



The Scottish Parliament
Pàrlamaid na h-Alba

ECONOMY, ENERGY AND TOURISM COMMITTEE

AGENDA

3rd Meeting, 2012 (Session 4)

Wednesday 25 January 2012

The Committee will meet at 10.00 am in Committee Room 4.

1. **Land Registration etc. (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

Alan Cook, Chairman, and Ann Stewart, Member, SPF Commercial Committee & Professional Support Lawyer, Scottish Property Federation;

Gary Donaldson, Business Development Manager, Millar & Bryce;

and then from—

Sheenagh Adams, Keeper of the Register, Gavin Henderson, Land Registration Bill Team Leader, and John King, Director of Registration, Registers of Scotland.

2. **Land Registration etc. (Scotland) Bill (in private):** The Committee will review the evidence heard at today's meeting.

Stephen Imrie
Clerk to the Economy, Energy and Tourism Committee
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The Scottish Parliament
Edinburgh
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The papers for this meeting are as follows—

Agenda Item 1

Written submissions

EET/S4/12/3/1

PRIVATE PAPER

EET/S4/12/3/2

Economy, Energy and Tourism Committee

3rd Meeting 2012, (Session 4), Wednesday, 25 January 2012

Land Registration etc. (Scotland) Bill

Background

1. The following submissions has been received in response to the Committee's call for evidence:

- Registers of Scotland
- Robert Rennie
- Companies House
- Know Edge Limited
- Scottish Land and Estates
- Turcan Connell
- McGrigors
- Clifford McDonald
- Council of Mortgage Lenders
- Professor Peter F. Dale
- Andrew Anderson

Diane Barr
Assistant Clerk to the Committee
January 2012

SUBMISSION FROM REGISTERS OF SCOTLAND

The following is the information requested in relation to the ARTL system:

“ARTL was introduced in July 2007. The project was initially conceived in 1999 and research design costs are included from this early stage. ARTL was launched in 2007 and there was an intensive implementation programme to support solicitors adopting this technology for two years following the launch. The costs are set out for the ARTL system and the Public Key Infrastructure (PKI) electronic signature system that underpins it. RoS considers that the PKI system for ARTL will be capable of being substantially re-used for any successor system.

Development costs to the end of December 2011 are £3,713,410 for ARTL and £640,770 for the PKI.

Implementation costs to the end of December 2011 are £454,259 in total. We do not have a further split for these costs.

Supports costs to the end of December 2011 are £504,347 for ARTL and £1,351,000 for PKI.

Total costs are £6,663,816.”

Registers of Scotland 18 January 2012

SUBMISSION FROM ROBERT RENNIE

I was a member of the advisory committee at the Law Commission when the various discussion papers and reports were produced. I am currently a member of the group advising the bill managers.

I support the main aims of the bill. In particular:-

1. I support the introduction of Advance Notices to protect against intervening competing deeds and diligences.

2. I support the radical change in relation to rectification and realignment; the previous law preferring the registered proprietor in possession did not work fairly and was impossible to explain to innocent people who lost land and then had to argue for compensation. In my own experience neither the Keeper's staff nor myself as an expert giving opinions was ever able to convince such a person that they had not been "robbed " of their land.

3. I have given serious thought to question of provisional title sheets for common rights as a means of ameliorating the effects of the PMP decision and reluctantly come to the conclusion that they are too complicated to work. I am not convinced that builders would grant a deed of ascertainment at the end of the day. I agree that these provisions be dropped. There is no point in passing legislation which causes more problems than were there in the first place.

4. The new statutory right given to the Keeper to sue solicitors where an inaccuracy in the Register is caused by the carelessness of a solicitor is controversial but some years ago I gave an opinion for the Keeper to the effect that there was a common law duty of care owed by solicitors to the Keeper in any case.

5. I am pleased that there is a new provision which allows the Keeper to confirm acceptance of an application and that there will be a time limit set out in a statutory instrument.

Robert Rennie
Partner
Harper Macleod LLP

SUBMISSION FROM COMPANIES HOUSE

Section 6.1

Since we responded to the consultation Companies House has been involved in reforming Part 25 of the Companies Act which relates to registering charges with the registrar of companies.

The existing approach is to list all those charge types which are registerable. As you can imagine the existing law is largely based on the changes introduced in 1900 and we have many customer enquires around the registerability of their particular charges, which in a modern economy may not fit neatly into the existing statute.

The approach we are taking for the regulatory reform is to simply list those charges which are not registerable. This way anything that is outside the excluded information is registerable as a charge. This is much easier to understand and will reduce the amount of Legal resource utilised in dealing with this type of enquiry.

Mark Buckley
Senior Policy Adviser
Companies House
16 January 2012

SUBMISSION FROM KNOW EDGE LTD

INTRODUCTION

I am a director of Know Edge Ltd an Edinburgh based, independent management consulting company that supports organisations to innovate and generate business benefits from their land information. I am recognised as a world expert in Land Information Management and have worked extensively with the United Nations, EU and World Bank on land policy / land reform programmes to strengthen security of tenure and support economic reforms in Eastern and Central Europe, Africa, Middle-East and the Far-East. I am currently supporting the Iraq government in the formulation and implementation of their National Land Policy. I am an advocate of good land governance (1) that delivers transparent, fair and accessible land registration and cadastral systems for all within a comprehensive National Land Policy framework.

LAND REGISTRATION BILL

I welcome the introduction of this bill that formalises many of the procedures incorporated into the Keeper's Registration of Title Practice Book to remedy the deficiencies of the Land Registration (Scotland) Act 1979. However, I believe that the Land Registration etc. (Scotland) Bill 2011 does not go far enough to deliver transparency, accessibility and information to support good land governance for Scotland in the 21st century. My comments on the new bill focus on these crucial areas.

1. Open access to land registration and cadastral information

Transparency is a fundamental characteristic of good land governance that encourages engagement with citizens over land issues and is proven to reduce corruption. I believe that Registers of Scotland should be totally transparent and expose, free of charge, as much of their land registration and cadastral information to the public as possible.

Currently the Registers of Scotland's on-line information services are designed as commercial services to the private sector. The poor quality of the on-line citizen information services and the associated service costs currently inhibit citizens accessing this fundamental information. In 2011 I requested information on the title of my property on-line from Registers of Scotland and it required a phonecall to establish what information I required – and I am an expert in this area! A free, citizen centric information service is required.

I would also recommend that the cadastral map and land registration data become an integral part of the wider 'open data' initiative being advocated by open government. The opening up of governmental data, free for re-use, is being justified on economic grounds (2) (3) (4) since access to these data will have major benefits for citizens, businesses, and society and for the governments themselves. Some of the benefits include:

- **New businesses can be built on the back of this data:** Data is an essential raw material and can be integrated into a wide range of new information products and services, which build on new possibilities to analyse and visualise data from different sources. Opportunities for re-use have multiplied in recent years as technological developments have spurred advances in data production as well as data analysis, processing and exploitation. Facilitating re-use of this raw data will create jobs and thus stimulate growth.
- **Greater Transparency:** Open data is a powerful instrument to increase transparency in public administration, improving the visibility of previously inaccessible information, informing citizens and business about policies, public spending and outcomes.
- **Evidence-based policy making and administrative efficiency:** the availability of robust public data will lead to better evidence-based policy making at all levels of government, resulting in better public services.

The Registers of Scotland currently digitise the cadastral parcel boundaries relative to the topographic features contained within the OS MasterMap digital mapping product sourced from Ordnance Survey GB. The current 'derived data' restrictions imposed by Ordnance Survey GB will stop open access to this cadastral data from happening. Land rights are a fundamental dataset required to support good land governance and this bill should make provision for the cadastral dataset to be free for reuse.

