at regular intervals or a right of redemption or resumption exercisable at the landlord's discretion would be included but not a right to terminate on breach. A right (such as a right of redemption) which is converted into a real burden under sections 16, 19 or 23 is excluded.

218. Subsection (1)(g) refers to a right to development value provided that the right has not been converted into a real burden under sections 16 or 19. "Development value" is defined in subsection (2) as is the expression "right to development value".

Section 52: Calculating additional payment

219. This section sets out some general and some specific rules for determining the amount of an additional payment. Subsection (2) provides that the right is to be valued as at the appointed day.

220. Subsections (3) and (4) contain specific rules relating to the valuation of a landlord's reversionary interest in a claim under section 51(1)(e). In particular, the value is deemed to be the value of the right if sold on the open market by a willing seller to a willing buyer, with special buyers and special sellers (i.e. those with a particular interest in the property) disregarded.

221. Subsections (5) to (7) provide that any obligations on the landlord which are extinguished by conversion have to be taken into account (but not insofar as such obligations are preserved as a counter obligation to a real burden) as has any other entitlement of the landlord to recover in respect of the loss. “Any other entitlement” refers primarily to the compensatory payment calculated under section 47.

222. Subsection (8) caps a claim for the loss of the right to development value. In some cases, ultra-long leases may have been granted cheaply on the basis that the property was used for some limited purpose, such as the building of a church or a community hall.

223. Paragraph 6.45 of the Scottish Law Commission report said that if any leasehold conditions preserving development value were discharged by the Lands Tribunal, any compensation would be limited to a sum to make up for the effect the leasehold condition produced in reducing the consideration paid for the interest in the property. No account is taken of inflation. In other words, the loss of the right to development value is limited to the reduction in the price paid for the interest in the property at the time.

Section 53: Additional payment: former tenant agrees

224. This section applies where, following service of an additional payment notice under section 50, the former tenant agrees to make the payment specified in the notice. Unless the former tenant is entitled to pay by instalments (see section 57), payment must be made to the former landlord within 56 calendar days beginning with the day on which the notice was served on the former tenant.

225. There may be cases where the former tenant does not agree to pay the amount specified in the notice. In these cases, the former tenant and the former landlord may agree that a different amount should be paid (see section 54) or where agreement cannot be reached, the matter may be referred to the Lands Tribunal (see section 55).

Section 54: Additional payment: amount mutually agreed

226. Following service of an additional payment notice under section 50, the former landlord and former tenant may agree that a different amount be paid. This section regulates the procedure to be followed.

227. Subsection (2) requires the former landlord to serve a further notice in the prescribed form on the former tenant specifying the agreed amount and requesting payment. The notice must be served within 5 years of the appointed day to be valid. If a notice is not served, the obligation to pay does not arise and the landlord loses the right to collect the payment.

228. Subsection (3) sets out requirements for the form and content of the notice. The notice must be accompanied by a copy of the explanatory note (to be prescribed by the Scottish Ministers in regulations).

229. If the agreed sum is £50 or more, subsection (4) requires that an instalment document is served along with the notice. This gives the tenant the option of paying by instalments in accordance with the scheme set out in section 57. If an instalment document is not served, the notice has no effect.

230. Unless entitled to pay by instalments, subsection (5) requires the former tenant to make payment to the former landlord within 28 calendar days, beginning with the day on which the notice is served.

Section 55: Claim for additional payment: reference to Lands Tribunal

231. This section applies in cases where no agreement has been reached under section 53 or section 54.

232. Subsection (1) gives both the former tenant and the former landlord the right to refer any matter relating to a claim for an additional payment to the Lands Tribunal.

233. Subsection (2) gives the Lands Tribunal a wide discretion to determine the matter and make such order as it thinks fit.

234. Subsection (3) requires the Lands Tribunal to provide the former tenant with the option of paying by instalments in accordance with the statutory instalment scheme if the additional payment is fixed at £50 or more. This subsection makes certain amendments to the instalment scheme to take account of the fact that no instalment document will be served on the former tenant in such circumstances.

