

## Registers Update - Abolition of Feudal Tenure and New Title Conditions - Final Preparations Part A



This is the latest in a series of updates about the feudal reform legislation and its impact upon registration. Previous updates provide information on various registration aspects of the appointed day including feudal conveyances; constitution of real burdens; new deed types; Sasine Application Form and LR Forms; and superiority and mixed fee titles.

UPDATE: 10.5

Part A of this update provides information about servitudes; additional information about dual registration supplementing Registers Update 10.2; supplementary information about the Keeper's process for highlighting superiority interests; and the Keeper's approach to the transitional period.

Part B provides a checklist of changes introduced by the legislation and affecting registration.

### Servitudes

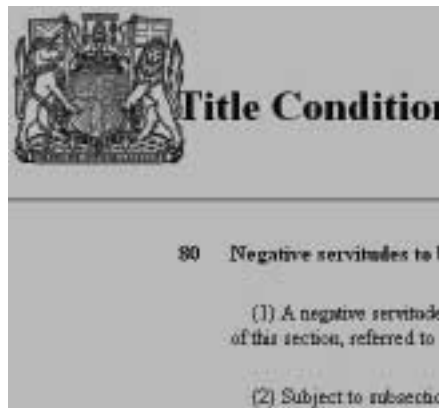
Although the Title Conditions (Scotland) Act 2003 ("the Act") mostly concerns the law of real burdens, in Part 7 (sections 75-81) it makes some changes to the law of servitudes.

Registers Update 10.2 provided detailed information about registration of a Notice of Converted Servitude and the provisions of section 80 of the Act. Further to those provisions, section 75(1) of the Title Conditions Act provides that a deed is not effective to create a positive servitude by express provision unless it is registered against both the benefited property and the burdened property. The terminology is changed from 'servient tenement' and 'dominant tenement' to 'burdened property' and 'benefited property' in keeping with the rest of the Act. This provision means that two applications have to be submitted to the Keeper for registration in the Land Register. However, where both burdened and benefited properties remain in the General Register of Sasines, only one application (on a Sasine Application Form) is required due to the unitary nature of that register. Where the application is wholly in the Sasine Register all properties must be narrated on the Sasine Application Form.

A servitude created by deed will no longer be an overriding interest for 'noting' against the servient tenement because of this necessity to register against both properties. The Keeper will enter details of the servitude in the property description in the Property Section (A Section) of the benefited property Title Sheet. Where the servitude is supported by obligations an entry may also be made in the Burdens Section (D Section) of the Title Sheet. For the burdened property an entry will be made in the Burdens Section of the Title Sheet.

Section 76 of the Title Conditions Act provides that servitudes created in writing and dual registered will not have to belong to the fixed list of servitudes previously known to Scots law. However, section 76(2) of the Act states that a servitude cannot be created "that is repugnant with ownership", thereby limiting the application of section 76(1). Further, it remains the case that servitudes retain a praedial relationship.

Section 77 of the Title Conditions Act makes it clear that a right to lead a pipe, cable, wire or similar can be constituted as a positive servitude. Exceptionally, a deed creating such a right need not be dual registered.



Unlike other provisions of the Act regarding the creation of real burdens, section 119(8) of the Act states that section 75 (the dual registration requirement) does not apply to deeds executed before 28 November 2004. Therefore a deed creating a positive servitude that was executed before the appointed day but presented to the Keeper for registration/recording after that date will not be rejected provided dual registration is not applied for.



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## Dual Registration

Registers Update 10.2 provided detailed information about the requirements for dual registration of applications containing constitutive deeds. From the appointed day, where new burdens are created, the title for both the burdened and benefited properties will reflect the burden(s). In respect of community burdens the deed of conditions or other constitutive writ will equally benefit and burden the given subjects.

Following discussion with representatives of the profession we have further enhanced the way in which we will make entries in title sheets for the burdened and benefited properties for burdens created by Disposition (not intended to apply equally across a community).

