The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

ECONOMY, ENERGY AND TOURISM COMMITTEE

Wednesday 18 January 2012

Session 4

Wednesday 18 January 2012

CONTENTS

ECONOMY, ENERGY AND TOURISM COMMITTEE
2nd Meeting 2012, Session 4

CONVENER

*Murdo Fraser (Mid Scotland and Fife) (Con)

DEPUTY CONVENER

*John Wilson (Central Scotland) (SNP)

COMMITTEE MEMBERS

*Chic Brodie (South Scotland) (SNP)
*Rhoda Grant (Highlands and Islands) (Lab)
*Patrick Harvie (Glasgow) (Green)
*Angus MacDonald (Falkirk East) (SNP)
*Mike MacKenzie (Highlands and Islands) (SNP)
*Stuart McMillan (West Scotland) (SNP)
*John Park (Mid Scotland and Fife) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Tom Axford (Scottish Water)
Richard Blake (Scottish Land & Estates Ltd)
Iain Langlands (Royal Institution of Chartered Surveyors)
Graham Little (Ordnance Survey)
Jean Urquhart (Highlands and Islands) (SNP)
Andy Wightman

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

Committee Room 3

Scottish Parliament

Economy, Energy and Tourism Committee

Wednesday 18 January 2012

[The Convener *opened the meeting at 10:00*]

Decision on Taking Business in Private

The Convener (Murdo Fraser): Good morning. I welcome to the second meeting in 2012 of the Economy, Energy and Tourism Committee our members, our first panel of witnesses and the visitors in the gallery. I remind everybody to turn off mobile phones and electronic devices.

I welcome Jean Urquhart, who is joining us for the first evidence session, and thank her for coming along.

Under item 1, does the committee agree to take item 4 in private?

Members *indicated agreement.*

Land Registration etc (Scotland) Bill: Stage 1

10:01

The Convener: Under item 2, I am pleased to welcome the first panel of witnesses for our stage 1 inquiry into the Land Registration etc (Scotland) Bill. Graham Little is head of service delivery, data collection and management at Ordnance Survey; Iain Langlands is a chartered surveyor with the Royal Institution of Chartered Surveyors; and Andy Wightman is an author and campaigner.

Before I move to questions, do any members of the panel wish to say anything by way of introduction? We have already received your written evidence, but you are welcome to give us a brief supplementary to that. It seems that no one wants to say anything at this stage, so we will move straight to questions. The first area that we are interested in exploring is mapping. Mr MacKenzie is going to handle that question.

Mike MacKenzie (Highlands and Islands) (SNP): Good morning. I live on a tiny island called Easdale, which was first surveyed by the Ordnance Survey in about 1872 by a Captain Melville, who, given the technology of the day, did an extremely good job. However, knowing that tiny island as intimately as I do, I know that the Ordnance Survey map is really quite inaccurate. It has been updated over the years of course, but I also have experience of other areas of the country, and I have found some other inaccuracies.

Bearing that in mind, will the panel members comment on how fit for purpose the Ordnance Survey map is as a basis for the land register? Are there any improvements that could be carried out?

Graham Little (Ordnance Survey): The term “inaccuracy” is an interesting one—I could ask you for a definition of what you mean, but I will not. As you rightly say, Ordnance Survey mapping has evolved over a very long period of time. Since the mid-1800s—in fact, since before then—there has been a constant process of improvement, in terms of the positional quality of the information, how up to date it is and how well it reflects the real world.

In using the word “inaccurate”, some people mean that the features on the map are not correctly represented in terms of their positional accuracy in relation to those same features on the ground. That is one general definition. Others will say that it means that things are on the ground but are not on the map—in other words, information is missing. That is a fairly important distinction to draw.

We have a continuous revision process that means that we constantly add change to the map base. By and large, such change is major, not minor, so it might not include some small details such as extensions to buildings and back garden sheds that might be relevant to land registration.

Where there is a requirement for land registration, Registers of Scotland will often commission us to supply that information. I am speaking about small items of change that may not be relevant to many map users, but may be relevant to land registration. It is about trying to produce a simple answer with regard to what is on the ground and what is on the map.

The map is never a true and absolute representation of what is on the ground; it is a representation based on a specification and an updating regime, which gives it currency, if you like.

Does that answer the question about the missing detail?

Mike MacKenzie: Given what we are considering, I and the committee are concerned about the map's fitness for purpose and its accuracy with regard to land and property ownership. Obviously, accuracy is relative—we are not talking nanometres here—but the map needs to be accurate to a degree that, as we go through the registration process, will not leave the legal profession and the courts with a huge amount of work to do in resolving disputes that arise over inaccuracies. Although there are different types and shades of inaccuracy, we are concerned about any that would give rise to disputes over property ownership.

Graham Little: I might be stating the obvious, but it is important to point out that Ordnance Survey maps show not property boundaries—that work clearly falls within Registers of Scotland's expertise, not ours—but physical features on the ground that might or might not be property boundaries. We supply information about physical features on the ground to a published specification, and that information is used by a wide variety of public and private sector organisations. Our mapping is not done specifically to the Registers of Scotland's requirements although, as I said, we sometimes provide supplementary information to meet its requirements.

Is the map fit for purpose? It has been used for the past three decades—since the advent of the land register in Scotland—and, in that time, it has been largely fit for purpose. Of course, that is not to say that it has been without fault. The Ordnance Survey certainly does not claim that its database is completely error-free but, given that it covers the whole of Great Britain in considerable detail, I would say that it is fit for purpose and that three decades of activity probably support such a statement.

Mike MacKenzie: Are you concerned that the advent of newer and much more sophisticated global positioning system-based technology, which allows very accurate surveying work to be carried quite easily and quickly, will lead to inaccuracies that might not have been apparent becoming increasingly so and that that, in turn, will lead to difficulties and disputes over land and property ownership?

Graham Little: You are quite right. It is true of every field of endeavour that technology is improving and it would be unwise for any organisation not to utilise the best available technology. Ordnance Survey utilises the technology that you have described, which is known generically as global navigational satellite system, or GNSS—most people call it GPS—which is the American satellite system. We use other satellite systems, and others are being developed. If the right methodologies are used, such systems give very high levels of absolute positional accuracy. With any global position, for example, you can fix the location with great accuracy down to centimetres.

That is great, but it also creates a problem for us. Ordnance Survey has been collecting data for many decades—indeed, one could say centuries—and our customers have been using that information for a similar period. We do not have the luxury of being able to wave a magic wand and suddenly bring everything up to modern specifications for positional accuracy. The very nature of the creation process means that the map database is fairly heterogeneous; it has mixed provenance going back over quite a long period and, if you survey additions to it using modern technology, you will inevitably get some mismatches.

Part of the skill is how we integrate information that is captured using modern technology with a database that has varied provenance. However, we are pretty good at doing that. That is not to say that we do not get things wrong occasionally, because of course we do.

Our vision is to improve the whole database over a period of time and to align it with modern accuracy standards. For obvious reasons of cost and resource it is problematic to do that in a short period of time. However, it is also highly problematic for our customers. We must bear it in mind that over many years our customers have been relating their information to the map base—the registers have been doing that for the past three decades.

The registers have built up a jigsaw puzzle—that is a useful analogy—of land titles that are not by any means complete but which are substantially complete for urban areas. All the interlocking titles are defined against a map. What do we do when we come to add a new piece of the jigsaw puzzle? Do we cut a piece that is perfect in every respect, but which will not integrate with the existing database, or do we find a compromise whereby we can integrate the new piece with the existing puzzle and have something that is coherent? I am trying not to get into technical language here. Am I making myself clear?

If we had a magic wand, we would not be where we are now. We are living with a legacy, if you like, that has been in very wide usage over a very long period of time. We and our customers are therefore having to adjust our processes so that we can accept the output of modern technology while avoiding the need to throw away all that we have done for the past three decades.

Chic Brodie (South Scotland) (SNP): Good morning. You said that the Ordnance Survey map is fit for purpose, although with certain conditions. The bill proposes the continuation of the current mapping system. However, you said that it is a compromise. Unfortunately, courts and tribunals do not necessarily accept compromises; they need hard information. I therefore suggest to you that the Ordnance Survey map is not fit for purpose. Have you thought about what alternative there might be to the current mapping system?

Graham Little: When I say that the Ordnance Survey map is a compromise, I am talking more about the technology involved in collecting change and integrating it into the database, which is a compromise to an extent. I am not using the term "compromise" in relation to the legal process. The legal process is the legal process, and I am not the best person to comment on that; that is for Registers of Scotland.

The definition of a title is certainly based on the Ordnance Survey map, but it is a general boundary definition rather than a precise definition; it is not a cadastral definition, if you understand the distinction—and it is an important distinction to understand. The decision about the precise alignment of any boundary is an issue not for Ordnance Survey but for the users of our mapping with regard to whether they consider it to be sufficient for their requirements. As I said, over the past three decades mapping has been used to populate the land register, with very little difficulty.

The Convener: Mr Langlands wants to comment on the same point.

Iain Langlands (Royal Institution of Chartered Surveyors): Thank you, convener, and good morning to you and to the committee.

When we talk about Ordnance Survey mapping, we must ask what it is being used for in land registration. The RICS Scotland perspective—this is one of the reasons why we are quite animated about the bill—is that the Ordnance Survey base map should be used for reference only. It is a reference tool for whatever titles are captured in relation to it.

