

# **ABOLITION OF FEUDAL TENURE ETC. (SCOTLAND) ACT 2000**

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## **EXPLANATORY NOTES**

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#### *Commentary on Sections*

#### **Part 4: Real Burdens**

#### *Section 17: Extinction of superior's rights*

69. *Section 17* sets out the general rule that a superior's rights in relation to the enforcement of feudal real burdens are extinguished on the appointed day for the abolition of the feudal system.
70. *Undersubsection (1)* any real burden enforceable only by a superior is extinguished on the appointed date of abolition. A burden which a third party (such as a neighbour) can also enforce survives, but the (former) superior loses his rights. Sections 18 (reallotment of real burden by nomination of new dominant tenement), 19 (reallotment of real burden by agreement), 20 (reallotment by real burden by order of Lands Tribunal), 23 (reallotment of real burden affecting facility of benefit to other land etc.), 27 (notice preserving right to enforce conservation burden), 28 (enforcement of conservation burden) and 60 (preserved right of Crown to maritime burdens) set out exceptions to this rule where a former feudal real burden may survive extinction but as an ordinary real burden without any of the feudal trappings. It should be noted that under section 75 (saving for contractual rights), a former superior will retain any purely contractual rights. Like other conveyances, feudal deeds contain contractual terms which, on registration, become real burdens. In a dispute between the original parties to a feudal relationship, a condition in a feu which is valid as a real burden will also be valid as a contractual term. Even after abolition, a feudal superior will be able to enforce the terms of a feudal deed against the original vassal in so far as such terms are contractual. Section 17 (extinction of superior's rights) extinguishes only the real burden. Successive vassals are subject only to the real burden, not the contractual terms between the original parties.
71. Under the general law, an obligation, once extinguished, is extinguished for all purposes. When feudal burdens are extinguished, it should therefore cease to be possible to sue in respect of past breaches. *Subsection (2)* prevents superiors from attempting to enforce burdens extinguished under subsection (1). It makes no difference that the breach occurred before the appointed day for abolition. Subsection (2) makes it clear that an interdict, or order for specific implement, will be deemed to have been abandoned on the date of abolition. *Subsection (3)* makes it clear that proceedings in relation to irritancy (for which see section 53 - discharge of rights of irritancy), damages and payment of money are not however affected by this section (see also section 54(3) - extinction of superior's rights and obligations qua superior). If a burden is saved under the Act then section 17 will not affect any proceedings or court order in relation to that

burden. If the superior is unable to save that burden under the Act he will not continue to have enforcement rights by other means.

***Section 18: Reallotment of real burden by nomination of new dominant tenement***

72. Burdens on neighbouring property are feudal if they were created in a feu writ, but non-feudal if they were imposed in a simple disposition. While non-feudal burdens will survive feudal abolition, the former superior's title to enforce formerly feudal burdens will not, unless special provision is made. For example, a person may have sold part of the garden ground of a house for the erection of a separate house, subject to conditions. The superior/proprietor of the original house would be unable to enforce these conditions if the burdens were created in a feu writ rather than a disposition following feudal abolition. Section 18 allows superiors, in certain circumstances, to reallocate the title to enforce a feudal real burden to neighbouring land which they own. That land will become the benefited property and the burden will be enforceable by successive owners of that land.
73. *Subsection (1)* provides for the registration of a notice nominating land as a benefited property. The superior must have right to the sole dominium utile or sole allodial ownership of the benefited property. Unless the land is in the vicinity of the burdened property (i.e. the former feu subject to the feudal burden), there will be no interest to enforce and registration will be pointless. The present legal requirement of interest to enforce is preserved by section 24 (interest to enforce real burden). Section 18 will come into force on such day as the Scottish Ministers may appoint (see section 77(4)) and the superior has until the appointed day for abolition to complete registration of the notice.
74. *Subsection (2)* sets out the content of the notice which must follow the statutory form given in schedule 5. Further provision in relation to counter-obligations referred to in paragraph (e) is made in section 25 (counter-obligations on reallotment).
75. *Subsection (3)* provides for registration (or recording) of the notice against both the benefited and burdened property in either the Land Register or the Register of Sasines, as appropriate. If the title to one property is in the Land Register and to the other in the Register of Sasines, it will be necessary to register (or record) in both registers.
76. *Subsections (4) and (5)* make it clear that the notice must be sworn or affirmed before a notary public. The notices will contain information provided by the superior, the accuracy of which will not always be easy to check. Sanctions of the False Oaths (Scotland) Act 1933 would apply in the event that the oath or affirmation was known to be false or not believed to be true. *Subsection (5)* sets out exceptions to the normal rule that the notice must be sworn or affirmed by the superior personally and Schedule 2 to the Requirements of Writing (Scotland) Act 1995 identifies who may sign on behalf of companies and other legal persons.
77. On the appointed day for abolition, *subsection (6)* converts the feudal burden into an ordinary non-feudal real burden in which the benefited property is the land nominated by the superior. It makes no difference if the superior no longer owns the land, but there must have been full compliance with subsections (1) to (5). The burden must still have been enforceable immediately before the date of abolition. If the superior registering the notice subsequently conveyed the superiority (unlikely given its impending abolition). This subsection makes clear that the savings provisions operate in circumstances where the superior would be able to enforce a burden if he were to complete title.
78. A notice will not be effective unless one (at least) of the three conditions of *subsection (7)* is satisfied. These are—
- (a) that the land has on it a permanent building used wholly or mainly as a place of human habitation or resort and that building is at some point within 100 metres of the burdened land;
  - (b) that the burden comprises—

