These notes relate to the Tenements (Scotland) Act 2004
(asp 11) which received Royal Assent on 22 October 2004

TENEMENTS (SCOTLAND) ACT 2004

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Miscellaneous and General

Section 25 – Amendments to the Title Conditions (Scotland) Act 2003

115. This section indicates that the Title Conditions Act will be amended in accordance with schedule 4.

Section 26 – Meaning of "tenement"

116. *Section 26* defines a "tenement" for the purposes of the Act. Most tenement property is residential (though even in those cases there are very commonly shops on the ground floor), but the definition in the Act includes commercial properties such as office blocks. Large houses which have been converted into flats, high rise blocks, "four in a block" and modern blocks of flats will also qualify as tenements, as well as the traditional sandstone or granite buildings of three or four storeys. A tenement is a building comprising two or more related flats which are owned or designed to be owned separately and which are divided horizontally. Generally a building will comprise a single building of related flats. The definition, however, caters for other possible circumstances.

117. As, in terms of *subsection (1)*, a part of a building may be a separate tenement if it comprises related flats, *section 26* excludes those properties which form part of a building but which do contain related flats and which were never intended should form part of a single tenement. These properties are most typically semi-detached houses and terraced houses. Where, for instance, two semi-detached houses are part of the same building, then in the event that one house were to be converted into flats, the definition should not result in the whole building becoming a tenement. There may also be circumstances where two independent management regimes operate within the same building. In effect this means that there are two or more "tenements" rather than one within the same building. This may happen where, for example, there are two or three separate tenement stairs within the same building, perhaps on a corner site. For this reason, *subsection (1)*makes reference to a "building or a part of a building".

118. The physical features of a building are clearly relevant to deciding the question of whether flats are "related", but *subsection (2)* provides that regard should also be had to the relevant title deeds and burdens contained therein.

Section 27 – Meaning of "management scheme"

119. The concept that every tenement will in future have a management scheme to assist in common decision making is a fundamental aim of the Act. The management scheme for a particular tenement may be set out in:

- the Tenement Management Scheme in the Act (though it is unlikely that this will apply in its entirety to very many tenements);

- the development management scheme applied under the Title Conditions Act;
- the tenement burdens contained in the title deeds (these will apply in a great many cases since they may provide a more comprehensive and sophisticated scheme than the Tenement Management Scheme); or
- a combination of the tenement burdens and individual rules of the Tenement Management Scheme (as required to supplement the tenement burdens if these are silent or unworkable on the subject matter of the rules of the Tenement Management Scheme).

120. The reference to tenement burdens in *section 27(c)* includes within the definition of "management scheme" any reference in the existing title deeds to maintenance, management or improvement of the tenement. Neither the Tenement Management Scheme nor the development management scheme provide for improvements, but it is possible that the existing titles might do so: the definition reflects that possibility. This does not expand the Act generally to include decision making on improvements and not merely maintenance. It is simply a reference to any existing improvement provisions which may be set out in individual title deeds.

Section 28 – Meaning of "owner", determination of liability etc.

121. *Section 28* defines the meaning of "owner" for the purposes of the Act. The question of exactly when people become the owner of a flat is important since they will acquire rights and obligations at that point. This section brings the Act into line with the definition in the Title Conditions Act.

122. *Subsection (1)*makes it clear that where the word "owner" appears in the Act without any further clarification or addition, then it means the owner of a flat in the tenement. Some sections, for example, *section 8*, use the expression "owner of part of a tenement building" and in those cases the term "owner" is not intended to be limited to the owner of a flat.

123. In *subsection (2)* an owner in relation to a flat is defined as someone who has a right to a flat, that is someone who is entitled to take entry under a conveyance of the flat in question. It will not be necessary for them to have completed their title by registering it in the property registers before they can be considered owners. If more than one person comes within the description of an owner, then for the purposes of the Act the "owner" is the person who has most recently acquired that right (to take entry under a conveyance).

124. At present heritable creditors are generally regarded as standing in the place of the owner when they enter into the possession of security subjects. *Subsection (3)* extends the meaning of "owner" to mean heritable creditors who have entered into lawful possession of a flat.

125. *Subsection (4)* provides that where two or more people own a flat the term "owner" applies to both or all of them. This provision is qualified however by *subsection (5)*. The provisions listed confer rights on owners (as opposed to obligations) and the effect of this subsection is that any *pro-indiviso* owner (part owner) is able to exercise these rights independently.