If we are discussing the merits or the accuracy of Ordnance Survey mapping and we then refer to titles in the land register, in my view and in the view of the RICS that is almost like comparing apples and oranges. Current practice is such that modern surveying technology can give a far greater accuracy of position than can the cartographic generalisation of an Ordnance Survey map or any other small-scale map.

It is not for me to speak up for Ordnance Survey but, in the RICS's view, it is not that there is anything wrong with the OS map, unless a title is digitised to match the OS map, in which case there is a dilution of the surveyed information to match the generalised cartographic information. As long as the distinction is made that the OS map is for reference only, it becomes a lesser issue.

10:15

The Convener: Just to follow up on that specific point, is not the whole issue with the land registration system the fact that it is based on the Ordnance Survey map?

Iain Langlands: Yes—for the RICS, the crux of the argument is to do with that being based on the Ordnance Survey map. Does that mean that a title must match what is on the OS map, or does it mean that it must relate in space, in terms of a locational reference to what is on the OS map? I could go out and survey the curtilage of this building and its physical features and that would be far more precise in millimetric dimensions than anything that Graham Little and his colleagues would represent on the OS map. It is that difference that we are debating.

The Convener: Yes. I do not know what the title to this building looks like, but if it is a registered title, it will exist in map-based form, which will be an extract from the Ordnance Survey map.

Iain Langlands: I might disagree with you there—it might not be an extract from the Ordnance Survey map; it might be a surveyed boundary related to the Ordnance Survey map.

The Convener: Okay, but I am not sure that that is quite correct. My understanding is that the keeper prepares plans from the OS map.

Iain Langlands: Yes, but to anyone who looked at a registered title sheet that was on a scale of 1:1,250, for example, it would look as if the red

line matched the Ordnance Survey mapping. However, in reality, if you were to plot that red line at a scale of 1:1,250, which is the precision and accuracy to which it might have been surveyed, it might not do so. We are talking about subtle differences but, in the RICS's view, it is an important point.

The Convener: Rhoda Grant wants to ask a question. Does Mike MacKenzie have a further question?

Mike MacKenzie: Yes.

The Convener: I will let Rhoda follow up on this point first.

Rhoda Grant (Highlands and Islands) (Lab): I can understand the difficulty of trying to plot on a flat map something that, because of its features, is not flat. If there is a measurement in a title deed and an attempt is made to transpose that on to a flat map, it will not fit because no account is taken of how the land lies. Therefore, would it not be wiser to look at using some kind of satellite positioning system with the register to give a degree of clarity? We are trying to avoid boundary disputes. If a title specifies a length, which is put on to an OS map that is flat and does not take into account the fact that it might have been necessary to go up a hill to get that measurement, the boundary will get larger and people will dispute it.

Would it not be better to use measurements in a deed, plus satellite positioning information to say where the land is? That would get rid of any argument. Instead of using Ordnance Survey mapping—which, granted, was probably the only thing that was available at the time—has not the technology moved on far enough to allow us to do something quite different, especially as we are looking at legislation?

Graham Little: There are two separate issues there. One is to do with the third dimension. I agree that it would be great if we could have a truly three-dimensional model. You are quite right—the Ordnance Survey map and, indeed, most other maps are reduced to the horizontal, so the measurement on the ground will not always agree with the measurement on scale from the map, because one is measuring a horizontal and the other is measuring a slope distance. That is a universal problem that, until we develop our data management and data modelling to truly represent that third dimension consistently, we will just have to live with. It is quite possible, of course, to put the true measured dimension in the title, if there is a desire to do so, should there be a radical difference between the horizontal and the true slope distance. That issue is a challenge for anybody who deals with any definition of a piece of land on the surface of the earth.

You also asked about satellite positioning. Satellite positioning can give both those dimensions—in effect, it can give the X, Y and Z co-ordinates. In isolation, that might be fine, but we should bear it in mind that we have a land register that is already substantially populated. To return to the jigsaw analogy, relating that new and precise definition to what is already in the register would be a challenge because, in effect, we would have a jigsaw piece that did not necessarily fit. Perhaps we would have a jigsaw piece in three dimensions, whereas the rest of the pieces would be in two dimensions. So you are on the right track in relation to the vision for the future, but the idea is not practical here and now.

Andy Wightman: The issue is important but, as Graham Little says, we have a legacy issue. The most important thing about the land register is that it shows where the boundary is, and people understand where that boundary is. If the proprietors on both sides of a boundary understand where the boundary is, there is no boundary dispute. If that boundary has not been plotted accurately and is, at a higher scale, in fact 75cm away from where it should be, that does not matter as far as the land register is concerned, because both owners understand that their boundary is the fence. As long as no one shifts the fence in the middle of the night—or as long as nobody notices—matters are okay. Therefore, we should not get too hung up on positional accuracy in relation to the land register. As Graham Little says, the problem is a generic one that faces the Ministry of Defence, local authorities and everybody who uses maps.

Mike MacKenzie: I am concerned that, as Mr Langlands said, it is common practice to produce an initial title plan to a high degree of accuracy, at 1:200 or whatever. Following the jigsaw analogy, if we produced title plans to that degree of accuracy for every single title in Scotland and put them all together as the pieces of the jigsaw, we seem to agree that they would not fit the Ordnance Survey plan. Therefore, in effect, somebody would have to take a pair of scissors to some of them to make the pieces of the jigsaw fit together. However, we must remember that the bits that would be cut off are bits of land or property that people currently believe that they own.

Am I correct that the current mechanism for resolving those problems is the courts and that the legal and surveying professions would have to be involved in a huge amount of work to resolve many of the differences, which are really quite intractable? They are particularly intractable because the parties that are affected by such land disputes are actually innocent parties—it is not their fault. I do not suggest that it is anybody's fault—it just so happens that we have the legacy of an Ordnance Survey plan that was started way

back, but we now have sophisticated and accurate measuring. Resolving all the potential boundary disputes, many of which we do not know about, would create a great deal of difficulty and expense. Should the committee therefore consider a reasonable, low-cost and relatively quick means of resolving those disputes short of the courts as a potential solution to the problems that we are talking about?

Andy Wightman: In my experience, most boundary disputes are not grounded on whether a map is accurate; they are grounded on where the boundary is. They are about whether the boundary is one fence or another one; whether it is a fence that was there in 1942 and is no longer where it should be; or whether it is the bank of a river that has eroded by 10m. All such disputes can be resolved adequately by the courts and they often derive from plans or titles that are of some antiquity.

If the parties cannot agree on where the boundary is, there is no alternative but to look to the courts. The land register is based on modern maps, and a modern map, even from 30 years ago, is vastly superior to the maps that were produced in 1920, 1860 or 1880, from which many titles in the sasine register that are migrating to the land register are derived. I am not sure that this is a vital issue, because ultimately the boundary dispute will have arisen as a consequence of the fact that the parties cannot agree among themselves or there is insufficient information in the existing registers.

Graham Little: Can I add to what Andy Wightman has said? I do not want to sound like a stuck record, but it is important to point out that the features on the Ordnance Survey map do not define legal title. Indeed, there may be no feature on the ground that defines legal title. The issue, therefore, is not about the accuracy of the map but about a clear understanding of the location of a title extent. That may well align with a feature on the map, but it does not necessarily do so. The feature on the ground could have been changed, and we would reflect that change on the map because we survey what is physically there without any reference to whether it defines legal title.

Iain Langlands: If it is permissible to have surveys of the level of precision that my practitioners can provide and match them with historical data, there will be mismatches of the kind that we are talking about. I agree, and the RICS Scotland would agree, that there is a potential risk of lots of challenges and appeals against those mismatches, and it would be helpful if there were some form of mechanism to speed up the process. Assuming that one can differentiate disputes that arise from historical information and those that arise from currently surveyed information, the RICS believes that if one captured supplementary information such as GNSS and GPS-type co-ordinates, a surveyor could go back out into the field and re-establish, with a great degree of precision, exactly where the boundaries were when they were first measured and then captured in title.

Our difficulty lies with the old records on the land register and the register of sasines. The archived information that we have makes it much harder to re-establish the boundaries, so an almost two-pronged approach is required. We must recognise where we stand as regards the historical information that we have, and then we must recognise the opportunities that I hope the bill can present in smoothing the process for the future. In the view of the RICS, this is not only about capturing the title and recording it but about re-establishing the title boundary in future. That is where the archived supplementary information would be very helpful.

John Wilson (Central Scotland) (SNP): Good morning, gentlemen. I think that we need to go back to Mike MacKenzie's original question—is the Ordnance Survey map suitable for matching with the land register? Mr Little said that Ordnance Survey maps only the features that are on the ground, so any fence, garage, shed or whatever that is currently situated on the land will be identified on an Ordnance Survey map. However, those features may not correspond to the ownership of the land. We received a submission from Scottish Water—no doubt Network Rail would make a similar submission—saying that in some cases where it had fenced off what it thought was its land in terms of title, it had not fully integrated all the land that had been passed to it. It gives the example of having historically fenced off a particular area while having title to more land outside that area, so that someone could think at a later date that they have title to the land up to the fence because the fence is the boundary that is identified on the Ordnance Survey map.

