

POW OF INCHAFFRAY DRAINAGE COMMISSION (SCOTLAND) BILL

Written evidence received by the Law Society of Scotland

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Property and Land Law Reform Sub-committee and Rural Affairs Sub-committee welcome the opportunity to consider the Pow of Inchaffray Drainage Commission (Scotland) Bill and provide our views to the Pow of Inchaffray Drainage Commission (Scotland) Bill Committee. The Sub-committees have the following comments to put forward for consideration.

Comments

Opening remarks

We consider that the constitution of the Pow of Inchaffray Drainage Commission is a matter for the parties directly affected. The Commissioners should be commended for seeking to modernise the existing arrangements.

However, we would like to offer the following general legal observations which we hope will be helpful in consideration of the bill from a practical perspective.

Apportionment of charges

One further issue to consider is the apportionment of charges and whether responsibility for payment of charges dated on or prior to conclusion of missives should remain with the seller (in the same way as responsibility for payment of local authority or public body notices or orders under SSC version 2 condition 6.1). A further question arises in the context of an executry as to whether the executors would be regarded as "owners" (and therefore heritors) in terms of the act. The same principle would apply to heritable creditors in possession/trustees in sequestration.

Purchaser awareness

While we note that the Commission has been in existence for a substantial period of time and as a principle of law, what appears in statute is deemed to be known, in practice this may not be sufficient to ensure awareness on the part of potential purchasers.

We note that the obligation to pay the Commissioners would not appear on the Land Register. From the perspective of a purchaser or prospective purchaser of land affected, there is therefore a question as to whether or how they might know of the obligation to pay unless the seller chooses to inform them of it.

The obligation is not to be noted in the Land Register. This seems to be the correct approach as we do not consider that the obligation to pay would fall within the scope of a servitude/burden-type situation as no real rights are being created under the bill. It might, however, be possible for the Act to specifically stipulate that it be registered, bringing it within the scope of an “encumbrance” under section 9(1)(f) of the Land Registration (Scotland) Act 2012 and in turn ensuring disclosure to purchasers or prospective purchasers.

In legal terms the fees would be analogous to e.g. water rates or council tax but they are more unusual. Although local knowledge on the part of the purchaser’s solicitor might, in practice, mean that the purchaser is alerted to the existence of the Commission, this would not necessarily be the case.

Indeed as it is a highly unusual arrangement and particular to a very localised area, unless a solicitor or other conveyancing professional had specific local knowledge or experience of the matter they would not normally check for this kind of obligation when providing a competent service on behalf of the purchaser. Nor would the obligation necessarily be covered under generic apportionment terms in standard missives without a specific clause being introduced, thereby potentially leaving a purchaser exposed to an unexpected cost.

This is also the kind of information which many practitioners might expect to be noted in sales particulars. Similarly, the clauses in the property questionnaire section of the Home Report may be of some limited assistance. The most equitable solution may be to impose a specific obligation to include details of the Commission and attached charges in the Home Report.

Collection of charges

While details are given as to how costs are to be calculated, no mechanism for collection of the charges is specified. This could create practical problems as the Commission would be unable to carry out certain projects without funds and at the same time individuals may have neither the inclination nor the power to ensure that payments are made. This could be resolved by an additional provision in the bill granting powers/imposing an obligation to enforce payment of the charges.

Property Factors (Scotland) Act 2011

Consider whether the Commission would or should indeed be required to register in line with the attached Guide. This is a public register and registration would have the advantage of alerting people to the Commission's existence and the properties and lands affected.

PROPERTY FACTORS (SCOTLAND) ACT 2011

FREQUENTLY ASKED QUESTIONS

August 2012

Jointly Prepared by:

Association of Local Authority Chief Housing Officers
TC Young,
Harper Macleod LLP
Scottish Government
And representatives from the Local Authority and RSL sector

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Background

All remaining provisions of the **Property Factors (Scotland) Act 2011** (the “Act”) will come into force on 1 October 2012. The Act’s main aim is to create a statutory framework to provide protection for homeowners in Scotland who receive services from a property factor.

The Act covers all organisations offering residential property and land management services including private sector businesses, local authorities and housing associations.