Base mapping does not have to be sourced from Ordnance Survey GB. In many countries, ortho-rectified satellite imagery is used to underpin cadastral parcel boundaries; this is appropriate for many rural areas of Scotland along with open data sources such as OpenStreetMap.

2. Need for national land policy framework to guide land registration and cadastre

Land Administration Systems provide the infrastructure for implementing land policies and land management strategies in support of sustainable development. This infrastructure includes the institutional arrangements, a legal framework, processes, standards, land information, management and dissemination systems, and technologies required to support allocation, land markets, valuation, control of uses, and development of interests in land. Land Administration Systems are dynamic and evolve to reflect the people-to-land relationships, to adopt new technologies and to manage a wider and richer set of land information. The Registers of Scotland provide the land tenure element of Scotland's Land Administration System.

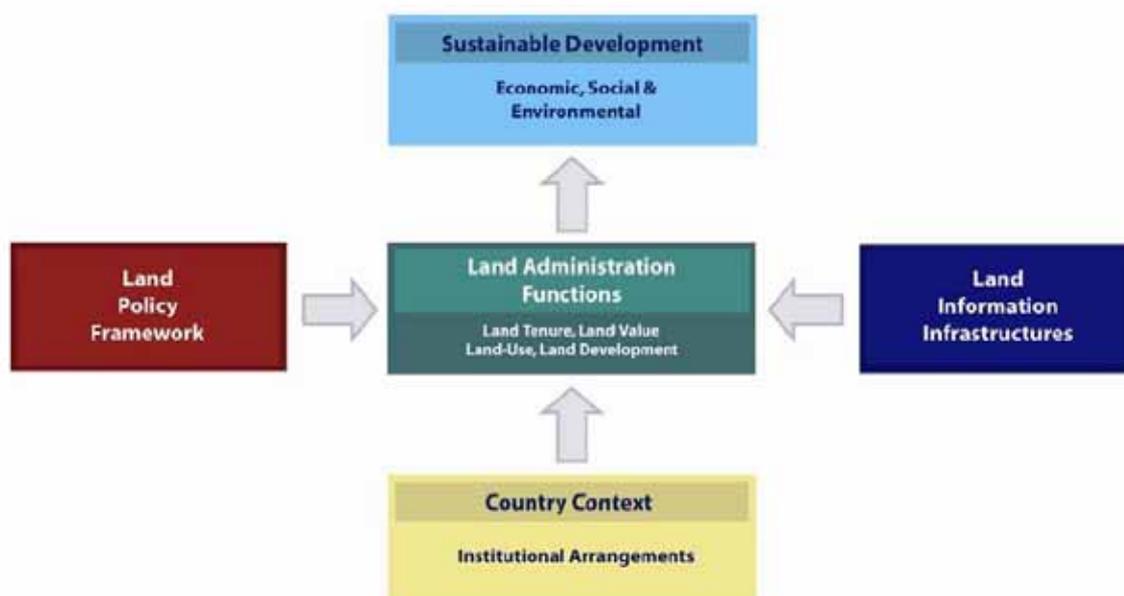


Figure 1: The land management paradigm (5)

Land management underpins the distribution and management of a key asset of any society namely its land. For western democracies, with their highly geared economies, land management is a key activity of both government and the private sector. Land management, and especially the central land administration component, aim to deliver efficient land markets and effective management of the use of land in support of economic, social, and environmental sustainability. The land management paradigm, as illustrated in Figure 1, allows everyone to understand the role of the land administration functions (land tenure, land value, land use, and land development) and how land administration institutions relate to the historical circumstances of a country and its policy decisions. The LAS is the fundamental infrastructure that underpins and integrates the land tenure, land value, land use and land development functions of land administration to support an efficient land market that fully demonstrates sustainable development.

Land Administration Systems are just a means of implementing land policies. However, Scotland does not have a National Land Policy to provide a holistic framework to guide the land tenure, land value, land use and land development functions of land administration. It is recommended that Scotland creates a National Land Policy to guide the future of institutions such as the Registers of Scotland. Had a Scottish National Land Policy been in place then it would certainly have influenced the content of this new bill and ensured greater openness and integration with other 'land' institutions.

3. Citizens role in completing the Land Register

The Land Register currently provides incomplete coverage of land rights across Scotland. Even with greater interventions to trigger registrations, the Land Register will remain incomplete for a long time. This is unacceptable for a fundamental dataset that is required to support the sustainable development of Scotland.

One potential solution to completing the gap in the Land Register is to involve citizens in directly capturing and recording their land rights through what is termed 'crowdsourcing' (6). Crowdsourcing uses the Internet and on-line tools to get work done by obtaining input and stimulating action from citizen volunteers. It is currently used to support scientific evidence gathering and record events in disaster management, as witnessed in the recent Haiti and Libya crises, for example. These applications are emerging because society is increasingly spatially enabled and consumer technology products, such as mobile phones, can be used to directly capture land rights information. By establishing a partnership between citizens and land professionals in the Registers of Scotland, citizens would be encouraged to involve themselves in directly capturing and maintaining information about their land rights. Facilities and procedures could be made within the Land Register to manage a provisional registration of property provided by citizens. These provisional registrations could then be upgraded to full registrations through quality assurance procedures. This approach would accelerate the completion of the Land Register and importantly engage citizens in land issues.

It is recommended that the bill makes accommodation for this provisional registration by citizens in the Land Register.

4. Land register to include marine rights

Although the bill makes some provision for the inclusion of marine rights through the use of non-Ordnance Survey GB base maps, the bill should be much more explicit about the management of marine rights within the Land Register. It is important that we have the holistic management of our land and marine assets.

5. Prescription and a non domino titles (Section 42 - 44 of the Bill)

Although the bill strengthens the rules around prescription and a non domino titles, I recommend that alternative arrangements should be put in place to deal with land that has no apparent owner. The Registers of Scotland should publically advertise for at least six months any claims, and associated supporting evidence, made for land that is apparently not owned. This approach supports the total transparency of information that should pervade this bill. After six months the Keeper should review the claim or claims and be able to admit an *a non domino* deed for registration. Any disputes associated with the claims should be settled by the Lands Tribunal.

Robin McLaren
17 January 2012

REFERENCES

- (1) Deininger, K., Selod H. and Burns, A., (2011). The Land Governance Assessment Framework: Identifying and Monitoring Good Practice in the Land Sector. Published November 28, 2011 by World Bank, ISBN: 978-0-8213-8758-0.
- (2) ACIL, (2008). 'The Value of Spatial Information'. ACIL Tasman Pty Ltd. Retrieved from www.crcsi.com.au/Documents/ACILTasman-ExecSumm.aspx (Last accessed 11 January 2012).
- (3) Vickery, G., (2011). 'Review of recent studies on PSI re-use and related market developments'. Retrieved from <http://epsiplatform.eu/content/review-recent-psi-re-use-studies-published> (Last accessed 11 January 2012).
- (4) Maria Teresa Borzacchiello, Max Craglia, (2011). Towards the assessment of the demand of Spatial Data Infrastructures and e-services: lessons from the e-Cadastre. European Commission, Joint Research Centre.
- (5) Enemark, S., Williamson, I. and Wallace, J. (2005): "Building Modern Land Administration Systems in Developed Economies," Journal of Spatial Science, Perth, Australia, Vol. 50, No. 2, pp 51-68.
- (6) McLaren, R., (2011). "Crowdsourcing Support of Land Administration. RICS, London. Retrieved from http://www.rics.org/site/scripts/download_info.aspx?downloadID=8083 (Last accessed 10 January 2012.)