We need to ensure that what we get from the land register in future represents the most accurate mapping of land ownership in Scotland. At the moment, someone may build a shed or a garage on what they think is their piece of land and then somebody can say 30 years later, "Your garage is on my land. I want you to get rid of it because I am going to sell off this land, and the land title shows that I own the area where your garage is situated." How do we get to a situation where the Ordnance Survey map accurately matches land title ownership? Will it ever get to that stage? If not, what do we do in terms of completely mapping title ownership of Scotland over the next 30 or 40 years, which is what we hope to do?

10:30

Andy Wightman: I am not sure that this is a question of mapping. Say the Forestry Commission acquired 1,000 acres of open hill land in Perthshire and put a fence around it. When the commission sells the land, 50 years later, the title plan will show that the legal boundary is sometimes outside the fence and sometimes inside the fence, because the people who went up the hill in 1940 to put the fence up were not following a legal boundary—they were trying to, but there is no way that they could. That is not a mapping problem. The fence is where the fence is. The Scottish ministers' title—as it is they who own Forestry Commission land—is where it is. If Scottish ministers fail to defend land that is legally theirs but is outside the fence, that has nothing to do with mapping. It has everything to do with prescriptive claimants and so on; it is a matter of law.

I was recently involved in another situation involving a prominent golf developer in the north-east of Scotland, who is claiming that someone has built a garage on his land. He has gone around with highly accurate global positioning system equipment to show that the garage is 75cm away from where it should be. The resolution of base mapping for Aberdeenshire in 1979 or whenever would have had a tolerance of 2m, and the fact is that this person's boundary is the fence, which is still there. The fact that the fence is not where it is supposed to be, according to the map, is neither here nor there. It will matter in future, as that fence will be surveyed to a higher degree of provision in future, but that does not necessitate a change to the land title, because the boundary is clear—it is the fence. That is what matters, as far as land titles are concerned.

Iain Langlands: At the risk of repeating what Graham Little has already said, the Ordnance Survey map is not a capture of land title. Title will always take precedence over Ordnance Survey mapping. I repeat what I said earlier. For the RICS it is not a question of whether the Ordnance Survey map is fit for recording title; the point is that it is absolutely fit for referencing title in locational space. That is the purpose to which we believe that the bill is alluding. We do not think that the bill is attempting to suggest that any boundary of title should be matched physically to what is recorded on the Ordnance Survey map. For us, that is the crux of the argument.

Graham Little: As I think that we have established, the Ordnance Survey map is a map of topography, not a map of title. It can be used as a representation or an index of where a title is, but not always with sufficient definition that it can stand alone. Over the past 30 years, the registers have used supplementary information where the description of a title cannot be clearly defined on the Ordnance Survey map. A classic example of that is in tenements, where there are quite complex ownership arrangements, with shared access and shared facilities, which cannot be represented on a two-dimensional map. The Ordnance Survey map is the basic statement of where that title lies and its approximate shape. It is certainly fit for purpose, but that is not to say that supplementary information will not add greater clarity to the process.

The Convener: That has been helpful. If members have no further questions on that matter, I would like us to move on.

The committee is interested in the process of the completion of the register, which is in many ways the driving policy behind the bill. What priority needs to be given to completion of the land register? What advantages would flow from that? In practical terms, how should that happen and who is going to pay for it?

Andy Wightman: I think that it is desirable to complete the land register. The register of sasines is a tired old beast that is not easy to use and is the source of many disputes given that, prior to the 1930s, there were no plans in the public domain and the ones that were produced after that time are not very good. We need to complete the land register.

The priority that should be attached to the land register's completion is a political question because, as you say, that costs money. At the moment, Registers of Scotland is a self-funding organisation—I seem to recall that it was Margaret Thatcher's first next-steps agency in Scotland—and the degree to which it can speed up the process is dependent on its legal powers, which the bill is extending in terms of triggers for registration, and the resources that it has to complete the register. It is important that we try to complete the land register as soon as possible—certainly, by the end of the century it would be nice to see 97 per cent of Scotland's land on the land register. I calculated how long it would take to complete at the current rate of progress—it was a desk exercise, which I can give you if you like—and the date is well past 2050 or 2060. However, a lot of stuff is now going on to the land register and, in certain counties, progress is slowing down, as the land that is not registered is mainly land that is not subject to frequent transaction. If you want Registers of Scotland to continue to be a self-funding organisation that does not receive any public money, a balance must be struck between the demands on its time, the costs to those who are paying fees for the registration of titles and public demand for that information.

The Convener: Does anybody else want to comment on that?

Chic Brodie: On the issue of completing the land register by the end of the century, I understand that Registers of Scotland has fairly substantial surplus funds. Is it a question of resource or skill that would allow us to accelerate the process of completing the land register earlier?

Andy Wightman: It also depends on what you mean by completion. I have the figures. In terms of title, we are over 50 per cent complete; with respect to land coverage, we are still down at 20 per cent. What is the priority for the register? Is the priority to get to 90 per cent of titles or to 90 per cent of the land? I suggest that it is a mixture of both. However, the fact that a vastly greater percentage of titles is on the land register reflects the fact that it is the land with the highest turnover that is getting on to the land register. That tends to be properties in urban areas—principally domestic properties—that the public are transacting, and the priority is greatest for those to be on the register. If the greatest volume of buyers and sellers of land are buyers and sellers of houses, it is most important that they have access to a good-quality register in which the title being conveyed is clear, so that would be the priority.

However, if your priority is to identify who owns Scotland, you will want to find mechanisms for admitting large rural properties, many of which are held in trusts and companies and which will never change hands—the title will remain with the company or trust as family members die. As it stands just now, many rural properties will never get on to the land register because they are structured in such a way that they never transact. The bill introduces triggers on succession, but nobody inherits the Buccleuch estates, for example—the succession of the members of the Buccleuch family will not trigger the registration of the land that is owned by Buccleuch Estates Ltd. Therefore, one has to make a political decision, at some point, as to the public interest in registering extent of land, and the bill gives the keeper powers to undertake keeper-induced registrations that could be triggered at any time in the future. The bill, as it stands, gives sufficient flexibility, in terms of triggers, ministerial orders and secondary legislation, to order the completion of the register.

The Convener: I have a follow-up question on keeper-induced registration. Who should pay for that? Should the landowner be charged for it, even though he or she did not necessarily want to register the land, or should the resources come from Registers of Scotland?

Andy Wightman: That is a tricky one, because every circumstance is slightly different. If the public interest is in registering the land, the keeper should substantially pay. However, the owner should not be exempt. As a consequence of registration, the owner will get a much better title that is guaranteed by the state. That is incredibly valuable to have, in comparison with the quality of titles that some people have. It is therefore only fair that owners should pay something. However, sending somebody a bill for something that they did not ask to be done is in a sense a political problem.

Mike MacKenzie: I am still not quite clear about the benefits of completing the land register. Last week, the committee heard from conveyancing solicitors, who said that they can buy and sell property on clients' behalf reasonably well under the current system, although they also said that improvements could be made. I am not quite sure about the tangible benefits of completing the register simply for the sake of doing so—for the satisfaction of completion.

Andy Wightman: One of the big drivers for land registration is the consumer interest. I am not surprised that conveyancing lawyers sat here and said that they were relaxed about how the system works, because the ultimate vision is that the land registration system will be based on positional accuracy to the millimetre and computer-mapped titles that allow people to transact digitally without involving lawyers at all. Lawyers will always be comfortable with what is around now, because it pays them money. We are moving towards a system in which transacting in property will cost much less, because that will increasingly be done simply by changing the name on a land certificate. Using the land register means that searches do not have to be undertaken, for example.

The thrust of and main driver for having a good land registration system is making it cheaper, easier and faster for the consumer. In the process, lawyers and land search companies will lose work. I do not expect them to come along and say that that is the world that they want.

The Convener: To be fair to the lawyers—I should declare an interest—their clear view when we heard from them last week, which was probably fair, was that most of the work that is involved in a domestic transaction has nothing to do with the transfer of title; it concerns missives and related issues such as whether central heating works and what the price includes. I must defend my former profession for a second.

Andy Wightman: Well said.

Iain Langlands: The recommendation to complete the register is perhaps an issue of vision. I and others in my profession deal with the capture, display and analysis of digital information. When a data set is incomplete, as the land register is, that limits what can be done with it. Land registration and everything that is in the bill might be the vehicle that justifies completion, or a wider vision might have to be taken on the fact that

heading towards and being proactive about completing the register will create a digital data set that covers the entire country, from which strategic analysis and statistical interrogations can be done.

The RICS is probably neutral on completing the register, but I caution the committee to consider carefully what completing it could offer for national objectives and priorities.

10:45

Graham Little: I do not wish to make any kind of political statement, but I simply observe the reality that many public bodies in Scotland have an interest in land ownership, and the easier that it is for them to ascertain that information, the more effectively they can deliver their services. That would apply to almost every public sector organisation—it applies to organisations in the private sector too—whether it is an environmental, farming or other organisation. Whatever an organisation's purpose is, having ready access to unambiguous land ownership information has an intrinsic value.