In the benefited property title sheet the Property Section (A section) will state the title number(s) or Sasine address(es) of the burdened properties in respect of which that benefited property has enforcement rights. These references will cross-refer to the Burdens Section (D section) of the Title Sheet, where the burdens that the property has the right to enforce will be set out in full. Such burdens will be separated from the burdens enforceable against that property and clearly identified in the preamble narrated in the D section.

The burdened property title sheet will reflect the burdens in the D section as now.

## Fees

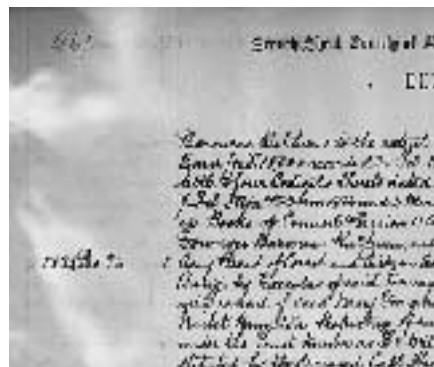
Registers Update 10.2 indicated that an amendment to the fee order will provide two fees for dual registration and that the proposed fee for registration in the Land Register would be a principal fee for the burdened property and an additional fee for each benefited property. To accommodate the additional work mentioned as part of the preceding section, there will now be only one level of fee for dual registered applications. In addition to the ad valorem scale fee for the burdened property, the fee for each benefited property application in the Land Register is now confirmed to be £22.00 (note: this supersedes the information given in Registers Update 10.2). The Fees in the Registers of Scotland Amendment Order 2004 has now been laid before Parliament.

## Superiority & Mixed Fee

Registers Updates 10.4 explained the Keeper's position with regard to superiority and mixed fee titles in the Land Register.

In order to alert anyone searching the Land Register that a title may contain an interest that has been abolished in terms of the legislation an application note will be added to affected registered titles. This note will be visible through Registers Direct in an Application Record search. The text of the note will be:

**Note:** the feudal superiority interest formerly conferred by this title sheet ceased to exist on 28 November 2004 in terms of section 2(2) of the Abolition of Feudal Tenure (Scotland) Act 2000. The registered proprietor may nevertheless retain ownership of parts of the surface or of mineral rights. This will receive further consideration upon the next application for registration or rectification being made in respect of this title.



## Transitional Period

Registers Update 10.1 explained that provisions of the Feudal Abolition Act and the Title Conditions Act provide the Keeper with discretion to treat extinguished real burdens as subsisting. It also set out the position with regard to applications for removal of extinguished real burdens for the duration of the 10-year transitional period from the appointed day.

Section 17 of the 2000 Act extinguishes the superior's right to enforce real burdens, subject to saving provisions. Under subsection (1) any real burden enforceable only by a superior is extinguished on the appointed day.



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Part 4 of the 2003 Act abolishes enforcement rights implied by common law but provides a preservation procedure and recreates some of these rights with a statutory basis. In future it will not be possible to create implied rights. Sections 52 to 56 of the 2003 Act and section 60 of the 2000 Act detail the circumstances whereby a burden will subsist, for example:

- where real burdens are imposed under a common scheme expressly referred to;
- where real burdens imposed on a common scheme are mutually enforceable by the owners of each property within that scheme;
- where real burdens are imposed on sheltered housing; and
- where real burdens are facility or service burdens.

Sections 46 of the Feudal Abolition Act and 51 of the Title Conditions Act provide the Keeper with temporary relief for a period of 10 years from the requirement to update the Land Register by the removal of extinguished burdens or the entry of statements in accordance with section 58 of the 2003 Act.

During the transitional period the Keeper will not remove extinguished burdens in the ordinary course of dealing with applications for registration. Instead, the Keeper will exercise the discretion conferred on him by the legislation to treat extinguished burdens as subsisting. In order to identify those burdens that subsist or are extinguished, each title will have to be investigated. The Land Register currently holds close to 1 million registered titles, which is anticipated to rise to 1.7 million by the end of the transitional period. To enable this work to progress in a planned and methodical manner, we have chosen to investigate and remove extinguished burdens from registered titles by undertaking a programme to update them over the course of the next 10 years.