A copy of the Act can be found at: <http://www.legislation.gov.uk/asp/2011/8/contents>

Frequently Asked Questions

Further to a range of questions and areas of clarification raised by stakeholders, a short life informal working group was convened to consider some of the common concerns, predominantly from social sector organisations. Membership of the group was drawn from:

| | |
|------------------|--|
| Jim Hayton | Association of Local Authority Chief Housing Officers (ALACHO) |
| Lorraine Nolan | North Lanarkshire Council |
| Karen Moore | South Lanarkshire Council. |
| Donalda Hogg | Queens Cross Factoring Ltd |
| Alison McDiarmid | GHA/Your Place |
| Derek Hogg | Harper Macleod LLP |
| Christine Stuart | TC Young solicitors |
| Gordon Paterson | Scottish Government |
| Graham Fisher | Scottish Government |

The group have discussed queries raised, under 4 main headings: *Am I a Property Factor; Property Types; Registration as a Property Factor; and Homeowner Housing Panel Complaints.*

Disclaimer

This note is intended for guidance purposes only and is not a substitute for formal legal advice.

This note does not contain legal advice. It should not be relied on as authoritative — the Property Factors (Scotland) Act is law as passed by the Scottish Parliament and it is for the courts to interpret the law. The broad range of title deeds and circumstances in terms of co-ownership, maintenance of common parts, property management arrangements, service contracts etc mean that two situations are rarely alike. You should consider seeking legal advice if you are in doubt on the role that you play and your relationship with the homeowner. It is not possible to provide guidance that will apply to all cases.

PART ONE: AM I A PROPERTY FACTOR?

The definition of “property factor” in the Act is broad in the sense that it does not relate only to where a fee is charged for work undertaken. It is up to each individual and organisation concerned with property management to form their own view on whether or not their property management activities fall within the scope of the Act and if the Act applies to them.

Section 2 of the Act defines “property factor”. It covers private businesses, local authorities and housing associations which manage or maintain land which is either: (a) owned by two or more other persons (or, in the case of land owned by a local authority or a housing association, by them and one other person) for residential purposes or (b) made available for use by neighbouring residential properties who are bound by their title deeds to pay for managing or maintaining the land.

However, any fee charged may be relevant to whether a private person is a business caught by the Act.

In other contexts, courts have found that a **business** involves a certain degree of continuity and substance in relation to services supplied, and that the marks of business activity include that it is “regular, conducted on sound and recognised business principles, with a structure which can be recognised as providing a familiar constitutional mechanism for carrying on a commercial undertaking, and it has as its declared purpose the provision of...services which are of a type provided and exchanged in course of everyday life and commerce.”

Written statement of authority

Neither the Act nor the Property Factors Code of Conduct, with which all registered property factors must comply, directly require any proof of authority to factor. However, the Code of Conduct requires property factors to tell homeowners, by means of a written statement, what the basis of their factoring arrangement is: “*a statement of any authority you have to act on behalf of all the homeowners in the group*” (s.1A(a) of the Code).

Neither the Act nor the Code of Conduct provides that one type of arrangement is acceptable and another unacceptable. The statement is simply an up-front declaration of what the nature of the arrangement actually is. Furthermore, the Act does not alter the existing legislation which covers the mechanisms for appointment or dismissal of factors, nor does it change the status of title deeds. It is about transparency and confirmation of the agreement between the factor and the homeowner to whom the factoring service is provided.

Whether you are a property factor within the meaning of the Act will depend on individual circumstances.

3 Management Scenarios

The following three management scenarios are designed to help you decide if you are a property factor in terms of the Act

A **Where a managerial burden exists within the title deeds for a group of properties, identifying you/your organisation as having a maintenance or management role**

In these circumstances, then provided that some element of maintenance or management is undertaken, you are likely to be the property factor for the purposes of the Act and so will be required to register in relation to these properties.

Even where service provision is infrequent or you only undertake works on an ad hoc or reactive basis, this will not necessarily excuse you of the role of property factor. If, however, you do not actually manage the property even though you have been identified in the title deeds as performing that role, then it is unlikely that you will be the property factor for the purposes of the Act. Similarly, if you are a private person and you do not carry on factoring as a business, then you will not be a property factor.

If you are identified in the title deeds as having a maintenance or management role, but someone else undertakes management or maintenance work on your behalf or in accordance with your instructions, you are still likely to be the property factor in respect of that property in terms of the Act. If you think another person is acting as property factor, that person may also be a factor in terms of the Act, and you both need to clarify the relationship between you and the homeowners.

B **Where title deeds are silent but you have been undertaking the work of property factor**

It may be that you have been managing properties, notwithstanding that the title deeds of the properties concerned say nothing explicitly about you doing this.