Andy Wightman: Your question underlines what Iain Langlands and Graham Little have said. Land registration is not just about registering titles or about the law; you have plenty of advisers on the law. It is about building the basis of a national land information system, so that any public agency—as Graham Little said—or any individual can go in there and find the answers to questions. If you want to find out how much land in Aberdeenshire has been sold in the past 10 years, you should be able to do so in a straightforward way. HM Revenue and Customs is interested in how much land in Scotland is held in the Bahamas and Grand Cayman, and it should be able to find that out. The information is all there. It is much more than a system of recording titles and legal ownership—it is a vast source of information for a wide range of public and private bodies. That, in addition to the consumer interest dimension, is a key benefit of completion.

Chic Brodie: Again without making an oblique or direct political statement, I would have thought that it was desirable from an environmental and economic point of view for us to have a nearly complete land register. If we were taxing land values, for example—I am not suggesting that we should—we would require an almost 100 per cent accurate land register. I find it slightly unequal that all the transactions for Mrs McGlumphie's flat and so on are recorded, while the Duke of Buccleuch can sit there and we do not know exactly what he owns.

Andy Wightman: In 1910, Lloyd George wanted to introduce land taxes in his famous people's budget. The Inland Revenue surveyed every last square inch of the whole of Great Britain and Ireland in the space of four years, with ink and paper. All those maps for Scotland are sitting in the national archives. They could do that 100 years ago, and there are no barriers to doing so now if we wanted to.

Chic Brodie: So it will not take a century.

Andy Wightman: If you want a national land information system, you should not rely simply on the imperatives of land registration and the lawyers—you should build a land information system.

The Convener: Okay—thank you. We will move on and talk about another subject of interest to the committee, which is the issue of a non domino titles. I think that Patrick Harvie wants to ask a question on that.

Patrick Harvie (Glasgow) (Green): Yes, but, first, may I ask one brief supplementary on the previous discussion?

The Convener: Yes, of course.

Patrick Harvie: If there is a substantial benefit in the completion of the land register or, in another sense, the creation of a land information system, should the bill specify a target date for—as an example—90 per cent of land or titles to be on the register?

Andy Wightman: If Parliament so desires. It is all the rage to have targets—in fact, I think that we have some statutes that contain very little other than targets. That would be highly beneficial. If Scotland's legislators were to say that they would like the land register to be substantially complete by 2050—around 98 per cent coverage; it would never be 100 per cent complete down to the last bit—I see no reason why that should not be in the text of the bill.

Patrick Harvie: I will give the example of the fuel poverty target. Not all factors affecting fuel poverty are within the power of Scottish ministers, but ministers still have legal duties to, as far as practicable, eradicate fuel poverty. Something comparable could be included in the bill. Are there any other views on that?

Iain Langlands: It is a valid question. If you have an aspiration, there is no guarantee that you will ever get there. If you want to get there, you have to set a target. I can feel the keeper's knees quaking as I say that. There are resourcing issues, but a target would generate discussion about those issues. You are right: a target must be in there, or the aspiration simply will not be achieved.

Graham Little: I agree. The target will drive the definition of resources. It will not work the other way round.

Patrick Harvie: Thank you. As the convener said, I will move on to some of the other issues, particularly those that Andy Wightman raised in his written evidence. Mr Wightman might have more to say about this, but I would like the other witnesses to comment on prescriptive acquisition. Do you have a view on the Government's general approach of retaining the existing mechanism of prescriptive acquisition—a non domino dispositions—but tightening the conditions under which it can be used?

Graham Little: No.

Iain Langlands: The RICS has no view on that.

Patrick Harvie: In that case, the floor is all yours, Mr Wightman.

Andy Wightman: I am sorry—what was the question?

Patrick Harvie: I suspect that your answer will be no. Is the Government right to take the general approach of retaining the existing mechanism of prescriptive acquisition and somewhat tightening the conditions under which it can be pursued?

Andy Wightman: The legislation governing prescription is the Prescription and Limitation (Scotland) Act 1973, and I think that there has been subsequent legislation. The legislation states that prescriptive acquisition is legitimate. I have many problems with that, but the bill is not about prescription per se. However, the bill is about land registration and, as the Scottish Law Commission made clear, whether the door should be shut, open or ajar to the admission of prescriptive acquisitions and the circumstances in which that should be the case. That is fairly and squarely a matter for the bill.

Although it is seeking to tighten up those conditions, the Government has not thought enough about the public interest in admitting a non domino dispositions in the first place. Its position appears to be that they are legitimate, even though the law has to contort itself by ignoring something that is invalid and pretending that it is valid. That is not a very good basis for Scots law. The Government appears to be saying that it will admit a non domino dispositions while just tightening up the rules somewhat.

We have to go back to first principles. If someone is attempting to acquire a piece of land through the process of prescriptive acquisition and a non domino titles, there can be two positions. First, the true owner simply cannot be found. I have seen titles in the name of people who lived in Kwazulu-Natal in 1932; where are they now? There is no requirement to keep the register of sasines or even the land register up to date in respect of where the owners are, and that will be a problem for the land register. Land will be acquired, 50 years will pass and we will have no idea of where the owners are. That is the first possibility—the true owner of the land cannot be found. There have to be mechanisms to deal with that. As the bill and its explanatory material make clear, it is not in the public interest for land, particularly large or valuable areas of land, to lie unused purely because we have no idea who the owner is or where they are.

The second case is when land does not have an owner—even then, there is no such thing as land that does not have an owner as, ultimately, it is owned by the Crown.

I have a problem with the Government's approach in both those cases. On the first, I do not see why the first person to kick open the door should be the one who gets to submit a claim. That is not particularly fair or legitimate. In the second case, if land does not have an owner, it falls to the Crown and I do not see why the keeper should have anything to do with it whatsoever. The Crown should deal with it, as it currently does. When companies dissolve and disappear or there is no heir, all property falls to the Crown.

That a non domino device has been abused for centuries and even in recent decades. The keeper has tried to tighten things up, but the Land Registration (Scotland) Act 1979 is silent on how it should be dealt with. The current bill will tighten up procedures somewhat, but I still have fundamental questions about whether it is a legitimate way of acquiring title to land, particularly in the terms outlined in the bill.

Patrick Harvie: There are probably a few arguments that might be put to you in response to that, some of which come from previous witnesses and some of which we might expect the minister to use. It would be useful to hear your response before we hear from him. One argument would be that notification of land to the Crown would lead to what one witness described as "ransom" prices being exacted. There could be unreasonable prices to pay for land that might be of particular benefit to a developer if their development is to go ahead but not of much value to anyone else; for example, it could be a tiny strip or corner of land that is important for a particular development but not of much use otherwise.

Another argument might be that notification would spark off a bidding war, not necessarily by the Crown but by others, and that there may be different scenarios for land with commercial value compared with land that does not have such value, such that there would be a disincentive to report unowned land or land for which there is no clarity about ownership. How would you respond to the arguments about bidding wars or ransom prices, or about disincentives to report unowned land?

Andy Wightman: I do not understand the disincentive to report unowned land.

Patrick Harvie: There is land that has clear commercial value, and opportunities can be created to bring it into ownership and put it to use. However, land that does not have much commercial value might continue to sit unreported because no one has an incentive to report it.

Andy Wightman: I am not too concerned about the latter. If there is not much interest in a piece of land, why should anyone bother themselves with it? The only trouble that I would have about such instances is in relation to what I said in my written evidence about common land and cases in which people simply do not know that land is common land and some people have aggressively moved in and acquired it.

On Mr Harvie's other point, I read the evidence from the witnesses at last week's committee meeting and I have to say that I do not see the public interest being taken account of in the arguments. One witness seemed to argue that, if a commercial developer found a little piece of land but could not find who owned it, that somehow entitled them to title of it, because otherwise the development would be prevented from taking place. That seems to me to be a non sequitur. I cannot understand the logic in that. I can understand the public interest in bringing forward a development, but I do not understand why as a consequence the developer should simply be given title to unowned land.

As to whether ransom prices would be paid if land falls to the Crown, ransom prices are paid in the private sector all the time. If you want to develop but you cannot put your hands on all the land, and one little strip is held by Patrick Harvie, then that is life: you have to pay ransom prices. However, Patrick Harvie is not the same as the Crown, which can put in place arrangements that do not require ransom prices; for example, it could put land to public auction, as in fact I understand it currently does for certain land that falls into its ownership. Land in a public auction will go to the highest bidder. I do not see any problem with that. I just found offensive the idea that the people with the deepest pockets and the cleverest lawyers can move in first and grab land. If they want to lay claim to land, let them lay claim to it at a public auction like everybody else.

Patrick Harvie: I have a slightly more general question. You have made a case that is partly about the current situations that you describe and partly about the historical use of the a non domino mechanism. Would you like to speculate on why the Government has not introduced a bill that addresses the issues that you have raised? Is it because it thinks that the issues are only historical and that there is no current public interest in that regard? Is it because it is simply looking for a bill that addresses economic interests and developer interests ahead of wider public interests? Is there another reason why the Government is not legislating in a way that you might find more welcome?

Andy Wightman: It is not for me to speculate on why the Government has introduced this bill. I would not care to do that publicly. However, we should remember that the bill is based on—

Patrick Harvie: But bear it in mind that we have only your words now and your written evidence to put to the minister. We are going to have the opportunity to ask the minister those questions, so it would be useful to have your views.