126. *Subsection (6)*applies *subsections (2) to (5)* of *section 28* to owners of part of the tenement as if they owned a tenement flat (and in any such case any reference to a flat will be read as being to the part of the tenement owned by that person).

127. Where two or more people own a flat, under *subsection (7)(a)* they are jointly and severally liable for costs arising from the operation of the Act. The other owners in the tenement have a right to sue any of them for the full amount owed. When one co-owner pays a debt, there is a right of relief against the other co-owner or co-owners. Paragraph

(b) provides that in relation to each other co-owners should be liable in the proportions in which they own the flat.

Section 29 – Interpretation

128. *Subsection (1)*explains certain terms used in the Act. Only a small number of definitions require explanation here.

- *Flat.* It is made clear that a flat may be premises which comprise more than one storey and may include business and other premises, not merely premises used or intended to be used for residential purposes.
- *Sector*. The term "sector" is used in the context of boundaries. In the definition of "sector", the reference to "any other three-dimensional space not comprehended by a flat, close or lift" is intended to make clear that boundaries are an issue only where the units are in separate ownership. For example, a broom cupboard within a flat would not be a sector for the purposes of the Act.
- *Tenement burden*. This term means any real burden (within the meaning of the Title Conditions Act) which affects the tenement or any sector of the tenement.

129. *Subsection (2)*explains how "floor area" is to be calculated. The "floor area" is the total floor area within the boundaries of a flat or flats including the area occupied by any internal wall or other internal dividing structure. No account is to be taken of the pertinents or a balcony. A loft or a basement will also be excluded when it is used for storage. If they are used for another purpose then they should be taken into account.

Section 30 – Giving of notice to owners

130. Rule 9 of the Tenement Management Scheme contains detailed provisions on the giving of notices under the Scheme. *Section 30* contains provisions on giving notices under the main part of the Act.

131. The ways in which notice may be given to an owner are set out in *subsections (1) and (2)*and provision for determining the date of giving notice, whether it is posted or sent electronically, is set out in *subsection (4).* These are consistent with the corresponding provisions in the Title Conditions Act. Under *subsection (3),* it will be sufficient for notice to be sent to the flat in question addressed to "The Owner" or a similar expression such as "The Proprietor". The name of the owner may not be known, or the name may be known, but the owner's whereabouts may be a mystery. But, in order to be able to rely on *subsection* (3), the person sending the notice will have to have made a reasonable enquiry as to where the owner is.

Section 31 – Ancillary provision

132. This section allows Scottish Ministers to make such ancillary orders as they consider necessary or expedient for the purposes of or in consequence of the Act.

Section 32 – Orders and Regulations

133. The Act empowers Scottish Ministers to make orders or regulations, exercisable by statutory instrument. *Section 32*generally provides for negative procedure except where primary legislation is being amended. This requires a resolution of the Parliament.

Section 33 – Crown Application

134. With the exception of *section 18*, the provision for compulsory insurance of tenements, the provisions in the Act will bind the Crown. The exception is necessary because in practice the Crown carries its own insurance risk and so should not be subject to a statutory obligation to take out insurance policies.

Schedule 1 - Tenement Management Scheme

135. The Tenement Management Scheme provides for a system of management and maintenance in tenements. It applies to the extent provided for in *section 4* of the Act to all tenements in Scotland, old and new. It will not apply where the development management scheme under section 71 of the Title Conditions Act has been applied.

136. The provisions of the Tenement Management Scheme will act as a background law where the title deeds to tenements are silent. If, for example, the title deeds set out how decisions should be taken or costs should be allocated, then those provisions will continue to operate and will not be superseded by the rules contained in the Tenement Management Scheme.

137. The Tenement Management Scheme is, therefore, a simple scheme which provides the basic requirements for the management and maintenance of a tenement where the titles fail to provide appropriate rules.

138. The scheme consists of 9 rules which are outlined below.

Rule 1 – scope and interpretation

139. Not every part of the tenement is to be managed under the Scheme. The whole basis of the Scheme is the new concept of scheme property. This does not affect the ownership of a tenement or its parts, but sets out in statute the main parts of the tenement in which owners share an interest. If a part of the tenement is not scheme property, then it will not be subject to the maintenance regime in the Tenement Management Scheme.