If you have an alternative contractual agreement with the homeowner to act as the property factor you are likely to be a factor for the purposes of the Act and so will be required to register your role in relation to the relevant properties.

Alternatively, you may have no contract in place with the homeowners and you have been undertaking the work by way of “custom and practice” (i.e. that you have been managing and maintaining properties for a period of time without having any express authorisation in the titles or by way of a contract to do so – perhaps you have been doing this because you have a number of tenants who have an obligation to ensure that common parts of a building are kept in a good state of repair) and plan to continue this role.

Either way, if you are a property factor this needs to be declared in the written statement.

Even in the latter case, you will still be acting as a property factor. The written statement will bring this to the attention of the homeowner(s) who were not previously aware of the basis of the arrangement. This may lead to a dialogue with them about your role and may provide the opportunity to review the relationship and services provided. If desired by all parties, you may then wish to move the relationship on to a more formal footing.

The outcome of stipulating “custom and practice” in the written statement as being the legal basis for you acting as property factor is therefore one which factoring organisations may wish to give further thought to, before issuing written statements on this basis. Are there a number of homeowners from whom you would expect challenge, if they appreciate the basis on which you provide services? If the role is challenged by a homeowner, you will need to be prepared to appropriately consider the case, including through your own complaints procedure if necessary.

Regardless of whether the factoring arrangement is based on “custom and practice” or some other basis, if you intend to continue to undertake a factoring role it is likely that you will require to register your role in relation to the properties concerned. You may wish to use the coming into force of the Act to put in place a schedule for reviewing the relationships that exist and the work undertaken with each homeowner.

C Where you have been acting because you are majority owner

As majority owner within a group of properties you do not necessarily have an automatic right to operate as the property factor. However, by way of the Tenement Management Scheme set out in schedule 1 to the Tenements (Scotland) Act 2004, you may control the majority vote required to assume the role of property factor for the group of properties if you wish to assume this role, subject to consulting with the each of the other owners of flats in the larger building.

If you undertake factoring activities based upon this relationship, and you are acting in the course of your business or as a local authority or housing association, it is likely that you will require to register your role as property factor in relation to the properties concerned.

The flow chart below is designed to help you to consider further the role that you are undertaking.

Note: *The flow chart is of particular relevance to local authorities and housing associations only.*

Flow Chart 1: Do I Factor Particular Properties

[This is illustrative only and regard must be had to the legislation.]