235. Subsection (4) provides that all references to the Lands Tribunal must be made within 5 years of the appointed day.

Supplementary

Section 56: Claims in excess of £500: preliminary notice

236. A landlord who intends to claim a sum which is likely to exceed £500 by way of compensatory or additional payment from the tenant of the qualifying lease has to serve a preliminary notice. This notice must be served no later than six months before the appointed day on the person who is registered at that time as the tenant. Separate notices have to be served in respect of each type of payment. If a notice is not served the amount of compensatory or additional payment that can be claimed is capped at £500.

Section 57: Making payment by instalments

237. Where the compensatory payment or additional payment is £50 or more the former landlord has to serve an instalment document along with the relevant notice. This section sets out the rules of the instalment scheme.

238. Subsection (2) provides that the instalment document must be completed in the prescribed form and accompanied by a copy of the explanatory note.

239. Subsection (3) requires that to obtain the option to pay by instalments, the former tenant has to sign, date and return the instalment document along with payment of a 10% surcharge. The tenant has to do this within the period allowed for payment of the compensatory or additional payment, which is either 56 or 28 calendar days.

240. Subsection (4) provides that the option of paying by instalments is lost by the former tenant of a qualifying lease in the event of a sale of the whole or part of the land now owned.

241. Subsections (6) and (7) set out the details of the instalment scheme. Whitsunday is 28 May and Martinmas is 28 November.

242. Subsection (8) provides for immediate payment of the balance if an instalment is unpaid for forty two calendar days.

243. Subsection (9) makes clear that in other cases the balance can be repaid at any time.

Section 58: Collecting third party to disclose information

244. This section requires any third party collector of rent (e.g. where rent has been on a *cumulo* basis) to disclose to the landlord information about the tenants from whom the rent has been collected and, where the rent remitted is part of a *cumulo* rent, the amount so collected, so far as this is practicable.

Section 59: Duty to disclose identity etc. of former tenant

245. This section requires a person on whom a notice was mistakenly served claiming a compensatory or additional payment to disclose the name and address of the former tenant or, failing that, such other information as will enable the former tenant to be traced.

Section 60: Prescription of requirement to make payment

246. This section provides that the obligation to pay the compensatory or additional payment prescribes (i.e. extinguishes) after 5 years. Prescription starts to run from the date the obligation to pay arises.

Section 61: Interpretation of Part 4

247. Subsection (1) defines former landlord and former tenant for the purposes of Part 4. It has to be read alongside the definitions of landlord and tenant in section 80(1). The definitions include a person who has a right to the interest but who has not completed title. If more than one person comes within the definition the latest such person is treated as the landlord or the tenant.

248. Subsection (2) provides where there are co-tenants their liability is joint and several as regards the compensatory or additional payment in a question with the former landlord and also among themselves. It also makes clear that for the purposes of Part 4 such tenants are to be treated as a single tenant except for the provisions regarding service of a notice.

PART 5: EXEMPTION FROM CONVERSION AND CONTINUING LEASES

Overview of Part 5 of the Act

249. This Part contains provisions on the landlord being able to exempt a lease, by agreement with the tenant or through an order of the Lands Tribunal, if the annual rent is over £100 either immediately before the appointed day or at any point in the 5 years before Royal Assent. Part 5 also makes provision on the tenant opting out of converting a lease to ownership by exempting the lease and recalling the exemption. It also contains provisions on the registration of unregistered leases. These are then treated as leases which are exempt from conversion but with the tenant having the option of recalling this exemption.

Exempt leases

Section 62: Exempt leases

250. This section sets out the consequences of a lease being an exempt lease when the appointed day arrives. The effect is to suspend the process of conversion in relation to that lease and any superior lease. Existing landlord-tenant relationships continue in force as before. “Exempt leases” are defined by reference to sections 63 to 66.

Types of exempt leases

Section 63: Exemption of qualifying lease by registration of notice

251. This section allows the tenant of a qualifying lease to opt out of conversion so that it becomes an “exempt lease”. The section requires the tenant to register a notice of exemption at least two months before the appointed day.