140. Rule 1.2 sets out what is classified as scheme property. Rule 1.2(a) includes any part of a tenement that is the common property of the owners of two or more flats and rule 1.2(b) includes any other part of the tenement that is required by the title deeds to be maintained, or the cost of maintenance of which is to be shared, by the owners of two or more flats. Certain other key parts of the tenement, listed in rule 1.2(c), are also scheme property whether rules 1.2(a) or 1.2(b) apply or not. These are the ground on which the tenement is built, its foundations, its external walls, its roof, the part of any gable wall that is part of the tenement building and any other wall, beam or column which is load-bearing.

141. Scheme property is a cumulative concept and will vary from one tenement to another. The extent of scheme property should be assessed in the context of an individual tenement. The scheme property for any given tenement might include property falling within all of the three separate categories in paragraphs (a), (b) and (c).

142. Certain parts of a tenement building which would otherwise fall within rule 1.2(c) are excepted from that rule and will be scheme property only if they are covered by rule 1.2(a) or (b). These are listed in rule 1.3 and include any extension which forms part of only one flat, any door, window, skylight or vent or other opening and any chimney stack or flue.

143. Rule 1.4 provides a definition of a “scheme decision”. Decisions are scheme decisions if taken under the procedures set out in rule 2 or under procedures set out in the tenement burdens. The scope of the subject matter of scheme decisions is not limited by rule 3.1 as the tenement burdens may enable the owners to take decisions on other matters. Rule 1.5 gives some other definitions, including that of “maintenance”. Alteration or demolition is not included in the definition nor is improvement, unless it is incidental to the maintenance. For example, an improvement which involves modernising an existing feature using up to date materials and technology is more likely to be permissible.

Rule 2 – procedures for making scheme decisions

144. Rule 2.1 stipulates that any decision to be made by the owners must be in accordance with the provisions of rule 2. Such decisions will be “scheme decisions”. *Section 4(4)*

of the Act provides, however, that if the title deeds contain procedures for the making of decisions by the owners and the same procedures apply to each flat, then the title provision will prevail. A decision made by the owners in accordance with the title provisions will also be a scheme decision (rule 1.4(b)).

145. Under rule 2.2, one vote is allocated to each flat and the right to vote can be exercised by the owner of that flat or somebody who is appointed by the owner. Under rule 2.3, no vote on a scheme decision relating to maintenance will be allocated to a flat if the owner of the flat is not liable for the maintenance, or the cost of maintenance, to that part of the tenement.

146. If two or more people own a flat, then the vote allocated to that flat can be exercised by any one of them under rule 2.4. If, however, the owners disagree on how the vote is to be cast, then no vote is accepted for that flat unless one of the owners owns more than a half share of the flat (in which case that owner will exercise the vote) or the vote is agreed among those owners who own more than a half share of the flat.

147. Scheme decisions are to be reached by simple majority (rule 2.5) meaning more than 50% of the total number of votes allocated.

148. Under rule 2.6, an owner wishing to call a meeting must give at least 48 hours notice of the date, time and purpose of the meeting. An owner may wish to propose that a scheme decision is made, but may not want to call a meeting. In this case, the other owners have to be consulted about the proposal under rule 2.7, except where it is impractical to do so, for example where an owner is absent at the time that the proposal is made. Under rule 2.8, the requirement to consult each owner is satisfied if only one of the co-owners of a flat is consulted.

149. Rule 2.9 provides that owners must be informed of scheme decisions as soon as is practicable. If the decision was made at a meeting then notification must be notified to all owners who were not present when the decision was made, by a person nominated at the meeting to do so. In any other situation, notification must be given to each of the owners by the owner who proposed that the decision be made. It is safer to notify in writing and rule 9.2 explains ways in which written notices can be given.

150. Under rule 8.2, once a scheme decision has been made it is binding on all the owners and, if the flat changes hands, on any incoming owner, even where the decision is made not under rule 2 but under the provisions of the tenement burdens. Section 30 of the Title Conditions Act makes equivalent provision. *Section 5(10)* prevents implementation of the decision for 28 days where an owner did not vote in favour of a decision, as they have the right to apply to the sheriff court to have the decision annulled.

151. Under rule 2.10, the scheme also contains some protection for an owner or owners who are liable for 75% (or more) of the costs arising from a decision made about maintenance under rule 2.5. Any owner or owners who did not vote in favour of a scheme decision to instruct maintenance where they would be responsible for 75% or more of the costs can annul that decision by notifying the other owners within certain time limits.