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- ((i) a right to enter or otherwise make use of the burdened land; or
  - ((ii) a right of pre-emption or of redemption;
  - ((c) that the dominant tenement comprises minerals or salmon fishings or some other incorporeal property and the terms of the burden make clear that it was created for the benefit of such land.
79. With regard to *paragraph (a)*, by stipulating a distance beyond which a burden cannot be preserved, it is possible to include those cases where protection of amenity is most essential while excluding those cases where the superior may have no real interest in enforcing the burdens. In built-up areas, distant neighbours are less affected than in open countryside where there are no intervening buildings to provide a shield. A rural superior with a large estate may own land adjacent to most, if not all, of the feus. The rule in Section 18 whereby a superior is permitted to convert a feudal burden into a neighbour burden is therefore restricted to circumstances where the benefited property has on it a building which is routinely used by people for work, recreation or habitation. If a building is merely used for animals or for storage it will not qualify.
80. *Paragraph (b)* should be read together with the definition of "real burden" in section 49 (interpretation of Part 4). Burdens conferring a right of use are different in character from amenity burdens and there is no reason to apply the 100 metres limit in such cases. Burdens may also be imposed for the benefit of a mineral estate or salmon fishings or some other incorporeal property. *Paragraph (c)* allows minerals and salmon fishings to become the benefited property under section 17 and it would not be appropriate to include a restriction based on distance or the presence of a building in these cases.

***Section 19: Reallotment of real burden by agreement***

81. **Section 19** makes provision for the superior and vassal to enter into an agreement to maintain a burden in force in favour of land nominated in that agreement in such terms as may be agreed between the parties. This provides an opportunity for both parties to maintain a burden in place while also providing an opportunity to modify the terms of the real burden or any counter-obligation enforceable against the superior.
82. It is competent under the present law for superiors and vassals (as well as people not operating under feudal law) to "save" what are in effect feudal burdens by creating new, ordinary burdens in identical terms in a non-feudal document, such as a deed of conditions. This section does not affect that facility, but it provides a means whereby parties may act to save (in modified form if the parties so agree) former feudal conditions as ordinary real burdens which are of lasting mutual benefit as regards particular land of the parties.
83. *Subsection (1)* stipulates that a superior should serve a notice in the form specified in schedule 5 on the vassal intimating that he is seeking to enter an agreement to save a burden. This is to give the vassal some information to help him consider his position. The notice would not have to be sworn or affirmed and it would not be registered in the Land Register (or recorded in the Register of Sasines), so there will be no need for a conveyancing description to identify the title to the land nominated as the dominant tenement. The superior has until the appointed day for abolition to register the agreement in the Land Register (or record it in the Register of Sasines). *Subsection (1)* makes it clear that the superior and vassal may, by the agreement, modify the real burden or any counter-obligation relating to the real burden. It also makes clear that it is possible for parties to enter into an agreement without first having to complete title.
84. *Subsection (2)* sets out the content of the notice which must follow the statutory form given in schedule 6. Further provision in relation to counter-obligations referred to in *paragraph (d)* is made in section 25 (counter-obligations on reallotment).

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85. *Subsection (3)* specifies the content of an agreement between the superior and the vassal to save a burden. If an agreement is entered into it will have to be a written document which expressly states that it is made under section 19.
86. *Subsection (4)* provides for registration (or recording) of the agreement against both the benefited and burdened property in either the Land Register or the Register of Sasines. If the title to one property is in the Land Register and to the other in the Register of Sasines, it will be necessary to register (or record) the agreement in both registers.
87. On the appointed day for abolition, *subsection (5)* converts the feudal burden into an ordinary non-feudal burden in which the benefited property is the land nominated by the superior. It makes no difference if the superior no longer owns the land, but there must have been full compliance with subsections (1)(b) and (c), (3) and (4). The burden must still have been enforceable immediately before the date of abolition. This subsection makes clear that, where a superior has not completed title, the savings provisions operate in circumstances where the superior would be able to enforce the burden if he were to complete title.
88. *Subsection (6)* relates to circumstances where a person has not completed title. A person who has not completed title should be able to enter into an agreement to save a burden under section 19. In line with conveyancing requirements for deeds which are to be recorded in the Register of Sasines where a person has not completed title to land, that person should deduce title in the agreement. This subsection enables parties to enter into an agreement without first having to complete title. The clause of deduction of title would specify the last recorded title and the various links in title by which the person entering into the agreement has acquired right to the land.

***Section 20: Reallocation of real burden by order of Lands Tribunal***

89. Clearly there will be occasions when a superior is unable to come to an agreement with a vassal to preserve a burden. There may also be valid feudal burdens imposed to protect valued amenity interests which are not saveable as ordinary non-feudal burdens under section 18. For example, the building on the superior's land may be more than 100 metres from the land subject to the burden. Alternatively, a superior may own an area of ground on which he intends to build a retirement home, but he has not yet built anything on his piece of land and so the property does not qualify under any of the heads in section 18.
90. **Section 20** provides a further opportunity for a superior to save a particular burden as an ordinary non-feudal real burden which would otherwise be extinguished by introducing an element of judicial discretion. If agreement cannot be reached with the vassal, the superior will have a right to apply to the Lands Tribunal for Scotland for an order to save a real burden in favour of land owned by the superior as an ordinary non-feudal real burden. The Lands Tribunal would have power to make an order in favour of the superior if it was satisfied that there would be substantial loss or disadvantage to the applicant if the burden was not saved. The section makes it clear that the superior will not be allowed to maintain any such burden unless various specified requirements have been gone through. This would then protect a range of cases, including general amenity or diminution in value. The Lands Tribunal is already used to applying the substantial loss or disadvantage test in relation to the amount of compensation which it is entitled to award for the variation or discharge of all real burdens under section 1 of the Conveyancing and Feudal Reform (Scotland) Act 1970. In addition, section 24 of the Act (interest to enforce real burden) provides that even if a feudal burden is saved under sections 18, 19, 20 or 23, to enforce the burden in the future the former superior will have to show interest to enforce in the same way as someone who benefits from a burden imposed in an ordinary disposition. The substantial loss or disadvantage test would involve the need to show a genuine and practical interest, and is intended to catch cases where there is a real interest to enforce and not the type of case where a superior

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does not have land in the vicinity at all and has no real interest in enforcing the burdens. The Lands Tribunal's decision will be final.