Robin McLaren
Director
Know Edge Ltd
17 January 2012

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

SUBMISSION FROM TURCAN CONNELL

Introduction:

Turcan Connell are a firm of Solicitors and Asset Managers based in Edinburgh and with offices in London and Guernsey. We act for private individuals, charities and owners and managers of land. The Land & Property Department in Turcan Connell act in all aspects of rural property transactions including purchases, sales and leasing arrangements for all types of property. The practitioners at Turcan Connell have significant experience in conveyancing and property law including dealing with recording deeds in the General Register of Sasines and registering land in the Land Register of Scotland.

Turcan Connell welcome the opportunity presented by the introduction of the Land Registration etc (Scotland) Bill (“the Bill”) to modernise and update the law with regard to land registration and address issues which practitioners have encountered since the introduction of the Land Register in terms of the Land Registration (Scotland) Act 1979 (“the 1979 Act”). We firmly believe that legal practitioners have an important part to play in reviewing and commenting on the Bill to assist the Scottish Government in achieving the best result for the land registration process. Conveyancers are and will be the users of the land registration process and, accordingly, their views (formed on their experience of using and working with the system) are, surely, essential in making an effective and workable land registration process. We are disappointed, therefore, at the timescale given for making written submissions. The Bill was introduced to the Scottish Parliament on 1st December 2011 and, given the Christmas and New Year break, the deadline for written submissions is very short.

Given the timescale, our submissions relate to what we see as some of the main issues arising in terms of the Bill. Our submissions are made in relation to the relevant sections noted in the heading of each paragraph.

Section 1 – The Land Register of Scotland

Notwithstanding that the Keeper’s discretion is stated to be subject to the provisions of the Bill, (which includes, in particular, Section 5 upon which we comment below) the Keeper still has a wide discretion with regard to the form of Land Certificates.

It is anticipated that the Register will be in electronic form. With the advent and acceptance by the legal profession of Registers Direct and Land Certificates produced therefrom, it is, possibly, too late to give consideration to the possible disadvantages of an electronic register. When Land Registration was first introduced, having a paper Land Certificate was important. One had to explain why one did not have the same in order to obtain a copy from Registers. This must have been an aid to combating fraud and this additional check will now disappear with the Electronic Register of Land being the ultimate Register of Ownership. We appreciate there is an obligation on the Keeper to take such steps “as appear reasonable” to protect the Register. The Keeper should be **required** to take **all necessary steps** to protect the Register.

Section 3 – Title Sheets and the Title Sheet Record

Under sub-section 1 the Keeper has an obligation to make up and maintain a Title Sheet for each registered plot of land. In sub-section 2, the Keeper has discretion as to whether a Title Sheet for a registered Lease should be made up. We submit that a tenant should be entitled to a separate Title Sheet for a Lease in excess of 21 years. A lender to a tenant under a registered Lease may well wish the registered tenant to have a separate Land Certificate on which their security appears.

Section 5 – Structure of Title Sheets

We strongly recommend that the structure of Title Sheets is addressed. A Land Certificate should give the entire picture regarding the title of and rights pertaining to and affecting a plot of land. The current structure of Land Certificates makes this difficult to achieve in a clear and concise way and, frequently, it is impossible to fully understand a title and report on it to a client without reference to prior deeds. This completely defeats the purpose of the Land Register. We suggest that Land Certificates should comprise:-

- (a) a Property Section;
- (b) a Pertinents Section: this would be a new section and would include (i) reference to the servitude rights pertaining to a property and would identify the properties over which these rights are exercisable; and (ii) details of the burdens which the proprietor of a registered property has a right to enforce and would identify the relevant burdened properties.
- (c) Proprietorship Section;
- (d) Security Section;
- (e) Burdens Section: the Burdens Section could be improved to make it clearer and more easily understood. Rather than referring to the relevant burdens writs and setting out their terms *verbatim*, we recommend that the Burdens Section of a Land Certificate sets out the burdens affecting the registered property and identifies the properties the proprietors of which are entitled to enforce them.

On a first registration, consideration should be given to making provision for the legal transfer of land to be completed by the purchaser's and seller's agents completing a Land Certificate template for use and checking by the Keeper. This would avoid duplication of work for the solicitors and ease the workload on the Keeper. The applicant's solicitor would, essentially, prepare the Land Certificate during the conveyancing process. This would reduce the time spent in checking Land Certificates on issue, often many years later when the detail of the transaction has been forgotten; and as much of the work would have been carried out in preparing a Land Certificate for the Keeper, Registers would merely have to check the various sections of the Land Certificate are correct in terms of the titles produced and

prepare the relevant records to be kept by the Keeper in terms of Section 2 of the Bill.

Section 6 – The Property Section of the Title Sheet

With regard to Section (1)(b) we refer to our comments above on Section 5. We recommend these rights are specified in a separate Pertinents Section.

Section 11 – The Cadastral Map

Sub-section (3) states that the cadastral map may show the boundaries of plots of land “on the vertical plane”. Is this in relation to showing the profile of a boundary or measuring the plots of land taking into account the topography of the ground? (E.g. if the land is measured as though it was flat, the area measurement will be less than the actual area which may incorporate hills, etc.) This would also link into maps lodged with the Scottish Government Rural Payment and Inspections Directorate in connection with IACS Forms and Single Farm Payment Entitlement claims as actual area measurements may be shown. It is assumed that, currently, area measurements are given on the basis of the horizontal plane (i.e. not taking into account hills, etc.).

Section 17 – Shared Plots

It appears the word “and” has been omitted after the word “plots”, before paragraph (b).

Salmon Fishings. We would like to see provision in the Bill which would resolve the issue of registering time-shared salmon fishings and property. As you will be aware, 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 a *pro indiviso* share may exercise their property rights. We have always taken the view that such burdens are unenforceable and are a matter of contract. As the Keeper does not give any indemnity in relation to burdens, there would be no problem with the Keeper registering such *pro indiviso* shares. However, the Keeper does not share this view. We are aware that there are (in particular of salmon fishings) “timeshare” interests changing hands. Dispositions are unrecorded so that the ownership per the Sasine Register no longer reflects the true picture. This is not sensible and muddle can only result the longer such a situation continues. It does not assist the ambition of speeding up the transfer of properties to the Land Register. We recommend, therefore, that provisions are entered in 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. It should also be made clear that subject to the above such *pro indiviso* shares should be registered in the Land Register.

We do not consider that Sections 17 – 20 of the Bill (regarding shared plots) address the issue. These sections refer to plots of land owned in common by proprietors of

other plots of land by virtue of the ownership of such other plot. In our view specific provision would need to be made in the Bill in respect of the issue of “time shared” property. We would be happy to work with the Keeper’s staff/Scottish Government on suitable wording if this would be of assistance.

Section 21 – Application for Registration of Deed

Sub-section 3 states the Keeper **must** reject an application which does not satisfy the Keeper that the general application conditions are met and the conditions set out in sub-section 2 of Section 21 are met. In complex cases we recommend that the guidance to the Keeper and the Keeper’s staff is that the first step in relation to problems with an application should be to phone the solicitor acting for the applicant. Sometimes there are simple errors which could be corrected with co-operation between the solicitor and the Keeper and sometimes applications are rejected incorrectly. Such an initial dialogue would prevent this and the waste of time from rejecting and having to accept a returned application (both for the profession and the Keeper/Registers). We understand, entirely, that this requires co-operation from solicitors as well, but the Keeper would still be able to reject an application if the solicitor did not timeously co-operate in addressing the issues raised. It is often useful to be able to discuss with an experienced member of the Keeper’s staff issues which arise in complex cases to find the best resolution.