152. These time limits are set out in rule 2.11. If a decision that an owner wishes to annul has been made at a meeting then notification of the annulment of that decision must be given within 21 days after the date of the meeting. In any other case notice of the annulment must be given within 21 days of receiving notification of the relevant decision.

Rule 3 – matters on which scheme decisions may be made

153. Rule 3.1 gives a list of the subjects on which scheme decisions can be made. Most scheme decisions are about maintenance and repairs and under rule 3.1(a) owners can decide to carry out maintenance to any part of scheme property. Owners may be able to arrange for an inspection of scheme property to determine whether or to what extent maintenance is required (rule 3.1(b)). A scheme decision can be made to appoint a

manager or factor (rule 3.1(c)) and to delegate to that manager any of the owners' powers (rule 3.1(d)).

154. Scheme decisions can also be made to:

- arrange for a common insurance policy for the tenement (rule 3.1(e));
- install a system enabling entry to the tenement to be controlled from each flat (rule 3.1(f));
- determine that an owner is not required to pay a share (rule 3.1(g));
- authorise any maintenance of scheme property already carried out (whether by an owner, manager or factor) (rule 3.1(h)); and
- modify or revoke any scheme decision (rule 3.1(i)).

155. If owners have made a scheme decision (either under the provisions of their title deeds or under rule 3.1) to carry out maintenance, rule 3.2 allows owners to make decisions to instruct or carry out maintenance or to appoint a manager to arrange for this. To allow for the fact that tradesmen may be unwilling to start work unless money has already been collected and deposited, each owner may be required to deposit money in advance by a date which the owners decide, subject to rule 3.3. This will be the owner's apportioned share of a reasonable estimate of the costs of the maintenance.

156. Unless the title deeds enable the owners to make decisions on other subjects, scheme decisions are restricted to those subjects listed in rule 3.1.

157. Rule 3.3 deals with decisions made under rule 3.2(c) which require owners to deposit a sum of money. The two tier arrangement found in rule 3.3 will allow owners to hand over small sums of money without the safeguards applying. Under paragraph (a), if the sum of money required to be deposited is less than £100, then the safeguards found in rule 3.4 will not apply. Rule 3.3(b) contains a £200 threshold so as to ensure that owners do not have to risk handing over more than £200 in any year without the protection of having the money placed in a maintenance account. Rule 3.3(b) may kick in, however, where a small sum – perhaps only required for stair cleaning – pushes the total amount over the £200 limit. The previous sums demanded in that year may already be held in a maintenance account, and in that case the only sum at risk is the small amount being demanded. Any sums which have already been placed in a maintenance account are therefore excluded from the £200 threshold.

158. Rule 3.4 deals with procedures where scheme decisions made under rule 3.2(c) require, under rule 3.3, the deposit of sums. It deals with the collection and deposit of funds, which must be paid into a "maintenance account". The owners can authorise others to operate the maintenance account on their behalf. This rule provides safeguards for owners who may be required to hand over considerable amounts of money as a result of a single decision or a number of decisions made by the owners over a 12 month period.

159. Paragraph (f) provides that the notice to be given under rule 3.3 may specify a "refund date" on which the sums deposited would be repayable to the depositors if maintenance has not been commenced by that date. If the notice does not state a "refund date" then rule 3.4(g)(i)(B) provides the default rule. Owners will be able to request repayment if the work does not commence before the refund date or, if no refund date is given, within 28 days of the proposed date of commencement.

160. Rule 3.5 will prevent abuse of rule 3.1(f). An owner's vote will not be counted towards a scheme decision if it is used to excuse him or her from payment under rule 3.1(f). This rule is intended to excuse from payment those who are genuinely unable to meet the financial demand. Without rule 3.5, there would be a risk that rule 3.1(f) could be abused particularly in circumstances where one owner owns a majority of flats in a tenement

Rule 4 – scheme costs: liability and apportionment

161. Rule 4 explains who is to pay for costs incurred as a result of scheme decisions by the owners of a majority of the flats - unless the title deeds provide that the entire liability for those costs is to be met by one or more of the owners. These costs are called "scheme costs" and rule 4.1 lists the type of cost which would fall into this category.

