SUBMISSION FROM BRODIES LLP

1 Introduction

1.1 Brodies LLP is a large commercial practice of solicitors which acts for various types of clients who buy, sell, lease and grant and take security over property throughout Scotland. We have around 80 property lawyers who deal with various types of property transactions involving residential developments, retail, office and industrial properties, rural estates and farmland and renewable energy projects, in particular, wind farms.

1.2 Having examined the provisions of the Land Registration etc. (Scotland) Bill as introduced to the Scottish Parliament on 1 December 2011 (“the Bill”), a number of points have come to our attention that may need further consideration as the Bill progresses through the Parliament.

2 Key Provisions

The key provisions of the Bill on which we would like to comment are: s19 on converting shared plot titles; s.29 on keeper induced registration; s.38 on the order in which applications are to be dealt with; ss42-44 on prescriptive claimants; Part 9 of the Bill dealing with acquisitions in good faith; Part 4 on Advance Notices; s89 on extinction of floating charge when land disponed and s.108 creating a new offence. We also discuss the burdening of pro indiviso shares of property.

3 Section 19 – Conversion of shared plot to ordinary plot title sheet

3.1 This section of the Act gives the Keeper the power to revoke a designation of shared plot and to designate the property as an ordinary plot. We are concerned that the provision in its current form does not limit or explain the circumstances in which this can be done. We would assume that safeguards will be put in place to protect any potential proprietors of the shared plot.

3.2 The Explanatory Notes for the Bill (“Explanatory Notes”) make reference to the Keeper exercising this power if a proprietor buys up all of the shares in a shared plot. Will this be the only instance when this power will be used or will it be used, for example, when shared plots have been abandoned (areas of housing developments which were intended to be used for common amenity purposes but never completed) and are subsequently developed by one party?

4 Section 29 – keeper induced registrations

4.1 We would assume that the proprietor will not be required to pay any of the costs involved in a keeper induced registration and also that the Keeper would consult the proprietor on any larger complex titles and pay for the costs involved in responding to requisitions and answering queries. The Bill should confirm the position.

5 Section 38 – order in which applications are to be dealt with

5.1 The Bill currently provides that applications will be placed on the Application Record in the order that they have been received. We would be interested to
know if there will be one central point for receiving all such applications or if there will be multiple points. If there are multiple points, will it come down to who presents first or who takes in the application on behalf of Registers and deals with it first that will preside?

5.2 The system of registering land in Scotland is clearly moving towards becoming an electronic system. We welcome the provision in the Bill at s.36 for Scottish Ministers to prescribe the time of registration by order and would welcome a similar facility to that used in England whereby the time of registration is noted in a title as well as the date of registration? This would assist with any issues relating to order of presentment.

6 Sections 42-44 – Prescriptive Claimants
6.1 We act for rural estate owners who want to be assured that the current stringent requirements imposed by the Keeper when dealing with a non domino disposions continue to be imposed.

6.2 We also act for developers who on occasion struggle to find the owner of a gap site needed to unlock a development. Being unable to locate the owner of such a gap site can prevent a development going ahead or a sale proceeding.

6.3 The Keeper has adopted strict procedures to prevent title raiders registering title to areas of land by way of disposition a non domino. The Bill proposes to add to the current requirements by, amongst other things, requiring a prescriptive claimant to prove that the true proprietor has abandoned the site for 7 years. The Bill does not specify what criteria will have to be satisfied but we would assume that it will include some evidence taken from neighbouring proprietors. Such evidence may be very difficult to obtain. How could one prove that, for example, the verge of a road has not been possessed for 7 years and has been abandoned?

6.4 We would assume that the Keeper will continue to scrutinise prescriptive claims. We would therefore suggest that the requirement for one years' possession by either the seller or the purchaser or the two combined prior to the application in addition to the requirement of ten years' open and peaceable possession without judicial interruption should be sufficient to protect true owners of land being denied their rights. The introduction of a system of provisional titles and the notification requirement will also assist with this protection. We would suggest that the requirement to prove 7 years' abandonment should be removed from the Bill.

7 Part 9 – section 82 acquisition from disponer without valid title
7.1 The requirement for the seller or the purchaser or both combined to have one years' possession of property to which the seller had an invalid title causes us concern. We are not clear as to how we can find out if a seller is not the proprietor if the seller's name appears on the proprietorship section of the title and the seller is in possession of the property? We are of course meant to trust the Land Certificate and not look behind it.
7.2 We are concerned that the effect of the provision as drafted will mean that one years' possession will be looked for in every transaction as there is no way of knowing whether a seller has a valid title or, alternatively, that the seller has an invalid title. If this is the case, every transaction could be in danger of being reversed at any point within the first year of possession.