91. This section may only be resorted to after the filtering process of seeking to first save the burden by agreement in terms of section 19 has been gone through and it provides for a timescale to be imposed for bringing these applications forward. In the event that any such feudal burden is saved under this provision it will be as an ordinary real burden, thus placing the former superior in the same position as if he had imposed the burden in a disposition.
92. So that the appointed day for the abolition of the feudal system does not need to be delayed until all applications to the Lands Tribunal have been disposed of and any orders to allow a burden to be saved as an ordinary non-feudal burden have been registered, provision has been made to allow determination of any applications still to be dealt with on the appointed day for the abolition of the feudal system to be dealt with thereafter. The application must, however, have been made within a period (which must end before the appointed day) to be prescribed by the Scottish Ministers in subordinate legislation. In respect of any applications still outstanding on the appointed day for abolition of the feudal system the burden in question will therefore survive on a transitional basis, but as an ordinary non-feudal burden, pending the determination of the Lands Tribunal. An extract order from the Tribunal will be registered in the Land Register or recorded in the Register of Sasines, as appropriate, at the applicant's expense.
93. *Subsection (1)* makes it clear that a superior will only be able to apply to the Lands Tribunal if he is unable to reallocate the burden under section 18. So, for example, the Lands Tribunal route is not to be available in respect of a real burden which comprises a right to enter, or otherwise make use of the servient tenement, or comprises a right of pre-emption or redemption. The section 20 procedure will also only be available to the superior if he has first attempted to reach an agreement with the vassal in relation to the burden in question under section 19. If so, he may apply to the Lands Tribunal for an order under subsection (7) to preserve the burden, but the application will have to be made within a period to be prescribed by Scottish Ministers by order. The period is not expected to be very long in order to “kick start” the process of superiors applying to preserve burdens. The period must in any event end before the appointed day of abolition.
94. *Subsection (2)* requires an applicant to the Lands Tribunal to include in his application a description of the attempt to reach agreement with the vassal pursuant to section 19. The form of application should set out the steps which have been taken by the superior to try to reach agreement with the vassal to save the burden. This requirement will act to filter out cases before they reach the Lands Tribunal.
95. On sending or delivering an application to the Lands Tribunal, the superior is required under *subsection (3)* to execute and register (or record) a notice, within 42 days, in the form contained in schedule 7. This is to put anyone checking the Sasine or Land Registers on notice that the superior has applied to the Lands Tribunal to seek to permanently save the burden. The imposition of a time limit of 42 days from the date of the application to the Lands Tribunal is to prevent the superior from delaying in registering the notice stating that he has applied. The Tribunal is given discretion to extend the time limit if there is good cause.
96. *Subsection (4)* sets out the content of the notice which must follow the statutory form given in schedule 7. The notice will set out the same information as for an agreement under section 19. A conveyancing description is, however, required because the notice is to be registered (or recorded).
97. *Subsection (5)* provides for registration of the notice against both the benefited and burdened properties in the Land Register or the Register of Sasines as appropriate. This subsection also provides that where, by the appointed day for abolition, an order by

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the Lands Tribunal giving its determination in respect of such application has not yet been registered, then for a transitional period (defined in subsection (6)) the feudal burden will be converted into an ordinary non-feudal real burden in which the benefited property is the land nominated by the superior. The burden must still, however, have been enforceable immediately before the date of abolition of the feudal system. The saving provisions will operate in circumstances where the superior could enforce a burden or would be able to enforce a burden if he were to complete title.

98. *Subsection (6)* defines the transitional period for the purposes of subsection (5) as the period beginning on the appointed day of abolition and ending on either the day on which an order preserving or extinguishing the burden is registered in the Register of Sasines or Land Register or on a "specified day" to be stipulated by order made by the Scottish Ministers to finally close off the position for burdens which have been saved on a transitional basis under subsection (5) but where, for example, the applicant has not pursued his application to a conclusion. The length of the transitional period will largely depend upon the number of applications to the Lands Tribunal by superiors attempting to have burdens preserved. At the end of the transitional period for each burden which has been saved on a transitional basis under subsection (5), the burden will either be saved permanently (on registration of the Lands Tribunal's order where the application has been successful) or extinguished (which will happen on registration of the order where the application has been unsuccessful, or failing any order at all in respect of the application, on the specified day).
99. *Subsection (7)* provides that the Lands Tribunal may order that a burden, in respect of which a notice has been duly registered, may continue to be enforceable after the appointed day of abolition and shall continue to be enforceable after the end of the transitional period. It will do so if it is satisfied that there would be substantial loss or disadvantage to the former superior. It already uses this test in relation to the amount of compensation which it is entitled to award for the variation or discharge of real burdens under section 1 of the Conveyancing and Feudal Reform (Scotland) Act 1970. Alternatively, under *paragraph (b)* the Tribunal may order that the burden should be extinguished or should cease to be enforceable by the superior if it is not so satisfied. The use of the words "(taking him to be such)" after "owner" in paragraph (a) is intended to ensure that a person who does not have a completed title is treated in the same way as one who does. Normally, an owner of land is considered to be the person who has a registered title to the land, but it is not necessary for a person to have completed title in order to save a burden. These words also make it clear that, for the purposes of saving the burden, the original applicant to the Lands Tribunal does not still have to own the land which is to become the new dominant tenement. The proceedings under section 20 will not be prejudiced and will be able to proceed even if the original applicant has transferred the nominated land on to a third party.
100. *Subsection (8)(a)* makes it clear that if an order to save the burdens is obtained under subsection (7)(a) and is registered, then the burden or burdens which were the subject of the application to the Lands Tribunal will be preserved. Under *sub-paragraph (i)*, if the order was obtained and registered before the appointed day of abolition, then the burden will still be enforceable by the superior (or by a successor) on that day provided it was enforceable immediately before that day. Under *sub-paragraph (ii)*, if the order was obtained and registered on or after the appointed day of abolition, then the burden will remain enforceable from the day of registration of the order, provided it was enforceable immediately before that day. *Paragraph (b)* makes similar provision where an order is registered under subsection (7)(b) with regard to the date of extinction of a burden where an application to the Lands Tribunal has been unsuccessful. *Paragraph (c)* makes it clear that if no order has been made and registered under subsection (7) by the time of the specified day at the end of the transitional period, then the burden will be extinguished and will no longer be enforceable. This section makes it clear throughout that, where a superior has not completed title, the saving provisions will operate in circumstances where the superior would be able to enforce the burden if he were to complete title.