Section 64: Exemption of qualifying lease by registration of agreement or order

252. This section allows a landlord to claim an exemption in respect of a lease where the annual rental is over £100.

253. Subsection (1) provides that the landlord must register an agreement with the tenant or an order made by the Lands Tribunal no later than 2 months before the appointed day.

254. Subsection (2) makes provision in respect of the form of the agreement with the tenant.

255. Subsection (2)(c)(i) provides that one option is for the agreement to state that the annual rent immediately before the appointed day will be over £100. Such an agreement might be sought, for example, where the landlord allocates *cumulo* rent under section 39 and the allocated rent for an individual lease is over £100.

256. Subsection (2)(c)(ii), as read with subsection (3), provides that another option is for the agreement to state that the annual rent was over £100 at any point in the 5 years before Royal Assent. This reflects that some leases may have variable rent. Variable rent may mean that the rent paid in any one year in the 5 years before Royal Assent exceeds £100 even though the base rent laid down in the lease is under £100.

Section 65: Certain leases registered near or after the appointed day

257. An unregistered lease which otherwise satisfies the requirements for conversion is not a qualifying lease under section 1. This section makes provision for the situation where the lease is subsequently registered.

258. An unregistered lease which is first registered in the year before the appointed day or at any time thereafter is treated as an exempt lease. This enables the lease to be converted into ownership by registering a recall notice under section 67. This procedure gives the landlord of that lease notification of conversion of the lease to ownership and the opportunity to register notices converting conditions into real burdens etc. Where first registration of the lease takes place in the year before the appointed day, section 62 suspends the process of conversion.

Section 66: Subleases of exempt leases

259. The tenant under an exempt lease may grant a sublease which fulfils the criteria for conversion. This section provides that on registration the sublease is to be treated as an exempt lease. The tenant may then register a recall notice.

Section 67: Recall of exemption

260. This section allows the tenant under an exempt lease to register a recall notice, so long as the lease is not exempted under section 64 by the landlord. The tenant may register a recall notice before or after the appointed day.

261. Under subsection (2), on registration of a recall notice the exempt lease ceases to be an exempt lease. It then becomes eligible for conversion so long as it meets the general criteria for conversion. In particular, the unexpired duration of the lease must at the appointed day (see subsection (3)) be more than 100 years (for a residential lease) or more than 175 years (for a non-residential lease).

262. Subsection (3) prescribes the appointed day where the notice of recall is registered in the six months before or on or at any time after the standard appointed day laid down in section 70 – appointing it as the first Whitsunday (28 May) or Martinmas occurring 6 months or more after the notice of recall is registered. The effect of deferring the appointed day is to give a landlord of the qualifying lease or any superior lease a period of

six months in which to consider whether to register notices converting leasehold conditions into real burdens.

263. Subsection (4) removes the requirement for the landlord to serve a preliminary notice in order to claim compensation or additional payments of more than £500. The purpose of such a notice is to invite consideration of opting out but that is not relevant where the decision to recall has been made by the tenant.

Supplementary

Section 68: Exemption and recall notices: supplementary

264. This section sets out rules for the service and registration of a notice of exemption or a notice of recall.

265. Subsections (2) and (3) provide for the sending of a copy of the exemption notice or recall notice to the landlord of the qualifying or exempt lease and any landlord of a superior lease. Service can be on the person who is registered as landlord. Normally service is by post, and must precede registration. The notice must contain a statement about service, or an explanation as to why service was not reasonably practicable.

266. Subsection (4) requires the notice to be registered against the title of the tenant. This allows anyone dealing with the lease to see the position.

Section 69: Application to Lands Tribunal for order confirming rent

267. This section makes provision for the landlord to obtain an order from the Lands Tribunal that the annual rent in relation to a lease exceeds £100. If such an order is granted, the landlord may register the order under section 64 to claim an exemption.

