SUBMISSION FROM SCOTTISH LAND AND ESTATES

Scottish Land & Estates (formerly The Scottish Rural Property and Business Association) is a membership organisation, uniquely representing the interests of landowners and land managers in Scotland. Our membership includes those who own farms, landed estates and rural businesses throughout Scotland, as well as professional firms who advise rural land owners. Accordingly, Scottish Land & Estates and its membership are key stakeholders and therefore are pleased to take this opportunity to submit written evidence on the content of The Land Registration (Scotland) Bill.

General Comments:

Scottish Land & Estates is fully supportive both of the principle of completion of the Land Register and of the accurate mapping of land for that register.

However, Scottish Land & Estates wishes to ensure, in so far as possible, that any new system is fit for purpose and does not result in unintended consequences. It is in the interests of all concerned to ensure that the system of land registration in Scotland allows land to move from the General Register of Sasines to Land Register as easily and as cost effectively as possible. However, a new Statute which seeks to improve the system of land registration in Scotland must not place an unreasonable burden on those owners of land who have complied fully with the requirements of recording under the present Sasine based system. Scottish Land & Estates has serious concerns that the costs of complying with the proposed legislation will be considerable in the case of owners of land with complex title arrangements and that these costs have been seriously underestimated by the Scottish Government in its preparation for this Bill. The financial implications as stated in the Financial Memorandum within the Explanatory Notes accompanying the Bill are misleading as they do not deal in any way with the professional and other costs which will inevitably be incurred by owners of rural land with complex titles who will now be required to register land in the Land Register, either on a conveyance for no consideration, or on voluntary first registration, or on keeper induced first registration, or in other situations such as registerable leases. It appears that the financial implications have been considered only in relation to small or relatively straight-forward plots of land.

Scottish Land & Estates has not carried out a detailed examination of the provisions of the Bill and will restrict its evidence to points of principle which are likely to affect our members and their advisers.

It is accepted that many of the complex cases of first registration in Land Register relate to rural properties. These may, for example, be large landed estates with no accurate plans attached to Sasine titles, properties where there have been numerous break off writs (possibly numbering hundreds or more), or areas of land where the legal boundary has been altered on the ground because of geographical features, perhaps where fencing has been impossible on the actual legal boundary and has been erected along a more convenient line, or, in numerous cases, where
fencing has been erected to take account of modern farming and land management requirements.

The current system of land registration does not achieve the goals of ease and cost effectiveness. In order to overcome difficulties, expense and lengthy registration procedures, a practice has developed whereby two titles may be granted on a sale or transfer for consideration which would induce first registration under the current system. The first title might be granted for the full consideration over the area which is easily identified, thus triggering first registration, while a second title might be granted for no consideration over the "rump" by way of a "mopping up" conveyance, thus allowing a more straightforward recording in the Sasine Register. While this is not ideal, it has proved to be a workable solution in certain cases and avoids the considerable expense of detailed site investigations and title examination for the purpose of the production of suitable plans.

These difficult cases will continue and a solution is required for them. The apparent absence of a mechanism for dealing with them in the Bill combined with the "one shot principle" introduced by section 33 of the Bill will not give confidence to owners of complex estates, particularly as it is a stated aspiration that there should be more voluntary first registrations of land.

Specific Comments:

1. **Extension of first registration to conveyances without consideration being paid.** This will inevitably lead to greater expense on the transfer of land following the death of the owner of any area of land to a member or members of the deceased’s family. The family farm or estate, of whatever size, where the title is in name of an individual (as opposed to a company or trust) will have to undergo the detailed procedure of first registration (including the preparation of appropriate plans), thus increasing both the cost of winding up an estate and also the length of time required to complete the winding up.

2. **Extension of first registration to registrable leases.** The following important points will affect our members:

   - Registrable leases are likely to include leases of land for renewable energy projects. It is the understanding of Scottish Land & Estates that the tenant will be required to register such leases and that the underlying plot of ground over which the lease is granted will also require to be registered. This will likely increase the cost of such transactions. In addition, where option agreements have already been granted for possible future leases, such additional expense and work will not have been considered. It is arguable that there should be an exemption from compulsory registration for leases which are granted in terms of an Option Agreement already in place.

   - Registrable leases are likely to include Limited Duration Tenancies ("LDT") under the Agricultural Holdings (Scotland) Act 2003 (as amended) ("the 2003 Act"), which are leases of land for agricultural purposes for more than 10 years. In terms of the 2003 Act, the default period for changing from "a
secure 1991 Act tenancy” to a LDT is 25 years. Scottish Land & Estates is also aware of a number of recent LDTs of more than 20 years.

The requirement to register such leases, with the consequential additional work and expense thereby entailed both for landlord and prospective tenant, may be a disincentive to enter into leases for in excess of 20 years where it might be the wish of both parties to enter into a long agricultural lease, possibly to give the prospective tenant security until retirement.

Given that Scottish Land & Estates is working, and will continue to work with others in the agricultural sector and with its members to stimulate new agricultural leases in terms of the 2003 Act, any such disincentive will not assist with this stated policy objective of the Scottish Government. Consideration should be given to excluding LDTs from the new compulsory registration requirements.

3. **Registration of anything “otherwise affecting the terms of the lease” (s 51(2)).** This requires clarification in relation to the requirements of the Agricultural Holdings legislation relating to registered leases. Is the intention that the Keeper will require registration of rent review memoranda, correspondence between tenant and agent, Land Court and other court decisions, arbitration and mediation decisions, notices of improvements, etc.? Once again, this will lead to increased costs on both landlord and tenant. This requires further detailed consideration.