162. Rule 4.2 sets out liability for the maintenance of and running costs related to scheme property. Where rule 4 applies (because the tenement burdens do not apportion the entire liability for a cost) liability for the cost of maintenance of common property of two or more owners (ie scheme property under rule 1.2(a)), then the maintenance costs are shared among those owners in proportion to their ownership in the property (rule 4.2(a)).

163. The cost of maintaining other scheme property is shared equally among the owners of all the other flats, except where the floor area of the largest flat is more than one and a half times the size of that of the smallest flat. Then the costs are allocated according to the floor area (rule 4.2(b)).

164. Rule 4.3 provides that all of the owners in a tenement are liable for the upkeep of the roof where all or part of the roof is the common property by virtue of *section 3(1)(a)*. This is to make the calculation of apportionment of the cost of roof repairs easier where *sections 1*to*3* apply, as in this case the roof over the common stair would be common property but the rest of the roof would not be. The owners of main door flats may not have access to the close and, if the title deeds are silent on ownership, they will not have a right of common property to the close under *section 3(1)(a)* of the Act. Under the normal rules for liability set out in rule 4.2 the owners of main door flats would therefore not be liable to pay a share of the cost of maintaining the roof over the close. They would, however, be responsible for a share of the cost of maintaining the rest of the roof. Rule 4.3 ensures that the whole roof is treated the same under the default rules for liability contained in rule 4.

165. Under rule 3.1(e) owners may make a scheme decision to arrange a common policy of insurance for the tenement. Rule 4.4 provides that owners may decide on an equitable basis the contribution of each owner to the premium (as set out in rule 3.1(e)). If the common insurance policy is arranged in order to comply with one of the title provisions then, in the absence of title provision to the contrary, they will pay equal shares of the premium.

166. Rule 4.5 makes it clear that any scheme costs relating to the remuneration of the manager, the installation of a system enabling entry to the tenement to be controlled from each flat, the cost of calculating the floor area of each flat and any other costs relating to the management of scheme property are to be shared equally among the flats and owners are liable accordingly.

Rule 5 – redistribution of share of costs

167. Rule 5 deals with the situation where an owner is unable to pay their share of the costs perhaps because he or she is bankrupt or cannot be contacted or where a scheme decision has been made under rule 3.1(g) that the owner should be exempted from payment. It is not enough to allege that an owner cannot be contacted and it is therefore not possible to get from him or her his or her share of the costs. An effort must be made to identify and locate him or her and that effort must be a reasonable one.

168. In such cases, the relevant share must be paid by the other owners as if it was a scheme cost for which they are liable under rule 4. The "other owners" would only be the owners who were together responsible for the rest of cost of the repairs. This is to cover the situation when one of the flats is sold between the time when the owners become liable for the costs and the time when they discover that one of their number cannot pay. So

if one of the flats changes hands, the irrecoverable share will be divided between the owners who are responsible for the costs. Generally this will be the outgoing flat owner.

169. If the share cannot be recovered because the owner is bankrupt or cannot be contacted, then that owner remains liable to all the other owners for the amount paid by each of them.

Rule 6 – procedural irregularities

170. Under rule 6.1, a procedural mistake will not make a scheme decision invalid. This will not, however, for example, excuse substantive failure such as a failure to achieve a majority as required by rule 2.5.

171. Rule 6.2 exempts an owner from liability for scheme costs if that owner, as a result of a procedural irregularity, did not know that expenditure was being incurred or immediately objected to the expenditure when they did become aware. The owner is left out of the calculation of the shares of costs of the work.

Rule 7 – emergency work

172. Title deeds may make provision for owners to undertake emergency work in specified circumstances. If they do not, rule 7.1 allows an owner to instruct or carry out work without a scheme decision where it is an emergency, and where, as a consequence, there is no time to consult the other owners. Rule 7.2 provides that the work is to be paid for as if a scheme decision had been taken under rule 4.1(a). The word "work" is deliberately used instead of "repairs" because some work will not fall under the category of repairs.

173. Under rule 7.3, emergency work is defined as work which has to be carried out to scheme property to prevent damage to any part of the tenement, or in the interests of health and safety, and has to be carried out before a scheme decision can be made.

Rule 8 – enforcement

174. Rules 8.1 to 8.4 provide for the enforcement of the provisions of the scheme. Scheme decisions are binding on the owners and their successors as owners and any obligation arising from the scheme or as a result of a scheme decision may be enforced by any owner. Owners may also authorise a third party to enforce an obligation on that owner's behalf and the third party may bring an action in their own name.