268. Subsection (3) provides that an application can only be made to the Tribunal if an attempt has been made to reach agreement with the tenant. Subsection (4) provides that any application to the Tribunal must outline what had been done to obtain an agreement and must be made within a year of the section coming into force.

269. Subsection (1)(a) provides that the application may be for an order that the annual rent immediately before the appointed day will be over £100. Such an order might be sought, for example, where the landlord allocates *cumulo* rent under section 39 and the allocated rent for an individual lease is over £100.

270. Subsection (1)(b), as read with subsection (2), provides that the application may be for an order that the annual rent was over £100 at any point in the 5 years before Royal Assent. This reflects that some leases may have variable rent. Landlords may wish to claim an exemption as variable rent may mean that the rent paid in any one year in the 5 years before Royal Assent exceeds £100 even though the base rent laid down in the lease is under £100.

PART 6: GENERAL AND MISCELLANEOUS

Overview of Part 6 of the Act

271. This Part contains provisions on a variety of issues: the appointed day; how to determine the duration of leases; leases continuing on tacit relocation; irritancy; service of notices; registration of notices; matters that the Keeper of the Registers of Scotland is not required to determine; referring disputed notices to the Lands Tribunal; the registration of documents rejected by the Keeper when the courts or the Lands Tribunal determine that they are registrable; amendments to enactments; interpretation; ancillary provisions; subordinate legislation and commencement.

The appointed day

Section 70: The appointed day

272. This section fixes the appointed day, which is the day when qualifying leases are converted into ownership. Martinmas (28 November) is chosen because that is one of the dates on which rent is normally payable. The period of two years between the coming into force of the section under section 70 and the appointed day enables the qualifying leases to be identified ahead of conversion. This in turn enables the statutory notices for conversion of qualifying conditions etc. to be served and registered before the appointed day.

273. The Term and Quarter Days (Scotland) Act 1990 regulates, in Scotland, the date of Martinmas (and Whitsunday, Candlemas and Lammas).

Duration of lease etc

Section 71: Determining duration of lease

274. The provision sets out a number of rules for calculating the period of a lease. The period of a lease is relevant for the purposes of working out whether a lease qualifies for conversion (section 1(3)); whether an additional payment can be claimed for the residual value of the reversionary interest (section 51(1)(e)) and how that value is to be assessed (section 52(3) and (4)); and whether an additional payment can be claimed for the loss of a right to bring a lease to an end early (section 51(1)(f)). In each case the duration of the lease is calculated in the same way.

275. Subsection (1) sets out the rules for break options (which are disregarded), for renewals (which are included), for calculating the lifetime of a tenant (for the exceptional cases where this might be relevant), and for consecutive leases (which are included). A consecutive lease is a lease which is granted during the term of the first lease on essentially the same terms and conditions as the first lease and which is to run from the moment the first lease ends.

276. Subsection (2) makes clear that a calculation of the period of a lease in accordance with the rules in subsection (1) is subject to section 67 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000. That provision (with certain exceptions) prohibits the grant of a lease for more than 175 years. The provision has no relevance for break options and so subsection (2) does not apply to such options.

Section 72: Leases continuing on tacit relocation

277. This section relates to leases continuing on tacit relocation (leases continuing on a year by year basis where, for example, a renewal was due to have taken place but did not actually happen). The section provides that Part 4, on compensation, applies to such leases as does section 71, on determining the duration of the lease, as if any provision requiring the landlord to renew the lease had been complied with.

278. To give an example, some leases in Blairgowrie are for 99 years but contain provisions requiring the landlords to renew them in perpetuity for further periods of 99 years. The effect of section 72 is that where such leases have not been renewed but continue on tacit relocation, the renewal is deemed to have taken place, including conditions about further renewals. This means that the durational requirements for leases to convert to ownership are met.

Extinction of right of irritancy in certain leases

Section 73: Extinction of right of irritancy in certain leases

279. This section prevents the termination by irritancy of a lease of land granted for a period of more than 175 years which has an unexpired duration of more than 100 years (for residential leases) or has an unexpired duration of more than 175 years (for non-residential leases) and is not excluded by section 1(4) or section 64. The lease does not have to be registered to be covered by this section.