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101. *Subsection (9)* makes it clear that the order issued by the Lands Tribunal may modify the burden or any counter-obligation attaching to the burden. This provides an element of flexibility and may indeed mean that a burden is preserved in a form which is more acceptable to the former vassal if the Lands Tribunal so orders.
102. *Subsection (10)* provides that there is no appeal beyond the final decision of the Lands Tribunal on an application under section 20.
103. *Subsection (11)* imposes a duty on the Lands Tribunal to extract and register (or record) an order issued under subsection (7) against both the burdened and benefited properties in the Land Register or the Register of Sasines. The provision makes clear that the applicant (i.e. the former superior) will bear the cost of registration (or recording) and this will be reflected in an amendment to the rules prescribing the fees payable in respect of applications to the Lands Tribunal.
104. *Subsection (12)* makes it clear that the provisions of subsections (2) and (3) of section 17 will apply to burdens which are extinguished or rendered unenforceable on the determination of the Lands Tribunal in the same way as would have been the case if they had fallen under subsection (1) of section 17. Burdens extinguished or rendered unenforceable under section 20 will therefore either fall on the appointed day for abolition (if the Lands Tribunal determines before that date) or on the date of registration of the relevant order from the Tribunal (in the case of an application dealt with after the appointed day of abolition) and failing any such order, on the specified day.
105. Under *subsection (13)*, a person opposing an application to preserve a burden at the Lands Tribunal (the former vassal) will incur no liability in respect of the expenses incurred by the applicant (the former superior) or his successor unless in the opinion of the Lands Tribunal they have acted vexatiously or frivolously. This is to limit the financial implications for former vassals being drawn unwillingly into litigation at the Lands Tribunal.
106. *Subsection (15)* requires the notice for registration to be sworn or affirmed before a notary public. The notices will contain information provided by the superior, the accuracy of which will not always be easy to check. Sanctions of the False Oaths (Scotland) Act 1933 would apply in the event that the oath or affirmation was known to be false or not believed to be true. *Subsection (16)* sets out exceptions to the normal rule that the notice must be sworn or affirmed by the superior personally.

***Section 21: Manner of dealing with application under section 20***

107. This section relates to the procedure in the Lands Tribunal for Scotland for applications under section 20. The approach is that the Tribunal should deal with these cases in broadly the same way as it deals with cases under section 1 of the Conveyancing and Feudal Reform (Scotland) Act 1970. On receiving an application under section 20, the Tribunal will inform the vassal and any other party which the Tribunal considers should be informed. It also sets out who may be heard by the Tribunal, namely the owner of the servient tenement or someone who is affected by the real burden in question. It gives the vassal and any other interested party the right to be heard by the Tribunal. It also provides that Scottish Ministers may make special rules in relation to section 20 cases, in the same way as they can for other business of the Tribunal. This allows a degree of flexibility and could provide a means for introducing an expedited procedure for the particular type of case under section 20.

***Section 22: Amendment of Tribunals and Inquiries Act 1992***

108. *Section 22* is ancillary to section 20(10) which provides that there is no appeal from the decision of the Lands Tribunal on an application under section 20.

**Section 23: Reallotment of real burden affecting facility of benefit to other land etc.**

109. Common facilities burdens regulate the management, maintenance or use of a common facility. They are of the same nature as the equivalent non-feudal real burdens and similarly, in certain circumstances, are enforceable by the owners of land which they are designed to protect. The extra-feudal feature is that they are also enforceable by the superior because they are imposed in a feu deed. In some cases, they can be drafted in such a way that only the superior has a right to enforce them. Without express provision, these burdens and rights would be extinguished on abolition. Common facilities in housing estates and tenements would be particularly at risk. This section transfers the superior's enforcement rights to the owners of those properties which benefit from the common facility in the event that they do not already have this right. The effect will be to convert a feudal burden which could be enforced only by the superior into an ordinary real burden, mutually enforceable within the tenement or housing estate.
110. *Subsection (1)* transfers a superior's enforcement rights to the owners of the properties which benefit from the common facility. *Subsection (1)* creates enforcement rights only where none exist already. If, as often happens in practice, the properties benefiting from the facility are already subject to the burden but have mutual enforcement rights, section 23 will not be necessary and will not add anything.
111. *Subsection (2)* extends the effect of the section to burdens regulating the provision of services to other property (for example factoring or heating).
112. *Subsection (3)* excludes burdens which constitute maintenance obligations (for example in relation to roads and sewers) from the operation of subsection (1) which have been taken over by a local or other public authority since the maintenance of the common facility is covered already without the need to transfer the right to enforce the burden.
113. *Subsection (4)* gives some examples of common facilities. The list is not intended to be comprehensive.