Rule 9 – giving of notice

175. The ways in which notice may be given to an owner are set out in rules 9.1 to 9.4. These rules are replicated in *section 30* of the Act. This is necessary because a decision might be taken by owners to carry out maintenance under conditions in title deeds, but there might be no provision in those conditions for sending notice of the decision to owners. These provisions are consistent with the corresponding provisions in section 124 of the Title Conditions Act.

176. Rule 9.3 provides that if an owner's name is not known, or if the name is known but the owner's whereabouts are a mystery, then it will be sufficient for the notice to be sent to the flat. The person sending the notice will, however, have to make reasonable enquiry as to where the owner is.

177. Provision for determining the date of giving notice, where it is posted or sent electronically, is set out in rule 9.4 and this is either the day of posting of the day of electronic transmission.

Schedule 2 – Form of Notice of Potential Liability for Costs

178. Schedule 2 prescribes the form of a notice of potential liability for costs. It is necessary to give details of the flat to which the notice relates and a description of the work to

which it relates. The notes for completion specify that the flat must be described in a way that is sufficient to identify it. The description must refer to the title number if the flat has been registered in the Land Register of Scotland.

Schedule 3 – *Sale under Section 22(3) Or 23(1)*

179. This schedule provides a procedure for applications to the sheriff court for power to sell the site of a demolished tenement building or an abandoned tenement.

180. Under paragraph 1, an owner may make a summary application to the sheriff seeking a power of sale order. The applicant must give notice of it to each of the other owners of the sale subjects. The sheriff shall grant the power unless he or she is satisfied that it would not be in the best interests of the owners as a group or would be unfairly prejudicial to one or more owners. Any previous power of sale order would be revoked on the grant of a new power of sale order. Paragraph 1 also sets out the detailed information which must be contained in an application. Paragraph 2 allows for appeals against either the grant or refusal of a power of sale order to the Court of Session on a point of law.

181. Paragraph 3 provides for the registration of power of sale orders in the property registers. Paragraph 4 contains rules about marketing in order to obtain the best price that can reasonably be obtained. Paragraph 5 requires the owners selling the sale subjects to pay the other owners their share of the proceeds and sets out rules for the calculation and payment of those shares. The sum payable to each owner will normally be an equal share of the gross proceeds of the sale less an equal share of the expenses incurred by the seller. An owner will receive the share less the cost of discharging any security the owner may have outstanding over his former flat. If another owner is not traceable, then the funds will be lodged with the sheriff court.

182. Paragraph 6 makes it clear that where the sale subjects have been sold under a power of sale order then all heritable securities affecting the sale subjects or any part of them shall be discharged.

Schedule 4 – *Amendments of Title Conditions (Scotland) Act 2003*

183. *Section 25* of the Act stipulates that the Title Conditions Act will be amended in accordance with schedule 4.

184. Section 3(8) of the Title Conditions Act provides that a person other than “the” holder of a real burden may not waive compliance with it. The reference to “the” holder implies that a burden could only be waived, mitigated or varied by all of the persons entitled to enforce it. It should, however, be possible for the title deeds to provide that a burden may be varied by some of the persons entitled to enforce it and not just all the owners. Paragraph 2 of schedule 4 substitutes “a holder” for “the holder”.

185. Paragraphs 3 and 14 correct a possible technical problem that could have hindered the operation of the Title Conditions Act in relation to groups of related properties such as housing estates. A change is made to relax the requirements for the creation of new burdens after the appointed day but only where the burden would be a burden to which section 53 would apply. Section 53 applies to burdens imposed on groups of related properties. The change is designed to avoid issues arising as to the validity of such burdens and to make sure that all of the properties within a community (the housing estate) will be able to enforce the burdens affecting each unit against the others.

186. Paragraphs 4, 5 and 20 introduce into the Title Conditions Act the same policy on liability for incoming owners set out in *sections 12*and*13* of, and schedule 2 to, this Act. The Title Conditions Act applies to all types of property, which is why separate (but identical) provision is required. Section 10 of the Title Conditions Act deals with affirmative burdens and the continuing liability of former owners. It provides for certain obligations to be enforceable against both the current owner and the owner

at the time the obligation arose – in other words, action may be taken against either for payment, though there is a right of relief for the buyer against the seller. These paragraphs introduce the same notice procedure for the Title Conditions Act as under the Tenements Act for purchasers who are unaware of an outstanding liability due by the seller and who, after taking entry, may be faced with a bill for a share of a cost of work already carried out.