Sections 24 and 25 – Circumstances in which certain deeds are registrable and conditions for their registration

These sections mean that on the granting of a registrable lease or a standard security the land over which it is granted will be registrable in the Land Register. This is likely to lead to a piecemeal registration of larger properties which will incur additional expense for landlord and tenant in a lease transaction and the landowners and lender in a security transaction. Conveyancing on such properties will become more complex as titles made up of various parts are always more time consuming to check and more complicated to explain to an owner or purchaser. In particular with regard to renewable projects the areas leased are often small discrete parts of a farm or estate. Having several small registered areas within an overall larger land area does not make sense. If the answer is a registration of the whole estate we refer to our comments on Section 29 below which would apply also in this situation.

Section 27 – Application for Voluntary Registration

The Keeper is given a wide discretion in Sub-section 3(b) (which, it is noted, the Scottish Ministers may by order repeal). Prior to any repeal, however, the Keeper’s discretion is wide. We would like to see a duty on the Keeper to take into account the owner’s reasons for applying for voluntary registration and to act reasonably including taking into account those reasons, in making his decision.

Section 29 – Keeper Induced Registration

1. We remain concerned with regard to the cost which such registrations will inevitably incur for the landowner. The Bill should make it clear that in such

situations no fee will be charged to the landowner. This does not wholly address the issue of costs however. Any Land Certificate issued to a landowner following on a Keeper induced registration will need to be checked. This will incur legal fees. In complex cases, our advice would always be for the landowner to have the Land Certificate checked once it is returned to his solicitor. Errors do occur in Land Certificates and, if not picked up timeously, may lead to complications in the future with dealings in registered land.

2. Although the Keeper has to notify a landowner that their title has been registered (Section 40) there is no provision for when notice should be given. We recommend that prior notice is given to a landowner.
3. Where a registration is Keeper induced, at least until the point where the landowner does something which would have induced registration, we consider provision should be made for the Keeper to be obliged to accept queries or comments or, alternatively, a special right of appeal should be written in for the benefit of such a landowner following on registration. Such a landowner should not be disadvantaged by any error in the Land Certificate following on a Keeper induced registration.

Section 33 – Withdrawal and Amendments etc of Application

Sub-section 2 states that Land Register rules may specify circumstances in which consent to substitution or amendment of an application must be given by the Keeper. It would be helpful if the guidance/rules/policy was to engage and allow amendment/substitution as discussed and agreed with the relevant solicitors. We refer to our comments in relation to Section 21 above.

Section 38 – Order in which Applications are to be dealt with

We recommend this section also provides that where a solicitor specifies an order for entries being made in the Land Register, this order should be followed unless there is a legal reason not to do so.

Section 42 – Prescriptive Claimants

We have concerns about the whole process. How is an applicant to satisfy the Keeper that the proprietor of land has not occupied it? If the proprietor can be identified, why should a procedure be put in place whereby their land can be transferred to another person? What evidence will the Keeper accept with regard to possession by the applicant? One year does not seem long in this context. On large estates how is a “nibbling away” of areas at the margins to be prevented? Where the estate owner is known to be the proprietor and receives notice, it could be a timely and costly exercise to combat third parties trying to obtain ownership of parts of such an estate in terms of this Section. In situations where no proprietor can be identified (as not infrequently happens) is it the intention that the Crown is to be given a commercial opportunity?

With regard to sub-section 8, we recommend landowners and not just the Keeper be consulted with regard to any amendment of the period of time referred to. Consultation of landowners could be through bodies such as Scottish Land & Estates.

Section 44(7) & (8)

We refer to our comments above regarding the Scottish Ministers making an order for changing the period of time as set out in Section 42. The same applies to changing the number of days within which notice of an objection can be received.

Section 54: Registration of order for rectification of document, etc.

We do not consider the provisions of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 ("the 1985 Act") as amended by the Bill (in so far as relating to land registered property/documents) are at all clear. We suggest that the 1985 Act is disapplied to land registered documents and new clear provisions are made in the Bill. More thought requires to be given to the issue of rectification of errors in Land Certificates (of both inclusion and omission) to ensure that the original intentions of the contracting parties is reflected in the Certificate issued/Title Sheet made up by the Keeper.

Section 73 Extension, Limitation or Exclusion of Warranty

We question why the Keeper has discretion in terms of sub-section 4. After ten years' possession and the removal of the provisional element of an entry, should the Keeper not be required to grant indemnity unless there is a specific reason for his not doing so?

Section 82 : Acquisition from Disponer without valid title

We are concerned that the provisions of this section change the way in which conveyancing is currently carried out. Where a party is on the title sheet as the registered proprietor of land, there is no way (without looking behind the Land Certificate, which defeats the whole purpose of land registration) that a purchaser could know that that party was not, in fact, the owner. Section 82 provides (among other things) that a purchaser or disponee acquires ownership of the land provided that the land has been in the possession, openly, peaceably and without judicial interruption, of the disponer for a continuous period of at least one year (or of the disponer and disponee, together, for one year). It is not currently normal practice to check ownership for a period of one year. However, it seems that on the enactment of this section, conveyancers will have to do so. Is that what Parliament intended? Has thought been given as to how possession is to be proved?

Section 87 (and subsequent): Extinction of Encumbrance when land disposed.

These provisions appear to state that if an encumbrance is missed off a title sheet for any reason, then on the transfer of that land, the encumbrance will be extinguished irrespective of the reason for the omission. We have concerns in this regard.

Although there is provision for compensation being payable, this seems to be inequitable to the party entitled to the encumbrance. In our view it is difficult to compensate for some rights: for example a security holder could lose out. Securities are not used solely in mortgage situations. Compensation could be much more difficult to quantify where a security is for a clawback or an obligation *ad factum praestandum*. Furthermore, a party entitled to enforce a burden, particularly a right of pre-emption, would find it difficult to quantify compensation. Compensation may not fully reflect the “loss”. For instance, if an estate owner does not have the opportunity to purchase back a cottage near to the heart of the estate, how is the compensation to be valued?

“Encumbrance” is stated not to include a servitude created other than in terms of section 75(1) of the Title Conditions (Scotland) Act 2003. Accordingly, a servitude created in terms of that section is an encumbrance and would, therefore, be extinguished if left off the title sheet. Is this the intention? What happens if this right is a right of access?

Properties are often sold before Land Certificates are issued and there would be no way to check that the Land Certificate is correct. Furthermore, it may not be in the owner’s interest to check that certain encumbrances are shown on the title sheet. Indeed, it would be in their interest not to draw the omission of such an encumbrance to the attention of the Keeper. Will the party entitled to enforce burdens or to the benefit of servitudes be sent copies of the Land Certificate to check? If their rights are omitted from the Land Certificate, presumably the error will be compounded by failure to send the Land Certificate to them for checking – there will be no reason on the face of the land certificate to do so.

Section 100

We would press for guidance/rules requiring the Keeper to issue complete maps when asked for copies: rather than large maps being printed off as A4 size pages with borders. Such maps are very difficult to use.

Section 7(1)(a) and Section 109.

Section 7(1)(a) of the Bill provides that the Keeper must enter in the proprietorship section of the title sheet the name and designation of the proprietor. Section 109 – interpretation – stipulates with regard to “designation” that it includes (where the person designated is not a natural person) the legal system under which the person is incorporated and if a number is allocated, that number. It would appear, therefore, that the Keeper will now reject applications where the disponee’s company number is not included. While many solicitors include the company number in their conveyances, it is not necessary to do so to properly design a company and many conveyances do not include it. While we understand the reasons for wanting to include company numbers on the title sheet and that it may be good practice to do so, we are not in favour of including provisions in the Bill which make it easier for applicants and solicitors to make an error (we consider a change to procedure such as this would fall into this category) resulting in their application being rejected.