280. Irritancy is the premature termination of the lease by the landlord, when the tenant has failed to comply with one or more of the tenant's obligations under the lease. It includes a provision in a lease which deems a failure of the tenant to comply with any provision in the lease to be a material breach of contract. Any proceedings already commenced in relation to irritancy of a lease covered by this section are deemed to be abandoned (subsection (4)). However, any final decree granted is not affected (subsection (5)).

Section 74: Service of notices

281. This section sets out the rules for service of a notice (and preliminary notice) in respect of a compensatory or additional payment and in respect of serving notices to enter into an agreement with a tenant for the purpose of converting a qualifying condition into a real burden in favour of neighbouring land.

282. Liability to pay any compensatory or additional payment depends on service of a notice. The date of service is the starting point for the period allowed for payment or return of the instalment document. The date of service is the date of delivery or posting. When notices are returned undelivered, provision is made for service on the Extractor of the Court of Session.

Section 75: Notices: pre-registration requirements

283. This section applies to notices which require to be submitted for registration under section 8 (sporting rights) or under Part 2.

284. The section provides for the sending of a copy of the notice to the tenant under the qualifying lease. Normally service is by post and must precede registration. The notice must contain a statement about service, or an explanation as to why service was not reasonably practicable.

Section 76: Keeper's duty as regards documents

285. This section relieves the Keeper of the Registers of Scotland of the need to verify certain matters which the Keeper could not reasonably be expected to check.

Section 77: Disputed notices: reference to Lands Tribunal

286. This section gives the Lands Tribunal a broad jurisdiction to resolve disputes in relation to notices. The section applies not only to notices converting conditions into real burdens under Part 2 but also to notices converting reserved sporting rights (section 8) and to exemption and recall notices (sections 63, 64 and 67).

Section 78: Certain documents registrable despite initial rejection

287. This section allows registration, within limits, if the initial rejection of a notice or agreement by the Keeper is judicially overturned.

288. Subsection (1) identifies the notices and agreements in question.

289. Subsection (2) provides that a notice or agreement has to be registered within 2 months of the determination by the court (defined in subsection (6) as either the Court of Session or the Sheriff Court) or the Lands Tribunal. Under subsections (3) and (4), a notice which is registered after the appointed day is given retrospective effect.

290. Subsection (5) provides for the Scottish Ministers to specify a period of time within which application has to be made to the court or the Lands Tribunal. A different period may be prescribed for exempt leases as an exempt lease can be recalled at any time (other than a lease exempted under section 64) and so the appointed day for that lease is uncertain.

Miscellaneous

Section 79: Amendments to enactments

291. This section gives effect to the minor and consequential amendments in the schedule.

Section 80: Interpretation

292. Subsection (1) gives the meaning of certain terms. The majority of the terms have already been discussed in the Notes to the earlier sections.

293. Under subsection (2) expressions used in the Title Conditions (Scotland) Act 2003 are to have the same meaning unless otherwise provided. Section 122 of the 2003 Act is the interpretation provision. This technique allows a number of terms to be used without further explanation – including, for example, benefited property, burdened property, conservation body, conservation burden, economic development burden, enactment, facility burden, service burden, health care burden, manager burden, and notary public.

Section 81: Ancillary provision

294. This section provides ancillary order-making powers for Ministers.

Section 82: Subordinate legislation

295. This section regulates the making of subordinate legislation under the Act.

Section 83: Commencement

296. This section deals with the date of commencement. Different elements of the Act may be commenced at different times.