**Section 24: Interest to enforce real burden**

114. At present, the interest of a superior to enforce real burdens is presumed in law. This section reaffirms the need for those succeeding to superiors' rights of enforcement to have an interest to enforce a real burden. Such interest however will not be presumed for burdens which are to be enforceable by the former superior under sections 18 (reallotment of real burden by nomination of new dominant tenement), 19 (reallotment of real burden by agreement), 20 (reallotment of real burden by order of Lands Tribunal), including burdens enforceable on the transitional basis under section 20(5), and 23 (reallotment of real burden affecting facility of benefit to other land etc.). The interest required is often characterised as being "praedial", by which is meant benefit, not as an individual, but to the dominant tenement. The position can be contrasted with conservation burdens (sections 26 to 32) and maritime burdens (section 60) for which, as they do not benefit other land, interest is presumed.

**Section 25: Counter-obligations on reallotment**

115. This section makes it clear that the acquisition of superiors' enforcement rights under sections 18 (reallotment of real burden by nomination of new dominant tenement), 19 (reallotment of real burden by agreement), 20 (reallotment of real burden by order of Lands Tribunal) or 23 (reallotment of real burden affecting facility of benefit to other land etc.) is subject to compliance with any counter-obligations which were binding on the superior. In the case of section 18, the counter-obligations require to be listed in the initial notice (see section 18(2)(e)). For example, if a superior could exact the cost of maintaining a facility only subject to an obligation to carry out the necessary work, any post-abolition successor will be similarly obliged. Similar provision also applies in respect of burdens saved by agreement under section 19 or the subject of an application to the Lands Tribunal under section 20. Under section 47 (extinction



of counter-obligation), a counter-obligation is extinguished with the extinction of the burden to which it relates.

### **Section 26: Conservation Bodies**

116. This is the first of a number of sections dealing with conservation burdens. In some cases superiors may be viewed as exercising their rights at least partly in the public interest. Superiors falling into this category might include the National Trust for Scotland and conservation trusts. For example, in selling a building which it has recently restored, a conservation trust might wish to impose real burdens in order to prevent inappropriate alteration and to ensure future standards of maintenance. Since the trust will rarely own neighbouring land, it is likely to sell by feu disposition, and its right to enforce the burdens will then be tied to the reserved superiority. Arrangements of this kind will not survive feudal abolition, unless a special saving is put in place. *Section 26* provides for the Scottish Ministers to prescribe by subordinate legislation a list of conservation bodies who will be entitled to preserve conservation burdens.
117. *Subsection (2)* sets out the criteria for a body to be included on the list. The definition of the type of body which may be prescribed as a conservation body is intended to be broad enough to catch all the bodies who have a function or object of preserving or protecting for the benefit of the public the architectural, historical or other special characteristics of land.
118. Since trusts are not separate legal persons, *subsection (3)* makes it clear that the conservation body would be the trustees.
119. *Subsection (4)* allows bodies to be removed from the list.

### **Section 27: Notice preserving right to enforce conservation burden**

120. This section permits a superior which is also a conservation body, and the Scottish Ministers, to preserve burdens concerned with conservation.
121. *Subsection (1)* explains how the burdens are to be preserved. The words "for the benefit of the public" are intended to ensure that the preservation of conservation burdens in the future must be in the public interest. The conservation body must register a notice before the appointed day for abolition of the feudal system in the Land Register or Register of Sasines. If no notice is registered, the burdens will be extinguished under section 17 (extinction of superior's rights). This subsection makes it clear that, where a conservation body has not completed title, the saving provisions will operate in circumstances where the body would be able to enforce the burden if it were to complete title. This also applies to Scottish Ministers.
122. *Subsection (2)* sets out the type of burden which may be preserved. The purpose of the burdens must be to preserve or protect the architectural or historical characteristics of the land or any other special characteristics of the land (including, without prejudice to the general rule, a special characteristic derived from the flora, fauna or general appearance of the land).
123. *Subsection (3)* sets out the content of the notice. The notice must follow the form given in schedule 8.

### **Section 28: Enforcement of conservation burden**

124. The effect of *section 28* is that on the date of abolition of the feudal system, a feudal burden in respect of which a notice has been registered under section 27 (notice preserving right to enforce conservation burden) is converted into a conservation burden. The burden will be enforceable by the person who was the superior immediately before the date of abolition, provided that such a person is a conservation body or the Scottish Ministers. Where a conservation body or the Scottish Ministers have not completed title, the saving provisions will operate in circumstances where the

conservation body or the Scottish Ministers would be able to enforce the burden if the body in question or they were to complete title. If the superior is not such a conservation body, or the Scottish Ministers, conversion will not take place and the burden will fall under section 17 (extinction of superior's rights). Unlike the case of neighbour burdens or common facilities burdens, a conservation body and the Scottish Ministers will be presumed to have an interest to enforce a conservation burden.

125. *Subsection (2)* makes it clear that if a conservation body has registered a notice preserving the right to enforce a conservation burden after the appointed day of abolition, but has conveyed the superiority to another conservation body or to the Scottish Ministers prior to the appointed day, then the successor conservation body or the Scottish Ministers as the case may be will be able to enforce the conservation burden after the appointed day. Similarly, if the Scottish Ministers have registered a notice but conveyed the superiority to a conservation body prior to the appointed day, then the conservation body will be able to enforce the burden after the appointed day.

### ***Section 29: Assignment of right to conservation burden***

126. Since a conservation burden is a burden in favour of a legal person and not land, there is no reason why a conservation burden cannot be assigned by its holder, provided that the assignee is another conservation body or the Scottish Ministers. *Section 29* provides that the benefit of a conservation burden can be assigned to another conservation body or the Scottish Ministers and assignment will be completed by registration in the Land Register or recording in the Register of Sasines. It is not necessary to intimate to the owner of the burdened property that assignment has taken place.