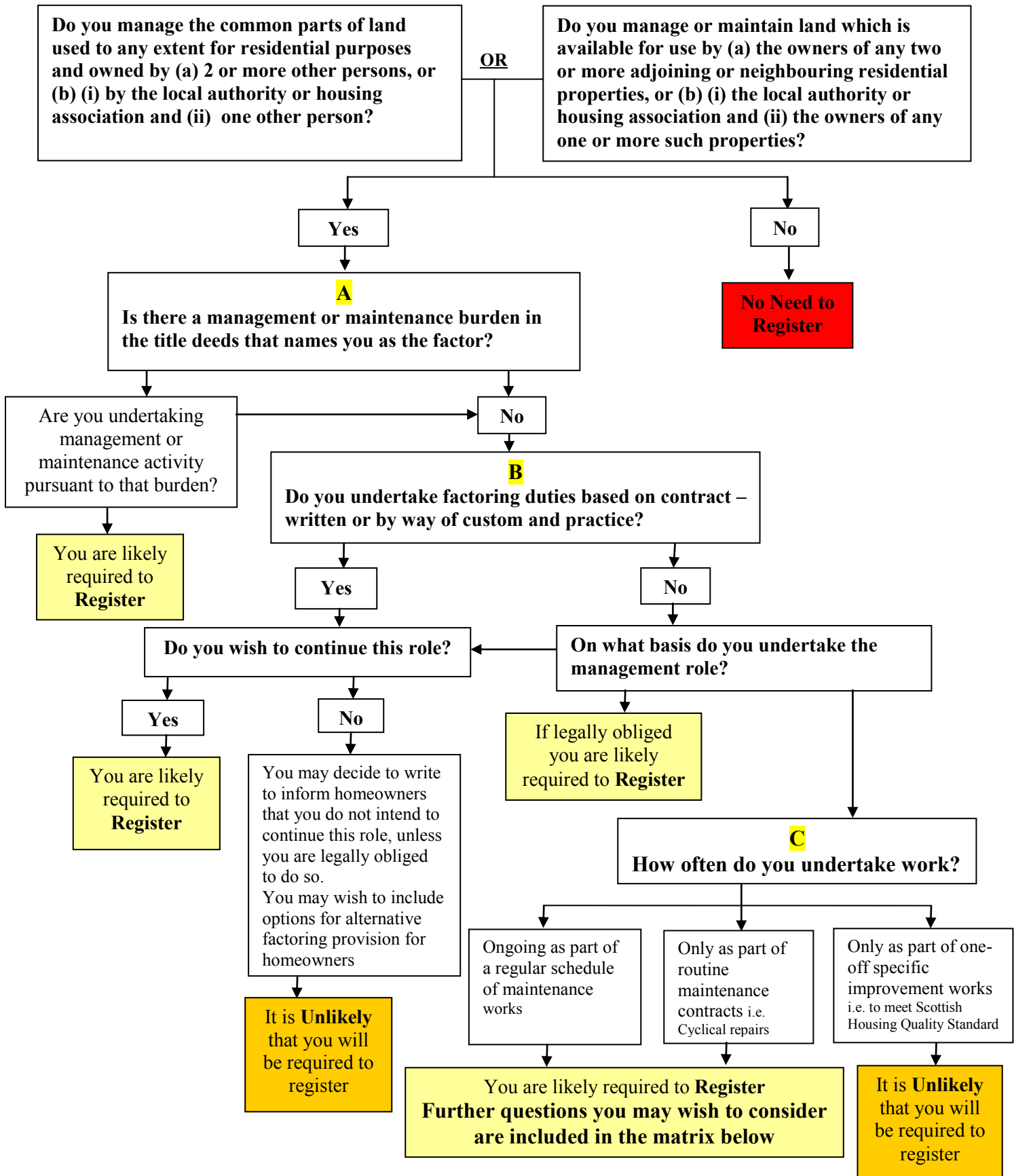


Table 1: Do I Factor Particular Properties

| Do I factor particular properties? <i>(Local authorities and housing associations only)</i> | Considerations | Outcome |
|---|---|--|
| Are you the only operating factor? | <p>If there is another person managing the properties in question, what is that person's relationship to you?</p> <p>What is your relationship with the homeowners?</p> | <p>You will need to clarify the respective relationships and the basis upon which you are undertaking the work. Regardless of the formality of the relationship, unless the other person has a clear entitlement to manage the properties and is not doing so on your behalf (ie as your agent) it is LIKELY that you will need to register as property factor for the properties concerned.</p> |
| Are you the majority owner? | <p>If you are undertaking factoring duties you may have the right to do that under the Tenement Management Scheme. However you do not necessarily have an automatic right to act on this basis.</p> | <p>If operating in relation to the Tenement Management Scheme it is LIKELY that you will be required to register for the properties concerned.</p> <p>If the relationship is not clear you will require to confirm the agreement in place with the owners and you may need to negotiate/ vote to confirm the formalisation of the role.</p> |
| How often do you undertake works? | <p>Do you regularly maintain common property or communal areas and provide a service to maintain the everyday use of the properties/areas?</p> <p>Do you only undertake maintenance work when significant large scale repairs are required?</p> | <p>If regularly (e.g. more than once per year) it is LIKELY that you will need to register for the properties concerned. However the Act does not refer to regular management or maintenance, and so frequency and regularity will depend upon specific circumstances. You may wish to seek legal advice in particular if there is any ambiguity.</p> <p>If you only undertake repairs and maintenance on a very infrequent basis e.g. once within a 5 or 10 year period and with no set programme, you may not be required to register. However, this may be dependent upon the titles and any contractual relationship that you have with the homeowners of the properties concerned.</p> |
| Do you provide a reactionary service to issues raised by homeowners? | <p>Do you provide a telephone number or contact details which homeowners can use to contact you to arrange for repairs or maintenance to take place, which you then carry out?</p> | <p>If this is the case, it is LIKELY that you will require to register for the properties concerned.</p> |

Risk and Consequences

It is recognised that it may be a sizeable task to review the title deeds of each of the properties to which a local authority or housing association may act as a property factor. Equally there is limited time in which to liaise with all homeowners in advance of the 1 October 2012.

Many managers will already be familiar with the property they factor, but it may be of benefit to consult title deeds where necessary to:

- (a) be clear on the basis of your relationship with homeowners; and
- (b) determine the proportions of the costs payable by the various homeowners in respect of the work undertaken by you.