Company numbers of UK companies are easily ascertained and could, therefore, be the subject of a requisition or added to the relevant form.

Miscellaneous Points

1. **Prescriptive Servitude Rights.** Would it not be useful for the Keeper to be able to enter on a title sheet that there is an unchallenged prescriptive right of access, even if this is in note form only?
2. It is noted that the Bill is predicated upon registration of plots of land rather than interests in land. We question whether this is, indeed, the best method for land registration. For instance, with regard to salmon fishings, where there can be a great number of *pro indiviso* proprietors, one title sheet for the plot of land would quickly become unwieldy and difficult to follow. In such an instance, a *pro indiviso* proprietor should be **entitled** to an individual Land Certificate for his *pro indiviso* share.

Turcan Connell
19 January 2012

SUBMISSION FROM MCGRIGORS LLP

1 Introduction

We support the introduction of the Land Registration (Scotland) Bill and particularly:

- the introduction of advance notices
- changes to the rules on inaccuracies and rectification.

2 Section 108

We are concerned at the introduction of a new offence under section 108 of the draft bill. We support any legislation to reduce fraud in connection with property transactions but section 108 would appear to have the effect of making professional negligence a criminal offence in certain circumstances. We have read the written submission made by the Law Society of Scotland in advance of them giving oral evidence to the Committee and endorse the views expressed in that submission.

3 Prescriptive acquisition

We share the Registers' concerns to prevent fraud and protect owners of land from title raiders by ensuring that there are rigorous steps in place before someone other than the owner can acquire title to land. However this needs to be balanced against the importance from a commercial developer's perspective of being able to bring back into economic use an area of land for which no owner can be identified despite rigorous title examination.

We might use an *a non domino* disposition when we discover a gap in historic titles when we are piecing together a site for redevelopment. In such title examinations we may encounter a gap in the title caused by, for example:

- an error in previous conveyancing many years ago (for example, that area having been wrongly excluded, or a map having been inaccurately drawn so as not exactly to coincide with the boundary of property which it is intended to adjoin) or
- the gap site being the solum of a stopped up road, close or pend.

We carry out extensive investigations to find the owner but if no owner can be found the development has sometimes been able to proceed by using an *a non domino* disposition of the area of ground together with a title indemnity policy for the 10 year prescriptive period. This unlocks the potential development and enables property to be brought back into use which may have lain unused for years.

The proposals in sections 42-44 of the Bill will be extremely difficult to comply with. It is not clear what evidence would be required to show that the owner has

been out of occupation for 7 years (and we would echo the concern of others that it is very difficult if not impossible to demonstrate conclusively that something has **not** happened) or that the applicant has been in occupation for 1 year. Where no owner can be identified it appears that the only option will be to negotiate with the Crown. We are concerned that these proposals will stand in the way of property development, in particular where brownfield sites are proposed to be brought back into economic use.

We would submit that the requirement to notify the owner, which was not contained in the SLC's proposals, should (if suitably rigorous) suffice to ensure that land which is clearly in existing ownership is not acquired by others by prescriptive acquisition. The notification requirement could perhaps be extended to ensure maximum publicity for the benefit of absent owners, eg newspaper advertisement or affixing notices to/at the property – such procedures are already a feature of other aspects of Scots property law such the provisions for termination of older real burdens in ss.20-21 of the Title Conditions (Scotland) Act 2003.

It could be a requirement that the notification requires to be made a period (say, 8 weeks) before the application for registration of the *a non domino disposition* can be submitted, and the notice could even encourage interested parties to contact the Keeper direct if they are concerned about the proposals. In those cases where there is some actual mischief at work and which have been a source of concern to the Keeper, we would imagine that there will generally be an identifiable owner of the property, and the need to notify them should be sufficient to flush out any mischief without the need to establish both 7 years' prior non-occupation by the owner and one year's occupation by the applicant, which requirements could well stand in the way of genuine non-abusive property development.

McGrigors LLP
19 January 2012

SUBMISSION FROM CLIFFORD McDONALD

I am a member of the public. I wish to make the following observations on the Land Register Bill.

(A) The proposals for the completion of the land register and registration issues;

(1) Completion of the Land Register: increased “triggers” for registration

Paragraph 20 of the Policy Memorandum states “Under the Bill all transfers of land (including those not for money) will result in the requirement to register the land in the Land Register.” If all ‘transfers’ includes transfers resulting from the operation of a survivorship destination this could impose on grieving parties additional worries, expense and difficulties in meeting the necessary expenditure of registration?

(2) Completion of the Land Register: closure of GRS to new deeds

It is proposed that the recording of a standard security in the General Register of Sasines will no longer be of effective. I would make the following observations for consideration on whether to accept this proposal

- (a) The introduction of this trigger is to be delayed to some time in the future. Any substantive delay in introducing this proposal will seriously negate the effectiveness of this proposal, as the number of such securities will decline.
- (b) It may affect the remortgaging market in that any savings to the proprietor in repayments could be negated by the additional costs of registering the land.
- (c) Second or subsequent loans are usually for substantially smaller amounts. The additional costs of registering the land may mean that the proprietor is discouraged from taking out such loans.
- (d) It is not clear how the proposal affects a security over part of the land owned by proprietor. Will it result in only that part of the land included in the security being registered? If it is the whole of the land owned by the Sasine proprietor then that might impose a substantial additional cost to that proprietor in registration dues and solicitor costs.

(3) Completion of the Land Register: voluntary registration

The acceptance/rejection of an application for voluntary registration should not be based on a date set or otherwise. The conclusive decision whether to accept/refuse an application should be based on the grounds of reasonableness. This will depend on and resources available to the Keeper at the time. The Keeper should not be forced to accept too many applications at the one time, as this could be detrimental and prejudice the proprietor’s compulsory registrable transactions.

(4) Completion of the Land Register: Keeper induced registration

What is being proposed is that the Keeper adopts the solicitor's role acting for the proprietor of the subjects with or without the proprietor knowing that the Keeper is acting in that way and without the proprietor of the property being able to consent to such registration. This seems contrary to ECHR legislation. The following issues have serious concerns for accuracy of the Register are not addressed:

(i) Where title is held subject to a survivorship destination. Without an enquiry by the Keeper to ascertain whether any of the parties have died. Not to make such an enquiry could result in an inaccurate register by creating an interest in the title in favour of a person who is deceased.

(ii) A variation on (i) above would include titles held equally where one of the equal owners title is held subject to a survivorship destination.

