

POLICY NOTE

THE SCOTTISH CROWN ESTATE ACT 2019 (COMMENCEMENT NO. 2 AND SAVING PROVISIONS) REGULATIONS 2020

SSI 2020/77 (C. 9)

The above instrument was made in exercise of the powers conferred by section 46(2) of the Scottish Crown Estate Act 2019. The instrument is laid with no procedure.

Purpose of the instrument.

The instrument does two things:

- Commences 1, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16(1) and (4), 17, 18, 19, 21, 27(1), (2), (3), (5)(b), 28, 29(1), (2), (3), (4), (5), 30(1), (2), (3), (5), 34(1), (3), (4), 35(1)(a), (2), 44 and schedule 1 and 2 of the Scottish Crown Estate Act 2019; and
- Makes necessary savings on commencement.

It forms part of a series of instruments that are required to support the commencement of the Scottish Crown Estate Act 2019.

Policy Objectives

In this note:

The Act means The Scottish Crown Estate Act 2019
1961 Act means The Crown Estate Act 1961

The Scottish Crown Estate Act 2019 (“the Act”) received Royal Assent on 15 January 2019. Sections 42, 43, 45, 46 and 47 came into force the following day and all other provisions will be commenced by regulations to be made under section 46(2) of the Act. Sections 2, 22, 23, 37, 38, 40 and 41 were included within regulation S.S.I 2019/170 and came into effect on 1 June 2019.

The purpose of this instrument is to implement the provisions (Sections 1, 7, 8, 9, 10, 11, 12, 13, 14, 16(1), (4), 17, 18, 19, 21, 27(1), (2), (3), (5)(b), 28, 29(1), (2), (3), (4), (5), 30(1), (2), (3), (5), 34(1), (3), (4), 35(1)(a), (2), 44 and schedule 1 and 2 of the Act) within column 1 of schedule 1 in relation to regulation 2(1) on 1 April 2020. These sections will replace the Crown Estate 1961 Act (1961 Act) with more modern, appropriate and flexible provisions to enable a manager of a Scottish Crown Estate asset to perform a number of activities in respect of management of the asset and deliver benefits for Scotland and communities.

Column 1 of schedule 1

Section 1 changes the name of Crown Estate Scotland (Interim Management) to Crown Estate Scotland to reflect the permanent status of the organisation.

Sections 7, 8, 9, 10, 11, 12, 13, 14, 15, 16(1) and (4), 17, 18, 19, 21 have the effect of implementing new or revised duties and powers in relation to the management of a Scottish Crown Estate asset. In particular Section 7 obliges a manager of a Scottish Crown Estate asset to maintain and seek to enhance the value of the asset and the revenue arising from it and a manager must act in the way best calculated to further the achievement of sustainable

development, and to seek to manage the asset in a way that is likely to contribute to the promotion or improvement in Scotland of wider socio-economic and environmental benefits. Section 8 provides that, within the constraint that ownership of the asset still rests with the Crown, a manager has the power (subject to restrictions or limitations contained in the Act or in another enactment relating to Scottish Crown Estate assets) to do anything the Crown could do as owner. Where any provision made under the Act requires the consent of the Scottish Ministers for a transfer of ownership of an asset or the acquisition of an asset, the transaction is void if no such consent is provided. Section 9 provides that a manager may enter into a transaction as if the person were acting on behalf of a person other than Her Majesty and enables Scottish Ministers to modify the definition of “registered” by regulations.

Section 10 requires Scottish Ministers’ consent for the transfer of ownership of a Scottish Crown Estate asset if the transfer would result in the manager no longer managing any assets or if the transfer relates to a portion of the seabed. Under Section 11 a manager is to obtain market value, but there is discretion to obtain less than market value when this is likely to contribute to the promotion or improvement of any of the socio-economic or environmental factors. The requirement is disapplied where the transaction is made for the purpose of complying with an obligation enforceable against the Crown or against the manager.