If time does not allow for dialogue ahead of 1 October, it may be prudent to put in place a programme for formalising the basis of your relationship with homeowners where appropriate.

Whilst the Act is intended to regulate the property factor industry, it does not remove the responsibility of homeowners to be familiar with their own title deeds. Homeowners may wish to compare the title deeds for their property to the details presented in the Written Statement of services provided by you as the property factor.

As such, if you are not in a position to review all title deeds fully ahead of issuing the Written Statements, you may wish to provide a cover note which invites homeowners to compare their details to those that you have presented and to get in touch if they identify any discrepancy. You could subsequently confirm the basis of the agreement in a written statement.

If you provide a statement that does not accurately represent the arrangement you have with the homeowner, it may be in your best interests to openly consider any response or complaint raised by the homeowner in accordance with your own complaints procedure. A clear and recorded review of the case and, where possible, any appropriate action taken to remedy the matter may avoid a referral of the dispute to the Homeowner Housing Panel.

PART 2: PROPERTY TYPES

Are there any specific property types excluded from registration?

No. No specific property types are excluded from the scope of the Act, unless they are entirely non-residential. If the Act does not apply to you, that will be because of the role and relationship you have with the homeowner and the work that you undertake.

What if I provide insurance to the properties?

In some instances you may provide or arrange for insurance to homeowners through a block policy. It will also be relevant what other management or maintenance is being provided, if any. However, organising a block policy might indicate that you manage the property to the extent that you may fall within the definition of property factor in the Act.

If you do provide common insurance, you may wish to confirm if there is another person who manages or maintains the properties.

A main principle of the Act and the Code of Conduct is one of transparency. The procurement of any insurance contract must fall in line with this principle. To do this it is important to be able to clearly demonstrate the valuation of the property insured and the costs associated with the insurance contract. If this can be clearly demonstrated, e.g. in the written statement of services etc, compliance with this aspect of the Code by registered property factors will be achieved.

Are statutory notices covered by the Act?

Statutory notices give local authorities various powers to serve notices on owners of buildings requiring work to be carried out to properties and to themselves carry out those works if the owners fail to do so, in terms of Chapter 5 of the Housing (Scotland) Act 2006 and, in relation to the City of Edinburgh, [section 24, 26, 27 or 28 of the City of Edinburgh District Council Order Confirmation Act 1991]

It is possible that a local authority which issues a statutory notice will also be a property factor in terms of section 2 of the Act in relation to a particular property. However, it is not considered that the use of statutory notices in the exercise of statutory functions **alone** is likely to constitute management for the purposes of the Act.

Are retail units on the ground floor of the block covered by the Act?

In accordance with section 10(5) of the Act, a “homeowner” means:

- “(a) an owner of land used to any extent for residential purposes the common parts of which are managed by a property factor, or
- (b) an owner of residential property adjoining or neighbouring land which is -
 - (i) managed or maintained by a property factor, and
 - (ii) available for use by the owner.”

On this basis, if you are maintaining a property that is primarily for residential use but includes business premises which also benefit from the factoring service that you provide e.g. cleaning of stairwells, and you are not clear if these business properties are covered by the Act. You may still have a property factoring relationship with the owners (including the commercial owners) in accordance with the Act and so you may wish to err on the side of caution by registering these properties under the Act.

PART 3: REGISTRATION AS A PROPERTY FACTOR

When will registration open?

The Register opened for applications on 30 July 2012. All completed applications must be submitted by 1 October 2012.

What does the registration process look like and how do I access it?

Registration can be completed online at. <http://www.scotland.gov.uk/Topics/Built-Environment/Housing/privateowners/propertyfactors/2011Act>

Each registering organisation will have one username and password that they will allow access to log onto the system.

Stage One – Organisation Details

Stage One in the registration process will require property factors to submit their organisation's contact details through the online registration process. This will include the organisation's name, address, telephone number, email address and if applicable, the organisation's Company Registration Number.

Stage Two – Portfolio of Property and Land; Responsible People; Fit and Proper Test

Once the initial account registration is accepted, **Stage Two** requires registering organisations to provide the application details of the houses, flats or land for which they act or expect to act as factor. Details of exactly what information must be supplied are available on the Scottish Government website.

This can be submitted onto the register through either:

- A bulk upload mechanism. This method may be preferable to organisations who have a large portfolio of customers. (*Guidance on the bulk upload process is available on the Scottish Government website*)
- Inputting the data directly onto the register. This method may be preferable to organisations with a small portfolio of customers or for organisations who do not already store this information electronically.