### ***Section 30: Deduction of title for conservation burden***

127. This section provides for deduction of title in cases where, under the general law, deduction of title would be required. No deduction of title would be required once the burden was registered in the Land Register.

### ***Section 31: Extinction of burden on body ceasing to be conservation body***

128. This section makes it clear that a conservation burden is extinguished if its holder ceases to be a conservation body. The privilege of conservation burdens will not be made available more widely.

### ***Section 32: No standard security over conservation burden***

129. This section prevents a standard security being granted over a conservation burden. Such a security would be of little value since a conservation burden is not usually income-producing and restrictions on assignment restrict the market for sale. This disposes of the possibility that a conservation burden could be extinguished if a security over it was called up by a creditor which was not itself a conservation body.

### ***Section 33: Notice reserving right to claim compensation where land subject to development value burden***

130. This section is the first in a group of sections on compensation for the loss of certain real burdens reserving development value to the superior. Property may have been feued for a heavily discounted consideration, or even for no consideration, for charitable, religious, public or amenity purposes on the understanding that a further financial return is to be available to the superior later if the land is freed to be sold on the open market or used for purposes prohibited by the burden. For example, land feued for use as a sports field might be suitable for a commercial development. The superior may have been happy to grant a feu for a token sum so long as the ground was used as a sports field but may have been unwilling to allow the vassal to make a large profit by selling the land for development. Where a superior has not completed title, the saving provisions

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will operate in circumstances where the superior would be able to enforce the burden if he were to complete title.

131. *Subsection (1)* enables the superior, before the date of abolition, to reserve the right to claim compensation by executing and registering a notice in prescribed form. This subsection deals with circumstances where a superior has gifted land or sold land at a price significantly lower than that for which the superior could have sold it had the burden not been imposed.
132. *Subsection (2)* explains what information should be set out in the notice.
133. *Subsections (3) and (4)* provide that the notice must be sworn or affirmed before a notary public. *Subsection (4)* sets out exceptions to the normal rule that this must be done by the superior personally. *Subsection (4)(b)* should be read in conjunction with Schedule 2 to the Requirements of Writing (Scotland) Act 1995 which identifies who may sign on behalf of companies and other legal persons.

***Section 34: Limited transmissibility of right to claim compensation***

134. This section allows the free assignation of a right to claim compensation for the loss of a development value burden. It will also be possible to transmit a right to claim by testamentary disposition, court decree or by operation of law.

***Section 35: Claiming compensation***

135. This section deals with the circumstances in which a right to compensation arises if a notice has been duly registered under section 33 (notice reserving right to claim compensation where land subject to development value burden). The general rule is that the right does not arise immediately after the date of abolition. It emerges only if something happens within 20 years after the appointed date of abolition which would have been a breach of the burden if it had still subsisted.
136. To deal with cases where there may have been a breach shortly before the appointed date for abolition so that the superior has not had time to enforce the burden, section 35 also allows the superior to claim compensation for breaches occurring within 5 years before the date of abolition.
137. *Subsection (1)* confers the right to compensation if the conditions set out in *subsection (2)* are satisfied. This subsection also makes it clear that it will not only be the person who registered the notice who can claim compensation, but anyone who subsequently obtains a right to all or part of the claim. Every party who has a right to claim must serve a notice to actually make the claim.
138. In setting out these conditions, subsection (2) makes it clear, in particular, that the real burden must have been enforceable by the superior before it was extinguished or rendered unenforceable by abolition. This is because many apparently valid real burdens are unenforceable. This subsection makes it clear that, where a superior has not completed title, the saving provisions will operate in circumstances where the superior would be able to enforce the burden if he were to complete title.
139. *Subsection (3)* regulates the way in which a claim is to be made. A notice in writing will be duly served on the owner and this will specify the amount of compensation claimed.
140. *Subsection (4)* lays down time limits within which a claim for compensation must be made. In the normal case the time limit is 3 years from the date of the occurrence which would have been a breach had the burden still subsisted. In the special transitional case of breaches in the 5 years before the appointed date of abolition, the time limit is 3 years from the date of abolition.
141. *Subsection (5)* makes it clear that in the case of a continuing breach or occurrence, the time runs from the date when the breach or occurrence first happens.

**Section 36: Service under Section 35(3)**

142. This section makes provision for service of a claim for compensation. This will be made against the person who is the owner of the land at the time of the act or event triggering the claim. The obligation to pay compensation would be a personal obligation on that person and would not run with the land. Section 36 follows the model of section 11 (service under section 8(1)).

**Section 37: Amount of compensation**

143. *Subsection (1)* provides that the amount payable on any one claim is the amount of development value which would have accrued to the owner of the land if the burden had been modified so as to free the land for the development which has actually occurred. For example, if the burden prohibited all building and the owner, 7 years after the appointed date of abolition, has built a small shed, the compensation would only be the difference between the value of the land on the assumption that a shed could not be built and the value of the land on the assumption that a shed could be built. Building the shed would not trigger a claim for compensation based on the fact that a supermarket could be built.
144. *Subsection (2)* limits the total amount of compensation payable, on one or several claims, to such an amount as will make up for any effect which the burden produced at the time when it was imposed in reducing or eliminating the consideration paid by the vassal for the original feudal grant. This formula is derived from section 1(4)(ii) of the Conveyancing and Feudal Reform (Scotland) Act 1970. In relation to that provision, the practice of the Lands Tribunal for Scotland has been to make no allowance for inflation in the calculation of compensation. To leave inflation out automatically takes account of the age of burdens. Since the Lands Tribunal was given the power in 1970 to vary or discharge land obligations, it is now rare for feuing conditions alone to be used to protect the superior's interests in development value.
145. *Subsection (3)* is designed to prevent double compensation. The former superior may, for example, have a valid contractual claim against the former vassal if they are both the original parties to the contract. There would be no need for statutory compensation in such a case. *Paragraph (b)* stipulates that the assignee of a reserved right to claim compensation will not be able to recover more than the assignor would have been entitled to had there not been an assignation. The former superior may have contractual rights to recover the development value that are not passed on to the assignee. These contractual rights will still, however, be taken into account for the purposes of determining the amount of compensation due to the assignee.
146. *Subsection (4)* is designed to deal with the point that, in the case of an occurrence after the appointed date of abolition, the burden will already have been extinguished by section 17 (Extinction of superior's rights). The comparison is between what the land would have been worth if a burden had subsisted unmodified and what it would have been worth if the burden had been modified to permit the development which has taken place.