(iii) The methodology in preparing a title sheet being proposed contains flaws and raises many important issues. It is imperative that strict criteria are in place to ensure that the Keeper carries out a thorough examination of title. There should be an undertaking that the Keeper meets all the costs incurred by the titleholder. Legislation that is deliberately targeting an individual's freedom of choice requires a cautious and thoroughly considerate approach especially as Ministers will require to justify the approval of such legislation to their voting constituents. The rules under which such legislation is applied should not solely be for the benefit of unelected civil servants. The Keeper is not legally acting for the proprietors and appears to be proposing an inadequate of examination of such titles. The Keeper's staff are not in the main solicitors their interest is acting on behalf of the Keeper. This creates the possibility of a conflict of interest e.g. where boundary overlaps/disputes are not addressed because of the desire to complete the registration. A duty of care must be owed to the proprietor of the property. The search sheet is not a statutory document nor does it always represent the current state of ownership of the title [e.g. (i) and (ii) above]. Further difficulties will arise, as the Keeper will be examining copy deeds rather than the original documentation in order to process the title. The Keeper will only have copy deed plans that are black and white photocopies. How will the Keeper deal with copy deeds that refer to colouring on the deed plan to identify the parts of the title? In addition measurements based on a photocopy of a plan are not accurate. In light of the foregoing the Keeper before she/he undertakes Keeper induced registrations should seek the permission and approval of the titleholder whose land he is forcibly registering. If the Keeper is empowered to forcibly register plots then the Keeper must also assume all the costs relating thereto including all the costs incurred by the proprietor in instructing a solicitor to check that the Keeper has not erred in the registration of their title, this latter cost is not included in the current proposals. This would place the examination of a forcibly registered title on the same footing as any other registration the proprietor should expect no less, for the Keeper not do so she/he would be failing in her/his duty of care.

(iv) The rights of security holders seem to be being ignored or will they be given the chance to formally register their recorded security in the land register and gain the benefits that flow therefrom?

The understanding of the extent of the unregistered residue of land seems restrictive e.g. no account appears to be being taken of the tens if not hundreds of thousand of slithers, small areas of ground which were retained (not conveyed) by developers, estate owners. The developers, estate owners may no longer exist or may have abandoned the land. The Lands Tribunal case [PMP Plus Ltd v The Keeper & others] infers rights in common in developments to residue of land in the development not identified until the development is completed are in fact not validly conveyed and as a result are not registered. The inference from the said Lands Tribunal case is that there will be inaccuracies in the register in that land thought to be included in the registered titles is not in fact include in those registered title i.e. they will be added to the pool of unregistered titles.

QLTR are unlikely to be interested in taking title to the unregistered slithers of ground [nor will have the resource to do so]. Where there is no readily discernible owner to unregistered land it has been proposed that title sheets should be created for titles with non-discernable owners I would suggest that this is palpably absurd. It goes in the face of the fundamental concept that the register can be relied upon. This very basis of the register has been given judicial approval at all levels. The creation of a title with no owner appears to be a complete contradiction. The devil is in the detail in the work involved in transferring the residue of the unregistered interests in land to the Land Register completion of that process is likely to take substantially longer than anticipated.

The explanatory notes to the Bill at paragraph 419 states that it is not immediately clear whether the Keeper will implement this proposal for Keeper induce registrations at the time the bill comes into force and paragraph 420 takes a restrictive view of the costs to that may fall to be met by the Keeper. Why this delay in taking forward the prime aim of completion of the Land Register? With the likelihood that the property market will continue to be at a low ebb with insufficient intakes of registration applications to keep all the Keeper's staff employed. In such a situation would it not be sensible to accelerate this proposal Keeper induced registrations provided the concerns addressed above are dealt with rather than have staff unemployed. The Keeper is after all paying the staff for doing nothing, surely supplying the staff with work is more beneficial to all concerned.

(B) The proposals for electronic documents, conveyancing and registrations;

I have no difficulty with the proposals for electronic documents. I am concerned about the viability of the Register of Scotland's Automated Registration of Title to Land (ARTL) system. The Report by the Auditor General for Scotland under Section 22(3) of the Public Finance and Accountability (Scotland) Act 2000 the 2010-2011 Audit of Registers of Scotland at paragraph 8 states:

In line with the Auditor General's concerns the indications are that the ARTL system is not a viable project. For example, there have in the last 4 years or so only just over 50,000 applications. The Keeper's projected estimates envisage around 700,000 such applications, a shortfall of some 650,000 applications. If the average fee for these applications was in the range of £100 to £200 there is an income shortfall of between £65 and £130 Million. The proposals in the Bill will impose further restrictions or have an effect on the number of transactions that will be ARTL compatible e.g. Advance Notices. The current state of the property market is likely to continue for some time and will have a

major effect on the financial viability of ARTL. The registration processes impose restrictions on the number of transactions that are ARTL compatible. The current ARTL system requires a buoyant re-mortgaging market to recompense the cost of its introduction and continued usage. Despite the Keeper setting the fees for ARTL applications at a lesser amount than paper transactions the costs taking account of the cost of development greatly exceed those for paper transactions. In light of these facts it seems possible that electronic registration could be abandoned as such level of losses is unsustainable.

(C) Any other aspects of the Bill

(1) Re-alignment of registration law with property law (bullet point 4 of paragraph 12 of the Policy Memorandum)

The Bill seeks to re-align registration law with property law by e.g. by adjusting the circumstances in which a person can recover their property rather than only receive compensation under the state guarantee of title from the Keeper of the Registers. It is suggested that the new scheme strikes a fairer balance between the interests of the registered proprietor and the true owner. All that is being achieved is an alteration in the aggrieved party from the true owner to the party who is losing the property in dispute. What is being proposed is that after completing registration of 55% of properties the law is being turned on its head for the completion of the residue of 45% of properties this can only lead to confusion and conflict. Emphasis may have been better served by re-aligning property law with registration law rather than reverting to a Sasine system albeit with a plan. In formulating the revised registration process the effect on the underlying policy of reliance on the register may not have been fully thought through or may not accurately foretold all its effect.

It seems generally accepted that there is no perfect system. Whilst true owners deserve protection the rectification, where permitted, of all inaccuracies many injustices will arise. The reversal of the policy to protect “true owners” will create situations worse than those which the proposals in the Bill seek to remedy e.g. protecting the innocent in possession of their home rather than putting them out on the street and possibly creating financial and social hardship is surely a preferable aim. Monetary recompense of the true owner whilst often unsatisfactory is fairer than removal from the property of the vulnerable innocent owner e.g. a pensioner or a family who may have rearranged their lives, the schooling of children, adapting the house to the need of the family (disabled needs, aged parental needs etc). This vulnerability could last for up to 10 years and certainly detracts from the current certainty of reliance on the register. In these circumstances is this proposal contrary to human rights legislation.

There may however be merit in allowing rectification of inaccuracies in the Register to return to the true owners small/insignificant slithers of ground. Some sort of “equity” as to whether it should be “mud or money” should be the target.

(2) Shared Plots (Sections 17 and 18 of the Bill)

The practical application of this proposal does not appear to have been thought out. The difficulties that arise following the Lands Tribunal decision (*PMP Plus Ltd v The Keeper*

and others) in relation to unspecified rights in common to property are not dealt with. What forms a shared plot in existing title sheets is in a state of flux. Based on the Lands Tribunals view there are several thousand inaccurate title sheets.

Another problem that is that 55% of all properties are already registered. The 45% of properties remaining to be registered will have title sheets formulated on a different basis to existing registrations. Where some of the proprietors who own part of a shared plot do not have a registered title does that mean that part of the property which they own a pro indiviso share is registered despite no application to do so has been submitted? As registration of the unregistered 45% progresses is it the intention is it the intention to rectify those parts of the 55% registered properties to provide a consistent register? The Bill appears vague on this point.

Section 17 (2) of the Bill gives discretion to the Keeper whether a shared plot title sheet is to be made up or not. I do not see how this sits with the correlation between one title sheet and one cadastral unit and the necessity to realise a true map based system of land registration (paragraphs 65 and 66 of the Policy Memorandum).

If title sheets identify all proprietors, including those with unregistered titles, who own the shared plot what would be the increased costs for proprietors? I see limited benefit in the Keeper discontinuing the current arrangement of narrating all the common proprietors in the title sheet.