4. **Timeshared salmon fishings and property (sections 17-20).** There are numerous examples of salmon fishings and other property which have been timeshared and which contribute considerable sums to the economies of rural communities. At present, it is the understanding of Scottish Land & Estates that the Keeper refuses to register pro indiviso shares in property (whether land based or salmon fishings) where there are burdens restricting the times during which the proprietor of the pro indiviso shares may exercise their property rights. There is a view that such burdens are unenforceable and are purely a matter of contract. As the Keeper gives no indemnity in relation to burdens, there appears to be no difficulty, in principle, of registration.

As timeshare interests change hands, dispositions are unrecorded with the result that the ownership per the Sasine Register is outdated, which is not sensible, may lead to confusion and does not assist with the transfer of land registration to Land Register. It is recommended that suitable amendments are made to the Bill to make it clear that any title which includes a burden or restriction to the effect of restricting the period during which occupancy of the property can be exercised is not guaranteed by the Keeper and that the title sheet is evidence only of the fact that the party entered into the proprietorship section owns the pro indiviso share entered in the title sheet. Restrictions on entitlement to occupy could be omitted from the burdens section and it could be made clear that, subject to this, such pro indiviso shares should be registered in the Land Register.
5. **Voluntary Registration (sections 27 and 28) and Keeper induced Registration (section 29).** Sections 27 and 28 deal with voluntary registration. While we have no difficulty with this in principle, it has been noted that the application fees in England and Wales are comparatively low, presumably to encourage such applications. We would urge the Scottish Government to ensure that the application fees are sufficiently low to encourage voluntary registration.

Section 29 gives the Keeper the ability to register land without application and without the consent of the owner of the land. While it appears that such registration would not attract an application fee, although this is not entirely clear from the drafting of this section, and that the Keeper will be relying on information readily available from Land Register and Sasine Register, Scottish Land & Estates remains concerned with regard to the cost which such registrations will inevitably incur for the rural landowner. Any land certificate issued to a landowner following a registration under section 29 will require to be checked against title deeds as well as break off deeds where there have been sales of plots. This will incur legal and, very possibly, land agent fees as well as time and expense for the landowner and relevant office employees. In complex cases, advice will be given to the landowner to have the land certificate checked as errors can and do occur and, if not picked up timeously, can lead to complications in the future with dealings with registered land.

Furthermore, although the Keeper has to notify a landowner that their title has been registered, there is no statutory time limit for such notification. Accordingly, it is recommended that a time limit is written into the Bill in order that the Keeper is under an obligation to inform the landowner timeously. Indeed, it is arguable that advance notice that the Keeper intends to induce registration should be given to the landowner in order to avoid any difficulties with sales or leases of land during the period when the Keeper is making up the Land Certificate. In complex cases, the Keeper’s investigations may take months, if not years.

In addition, there is no clear provision for the Keeper as to how, if at all, the Keeper should deal with relevant queries or comments made by the landowner following receipt of the land certificate. It is recommended that the Bill should make appropriate provision.

All this will lead to considerable additional expense for landowners where the Keeper decides, unilaterally, to induce registration. It is our view that, as no mention is made in the Financial Memorandum, these costs have been omitted from consideration, or, at the very least, grossly underestimated by the Scottish Government. There will, inevitably, be significant costs to be incurred by individuals and small businesses in connection with Keeper induced Registration and provision should be made for the Keeper to meet these costs which the relevant landowner will be forced to incur as a result of an unilateral action by a Non Ministerial Department of the Scottish Administration.

6. **Sections 42(8), 42(9), 44(7) and 44(8).** If the Scottish Ministers are to make an Order changing the number of days within which a Notice of Objection can be
received, it is recommended that landowners (perhaps through stakeholder bodies) should be consulted as well as the Keeper.

7. **Sections 87, 88 and 89.** These provisions appear to state that, if an encumbrance is omitted from a title sheet, then, on transfer of that land, the encumbrance will be extinguished, subject to compensation being paid. This may lead to certain problems:

- The rights of a security holder may be affected.
- The holder of an omitted right of pre-emption may be affected.
- Properties are often sold before a land certificate is issued and there would be no method of checking whether an encumbrance has been omitted before the sale.
- It may be in the landowner’s interest not to draw the Keeper’s attention to the omission of an encumbrance (in that the omission may be in his interest and contrary to the interests of a third party).
- If a right of pre-emption is lost due to the section 87 procedures, compensation can be difficult to ascertain. There should be more detailed provisions for the calculation of loss.

8. **Financial impact on individuals and businesses.** As stated above, Scottish Land & Estates considers that the Scottish Government has not given due consideration to the financial implications on owners of rural land with complex titles of complying with this legislation, either in connection with compulsory first registration of land on transfers without consideration (for example on a transfer by gift or following death) or following Keeper induced Registration. In certain complex cases, such expenses are likely to be considerable and it is recommended that consideration be given to requiring the Keeper to reimburse costs necessarily incurred in the case of Keeper induced registrations where the Keeper unilaterally registers a property without prior discussions with the landowner or his representatives, particularly in such cases where there are errors in the subsequent Land Certificate through no fault of the landowner or his representative.

**CONCLUSION**

Scottish Land & Estates supports the principle of completion of the Land Register but remains concerned that there will be consequential unintended implications for its members, both in terms of increased costs for members and in the interaction with, for example, Agricultural Holdings legislation where Scottish Land & Estates is committed to ensuring that there is a vibrant tenanted sector.

Scottish Land & Estates hopes that it can continue to work with the Keeper and her staff to ensure that, in the lead up to the enactment and subsequent coming into force of the Land Registration (Scotland) Bill, the interests and concerns of its
members and their advisors are fully understood with a view to promoting best practice and a workable system.

Scottish Land & Estates
19 January 2012