Section 12 defines “market value” which accords with the definition of “market value” (and “market rent”) adopted by the Royal Institution of Chartered Surveyors (RICS) in RICS Valuation - Global Standards 2017 (“the Red Book”)¹. Scottish Ministers are able to modify this definition through regulations. Where an agreement is made to make a relevant transaction in respect of an asset more than 10 years after the date of the agreement, the asset is to be valued at the time the transaction occurs and not at the time of the initial agreement the transaction is made. In pursuance of paragraph 15 of Part 3, or paragraph 25(1) of Part 4, of the Crown Estate Transfer Scheme 2017 (the transfer scheme) (in relation to oil or gas pipelines or electricity cables etc.), “market value” has the meaning given in those paragraphs instead.

Section 13 enables Scottish Ministers to direct a manager as to the amount that may be charged (or how that amount is to be calculated) by way of rents for a lease of an asset or in connection with any other agreement for the use of an asset. To avoid potential conflict between a manager’s duty under sections 11 and 13, where a direction is made which applies to a lease or other agreement for the use of an asset, section 11 is disapplied. A manager can depart from the direction only with the consent of the Scottish Ministers. If such consent is not obtained the lease or other agreement is void. The power of the Scottish Ministers to make a direction about the amount that a manager may charge does not apply to the following agreements: (a) an agreement under paragraph 64(1) of schedule 3A of the Communications Act 2003 (granting of rights relating to tidal waters); (b) an agreement within the meaning of paragraph 15 of Part 3 of schedule 4 of the Transfer Scheme (the granting of rights in respect of pipelines); and (c) an agreement within the meaning of paragraph 25(1) of Part 4 of schedule 4 of the Transfer Scheme (granting of rights in respect of transmission or distribution of electricity).

Section 14 prohibits a manager from leasing or granting another right in or over an asset for more than 150 years unless the manager or the Crown is under an obligation to do so.

¹ <https://www.rics.org/uk/knowledge/professional-guidance/red-book>

Section 16 requires a manager to meet its Scottish Crown Estate liabilities from the Scottish Crown Estate accounts it keeps. Scottish Ministers may by regulations transfer a right or liability from one manager to another manager. The rights and liabilities which can be transferred in this way are those relating to a Scottish Crown Estate asset, a former Scottish Crown Estate asset or a historic Scottish asset (within the meaning of paragraph 1 of schedule 2 of the Crown Estate Transfer Scheme 2017 (an asset in Scotland which once formed part of the Crown Estate but which did not form part of the Crown Estate in Scotland on 1 April 2017)).

Section 17 prohibits a manager from granting a heritable security over a Scottish Crown Estate asset. (“Heritable security” is defined in section 45(1) by reference to section 9(8) of the Conveyancing and Feudal Reform (Scotland) Act 1970, meaning a security which is capable of being constituted over any land or real right in land by disposition or assignation of that land or real right in security of any debt and which is capable of being registered in the Land Register of Scotland or recorded in the Register of Sasines).

Section 18 makes provision restricting the type of investment that may be made by a manager. A manager may invest a sum of money from the manager’s capital account if it is invested in a heritable security in Scotland or in a security over land in the rest of the United Kingdom, in an interest-bearing account or in an investment of such other description as the Scottish Ministers may specify by a direction. A manager can invest a sum of money from their income account in an interest-bearing account. A manager under Section 19 can make charitable donations out of the manager’s income account. A “charitable donation” is defined as one made for a charitable purpose (within the meaning of section 7(2) of the Charities and Trustee Investment (Scotland) Act 2005) and which provides public benefit in Scotland such as making a positive difference to the public in Scotland. In accordance with Section 21, a manager is to exercise their functions in a way that encourages equal opportunities.

Sections 27(1),(2),(3), (5)(b) require the Scottish Ministers to lay a copy of the annual reports prepared under section 26(1) or article 18(1)(a) of the Crown Estate Scotland Order before the Scottish Parliament. The Scottish Ministers are able to lay copies of individual reports or to lay copies of the reports as part of a consolidated report. As soon as possible after laying copies of the reports, whether individually or consolidated, the Scottish Ministers are required to publish the reports. Managers must not publish their own reports until a copy of it has been laid before the Scottish Parliament, either as an individual report or as part of a consolidated report.

