Briefing Note

The Community Empowerment (Scotland) Bill
The Community Right to Buy and the Land Reform Agenda

The Scottish Government introduced its long awaited Community Empowerment (Scotland) Bill on 11th June 2014. The Bill can be found at:

http://www.scottish.parliament.uk/S4_Bills/Community%20Empowerment%20(Scotland)%20Bill/b52s4-introd.pdf

The Bill, as introduced, is wide ranging in its scope, having chapters on community planning, asset acquisition requests from public authorities, common good land, allotments and schemes for reduction or remission of non-domestic rates.

However, for private landowners, the significance of the Bill will lie in the extension of the Community Right to Buy which was introduced by Part 2 of the Land Reform (Scotland) Act 2003 (where it was restricted to rural property) to practically all land, urban or rural, and for the introduction of a community right to buy where there is no willing seller outwith the crofting counties.

Over and above the contents of the Bill as introduced, there will be undoubted interest, if not concern, to see how much the Bill changes in its passage through Parliament and, in particular, the extent to which MSPs use the passage of the Bill as a surrogate to make legislation incorporating parts of the Final Report of the Land Reform Review Group.

Proposed Changes to the Community Right to Buy

(1) Registrable Land

At present, the Community Right to Buy applies only to rural land and land within towns and villages with a population of up to 10,000. Under the Bill it is envisaged that ALL LAND WILL BE REGISTRABLE LAND, with the exclusion of those mineral rights which are reserved to the Crown (oil, coal, gas, gold and silver).
Urban land, industrial and post-industrial land and commercial property will all now be eligible for registration by a Community Body. If, in an urban development context, a developer has to acquire land from different ownerships in order to allow the project to proceed, and the Community are opposed to the project, then an application to register an interest in the Community Right to Buy would only need to be directed at one of those ownerships in order to threaten the viability of the entire project.

Salmon fishings and mineral rights which are owned separately from the land in which they are exercised will now be subject to the Community Right to Buy. If the community wish to stop a sand and gravel quarry, or the local angling association wish to take over the local salmon fishings, then they will be able to register their interest to do so, with ministeinal approval.

(2) Community Bodies

Community Bodies set up to exercise the Community Right to Buy are no longer to be restricted to operating as companies limited by guarantee. If the body meets "prescribed requirements", that will be a sufficient constitution. There is specific provision for a Community Body to be constituted as a Scottish charitable incorporated organisation.

If the Body wishes to remain as a company limited by guarantee, then it will no longer need to undergo audit and will have the power to withhold information contained within its minutes.

(3) Changes to the Late Application Procedure

There are practical changes to the "Late Application Procedure", whereby a Community Body only seeks to register an interest in exercising the Right to Buy once the land is exposed on the market for sale or a sale is underway, in the form of unconsidered missives or an incomplete option.

At present the Community Body has to show good reason why no steps were taken to register the interest before steps were taken by the owner to transfer land. That is now made more difficult, as the Community Body would now have to demonstrate that it had taken steps to complete an application to register, sufficiently in advance, in Ministerial opinion, of the steps being taken by the owner to sell the land.

Where Ministers request additional information from the owner, heritable creditor or Community Body, the statutory time limit for Ministerial decision, which, in practice has not been observed, can be extended by 14 days.

(4) Concluded Missives and Options

There is currently a list of exemptions to the requirement to give notice to the Community Body with a registered interest of a transfer of the land. The most commonly encountered is that of a transfer implementing missives or an option which existed on a date when there was no interest registered in the Register or application to register being considered.

Under a new provision, where the owner receives notification of an application to register and there are pre-existing missives or an option, the owner of the land has 21 days to provide Ministers with evidence of the existence of the missives or option.
In addition, in certain circumstances, the owner must also inform Ministers when the option will expire and whether the period of the option is capable of extension.

Ministers can then decline to approve the application to register an interest.

(5) Other provisions in relation to exempt transfers

At present, where a transfer of land which is subject to a registered interest, but no notice is required because one of the exemptions apply, it is sufficient to include a declaration in the disposition, specifying the exemption which is being relied upon.

The Bill will impose on owners the additional burden of notifying the Ministers, within 28 days of the exempt transfer, as to the existence and date of the transfer, a description of the land transferred and the name and address of the transferee.

(6) Ballots and Community Support

The Bill contains detailed provisions making it easier for Community Bodies to demonstrate sufficient support in their community to allow the exercise of the right to buy to be approved by Ministers.

(7) Withdrawal by the Owner and the Expenses of Valuation

At present, the Scottish Government meets the expense of obtaining a valuation to fix the price at which the Community Body will buy the land.