7.3 We do not believe that the intention is for every transaction to be subject to the requirement of one years' possession before good title can pass. We would therefore suggest that the Bill be amended to reflect the circumstances in which a seller's title will be deemed to be invalid.

7.4 If the provision remains in its current form, if a purchaser cannot show that one years' possession has expired, will the title granted to the purchaser be noted as provisional until the possession requirement has been met?

8 Part 4 – Advance Notices

8.1 We welcome the proposed introduction of a system of advance notices. This will assist us greatly with cross border transactions as well as paving the way for us to get rid of letters of obligation.

8.2 We understand from the provisions that a notice will be registered in respect of each deed which is to be protected. This could lead to a number of notices being required in complex commercial transactions where several deeds may be involved, for example, more than one disposition and standard security. We do not believe that this will cause great problems for the solicitors involved but it could add a large administrative burden on Registers of Scotland and increase the chance of error. Would it therefore be possible for the parties to register one advance notice with the details of all parties involved and property affected without having to go on to specify the type of deed which is to be protected? This would allow for buyers and lenders to be covered by one notice.

8.3 We also understand that once registered, a notice ("Notice A") cannot be changed. If a Notice A requires to be changed, a fresh notice ("Notice B") will have to be registered. Notice B will trigger a new protected period and will rank behind any other notices which were registered after Notice A but before Notice B.

8.4 It is often the case that transactions change as they progress, for example, the name of the company which intends to take title to the property changes or the name of the company granting the security or taking the security changes. In such situations, would it be possible to amend the Notice A, and then to benefit from the remainder of the protected period which was outstanding when the amendment was made instead of having to register the new Notice B?

8.5 The Bill currently allows for deeds not protected by an advance notice or subject to a later advance notice to be registered during a protected period. Any such deeds would then become invalid or in the case of securities, we
assume postponed to the deed which was protected by an advance notice and duly registered within the relevant protected period. We understand that the land registration system in England would not allow the registration of deeds which are not covered by an advance notice during a priority period (known as the protected period in Scotland). Any such deeds would be held in abeyance until the priority period had expired. This would be a more preferable approach in Scotland.

8.6 If however, Registers wish to continue to accept applications for registration during a protected period, would the title sheet for the "unprotected" applications note that an advance notice had not yet expired and will the Keeper be excluding indemnity until the protected period has expired? Would it be possible for those titles or securities to be given a provisional status, ranked in accordance with time of presentment? If yes, the provisional status could then be lifted at the end of the protected period. If the protected deed was registered within the protected period, any competing provisional title would fall and similarly, if the protected standard security was registered within the protected period, any provisional security would rank postponed to the protected deed.

9 Section 89 – Extinction of floating charge when land disponed
9.1 This section provides that a purchaser will acquire a property free of a floating charge granted by a predecessor in title of the seller. It would perhaps be unusual and only occur on a rare occasion, but, if a property was sold twice within the "blind" 21 day period for the appointment of an administrator under a floating charge, the floating charge holder would be denied his right to the property under the floating charge. Such a chain of transactions may be put in place to deliberately avoid the floating charge.

10 Section 108 – Offence relating to applications for registration
10.1 We share the views which have been expressed by the Law Society and others about this proposed provision and would call for it to be removed from the Bill in its current form. In our opinion, the provision could result in a solicitor being held criminally responsible for an error in completing a form which seems to be a heavy handed way of dealing with the purported problem.

11 Ability to burden pro indiviso share of property
11.1 Sections 4 and 6 of the Title Conditions (Scotland) Act 2003 provide that a constitutive deed (creating a real burden) cannot be registered against a pro indiviso share of property. This causes us problems in a number of situations, for example, with salmon fishing rights which are often owned in pro indiviso shares but which shares cannot be burdened and in shared ownerships of family estates. In the latter situation, we cannot, for example, register pre-emption rights against pro indiviso shares and have to resort to registering contractual arrangements in the Books of Council and Session. The Bill may present an opportunity to amend the Title Conditions (S) Act to permit the burdening of pro indiviso shares.
12 Conclusion
We welcome the introduction of the Bill and are happy to assist further with
any of the points raised above.

Brodies LLP
23 January 2012