Sections 28, 29(1),(2),(3),(4),(5), 30(1),(2),(3),(5), 34(1),(3),(4), 35(1)(a),(2) within this instrument impose revised financial and accounting duties on a manager including the transfer of funds between managers, grants, loans and audit conditions. A manager is required to keep separate accounts for income and capital. These accounts must also be kept separate from any other accounts kept by a manager, in any other capacity. The capital account represents those items transferred to a manager at the outset plus any amounts added in subsequent years. The income account represents the revenue that is generated by Scottish Crown Estate assets. Keeping separate accounts enables a manager of a Scottish Crown Estate asset to maintain appropriate segregation between income and capital and to be able to readily identify the value of those accounts at any given time.

Scottish Ministers under Section 29(1),(2),(3),(4),(5) have the power to direct a manager to carry money from the income account to the capital account, and for money to be retained in the capital account. Effectively, it enables a manager to invest in the asset(s). It also allows a manager other than the Scottish Ministers to make other transfers during the financial year. This is expected to be of most use early in a manager's management to smooth cash flow. Transfers must be repaid in full to the income account during the same financial year in which the sum was transferred from a manager's capital account.

Section 30(1),(2),(3),(5) make provision for the treatment of various sums, setting out whether the sum is to be carried to the income or the capital account. It recognises that some tenants pay a significant sum initially in exchange for an annual peppercorn rent and provides for different accounting for that sum, depending on the length of the underlying lease. The section requires a manager to make repayments of any loan made by the Scottish Ministers from the account to which the manager carries the sums received under the loan (i.e. loans carried to capital account are repaid from the capital account and loans carried to income account are repaid from the income account).

A manager is required to keep proper accounts and records and prepare a statement of accounts in relation to any Scottish Crown Estate asset(s) managed by them as required under Section 34(1),(3),(4). A manager is required to send their statements of accounts for each financial year to Scottish Ministers within 3 months of the end of the financial year to which the statement relates. Section 35(1)(a),(2) provides that Scottish Ministers must prepare a consolidated statement of accounts prepared by all managers and submit to the Auditor General for Scotland. Section 44 introduces schedule 2 which makes minor modifications and modifications in consequence of this Act.

Schedule 1 updates other related legislation and amends each of the enactments referred to by changing references from "Crown Estate Scotland (Interim Management)" to "Crown Estate Scotland" in consequence of the renaming of that body by section 1 of the Act. Schedule 2 makes provision for the amendment of various enactments as a consequence of the provisions of the Act and makes a minor amendment of the Crown Estate Scotland Order.

Column 2 of Schedule 2

The purpose of this instrument is to also implement the provision (Section 15) within column 2 of schedule 2 in relation to regulation 2(2) on 1 October 2020. Section 15 will prevent a manager of a Scottish Crown Estate asset from granting a right to remove wild kelp (as defined in section 15) from any area of the seabed they manage, if either of two cases apply. The first case is where such removal would inhibit the regrowth of the individual plant and the kelp is intended for commercial use. The second case is where the removal of kelp is a licensable marine activity (determined in accordance with section 21 of the Marine (Scotland) Act 2010) and no marine licence has been granted by the Scottish Ministers under Part 4 of the Marine (Scotland) Act 2010). Any right granted by a manager to remove sea kelp from the seabed where either of those two cases applies is void.

Savings arrangements

Savings provisions included within this instrument provide clarity to a manager about rights entered into or granted under the 1961 Act. The savings arrangements provide details of the

circumstances which apply to agreements entered into prior to 1 April 2020 using the 1961 Act and relate to management of property, rights and interests on behalf of the Crown.