The costs to the Keeper of processing shared plot titles, as set out in 373 to 375 of the Explanatory Notes is a narrow view that needs expanding. No account is taken of ongoing developments pre the new proposals taking effect nor of the many titles from old developments that have yet to go through the process of First Registration. Further should rectification of the present inaccuracies in the register be undertaken the level of work could reach gargantuan levels.

(3) Advanced Notices

Advanced notices clearly have benefits. These Advanced notices are effective for a protected period (35 days). Applications that affect a registered plot of land will appear in the application record and for unregistered land the notice will be recorded in the Register of Sasines. At this point there is no real difficulty in complying with the Bills proposals. The Bills proposals however appear incomplete or incapable of being complied with in relation to the removal or discharge of the advanced notices.

Section 59 and 60 of the Bill deals with the removal/discharge of the Notices: For the Register of Sasines, it is stated that if a discharge is recorded the advanced notice ceases to have effect. Is it envisaged that in the absence of a discharge the Notice will continue to have some meaning?

For the Land Register, (1) the Bill acknowledges that applications must be processed in the order they are submitted otherwise inaccuracies in the Register will occur. Therefore in many instances it will be impossible to comply with the compulsive "must" remove/discharge once the protected period has elapsed due to intervening applications that are unable to be processed in the Bill.

(4) The “one shot principle” (Section 33)

I have no difficulty with this proposal provided safeguards are in place. The Keeper has an extremely poor record in timeous processing some applications, particularly Transfers of Part Applications. Years may pass before it is identified that the application is not complete.

Subsequent events with a bearing on the title sometimes occur after the application has been received and this may result in the need to requisition additional documentation, a one shot rule in such cases would be extremely unfair. Common deeds and documentation that form part of an application may already been examined by the Keeper and in such cases the Keeper does not expect submission of the same. This can cause confusion as to what documentation the Keeper holds and what he does not. Rejection of an application resulting from this confusion would be harsh. Equally a link in title appropriate to several titles may be submitted in one of the titles and not the others. Where these titles are examined in a block it would seem ridiculous to reject the applications that do not have the link in title.

It is not unknown for the Keeper to requisition documentation that is not required e.g. the Keeper had to pay the expenses in a Court Action where the Keeper incorrectly rejected an application for registration. Perhaps a fairer rule would be that there should be a set period during which the Keeper would be able to reject an application on the grounds that the application is incomplete. After the set period the Keeper should not be able to reject the application without the Keeper requisitioning the required documentation. Only if that documentation is not submitted within a reasonable period of time can the application be rejected. The Keeper has a duty of care not to unnecessarily reject applications and if that happens the Keeper is subject to the liability of meeting all the costs relating to the incorrect rejection.

(5) Duty of care (Section 107 of the Bill)

The placing on a statutory footing the duty owed by a person who grants a deed, the grantee of and both their solicitors is a welcome clarification.

The duty of care owed by the Keeper should also be placed on a statutory footing. The Keeper also owes a statutory duty of care for his actions. The temporary judge in the action of Braes v The Keeper said “Where a loss occurred which would not have been covered by the scheme, and where the person suffering that loss is able to demonstrate that it was caused by negligence on the part of the Keeper, I can see no reason in principle why a common law duty of care should not exist.

(6) Consultancy and other powers (section 104)

This section of the Bill seems to be too wide in its terms. The Agency exists to serve the public in the area of their expertise i.e. registration. The Agency is not a commercial enterprise; it is a monopoly and as such is isolated from the real world in that it lacks the element of having the competition that businesses have. Business means risk and that is not the purpose of a Government Body. The Keeper should not be allowed to unfairly

compete in markets particularly when they lack the skills to do so. One of the main aims of the Bill is the completion of the Land Register. The Keeper should not lose focus by providing services not related to its primary function and should only be authorised to deal with matters that do not fall outwith the law and practice of registration. The Keeper should be restricted to the areas that form the core business and not be able to form separate Companies.

(7) Archive Record (section 14)

This provision of the Bill again raises the question of the wisdom of introducing rules that will be directly applicable to the 45% of the Land Register. This may create a conflict with the historical records relating to the 55% of the Land Register already registered. The archive relating to the said 55% have parts missing and may not held in a format easily searchable. A two-tier system (pre and post the provision) will be created.

(8) Souvenir Plots (Section 22(2)(a))

The definition of a souvenir plot in the Bill lacks any real definition e.g. (i) “size” of a plot is not definitive as to whether it is registrable e.g. several plots are or will need to be registered which are smaller than some of the souvenir plots, and (ii) “no practical utility” is lacking in any definitive meaning. It may be that the English definition whilst still not without difficulties provides a clearer view, namely:

“being of inconsiderable size and of little or no practical utility, is unlikely to be wanted in isolation except for the sake of pure ownership or for sentimental reasons or commemorative purposes.”

Clifford McDonald
19 January 2012

SUBMISSION FROM THE COUNCIL OF MORTGAGE LENDERS (CML)

Introduction

1. The Council of Mortgage Lenders (CML) is the representative trade association for mortgage lenders. Our 111 members and 88 associates comprise banks, building societies, insurance companies and other specialist mortgage lenders who, together, lend around 94% of the residential mortgages in the UK. In addition, the CML members have lent over £60 billion UK-wide for new-build, repair and improvement to social housing.

2. CML Scotland welcomes the opportunity to submit written evidence on the Land Registration (Scotland) Bill to the Scottish Parliament Economy, Energy and Tourism Committee.

Proposals for completion of the Land Register and registration issues

3. We are supportive of the desire to have all land in Scotland registered in the Land Register and for the Sasine Register to be eventually closed. We note that this will be achieved by the use of additional triggers for first registration, voluntary registration and keeper induced registration.

4. From the perspective of our members the main interest which they will have in this matter will be to ensure that Standard Securities granted in their favour as security for lending which they have provided are registered as quickly as possible in the Land Register and there are no delays which could expose our members to additional risk.

5. We would therefore urge the Keeper to have in place processes which will monitor the time taken for registration and to ensure that any delays are addressed as quickly as possible. The speed of registration in Scotland compares unfavourably with that in England and Wales, particularly on a first registration and this is an area which in our view needs to be addressed.

6. We remain concerned particularly around the time taken to register new build properties which means that our members are often left exposed to risk as they do not have an effective security. A number of the issues around registration we believe relate to the common areas and the ruling of the Lands Tribunal in the PMP Plus case. We note that the previous proposal of provisional shared title plots has now been dropped from the Bill and we certainly would welcome assurances from the Keeper that the current delays in registration of new build can be addressed.

7. The proposed introduction of advance notices is welcomed by lenders. It is something which they are familiar with in England and Wales where a very similar system known as priority notices apply. Such a system should provide additional protections which are not available in the existing system.

8. There is perhaps a need for clarification around where a Disposition is being granted by seller to a purchaser with the purchaser then granting a Standard Security in favour of the a lender if one or two notices are required.

9. With regard to the proposals for rectification of the Register we do agree that the true owner should be restored as owner as opposed to receiving monetary compensation. Where a lender who has in good faith advanced monies under a Standard Security from the party to be removed from the Land Register we would expect them to be compensated.

Electronic documents, conveyancing and registration

10. We are supportive of the move towards e-conveyancing. We believe it offers lenders many opportunities to streamline processes and will mean a better experience for consumers. Provided that sufficient protections and safeguards can be built into the system we would support both deeds conveying rights in land and land contracts being permitted in electronic formal.

11. From the perspective of our members they need to be able to rely on electronic documents and electronic signatures in the same way as they currently do in the paper based system. The need to protect against fraud and forgery is vitally important for lenders.