**Section 38: Duty to disclose identity of owner**

147. This section deals with the situation where there has been a sale or transfer of the property before the event giving rise to a claim for compensation in relation to a development value burden. If the former superior wishes to claim a compensatory payment he will have to do so from the owner of the property at the time of the breach or occurrence giving rise to the claim. The former superior may try to trace that person by searching in the property registers. If, however, the property had changed hands, the property registers may not disclose the new owner, if either the new owner had not yet presented their title, or the Register of Sasines has not been updated to show the new owner's title. It would still show the original owner as the owner of the house, but having sold or transferred the property, the original owner is not the person who is to

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pay the compensation. If liability rested with the person shown as owner in the property registers, the new owner could avoid liability by delaying in registering his title. This section provides a mechanism to assist the superior relying on the information in the property registers to identify the person who was the owner at the relevant time. An obligation is placed on the person who owned the property before the owner who is obliged to pay the compensation to help the superior to find that owner by telling him the name and address if he knows it or any other relevant information.

**Section 39: The expression "owner" for the purposes of Sections 35 to 37**

148. *Subsection (1)* defines "owner" for the purposes of liability for compensation. Before the appointed date of abolition, such a person will own the dominium utile and thereafter, by section 2(1) (consequences of abolition), will have simple ownership.
149. *Subsection (2)* makes it clear that where the land is held as common property, the former superior may recover all of the compensation from one of the co-owners. That co-owner would then have a right to recover the appropriate share from the other co-owners based on the size of their interest in the property.

**Section 40: Assignment, discharge, or restriction, of reserved right to claim compensation**

150. *Paragraph (a)* provides that a reserved right to claim compensation can be assigned and schedule 11 provides the appropriate form. It also makes clear that it will be possible to assign only part of the right to claim. Any assignment of part of a claim will be expressed as a proportion or percentage of each individual claim that may subsequently be made under section 35. *Paragraph (b)* makes it clear that a reserved right to claim compensation can be discharged or restricted by the person entitled to it. Provision is made for registration of such discharge or restriction and schedule 11 provides the appropriate form. This section is concerned with voluntary discharge or restriction. Section 44 (referral to Lands Tribunal of notice dispute) enables the owner of land affected by a notice reserving the right to compensation to apply to the Lands Tribunal for an order to have the notice discharged or restricted without the consent of the person entitled to it.

**Section 41: Notices: pre-registration requirements etc.**

151. This is the first in a group of sections making common provision for notices drawn up under sections 18 (reallotment of real burdens by nomination of new dominant tenement), 20 (reallotment of real burden by order of Lands Tribunal), 27 (notice preserving right to enforce conservation burden) and 33 (notice reserving right to claims for compensation where land subject to development value burden) which require to be registered.
152. **Section 5** (which abolishes warrants of registration) does not come into force until the appointed day for abolition and so would not affect these notices which require to be registered before that day. *Subsection (2)* therefore exempts notices from having to contain warrants of registration.
153. *Subsections (3) and (4)* provide for the sending of a copy of the notice to the vassal. Normal service will be 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 42: Further provision as respects sections 18 to 20, 27 and 33**

154. In some cases, a superior may have a choice of registering a notice to reallot a burden, or to save it as a conservation burden (if the superior is a designated conservation body or the Scottish Ministers) or to reserve a right to claim compensation, or alternatively may save it by agreement or on an application to the Lands Tribunal. *Subsection (1)* makes

it clear that the various courses open to the superior are mutually exclusive. A choice must be made though this would not necessarily be final. A different option could be pursued later, before feudal abolition, provided the appropriate steps are taken to deal with the notice or agreement first sent.

155. *Subsection (2)* deals with division of a feu. The rule is that if land originally subject to a single grant in feu comes to be divided into separate parts, each part is treated as a separate feu for the purposes of Part 4 of the Act (real burdens).
156. *Subsections (3) and (4)* regulate the number of notices which need to be sent. Each feu requires its own notice, but there is no objection to using the same notice or agreement for different burdens which affect the same property.

***Section 43: Notices and agreements under certain sections: Extent of Keeper's duty***

157. The Keeper has to decide whether to accept for recording or registration the deeds which are submitted to him. In relation to the Sasine Register, the Keeper's concern is limited to whether the deed presented for recording is of a type appropriate to the Register and whether it is formally valid. By contrast, all deeds are carefully examined before registration in the Land Register and if necessary the Keeper calls for further information or evidence. A notice would be rejected if the Keeper was not satisfied as to its validity. There are, however, certain matters which the Keeper could not be reasonably expected to check. These are:

- **whether a burden was enforceable by a superior in circumstances where a former superior is permitted to register notices or an agreement which will have the effect of either preserving a feudal burden as a non-feudal burden or reserving the right to claim compensation for the loss of a development value burden - in order for these notices or agreement to be competent, the real burden in question must be enforceable by the superior;**
- **whether a copy of the notice has been duly sent to the vassal;**
- **whether, in the case of a notice converting a feudal burden to a neighbour burden, the requirement of a building within 100 metres of the burdened property has been met;**
- **whether, in the case of a burden saved by an agreement, the notice requirement has been complied with;**
- **whether, in the case of a notice of an application to the Lands Tribunal to save a burden on substantial loss or disadvantage, an attempt was made to save it by agreement or that substantial loss or disadvantage does arise - the Keeper also has no duty to check whether the relevant notice has been executed and registered within the specified period;**
- **whether, in the case of a notice reserving a right to claim compensation, the statements made about development value, and the reduction in consideration are true.**