Section 84: Short title

297. This section deals with the short title.

Schedule

298. This makes minor and consequential amendments.

PARLIAMENTARY HISTORY

299. The table below sets out, for each Stage of the proceedings in the Scottish Parliament for this Act, the dates on which the proceedings at that Stage took place, the references to the Official Report of those proceedings, the dates on which Committee Reports and other papers relating to the Act were published, and references to those Reports and other papers. The Scottish Parliament's web page for this Act is:

<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/45695.aspx>

<u>Proceedings and reports</u>	<u>References</u>
Introduction	
Bill as introduced	SP Bill 7. Session 4 (2012) Bill (as introduced) (373KB pdf posted 13 January 2012)
Stage 1	
<i>Rural Affairs, Climate Change and Environment Committee (lead).</i>	
4 th meeting 2012	8 February 2012. Paper, written and supplementary evidence from the Scottish Government Bill team and oral evidence from the Scottish Government Bill team. Oral evidence is at columns 595 to 603. www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7183&mode=pdf
5 th meeting 2012	22 February 2012 Oral evidence from Brodies LLP; the Law Society of Scotland; Scottish Land and Estates; and the Scottish Property Federation. Oral evidence is at columns 616 to 629. www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7199&mode=pdf

*These notes relate to the Long Leases (Scotland) Act 2012 (asp 9)
which received Royal Assent on 7 August 2012*

6 th meeting 2012	<p>29 February 2012</p> <p>Oral evidence from Andy Wightman (independent researcher); the Society of Local Authority Lawyers and Administrators in Scotland (SOLAR); City of Glasgow Council; City of Edinburgh Council and Aberdeenshire Council.</p> <p>Oral evidence is at columns 638 to 670</p> <p>www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7209&mode=pdf</p>
7 th meeting 2012	<p>7 March 2012</p> <p>Oral evidence from Stewart Stevenson, the Minister for Environment and Climate Change, supported by Scottish Government Officials.</p> <p>Oral evidence is at columns 680 to 697.</p> <p>www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7217&mode=pdf</p>
Stage 1 report	<p>SP Paper 103, published on 27 March 2012.</p> <p>Stage 1 Report on Long Leases (Scotland) Bill (448KB pdf)</p>
<i>Finance Committee</i>	
3 rd meeting 2012	25 January 2012. Item taken in private.
Report to Rural Affairs, Climate Change and Environment Committee	<p>Paragraphs 168 to 170 of the Stage 1 report by the Rural Affairs, Climate Change and Environment Committee outline the work carried out by the Finance Committee and the written evidence it received.</p> <p>Stage 1 Report on Long Leases (Scotland) Bill (448KB pdf)</p>

*These notes relate to the Long Leases (Scotland) Act 2012 (asp 9)
which received Royal Assent on 7 August 2012*

<i>Subordinate Legislation Committee</i>	
3rd meeting 2012.	7 February 2012. Columns 259 and 260. www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7192&mode=pdf
4 th meeting 2012. Report.	21 February 2012. Item taken in private. Annexe A to the Stage 1 Report by the Rural Affairs, Climate Change and Environment consists of the report by the Subordinate Legislation Committee. Stage 1 Report on Long Leases (Scotland) Bill (448KB pdf)
<i>Consideration by the Parliament</i>	
Stage 1 debate	25 April 2012. Columns 8364 to 8395. www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7243
Stage 2	
<i>Rural Affairs, Climate Change and Environment Committee.</i>	
14 th meeting 2012	16 May 2012. Columns 939 to 949. www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7418&mode=pdf
Bill as amended at Stage 2	SP Bill 7A Session 4 (2012). Bill (as amended at stage 2) (2MB pdf posted 17 May 2012)
<i>Subordinate Legislation Committee.</i>	
12 th meeting 2012	8 May 2012. Column 392. www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7287&mode=pdf

*These notes relate to the Long Leases (Scotland) Act 2012 (asp 9)
which received Royal Assent on 7 August 2012*

Stage 3	
Stage 3	28 June 2012. Columns 10739 to 10747 www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7431
Debate	28 June 2012. Columns 10748 to 10770 www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7431
.	
Royal Assent	
Royal Assent.	7 August 2012. The Long Leases (Scotland) Act 2012 (asp 9) www.legislation.gov.uk/asp/2012/9/contents/enacted

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