12. It is however important that Registers of Scotland learns lessons from its Automated Registration of Title Project (ARTL) which lenders were supportive of and saw as having many benefits for them including a reduction in risk and the dematerialisation of deeds. Unfortunately the ARTL system has had limited use and questions are regularly raised of whether it is fit for purpose.

Further contact

13. This response has been prepared by the CML in conjunction with its members.

Council of Mortgage Lenders
19 January 2012

SUBMISSION FROM PROFESSOR PETER F. DALE

INTRODUCTION

Although now retired, I have been actively involved in aspects of land administration since being commissioned by the then Overseas Development Administration to prepare a study on *Cadastral Surveys within the Commonwealth* (HMSO, 1976). Since then I have acted as an academic and been a consultant on land administration in a wide number of countries around the world. I was the prime author of three publications by the United Nations Economic Commission for Europe - *Land Administration Guidelines* (1996), *Guidelines on Real Property Units and Identifiers* (2004), and *Land Administration in the UNECE Region – Development trends and main principles* (2005).

LAND REGISTRATION BILL

Although I have only very recently had my attention drawn to the Bill, I would like to offer several comments

1. I welcome the Bill, which clearly tidies up several loose ends and provides a sound framework for the future. In particular I welcome moves towards electronic conveyancing and initiatives to facilitate the registration of all land in Scotland. The latter is of particular importance if the use of land is to be optimised. I have however a few technical points to raise.

2. I note in §3(4) that a plot of land is defined as an area or areas of land all of which are owned by one person, or one set of persons. This implies that a set of scattered fields belonging to one farmer or even a chain of stores in different towns could be defined as one plot of land. Although there has been precedence for this (for instance on the Isle of Man) it is normal to insist that a plot has areas that are contiguous.

This requirement might appear to cause confusion where, for instance, the garage for a house is further down the street. The UNECE *Guidelines on Real Property Units and Identifiers* suggest the use of the term Property Unit to cover the combination of non-contiguous plots (which are more commonly referred to as parcels - see Chapter V, Section B of the Guidelines). From a land management perspective it makes sense to differentiate between non-contiguous areas.

Many insist that not only must areas be contiguous but also they must have homogeneous property rights. Thus a farmer who owns a field in freehold and an adjoining field in long-term leasehold would normally be regarded as having two plots although under §3(4) these could appear as one. The requirement for homogeneity need not apply in the case of shared areas such as a driveway, which can be treated as an exception, as with servitudes.

The terminology is important when operating within an international land market – for instance linked to EULIS, the European Land Information Service (see <http://eulis.eu/>).

I suggest that the definition of a plot be reviewed.

3. I note the references to cadastral units and that these are based on what in the English-speaking world is known as cadastral surveying. The Bill ties these units to ownership rather than value. Throughout mainland Europe there are moves to unite the fiscal records that are used for taxation and sometimes for the allocation of subsidies under the Common Agricultural Policy, with the land ownership records held in, for example, the Land Books.

§12(1) of the Bill defines a cadastral unit as a unit that represents a single registered plot of land. This to my reading fails to make the distinction that I think is intended between a plot (or what I would prefer to call a Basic Property Unit) and a cadastral unit.

I suggest that the definition of a cadastral unit be revisited in line with the review of the definition of a plot.

4. The Bill as it stands appears to me to treat some of the legal aspects of land ownership in isolation from the bigger picture. I use the phrase “some of the legal aspects” as there is little reference in the Bill to the nature of tenure or rights that are to be registered – apart from several mentions of access rights and one of sporting rights. Use rights are a key element in land resource management and in property valuation but these do not appear to be addressed. There should at least be a definition of what rights should be registered and what may be considered as overriding interests, including leases that are short in duration.

I suggest that the nature of property rights that are to be registered should be defined.

5. In some jurisdictions there has been confusion over the legal nature of a Land Certificate / Certificate of Title / Title Deed. I am not clear from my reading of the Bill whether any such certificate will be issued after a property has been registered. What proof will a landowner or a mortgage company have that the assumed landowner is the registered owner? What is the legal status of that proof vis-à-vis the information held in the Keeper’s database?

I suggest clarification of the role of Certificates of Title.

6. As I read §103, access to information on the registers is at the discretion of Scottish Ministers. This to me implies that there is no statutory right of access to information held by the Keeper, even for me to see what data are being held about my own property. Likewise there can be no public access to the cadastral map unless the Ministers authorize it. Whereas it is conceivable that some information should not be in the public domain in the interests of national security there should be primary assumption that the public have a right to know who owns what land and under what restrictions. Transparency is fundamental to good land governance and the Registers should be open and accessible to all as a matter of principle with minimal exceptions. The data held by the Keeper are essentially a resource that can be used to benefit citizens and the Scottish economy as a whole.

I suggest that the terms of access to data in the land registers should be reviewed.

7. Underlying all my comments is a concern for the use of land registration information in the wider field of land management. The Bill as it stands reflects attitudes of the 1990s more than the 2010s. In many countries there is a process of convergence between those responsible for land ownership rights, those for use rights and those for the valuation of land. The reasons are complex but are essentially driven by the need for better governance and a more joined-up approach to the exploitation of resources of which land is one of the most important. I do not see this reflected anywhere in this Bill, which seems to stand in isolation.

In my view the Land Registration Bill should address the wider fields of land administration and land management and land policy.

Prof. Peter F. Dale, OBE, PhD, FRICS, FInstCES
19 January 2012

SUBMISSION FROM ANDREW ANDERSON

INTRODUCTION

I am an individual with an interest in land issues and land reform in Scotland. I think that the Scottish Parliament should be looking in a more serious way at land reform and at addressing the large amounts of land which have been obtained by illegal or corrupt means in the past, however, I accept that this is beyond the scope of the current Bill.

LAND REGISTRATION BILL

I want to support the submission of Andy Wightman in its entirety but I have a particular interest in the issue of Common Land. I was born and bred in the Royal Burgh of Selkirk which I am pleased to say has managed to maintain, even if in somewhat reduced form, a substantial area of Common Land. However, I am concerned that the responsibility and accountability of Borders Regional Council with regard to Selkirk's Common Land does not inspire confidence.

I would like to support Andy Wightman's submission regarding Common Land:

“The Bill is relevant here for the simple reason that the law of prescription and a non domino titles have been (and continue to be) responsible for the theft of our commons. As the Bill stands, those devices can continue to be used to appropriate commons. The central problem is that in Scotland there is no means to register common land and it stands vulnerable to prescriptive claims. A means needs to be devised to protect them by assertive action by citizens to register them. What is needed is a simple solution that provides a statutory mechanism for members of the public to submit an application for recording titles to areas of common land. This could take the following form.

The Land Register recognises commons as a class of property and admits applications for registration from any member of the public residing in the civil parish in which the land is situated. For so long as the application is pending, no other private claims will be entertained by the Keeper. The application will advertised publicly on the Registers of Scotland website for a minimum period of six months and circulated to the local authority, community councils and published in local newspapers. The publicity should include the name of the claimant and their grounds for the claim, the extent of the land being claimed, a report on investigations into its legal history, and an invitation to lodge rival claims.

The Lands Tribunal shall adjudicate on any contested claims but if none are made, then the Keeper shall record a title and the land shall be registered as a common. Statutory power for their management would be vested in local authorities.”

I would add that local authorities should be obliged to maintain an accessible register (preferably on a free to access website) of all the common lands for which it is responsible. I would also add that the statutory power which should be vested in local authorities should be clearly specified in such a way that they must consult with

the specific local community about the management of the land and that such land may not be disposed of without the agreement of the specific local community through the mechanism of a local referendum.

Andrew Anderson
19 January 2012