11:00

Andy Wightman: I was coming round to that by another route.

The bill owes its genesis to an instruction made in 2002 or 2003, with the approval of Scottish ministers at the time, by the keeper to the Law Commission to review the law of land registration, which, as everyone involved in land transactions was aware and for reasons that have been well spelled out, was inadequate. As a result, the bill's genesis was in a department of Government—that of the keeper—that is principally concerned with registration of title and around which gather mainly conveyancing and legal interests. Moreover, the Law Commission revises and reviews Scots law. It is not surprising, therefore, that the bill is substantially legalistic and technical and concerns itself with conveyancing and titles. In a sense, I have no criticism of the Government's bringing forward the bill in its current form.

However, I am critical of the fact that the bill does not deal with the wider public interest. What do we have land registration for? What can it deliver for that wider interest? Does the bill create a national land information system? Does it deal with some of the abuses that we have seen with people seeking to acquire land or hide assets or with the question of commons that I have raised?

The opportunity has not been taken in the bill to deal with those wider questions, most of which are legitimate concerns that it should address. After all, the bill represents the first time that a democratically elected Parliament in Scotland has ever decided the basis for registering land ownership. That has never happened before, so it represents a big opportunity and I am disappointed that the Government has not introduced something broader.

Why has the Government not done so? I think that it is partly because it regards the bill as a very tight, legalistic and technical piece of legislation.

Unlike Registers of Scotland, the Scottish ministers did not even issue a press release on the day of the bill's publication and Alex Salmond did not refer to it in his speech on the legislative programme. The Government regards it as a technical piece of legislation that will go through quite quickly—and that is where the role of the Parliament comes in. It should scrutinise the technical measures, which by and large are all good and welcome. However, if it feels so moved, it should express a view on the wider public policy issues to which land registration gives rise.

Chic Brodie: Following on from that response, I note that you say in your submission that, although the bill is technical, certain "public policy dimensions" should be taken into account. You mentioned the Crown in that respect and, on page 301 of your immensely readable book, you make the interesting suggestion that the Scottish Parliament should abolish all Crown rights over Crown land. Given the current position with the Crown Estate, how might we do that?

Andy Wightman: I did not expect to have to answer a question about abolishing Crown rights.

The Convener: To be fair to Mr Wightman, I think that that issue is not strictly within the remit of the bill. We should give him the chance to defer the question and perhaps respond in writing.

Andy Wightman: I am sure that the committee is well aware of the distinction between the Crown Estate Commissioners and the Crown estate, and other Crown rights in Scotland. The Crown, as represented by the Queen's and Lord Treasurer's Remembrancer and the Crown Office, is and always has been responsible for ultimus haeres, bona vacantia, land that belongs to nobody and so on.

In the context of the bill, one might consider the points that I have made about a non domino and whether, in dealing with unowned land, the Crown Office could play a bigger role than its current very discretionary role. At the moment, it simply sits there and decides whether it wants to deal with any of these bits of land that come up. On the other hand, of course, the keeper also exercises vast amounts of discretion in deciding whether to admit and record them.

In effect, we have two officers of state exercising vast amounts of discretion over what happens to land with no legal owner. The bill provides an ideal opportunity to tighten up that process, put it on a better statutory footing and make it far more transparent.

Mike MacKenzie: I am slightly concerned about Andy Wightman's view that all development is necessarily bad and is undertaken by greedy developers. For instance, if I may describe a scenario—

The Convener: To be fair, I am not sure that Mr Wightman quite said that.

Mike MacKenzie: Well, there is the idea that the people with the biggest wallets and the best lawyers can in effect steal land. I will paint another, real-life scenario, although I will not mention where it is taking place. An affordable housing development in a village in which affordable housing is badly needed is being in effect blighted and delayed because of vacant land whose ownership is not easy to determine. Under the current system, there is at least a mechanism to resolve that problem in the community interest.

Equally, I am aware of several cases in which individuals have been in effect able to blight, not for land ownership reasons, the provision of community halls that are required and community playing areas, for example. Do you not think that your suggestion of advertising vacant land or land whose ownership is uncertain might result in vexatious claims to the land to blight development or for any other reason that might not be in the community interest?

Andy Wightman: There is a public interest in getting hold of land, but things have to start from a fairly clear legal basis. Just because Mother Teresa rather than somebody else does the stealing, that does not legitimise the process that is used.

There are existing legal provisions for compulsory purchase in the cases that you highlight. If land is necessary for community halls, affordable housing or roads, we should seek to beef up the compulsory purchase powers and to make them far easier to use rather than using a fairly contorted land registration process to get hold of that land. I do not see that the instances that you mention necessarily provide a defence of what is, I believe, a contorted and undesirable system. People could simply seek the local authority's consent to acquire the land compulsorily.

Mike MacKenzie: Compulsory purchase is almost another issue. I agree that the process should be simplified, cheaper and quicker.

Let us consider the scenario in which somebody finds that they do not actually own a strip of land at the bottom of their garden. That is quite a common occurrence. The person thought that they owned it, but it turns out that they do not. They hope to resolve the matter, but their neighbour, with whom they perhaps do not get on that well, decides to lodge a claim that has equal merit. Do you agree that that could cause problems under your proposed scenario?

Andy Wightman: Yes. If we have a system in which the land automatically falls to the Crown, as

it does in theory, and there is a public auction, there can be a bidding war over that land between two neighbours, but I do not see a problem with that. It would be a fact that the householder to whom you first referred did not own that land, regardless of what they thought they owned. If we were to introduce into the system criteria that meant that people got a higher score and a greater claim to land if they thought that they owned it, for example, that would be bizarre.

Mike MacKenzie: What proportion of the land whose ownership is uncertain lies under the footprint of people's houses? Does that apply to some of it?

Andy Wightman: If that is the case, some conveyancing lawyer has made a serious mistake somewhere in the past.

Mike MacKenzie: Indeed.

Andy Wightman: The bill provides far better measures for that. There certainly need to be measures by which people can rectify titles when it is clear that something has gone amiss and the title has not been properly recorded. Mechanisms are needed.

I am arguing for flexibility. If things fell to the Crown, the Crown would have guidelines—preferably statutory guidelines—on how to deal with them. If a piece of land falls under the area of somebody's house, they will probably have prescriptive possession of it anyway if they have occupied it for at least 10 years. Many such things will resolve themselves within the current law.

Mike MacKenzie: We are not talking about the current law; we are talking about the proposed law. My understanding is that you seek to abolish prescription in pretty much all circumstances. I am just asking whether that could give rise to difficulties.

Andy Wightman: I have views on prescription, but they are not within the scope of the bill. Prescriptive possession will continue to operate. The issue that the bill highlights is prescriptive claims, which occur when people lodge titles in order to initiate a claim of property.

Someone might have a very vague and uncertain title but, because they have occupied and possessed a defined extent of land for 10, 20, 30 or 40 years, their title is secure, regardless of the fact that the original title is unclear. I am not arguing about that kind of prescription, which will continue to operate in the Scots law of property; I am arguing about the specific case of prescriptive claimants who, if you like, lodge hostile bids for land.

Mike MacKenzie: I am not sure that the law recognises a distinction there.

The Convener: We need to move on, Mr MacKenzie.

Patrick Harvie: Convener, can I say something? For the record, I point out that the witness's written evidence calls for a more open and public process, rather than the abolition of the mechanism that we are discussing.

The Convener: That is a fair point.

Stuart McMillan (West Scotland) (SNP): I have a question for Mr Wightman on what he has said in his written submission and in oral evidence, compared with the proposals in the bill. To take an example, in Inverclyde, the local authority and Scottish Water both argue that they do not own a certain piece of land. I am worried that we will have a battle between those two public bodies that will continue for ever, at considerable cost, but with no definition of or decision on who owns that piece of land. The area causes much of the flooding in Inverclyde, so nobody will want to put in a bid to buy it, because of the cost of rectifying that. The current law certainly does not deal with such situations, but I am not sure whether the bill will help to deal with them or whether Mr Wightman's suggestion would help.

Andy Wightman: There are two issues there. The first is about who owns the piece of land. You mention two public bodies that deny that they own it, but somebody out there must own it. Secondly, I gather that you are talking about a piece of land that nobody wants, because of liabilities. With respect, that question is for the public authorities and is not one of land registration.

If the problem is that the owner cannot be traced or the land genuinely appears not to have an owner, we will certainly want to resolve the question. The bill provides mechanisms to do that, such as keeper-induced registrations or the a non domino vehicle. In the amended proposals that I am talking about, the Crown or somebody else other than the keeper would deal with who has title.

If nobody wants the land, that is a matter for other pieces of legislation. If the land causes flooding, I presume that the act that the Parliament passed a few years ago on flooding might help, or perhaps compulsory acquisition powers or whatever could be used. At the end of the day, I am not sure that the question is one of title. You seem to be saying that the fact that nobody wants the land is causing the problem. That is a problem, but it is not in itself a question of land registration.

Rhoda Grant: I have a question that relates to that issue and to the previous discussion. If unowned land or land whose owner cannot be traced because there is no title reverted back to the state in some form, would that sort the problem that Stuart McMillan is talking about, as

the state would become responsible for the flooding that the land caused? If the state had ownership of such land, it would have a public good interest in it.