Paragraph 3(2) and 3(3) apply where a manager has been involved in a transaction regarding disposing of an asset prior to 1 April 2020. This only applies where the missives for the sale have been fully executed. This power ensures any decisions made by a manager in the transaction under the 1961 Act continue to be valid unless they are reviewed.

Paragraph 3(4) and 3(5) apply where a manager has been involved in a transaction regarding the granting of a servitude right over an asset prior to 1 April 2020. This only applies where the granting of an agreement to grant a servitude right has been fully executed. This power ensures any decisions made by a manager in the granting of the servitude right under the 1961 Act continue to be valid unless they are reviewed.

Paragraph 3(6) and 3(7) apply where an asset is subject to an options agreement that has been concluded prior to 1 April 2020.. This only applies where the granting of the options agreement is concluded at the point it was fully executed.. This power ensures any decisions made by a manager in the granting the options agreement under the 1961 Act continue to be valid unless they are reviewed.

Paragraph 3(8) and 3(9) apply where a manager has been involved in an agreement for a lease over an asset has been concluded prior to 1 April 2020. This only applies where the agreement for lease has been concluded at the point it was fully executed. . This power ensures any decisions made by a manager in the granting of the lease under the 1961 Act continue to be valid unless they are reviewed.

Paragraph 4(1) and 4(2) apply where a manager has granted a licence to harvest wild kelp from the seabed prior to 1 October 2020 and only applies to those licences which are subject to the criteria within Section 15 of the Act. This power ensures where a manager has granted a licence to harvest a species of wild kelp as referenced in the Act before 1 October 2020 that was fully executed, that the licence continues to apply until the licence is up for renewal (normally within 5 years of initial granting) or earlier if it is reviewed.

Paragraph 3(10) and 4(3)) provide clarification that paragraph 3(1) and paragraph 4(1) are disapplied, and prevent a right or agreement being continued under the saving provision , if there is a variation/extension, and in such circumstances the 2019 Act will apply.

Paragraph 3(11) provides a meaning of option agreement in relation to these regulations.

Consultation

No separate public consultation was carried out on the specific provisions in this instrument, as commencement regulations are largely technical. The sections of the 2019 Act mentioned within the instrument were debated during the Act's progress through the Scottish Parliament and based on a previous Scottish Government consultation on the long term management of the Scottish Crown Estate. Scottish Ministers have engaged with Crown Estate Scotland (Interim Management) over the proposed content of the regulations to ensure there is continuity and that the saving provisions take account of pre-existing decisions and agreements regarding disposals, servitude rights, options agreements, leases and licences

taken before either 1 April 2020, or 1 October 2020 for section 15. This ensures that the new provisions do not impact on existing agreements entered into under the 1961 Act.

Impact Assessments

No separate detailed impact assessments have been carried out on the specific provisions in this instrument, as commencement is considered a technical, enabling exercise only to bring the sections of the Act into effect. Pre-scope assessments have been conducted and published where appropriate for the following:

- Equality Impact Assessment
- Island Communities Impact Assessment
- Fairer Scotland Duty Assessment
- Child Rights and Wellbeing Impact Assessment
- Data Protection Impact Assessment

A Strategic Environmental Assessment was completed for the Scottish Crown Estate Strategic Management Plan which outlines policies based on the new legal framework and it has therefore been decided that an SEA is not required for commencement.

Financial Effects

The financial impacts contained within this instrument have been considered in the context of the published Financial Memorandum developed for the Scottish Crown Estate Bill in January 2018; the supplementary Financial Memorandum prepared for the Bill following Stage 2; the Business and Regulatory Impact Assessment (BRIA) completed for the consultation paper on the proposals for the long term framework for managing the Scottish Crown Estate; and the partial BRIA produced as part of the development of the Scottish Crown Estate Strategic Management Plan.

The arrangements and the sections within this instrument have no additional financial effects on the Scottish Government, local government, business or the third sector from those identified in the earlier BRIAs and Financial Memoranda. A new BRIA is not therefore deemed to be required for commencement.

Scottish Government
DIRECTORATE FOR MARINE SCOTLAND
March 2020