Under the Community Right to Buy, an owner has the right to withdraw his land from a sale to the Community Body, after the right to buy has been activated, provided that the owner had done the right thing by notifying the Community Body of the transfer before taking steps to transfer the land.

Under the Bill, a landowner, who withdraws from a sale to the Community Body after the valuer has been appointed by the Ministers, runs the risk of having to pay to the Ministers, at their discretion, any expense the Ministers have incurred.

Payment is required within 28 days, although there is a right of appeal to the Sheriff.

An Absolute Right to Buy for Abandoned or Neglected Land

The Bill proposes to create a wholly new Community Right to Buy, with its own register, the “Register of Community Interests in Abandoned or Neglected Land”.

This new right to buy will have many features similar to “vanilla” Community Right to Buy. There has to be a Community Body, although it has to be a company registered by guarantee (and not an SCIO or unincorporated association) and current Community Bodies could not exercise the right without incorporating additional provisions into their articles of association. The Community Body has to demonstrate sufficient community support, as well as showing that sufficient members of the defined community have a connection with the land, and obtain the approval of Ministers that, in the discretion of Ministers, the purchase of the land is in the public interest and compatible with furthering the achievement of sustainable development in relation to that land.
The aspect of this new right to buy which is likely to be alarming to landowners is that the requirement for an owner to take action with a view to transfer of the land to a third party does not apply before a right to buy can be exercised. In short, there is no requirement for the seller to be willing to sell. Indeed, in order to apply to Ministers to exercise the right to buy, the Community Body must have already tried and failed to buy the land.

Subject to very few exclusions, relating to an individual’s home, crofts and land vested in the Crown as bona vacantia, the Bill does not propose to tell us what land will be eligible to be acquired from an unwilling seller. What we are told is that “Land is eligible for the purposes of this Part if in the opinion of Ministers it is wholly or mainly abandoned or neglected.” The only restriction on this general discretion is that “In determining whether land is eligible, Ministers must have regard to prescribed matters”. That is to say that, if there are to be any criteria at all, or any fetters on Ministerial discretion, we are not to know what these are until the Bill is passed and Ministers tell us the criteria in subsequent Statutory Instruments.

Landowners are, in our view, entitled to know, before the Bill becomes law, what type of land is likely to be viewed as “wholly or mainly abandoned or neglected”.

There are many reasons why a landowner may leave land in a condition which might appear either abandoned or neglected for several very good reasons. The appearance of abandonment or neglect is, in these circumstances, different from the truth. In the rural context, there are sound environmental reasons for allowing some land to ‘return to nature’ and government agencies in many cases provide grants or subsidies as incentives to leave land in that condition. In the urban setting, simply because land does not have a current use, the owner may have a significant future use in mind.

There are also consequences that flow from the creation of an absolute right to buy, which the Bill recognises but for which it offers little or no remedy. For instance, the land being bought may be subject to a standard security in favour of a creditor. The owner of the land may, de facto, be subject to negative equity (meaning the land is presently worth less than his security) or the statutory valuation may produce a price for the land which is less than the amount owing to the creditor. In the normal course of events, a prudent landowner might choose not to sell his land at that price, because the effect is to crystallise his loss and require full payment to the creditor and, instead, wait for the value of the land to rise. Equally, the unwilling seller may realise an unplanned capital gain which will be subject to taxation.

Where the owner can be compelled to sell, the action of forcing a sale imposes the crystallisation of the negative equity or tax liability on the owner. The Bill does make provision for the owner “who has incurred loss or expense” in complying with the Bill’s provisions to recover those losses and expenses from the Ministers. However, attempts to exercise similar provisions in relation to ‘vanilla’ right to buy have usually failed in the face of strong opposition. In relation to negative equity, the owner would have difficulty in establishing that the loss caused by the crystallisation was incurred by the operation of the right to buy, as it pre-existed the exercise and it would be difficult for Ministers to equate a liability for tax with a loss.
Prospects for the Passage of the Bill

The Bill was laid before the Scottish Parliament less than a month after the Land Reform Review Group published its “Final Report”. It seems clear from exchanges in the Scottish Parliament since the publication of that Report that substantial amendment of the Community Empowerment Bill will be sought at Stage 2 both to radicalise the existing proposals and to shoehorn parts of the LRRG Final Report and that the Ministers will have a difficult time in resisting these amendments.

It is anticipated that the Bill, when enacted, will contain several chapters which have not been consulted upon or foreshadowed in the Bill as published.