If communities wanted to exercise their right to buy under land reform legislation, they would be able to do that if the land was needed for the development of housing or the like. If there was a body with the right public interest in statute, land being taken back into public ownership need not be a dead hand; indeed, it could be the very opposite.

11:15

Andy Wightman: I agree. That goes back to my point that hostile bids should not be making their way into the keeper's office for the keeper to consult the Crown on. Under Scots law, if land has no owner, it belongs to the Crown. We should therefore look at Crown Office procedures and possibly beef them up, make them more transparent, give them more powers and put them on a statutory footing.

We should provide guidance and guidelines, some of which would be to do with the fact that, if there is a public interest in the land, the Crown Office should act as a public body—as the state—and do something proactive with it. At the moment, the Crown Office simply sits there choosing which pieces of land to accept—it does not want to accept responsibility sometimes—and taking the money to pass on to the Scottish consolidated fund. The Crown Office has a very passive role.

I agree that there is certainly a role for a public organisation or body to take on board land that has been abandoned and is lying unused, possibly causing problems for the community. To my mind, that should already be happening, because we have the Crown Office; it is just a question of revising its statutory obligations and duties in guidance.

The Convener: We will move on to the next topic. A number of members are interested in looking at the registration of common land.

Rhoda Grant: I am interested in the fact that common land cannot be registered at the moment. How can we amend the bill to allow it to be registered? Who could register it and who would pay for the registration? I imagine that a member of the public might not be keen to do the registration if they had to pay for it. I am keen to hear your view on that.

Andy Wightman: In theory, common land can be registered. The problem is mainly that people do not know that it exists. It is archaic, it has been left behind, lawyers have forgotten about it and some people even deny that it exists.

The current land registration process does not make it terribly easy to register common land. That is partly because defining who has beneficial ownership of common land is a bit tricky.

The bill provides an enhanced suite of means to register common land by providing the means to register shared plots, such as the gardens in Edinburgh's new town that are held in common or areas of green land in new housing developments that are held in common. The bill makes it much easier to register those plots as shared plots in and of themselves. That is one mechanism that could be used to register common land. The bill also provides for keeper-induced registration, so there is a variety of means by which the bill can provide for the registration of common land.

As I said, the principal problem is that people do not know that common land exists and can be open to hostile bids. A lot of common land has been lost that way. At the moment, I am looking at approximately 16 or 17 areas of common land, and I know that people have their beady eye on about half of them and would submit claims for them at the drop of a hat. Some have done so already and I have titles to show that.

I propose a more straightforward means of registering common land as a protective order that says, "We assert that this piece of land is common land. It belongs to the parish and should not therefore be subject to any claim of title until due process has been followed."

Rhoda Grant: Would that be necessary if prescription was outlawed so that people could not make hostile bids for common land?

Andy Wightman: If prescriptive claims were outlawed, such a measure would not be necessary, but no one is proposing to do that.

John Wilson: There is also the issue of common good land and the definition that is used by local authorities. In your written submission, Mr Wightman, you suggest that

"Statutory power for ... management would be vested in local authorities."

I am aware of a number of cases in recent years in which land was bequeathed to the people of a particular burgh or area and then came under the control of local authorities. The local authorities subsequently disposed of that land, despite the public outcry from the residents in those areas.

How do you square the view in your submission, which states that a local authority would have the statutory power to maintain the common good land or the common land for a community, with the fact that an authority would have the right—although it is currently untested in law—to dispose of that land as it sees fit?

Andy Wightman: The two designations are distinct. Common good is land to which there is an existing title. There may be no title at all: in the ancient burghs of Scotland—Perth, Edinburgh, Aberdeen, St Andrews and other places—there is land with no title as its status pre-dates 1617 and it has never been transacted.

The legal position is clear: title to common good is held by the current unitary authorities. When the town councils were abolished in 1975, they no longer existed as a legal entity, so titles had to be transferred somewhere. They were transferred to the districts and, in 1996, to the unitary authorities.

Mr Wilson referred to instances in which one class of common land already has a title and can be transacted. Whether or not local authorities should be selling the land is a question for those authorities, for their electors and ultimately for the courts.

What I am talking about in my evidence is land to which there is no title at all: it is genuinely common. As a default position, the management of that land should be vested in local authorities. They could make further provision that it should be managed by local communities or whatever, but a council would not be able to transact the land because it would not have title—it would be common land. It could not be sold by the local authority, so it would not fall prey to the same dangers as common good land, for which a clear title exists and in which local authorities' powers to transact are well defined.

Patrick Harvie: Can you give some clarity on one aspect that I do not understand? It has been suggested to us that common land can be registered on a voluntary basis—as I think you have acknowledged—by a property owner in the community. If it was registered voluntarily, and was given some sort of shared title, would that change its nature as common land? In other words, if one such property owner sold their house and moved away, would they retain part of the shared title to what had previously been the common land, or would the title continue to be attached to the property that they had owned? Would it continue to persist as common land owned by the property owners in that area?

Andy Wightman: Some of the law is not clear on that but, in general terms, parish commons—which became commonties—are owned by all the property owners in the parish. If you move away and have no interest in the parish any longer, you lose any interest in that particular piece of land.

Patrick Harvie: But if it had been registered on a voluntary basis and given title, would that change its nature as common land?

Andy Wightman: No, as long as the title was vested in the appropriate organisation or body. For a parish common, the ideal entry in the title would be, "the residents of the parish", but conveyancers will not like that. Historically, the appropriate body would have been the parish council, but we abolished those councils in 1929. There are real problems in how those titles are registered; I do not dispute that.

I am involved in a case at present in which a local development trust is bidding to hold title to a piece of land. I am saying to the trust that the land really belongs to the whole parish and that, although the development trust is a community organisation, it is in effect a private organisation. It could wind itself up tomorrow, and if its name were on the title it could sell the land.

I am telling the trust that I want it to have a special general meeting and pass a resolution that it is taking on the title on behalf of members of the parish, and that the land will never be sold without consent and so on. In other words, I am telling it to use administrative procedures to embed the property within the common ownership of the people of the parish.

Patrick Harvie: In short, there needs to be something more specific than simply the option for a local property owner to apply for a voluntary registration.

Andy Wightman: Yes, the procedure needs to be thought about. In my written evidence, I suggest that the property owners are the people who could initiate registration but that their name would not appear on the title—and some work needs to be done to determine exactly whose name would appear on the title. The main purpose is to provide some protective status for that land to exempt it from hostile challenge.

Stuart McMillan: My question follows on from that. Let us imagine that an individual submitted a registration but did not put in any specifics as to what would happen to the land in the future. That individual might be genuine and want to ensure that the land was kept for the community in the future, but if something happened and they died suddenly, their son or daughter would inherit the land. If they did not have the same community belief that their father or mother had, could they sell the land?

Andy Wightman: No. The title would never be taken by a private individual or a group of individuals.

Stuart McMillan: That was Patrick Harvie's question.

Andy Wightman: Such people would be entitled to lodge an application to register 6 acres in the parish of wherever as common land. They would be able to initiate the procedure, but the title would reflect the fact that it was common land.

The keeper could then perhaps have the discretion to admit a local development trust or, indeed, the local authority to have its name on the title, but that is a separate question to which further thought needs to be given.

No private individual would be able to transact. The whole point of the procedure is to put protective orders around pieces of land that are historically common and which have been prey to hostile takeover bids by individuals, often neighbours.

The Convener: Thank you. We have one more area to cover—disclosure of beneficial interest. I thank Mr Little and Mr Langlands for their patience. You have been very quiet, gentlemen. Please feel free to chip in if there are any issues on which you want to express a view.

John Park (Mid Scotland and Fife) (Lab): You beat me to the punch on that, convener. I was going to ask whether the witnesses wanted to say anything on this question. However, I will first ask Mr Wightman specifically about something in his written submission.

Mr Wightman, you state:

"My proposal is simply to make it incompetent to register title to land in Scotland's Land Register in any legal entity not registered in a member state of the EU. This provides compliance with Treaty of Rome obligations and means that any US or Japanese company that wishes to buy land and build a factory can happily do so—they simply need to set up an EU entity to do it."

What, if anything, could we do in the bill to encourage wider disclosure—not just the names of the owners but the beneficial interests that may lie behind their organisation, such as a pension fund?

Andy Wightman: You could do what you liked—that is the short answer.

That issue was behind Andrew Edwards's concerns in the quinquennial review of the Land Registry in England and Wales, to which I allude in my written submission. The recommendation never went anywhere. The quinquennial review of the Land Registry was put before the UK Parliament, but it chose to take no action on that recommendation. I do not know why—that was six or seven years ago.

The basis of the recommendation was that we need more transparency about who really owns the land. As the Law Commission made clear and as I suggest, we already know that: Hanky-Panky Properties in Tortola, in the British Virgin Islands, owns the land—end of story. The problem is that we do not know who those people are. We could tackle that by saying that there needs to be a disclosure of the beneficial owners, but the beneficial owners of the property may just be Hanky-Panky Properties in Panama. The chain can be endless and can change within 48 hours.