158. Accordingly this section provides that the Keeper has no duty in relation to these matters. The superior will have sworn or affirmed before a notary public that the information contained in the notice is true. The vassal may be expected to scrutinise any notice received and will be in a much better position than the Keeper to check the information in it. (Section 42(1) allows an invalid notice to be challenged.) Section 43 therefore relieves the Keeper of the need to verify the above facts which would in practice be difficult for him to check. Although the section applies to both registers, it is of importance mainly in relation to the Land Register.

159. *Subsection (3)* provides that it will not be a matter for the Keeper to determine whether or not a burden is actually enforceable, and by whom, immediately before the

appointed day or the day of registration of an order of the Lands Tribunal. This is a further provision resulting from the policy that the Keeper should not be expected to verify information which he could not check from documentation submitted to him in connection with an application for registration.

***Section 44: Referral to Lands Tribunal of notice dispute***

160. This section gives the Lands Tribunal for Scotland a broad jurisdiction to resolve disputes in relation to notices. The proposition that notices should be judicially challengeable is particularly important in the case of compensation notices, which depend on subjective assertions which are difficult to prove or disprove in the absence of extrinsic evidence. A compensation notice will be accepted for registration by the Keeper without consideration of its merits.
161. *Subsection (2)* gives jurisdiction in relation to claims for compensation following the extinction of development value burdens.
162. *Subsection (3)* makes it clear that the burden of proof will be on the person relying on the notice or making the claim for compensation.
163. *Subsection (4)* allows the registration of an extract of a Lands Tribunal order in the property registers and makes it clear that, on registration, they will affect third parties.

***Section 45: Circumstances where certain notices may be registered after appointed day***

164. *Section 45* allows a notice or agreement which is submitted for registration prior to the appointed day, but rejected by the Keeper, to be registered late in the event that a court or the Lands Tribunal determines that the notice or agreement is in fact registrable. Section 46(3) makes provision to prevent the Keeper from removing such burdens while a decision is awaited from the court or the Lands Tribunal. Section 45 provides that the application requires to be made within a period prescribed by an order made by Scottish Ministers. Notices or agreements which are the subject of determinations made on or after the appointed day will have to be registered within a 2 month period and before a date to be prescribed in an order by the Scottish Ministers. Provision is also made for the possibility that an appeal may be determined prior to the appointed day and, in particular, that the date of determination may be more than 2 months prior to the appointed day.

***Section 46: Duties of Keeper: Amendments relating to the extinction of certain real burdens***

165. This section has 3 purposes. First, it makes clear that it is not competent to request or for a court or the Lands Tribunal to order the Keeper to delete real burdens extinguished under section 17 (extinction of superior's rights) from the Land Register for such period of years following the appointed day as may be specified in an order made by the Scottish Ministers. Even if the Keeper has been ordered by the court or the Lands Tribunal to remove a burden from the Land Register which is the subject of a notice or agreement which has been rejected for registration but which the former superior is seeking to have registered late under section 45, then the Keeper is prevented from removing the burden while it remains possible that the notice or agreement saving the burden may yet be registered (see subsection (3)).
166. Second, this section gives the Keeper temporary relief for a period to be determined by Scottish Ministers after the appointed day for abolition. A degree of discretion is allowed to the Keeper. He will be enabled, but not required, to enter extinguished feudal burdens into the Land Register when processing an application for first registration and will be at liberty to remove extinguished feudal burdens. This is to enable the Keeper to deal with applications for first registration of an interest in land without having to make a judgement as to whether or not a feudal burden had been extinguished or had

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been validly saved. This temporary relief is in operation for a period to be prescribed by order made by the Scottish Ministers subject to negative procedure.

167. Finally, although the Keeper will be entitled to remove extinguished burdens from the register at his discretion, *subsection (3)* makes it clear that he will not be entitled to do so when the burden in question is the subject of a notice or agreement which is before a court or the Lands Tribunal for a decision on its eligibility for registration. This will ensure no-one might purchase the subjects in ignorance of the burden.
168. *Subsection (4)* simply ensures consistency in the time periods under the provisions of sections 45 and 46.

***Section 47: Extinction of counter-obligation***

169. Counter-obligations are tied to real burdens. This section makes it clear that, on the extinction of a real burden, any counter-obligation which is a counterpart of the burden is extinguished also. Such extinction will be on the appointed day for abolition of the feudal system, other than where the superior had applied to the Lands Tribunal to save a feudal real burden under section 20 and no order from the Lands Tribunal had been registered before the appointed day and the application was not ultimately successful, when extinction will be on the expiry of the transitional period (see section 20(5) and (6)).

***Section 48: No implication as to dominant tenement where real burden created in grant in feu***

170. This section makes it clear, for the avoidance of doubt, that a real burden created in a feudal grant is implied to be for the benefit of the superiority only, and not for the benefit of land in the vicinity which the superior also happens to own. Such land could be made into a benefited property only by the operation of section 18 (reallotment of real burden by nomination of new dominant tenement), section 19 (reallotment of real burden by agreement) and section 20 (reallotment of real burden by order of Lands Tribunal).

***Section 49: Interpretation of Part 4***

171. This section gives the meaning of certain terms used in Part 4 of the Act. "Superior" is defined to include over-superior. Over-superiors are able under the existing law to enforce real burdens directly against the vassal owning the dominium utile. For the purposes of Part 4, over-superiors are treated in the same way as immediate superiors.