Registering organisations will also have to provide details of the responsible person (see definition in section 3(9) of the Act) and other relevant people whose details require to be provided (see section 3(2)(d) and section 3(8) of the Act), and confirm that those persons are fit and proper (see section 5(2) of the Act).

The **responsible person** will be:

- a sole trader
- (in any other case) the individual directly concerned with the control or governance of the property factor who holds the most senior position within the management structure of a partnership, company or body

The other **relevant people** may be:

- Any person directly concerned with the control or governance of the property factor; and
- Any person who owns 25% or more of the equity of a property factor business

Property factors will be issued with an invoice in relation to their registration fees which normally last for 3 years. The following fee levels apply:

- £100 registration fee - for property factors with a portfolio size of 100 or fewer properties*
- £370 registration fee - for property factors with a portfolio size of more than 100 properties**

*** As of 1 July 2015, this will rise to £200. This affects applications submitted on or after 1 July 2015.**

**** As of 1 July 2015, this will rise to £750. This affects applications submitted on or after 1 July 2015.**

Stage 3 – Approval by Scottish Ministers and Publication

Once all applications from registering property factors have been reviewed Scottish Ministers will take a decision under section 6 of the Act whether to enter a person onto the register. As soon as is practicable after doing so, notice will be served to the responsible person of the date of entry onto the register.

In accordance with section 1(2) of the Act the information collated on the register must be made publicly available. In order to meet this requirement, information relating to the name of the business and the properties to whom they are recorded as providing a service will be published on the Scottish Government website.

Stage 4 – Annual Confirmation of Portfolio of Properties and/or Land

At the end of financial years 1 and 2, each registered organisation must update or confirm that their current portfolio of property and/or land they maintain on behalf of their home owning customers is correct. Registered organisations have up to a maximum of 3 months after the end of the financial year to provide this information.

Stage 5 – Re-Registration (Every 3 Years)

At the end of the 3rd year of registration, property factors will have to re-register all their details for the forthcoming 3 years.

Who should sign the fit and proper declaration on behalf of social landlords?

In accordance with section 3(2)(c) of the Act, *“the individual who holds the most senior position within the management structure of the partnership, company or body which is (or is to be) directly concerned with the control or governance of the property factor”* should sign the registration application as the responsible person.

In the case of local authorities and housing associations, this is likely to be the Chief Executive, the Director or the most senior manager with main responsibility for the property factoring part of the organisation.

Can a homeowner withhold their property details from being published on the register?

It is a clear express requirement of the Act that this information must be included in the register—by virtue of sections 3(2)(e), 4(6) and 1(2). Accordingly, the homeowner cannot prevent you from including the address of their property in your application for registration.

Do all homeowners have to be informed that the details of their property (as listed under the management of the property factor) will be published?

There is no specific requirement within the Act or the statutory Code of Conduct that this should be undertaken. However, property factors may of course have duties under the Data Protection Act 1998 as data controllers.

A suitable privacy notice could be included in the written statements to be provided under the Act, as required by the Code.

PART 4: HOMEOWNER HOUSING PANEL (HHP) COMPLAINTS

What is the relationship between the Homeowner Housing Panel and the Scottish Public Services Ombudsman?

Further to dialogue with the Scottish Public Services Ombudsman (SPSO) and evidence from local authorities and housing associations who have previously been approached, the SPSO has confirmed that complaints from private owners are not directly within its remit. However, the SPSO has identified that it will undertake some screening of factoring complaints to check whether there is any reason why they may might fall within jurisdiction.

Where any social landlord has been reported to the Homeowner Housing Panel and a Property Factor Enforcement Order is issued, this will be notified to the Scottish Housing Regulator.

What is the position if a case is in court and subsequently a homeowner raises an action through the Homeowner Housing Panel?

For existing cases raised in the courts before 1 October 2012, only failures to carry out the property factor's duties after 1 October 2012 can be considered by the Panel. See regulation 28 of the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 (SSI 2012/180). That provision also makes clear the Panel can consider circumstances before that date only in relation to failures after that date.

For the interaction of other cases, section 19(4) provides that no matter adjudicated on by the Homeowner Housing Panel (HoHP) can be adjudicated on by another court or tribunal.

In practice, agreement to sist ("put to sleep") actions can be sought from the sheriff in the event that the matter is referred to the HoHP to avoid duplication.