11:30

Companies law requires that the ultimate controlling interest is admitted in the registration of the company and the annual form that is required to be submitted. Therefore, I think that it would be much easier simply to exclude legal entities that have zero transparency from the Scottish land register completely. If someone wants to find out who is behind any company, they can go to the relevant company registration in France, Germany, the Netherlands or the United Kingdom, where they can find a vastly greater amount of information than they can if all they see is an entry that says, "Hanky-Panky Properties".

John Park: Some might argue that the proposal would limit potential inward investment from outwith the European Union or from companies that are not registered in the way that you describe. First, what would you say in response to that? Secondly, do you know of any examples of EU countries that have systems that enable greater transparency, and are you aware of any impact that that has had on potential investors?

Andy Wightman: On your second question, I am not aware of any such examples.

On your first question, I do not think that it is a disincentive at all. Even my friend the golf developer, to whom I referred earlier, set up a Scottish registered company. I have no doubt that Amazon in Dunfermline, Mitsubishi and all the other inward investors have companies that are registered in the UK or elsewhere in the EU.

Patrick Harvie: Not if they want to avoid corporation tax.

Andy Wightman: It would be unusual for a multinational company in Japan, Brazil, South Africa or the US to invest in France or the UK and not set up a subsidiary. That is the way that they do things. I therefore do not think that the proposal is a disincentive; the situation is normal for those companies.

I am seeking to exclude the people about whose motives we are uncertain, such as the people who have just bought the National Trust for Scotland's former headquarters in Charlotte Square, as well as half of the square itself. We do not have a clue who they are.

As Andrew Edwards has highlighted, a lot of money laundering and proceeds of crime go through property. I think that legislators have a public duty to ensure that their land registry—whether it be in England and Wales or in Scotland—provides a level of information whereby criminal prosecutors, the police, Her Majesty's Revenue and Customs and so on can find out some information about such people. At the moment, they are faced with a blank wall.

John Wilson: I have a general question. Earlier, Mr Wightman talked about some of the issues that are not addressed by the bill. Part of the role of this committee is to examine the bill and identify any shortcomings or flaws. Is there anything in the bill that our panel members would like to be tightened up, added to or taken out?

Iain Langlands: Yes. The bill addresses some issues of ultimate responsibility. There is talk in the supporting documents of the keeper's one-shot principle. There is a recurring problem in current practice, in that each of the various professions that are involved in getting from a survey to a registered title are sometimes guilty of thinking that one of the other professions is responsible for the end product. Although the keeper has the ultimate responsibility for what is registered, in this country we do not have a cadastral surveying system—we do not have licensed or registered surveyors—and there is no proposal to go that way.

Part of the issue with regard to conflicts and boundary disputes is the poor quality of the survey information that has been presented to the registers in the past. Therefore, the committee might wish to consider whether the responsibilities for all professions that are associated with the registration process are clear, or whether you want the responsibility to lie ultimately with the keeper, with all of the resource implications and delays that would be consequential to that.

Graham Little: The bill is fairly clear about the issue of new build, such as housing developments on brownfield sites and greenfield sites, but there is an issue of interpretation. Clearly, those projects involve a process that includes initial planning, provisional planning, planning approval and so on before the concept is eventually translated on to the ground, through a setting-out process. If that setting-out process is not done with sufficient precision and accuracy, the houses, roads and infrastructure might not end up in the place that they were intended. That could mean that, when the Ordnance Survey comes along and does an as-built survey, which records what is on the ground, there could be a discrepancy between what was planned and what was built and therefore shown on the Ordnance Survey map.

That is a difficulty. Which entity defines the legal title? Is it the plan or is it the as-built situation? The bill addresses that, but it is an on-going issue, as there is no validation process in place at the moment that says that the design has been faithfully replicated on the ground and that, therefore, the plan that was approved is effectively the legal title. The bill does not contain that validation, but the situation that I described can cause considerable difficulties, even to the extent of houses being built on land that the builder does not own.

That is not necessarily a comment about a deficiency in the bill; it is more about how the bill would be applied and the associated processes.

The Convener: I thank our witnesses. This has been a long session, but it has also been extremely helpful.

11:36

Meeting suspended.

11:44

On resuming—

The Convener: I welcome to the meeting our second panel: Richard Blake, legal adviser from Scottish Land & Estates Ltd, and Tom Axford, corporate secretary and head of legal at Scottish Water. Does either of you wish to comment on the previous panel's evidence before we move to questions?

Richard Blake (Scottish Land & Estates Ltd): Convener, I came in very late from another committee, so I did not catch very much. I have nothing in particular to say about common land.

The Convener: We covered a few areas before you arrived, Mr Blake, including the accuracy of maps, the quite vexed question of the completion of the register, the potential for and consequences of keeper-induced registration and, perhaps most important, who will pay the costs. Does either of you have any views on those issues?

Richard Blake: We are aware of issues with the accuracy of mapping, particularly in relation to rural property—which is obviously where I am coming from—but we are pretty comfortable with moves in that respect. My understanding is that the Registers of Scotland, the Law Society of Scotland and RICS Scotland have set up a working party to try to work out the best way forward.

The accuracy of mapping is certainly a problem. Where, for example, a dyke has been used as a march between two bits of land and, for convenience, fencing has been erected on one side or the other, the fence rather than the actual march wall will probably come out as the boundary. Moreover, discrepancies might arise where, as a result of European subsidy requirements, fencing around water margins might be erected several metres—indeed, probably tens of metres—back from the centre line of a burn or river. Practical issues need to be addressed, but I am confident that the RICS and the Law Society will do that.

The main issue for us is probably keeper-induced registration. Shall I set out my concerns at this stage or in questioning?

The Convener: Do it now. There are other issues that we want to cover but, as I raised that particular matter, we should just get into it.

Richard Blake: We address the issue in our written evidence. I am not sure whether you have seen the private draft that the clerk circulated yesterday—

The Convener: I think that we have.

Richard Blake: My understanding is that the section in question gives the keeper the ability to register the land without an application from or the consent of the landowner. Although it appears that because it is keeper induced the registration would not attract an application fee and that the keeper will rely on information that is registered either in the land register or the register of sasines, we feel that there will inevitably be significant costs to landowners when keeper-induced registrations are introduced.

It is at the moment sound professional practice in rural first registrations, when the land certificate comes back, for the lawyer to check the certificate's wording and the map's accuracy. Problems arise with estates and their significant hectarages, particularly where there have been what, as a lawyer, I would call break-offs or complex splits from the title—where, say, plots of land have been sold off over the years. For example, in an estate in East Lothian that I was involved with, there were 13 very thick bound copies of split-off documents from the 18th century.

We are talking about lawyers and land agents spending quite a lot of time checking what the keeper has done without any interaction with the landowner or the landowner's representatives. As a result, whatever the keeper does by way of issuing a land certificate, the professional advisers and the landowner will still have to do a lot of work.

Moreover, what happens when the land certificate goes back? As far as I can see, the bill neither says anything about when the keeper has to inform a landowner that a keeper-induced registration has taken effect, nor sets out the period for raising what we might call an objection or appeal against the certificate as issued. Will the keeper be under an obligation to deal with any queries that the landowner makes after a keeper-induced first registration certificate has been issued? All those practical issues need to be seriously addressed.

As far as we can see, the financial memorandum makes no mention that any expense that is incurred by landowners will be met by the keeper. We are concerned that what seems to us to be a unilateral action by the keeper, which is a non-ministerial department of the Scottish Administration, might lead to costs being incurred by the large estates. We have been assured by the minister and the keeper that it is not the intention of the keeper to bring on what would be called the large estates for decades, but it seems to me that the bill's stated intention is to complete the register. We are supportive of that—we have no problem, in principle, with getting Scotland mapped and registered. We think that that is a good thing for everyone, but it needs to be done in a sensible way, which we hope will involve a dialogue at an earlier stage.

The Convener: That was a very interesting response because, up until now, our discussion has been about the fee that might be charged for a keeper-induced registration and whether a fee would be appropriate. You have raised a different dimension, which is that, quite apart from the issue of any fee that might be charged, the amount of time and work that agents acting on behalf of landowners would have to put in to ensure that the work that the keeper had done was correct could give rise to a substantial cost.

Richard Blake: That is right. As far as fees are concerned, the encouragement of voluntary first registration is a different issue. I am talking about landowners being encouraged to get some blocks of land registered before the keeper feels that it is necessary to induce first registration. I suspect that that is an area in which there might be discussion about an application fee and whether encouragement should be given. I think that that is the case in England and Wales, where the fee for application for voluntary first registration is pretty low, to encourage people to get land on to the register.

It is certainly my understanding that, if registration is keeper induced, there is nothing to say that a fee will be charged. That is probably right because, in such a case, an application would not be involved.

The Convener: Scottish Water is a major landowner. Do you have a view on the issue, Mr Axford?

Tom Axford (Scottish Water): We do. We are moving to voluntary first registration for selected key sites. At the moment, the issue with that is the fees and costs that are involved, which we need to balance up.

I agree with what has been said about keeper-induced registration. I would be concerned about the impact that it would have on resources. I spoke to one of the water companies in England, where they have moved to voluntary registration.

That is involving a considerable amount of resource, but the application cost that the company had to pay was very low.

We support the aim of getting Scotland on to the land register, but we suggest that we still have a way to go. We should probably look at the fee levels for voluntary first registration before we move to implementation.

The Convener: As no other member wants to come in at this point, I will continue.