187. Paragraph 4 also provides that section 10 of the Title Conditions Act will not apply where *section 12* of this Act (the liability of owners and their successors) is applicable in tenement property.

188. Paragraph 6 brings the Title Conditions Act into line with this Act in relation to the calculation of the floor area of a flat. In particular, it makes it clear that the internal walls or other internal dividing structure will be included in the calculation but that balconies, lofts or basements are not unless the loft or basement is used for purposes other than storage.

189. Paragraph 7 extends the provisions of the Title Conditions Act on community burdens to situations where there are two rather than four units.

190. Paragraph 8 makes changes to section 29 of the Title Conditions Act, which deals with the power of the majority to instruct common maintenance. The changes will replicate the provisions of rule 3 of the Tenement Management Scheme. Parts of rule 3 provide procedures for the deposit and retention of monies. Similar procedures are found in section 29 of the Title Conditions Act. Paragraph 8 provides that both procedures will be the same. Paragraph 8 also makes it clear that where a scheme decision gives authority to operate a maintenance account, the authorisation must be to a manager or at least two other persons.

191. Paragraph 9 disapplies parts of section 28 and sections 29 and 31 of the Title Conditions Act (which relate to community burdens) in relation to a community consisting of one tenement or where the development management scheme applies to the tenement. These sections deal with the power of a majority to appoint a manager, the power of the majority to instruct common maintenance and remuneration of the manager and, as regards tenements, are superseded by this Act. If the community (i.e. a group of two or more properties all subject to the same or similar burdens which can be mutually enforced) consists of just one tenement, then this Act will provide appropriate rules if the title deeds do not do so.

192. Paragraph 10 amends section 33(1) and (2) of the Title Conditions Act which relates to majority variation and discharge of community burdens. It ensures that section 33(2) will apply even where a constitutive deed may allow specified owners to grant a variation or discharge and also authorise a manager to do so.

193. Paragraph 11 amends section 35 of the Title Conditions Act. Subsection (1) of that section provides that variation and discharge of community burdens by owners of adjacent units is only available "where no such provision as is mentioned in section 33(1)(a) is made". Paragraph 11 will make both methods of variation and discharge available. In other words, it will be possible for adjacent owners to vary or discharge community burdens by using section 35 or by using provisions in the title deeds if these exist.

194. Paragraph 12 relates to rural housing bodies. Section 43(5) of the Title Conditions Act enables Ministers to prescribe a list of bodies as rural housing bodies. These bodies will be able, when selling rural housing, to agree a right to repurchase the property in order to ensure that it remains within the rural housing stock. The former terms of section 43(6) specified that to be a rural housing body, an organisation must have as an object the provision of housing on rural land (or rural land for housing). This would have excluded bodies whose constitution is that they have a broad function of providing housing in any location but not a function specifically related to rural areas. Paragraph

12 will allow a wider range of housing body to be designated as rural housing bodies, but the provisions themselves may only be used over rural land (rural land is defined as for the Land Reform (Scotland) Act 2003, namely as land other than settlements with a population over 10,000).

195. Paragraph 13 removes a definition of "local authority" which is rendered unnecessary by the insertion of a definition into section 122 by paragraph 19.

196. Paragraph 15 simply makes it clear that the reference in section 90 of the Title Conditions Act should be to applications to the Lands Tribunal to disapply a development management scheme.

197. Paragraphs 16 and 17 make it clear that when the courts are considering the best interests of the owners they must consider the interests of the owners as a whole.

198. Paragraph 18 removes subsection (9) of section 119 of the Title Conditions Act. This subsection purports to delay the full effect of sections 106 and 107 of the Title Conditions Act (which deal with the extinction of real burdens in situations involving compulsory purchase). These sections have been in force since 1 November 2003.

199. Paragraph 19 changes the definition of "tenement" in section 122 of the Title Conditions Act to bring it into line with the definition in this Act. It also removes the definition of "flat" which will now be construed by reference to this Act. Other amendments to the 2003 Act extend the use of the term "local authority" and the definition in paragraph 19(b) is a consequence of this change.