Beginning in April 2005 the work will be undertaken using a phased approach starting on a small scale. We do not intend to carry out any updating work this financial year, which ends March 2005. The work will proceed on a county by county basis. As we update each title sheet we will clearly mark the title to indicate that it has been updated. We will not be identifying title sheets that have not been updated.

We will not re-issue Land Certificates as each title is updated.

We will publish a timetable for the updating process and will revise this each year as part of our business planning process. Prior to work commencing in April 2005, we will publish a plan for the year 2005/6 together with greater detail of the approach we will take and the outline schedule for the programme as a whole.

We will also issue a guide in the form of a Registers Update to provide more information about the process for updating titles and how titles that have been updated will be identifiable.

### Further Information

All previous Registers Updates are available on our website [www.ros.gov.uk/updates](http://www.ros.gov.uk/updates).

Our Pre-Registration Enquiries Section will be pleased to offer registration guidance to solicitors on specific matters of concern in connection with an application for registration affected by the issues raised in this update. The service is free of charge.

Contact: Pre-Registration Enquiries at:  
Registers of Scotland Executive Agency  
Meadowbank House  
153 London Road, Edinburgh EH8 7AU  
LP55, EDINBURGH 5  
DX 550907, EDINBURGH 9

Enquiries: 0845 607 0163 (local rate)  
Direct Line: 0131 479 3674  
Fax: 0131 479 3675  
Email: [pre-registrationenquiries@ros.gov.uk](mailto:pre-registrationenquiries@ros.gov.uk)



## Registers Update - Abolition of Feudal Tenure and New Title Conditions - Final Preparations Part B



### Checklist for the Appointed Day

Registers Updates 10, 10.1, 10.2, 10.3 and 10.4 provide information on changes introduced by the legislation and the effect upon registration in detail. Key changes are noted in this checklist.

<ul style="list-style-type: none"> <li>• Savings Notices cease to be registerable, excepting the appeals process.</li> </ul>	See Registers Update 10.1
<ul style="list-style-type: none"> <li>• It will no longer be competent to create a feudal estate and any applications containing feudal deeds will be rejected.</li> </ul>	See Registers Update 10.1
<ul style="list-style-type: none"> <li>• Dual registration is required for a constitutive deed against both the burdened property and the benefited property (subject to exceptions specified in the 2003 Act).                             <ul style="list-style-type: none"> <li>- a Notice of Termination;</li> <li>- a Notice of Preservation;</li> <li>- a Notice of Converted Servitude; and</li> <li>- an Undertaking not to exercise a right of pre-emption.</li> </ul> </li> </ul>	See Registers Update 10.2
<ul style="list-style-type: none"> <li>• Dual registration is required for a constitutive deed against both the burdened property and the benefited property (subject to exceptions specified in the 2003 Act).</li> </ul>	See Registers Update 10.2
<ul style="list-style-type: none"> <li>• The Sasine Application Form replaces the Warrant of Registration. on the next transaction conveying the new sporting tenement.</li> </ul>	See Registers Update 10.3
<ul style="list-style-type: none"> <li>• New versions of Forms 1, 2 and 3 are introduced.</li> </ul>	See Registers Update 10.3
<ul style="list-style-type: none"> <li>• Feuduty and other periodical payments are abolished.</li> </ul>	
<ul style="list-style-type: none"> <li>• Some real burdens will become unenforceable and are therefore extinguished.</li> </ul>	See Registers Update 10.1
<ul style="list-style-type: none"> <li>• Existing Land Register title sheets will contain real burdens that no longer subsist.</li> </ul>	See Registers Update 10.1&10.5
<ul style="list-style-type: none"> <li>• Negative servitudes become real burdens.</li> </ul>	See Registers Update 10.5
<ul style="list-style-type: none"> <li>• Positive servitudes (under exception) require dual registration.</li> </ul>	See Registers Update 10.5
<ul style="list-style-type: none"> <li>• Where a section 65A Notice converting sporting rights into a separate tenement has been registered/recorded, a new title sheet will be created</li> </ul>	