One of the proposals in the bill is to increase the number of trigger points for first registration. For example, first registration will be induced when a standard security is granted. Does anyone have a view on that? Is it a beneficial change?

Richard Blake: I have no particular comments on the technical side of that, but I do have some issues with registrable leases being a trigger point. Would you like me to expand on those?

The Convener: Please do.

Richard Blake: I have just come from giving evidence to the Rural Affairs, Climate Change and Environment Committee on the Agricultural Holdings (Amendment) (Scotland) Bill. I made the point to that committee that there is a crossover between the two bills, given that the current Administration is trying to encourage the entering into of more leases of agricultural land. Under the Land Registration etc (Scotland) Bill, we will face a situation in which the relatively new limited duration tenancy, if it is for more than 20 years, will induce a first registration, which will incur more costs for landlords and, perhaps more important, tenants. That might serve as an inducement to ensure that the leases are for a shorter period, to avoid registration, which could defeat another stated policy of the current Administration. I flag that up.

Another issue, which is really more practical, is that section 51(2) of the Land Registration etc (Scotland) Bill requires registration of anything

"otherwise altering the terms of the lease."

We would like clarification of that in relation to the requirements in the Agricultural Holdings (Amendment) (Scotland) Bill, because that very wide statement seems to imply that any correspondence between a land agent and a tenant, rent review memoranda and possibly even Scottish Land Court and Court of Session decisions might have to be registered in the land register. I am not sure whether that is the intention; it would add to the general clutter on the land certificate, possibly unnecessarily.

The Convener: Does Mr Axford want to add anything?

Tom Axford: No.

The Convener: You concur with what has been said.

I will ask you about an interesting point on the acquisition of land by others in Scottish Water's submission. You have particular concerns about the realignment provisions in part 6. Will you elaborate on that?

Tom Axford: About four or five times in the past 10 years, titles have been taken to assets that we own. Under the existing procedure, we have generally found that the keeper has been co-operative. We have looked at fraud or carelessness on the part of the proprietor in possession and we have managed to rectify the situation and acquire a couple of the titles back.

The bill will improve the situation. Currently, people have a remedy only against the first purchaser who acquires the invalid title. Under the bill, people will have rights against the first purchaser and, once that purchaser transfers the title, a right will apply for a year, which will cover occupancy by the first and second acquirers. Our concern is that that period is quite short for landowners of major areas of land across Scotland, including us, particularly if we are talking about transfers of access roads, which are difficult to ascertain—we have had to deal with that. The registration process can also take six to nine months to be completed.

Richard Blake: I confirm that the general concern of landowners—whether they are small or large—is that the provisions could chip away at the fringes of landholdings. Such transfers are difficult to ascertain, particularly in larger landholdings, unless landowners have adequate resources. The point applies particularly to large estates, which might be predominantly rural but lie on the fringes of urban or village populations, which might have taken gardens a little further than titles allow.

The Convener: Is it not the case that the bill offers better protection than the current law provides?

Richard Blake: Yes, but the issue is whether a year will be long enough.

Rhoda Grant: I will ask about the fraudulent acquisition of land under prescription. How do you differentiate somebody who had worked the land and who, because there are huge tracts of land, genuinely believed that they and not Scottish Water owned it from somebody who thought that they would have a land grab because Scottish Water was a huge organisation that had not visited the land in the past 10 years and was unlikely to pitch up in the next few weeks? If you have encountered that, how did you tackle and rectify the situation?

Tom Axford: We have tried to avoid any suggestion of fraud, because fraud is difficult to prove, as you will know. In the cases that we have had, we have looked at the wording on carelessness. We have looked at the process that the solicitor who registered the title undertook—they might have made a statement that the land had been occupied by the other party or they might not have looked at the surrounding titles.

In cases where we have gone to the Lands Tribunal we have pursued it on that basis, because, evidentially, fraud is very hard to prove other than in extreme cases. There is a famous case involving a husband and wife forging signatures, but in general fraud is quite hard to ascertain.

12:00

Rhoda Grant: Is that because of the way that the law is currently written, whereby prescription is allowed, and it is therefore very hard to prove whether someone is acting within the law or using the law for illegal purposes?

Tom Axford: Under the existing regime, it is hard to understand or to prove someone's motive when one looks at what they have done and whether it was careless or prudent. The new legislation tightens that up through the requirements on what must be submitted as part of an application.

The Convener: You may have caught some of the evidence about prescriptive acquisition that we heard from Andy Wightman on the previous panel; if not, you may be familiar with his views from elsewhere. In general terms, are you content with the principle of prescriptive acquisition? Are the threshold provisions and time limits in the bill correct and, if not, how would you change them? What is your view on Mr Wightman's proposal that if there is no clear owner of land it should be advertised and sold by auction, instead of allowing for the alternative of acquisition by prescription?

Richard Blake: I have no specific comments on the technical wording of the bill in that relation, as that is not a matter that we have looked at in much detail.

The advertising of land is an interesting area. We have a member who has recently been trying to establish whether he owns an area of woodland that sits within a village. The title goes back to 17-something; one is lucky if something from those days is in English and there will certainly be no plan. Nobody can find any evidence that the land was, or was not, part of the estate. The alternative in such a situation, if all other avenues have been exhausted, could be to find out whether the community might be interested in it. In this particular case, the community is not interested because of the liabilities that might attach to the timber. However, it is an interesting concept.

Tom Axford: The current system gives the keeper discretion in relation to a non domino dispositions. We have registered a couple of those and had to go through a fairly exhaustive process. I question whether advertisement would be necessary, given the increased checks and balances that are going into the system. We often find that interesting situations arise. There is part of a housing development where, in effect, 100 shares in one of our pumping stations are owned by the proprietors in common and there is a question as to whether they would want to be consulted on whether we acquire what they probably consider to be a liability.

Patrick Harvie: I imagine that for Scottish Water prescriptive acquisition might cut both ways—that sometimes Scottish Water would pursue it and sometimes Scottish Water would be pursued against regarding land in which it might wish to register an interest. Could it not reasonably be argued that when those situations arise, other parties should, instead of remaining in the dark, have an opportunity to express their interest? If the matter is resolved through an auction or by the Lands Tribunal, that might provide opportunities for a better resolution of the situation.

Tom Axford: A corollary to that is that, under existing legislation, if we want to serve notice to lay infrastructure, there is a procedure whereby we attach a notice to the land if we cannot trace the owner. There is a precedent in legislation for that type of approach should the Parliament be minded to adopt that.

Patrick Harvie: Thank you.

Mike MacKenzie: I have a question for Mr Blake. At the beginning of your remarks, you mentioned the problems of accurately defining boundaries and so on, but surely modern surveying techniques such as GPS make it easier to survey things very accurately. For a title in which a lot of individual plots have been sold over the years, do you envisage the greater accuracy of surveying and the less accurate Ordnance Survey map leading to problems, disputes and legal conflicts? Would that be of concern to your members?

Richard Blake: Yes, it could be. I was at a meeting with the bill team in 2011 with four experienced rural conveyancers, one of whom indicated that one of the estates that he looks after has on its fringes towns and villages in which 100 or 1,000 gardens might abut the estate. Some of those titles would have plans that were probably drawn originally by the estate surveyor and that might be quite accurate but, when it came to first registration, they would have gone on to the land

register mapping system. There are often inconsistencies in that because in the old days the thickness of the red-pen line for the boundary could have been the equivalent of 10ft. I am sure that the convener will be aware of that.

Going through my mind when you asked the question was an experience of first registration that I had up in highland Perthshire. There was a section round a village, but that got sorted out. The main problem was up in the north-west corner of the estate where the boundary was in the middle of a steep rock face. There were mark stones at both ends, but the fence had obviously been taken round the top of the cliff to prevent the stock from going over. That is an example of a commonsense situation that has to be sorted either by what is known as a section 19 agreement as to what the common boundary is, or by an exchange of land—an excambion.

Generally, a practical problem that has been resolved over the centuries by landed estates will get sorted—because it is a practical issue. However, where there is more detail around villages and towns, there could well be problems with the mapping tying in.

Mike MacKenzie: Would it be true to say that those problems would come to light as a result of a first registration process and that they may have hitherto been unnoticed?

Richard Blake: Yes, that is probably right and that leads me on to my concerns about keeper-induced registration, because the keeper will be going on information held in the registers and not information held in the estate office or the farm office. That is quite often where the discrepancy will sit.

The Convener: As members have no further questions, I thank our witnesses for their time this morning and for coming along. It has been very helpful.

12:08

Meeting continued in private until 12:36.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice to SPICe.

Members who wish to suggest corrections for the revised e-format edition should e-mail them to official.report@scottish.parliament.uk or send a marked-up printout to the Official Report, Room T2.20.

Available in e-format only. Printed Scottish Parliament documentation is published in Edinburgh by RR Donnelley and is available from:

All documents are available on
the Scottish Parliament website at:

www.scottish.parliament.uk

For details of documents available to
order in hard copy format, please contact:
APS Scottish Parliament Publications on 0131 629 9941.

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@scottish.parliament.uk

e-format first available
ISBN 978-1-4061-8161-6

Revised e-format available
ISBN 978-1-4061-8173-9

Printed in Scotland by APS Group Scotland