

Scottish Crown Estate Bill

[as amended at Stage 2]

Supplementary Delegated Powers Memorandum

Introduction

1. This supplementary Memorandum has been prepared by the Scottish Government in accordance with Rule 9.7.10 of the Parliament's Standing Orders, to assist the Delegated Powers and Law Reform Committee in its consideration of the Scottish Crown Estate Bill. This Memorandum describes provisions in the Bill conferring powers to make subordinate legislation, which were either introduced or amended at Stage 2. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

2. The contents of the Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament. It should be read in conjunction with the original Delegated Powers Memorandum published to accompany the Bill as introduced.

Revised and new Delegated Powers

Section 3(1) – Transfer of management function

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish
statutory instrument

Revised or new power: revised

Parliamentary procedure: affirmative if (i) relating to an
asset situated in or relating to the Scottish marine area or
the Scottish zone (as defined in section 40(1B) of the Bill)

or (ii) adding to, replacing or omitting any part of an Act, or otherwise negative

3. Section 3(1) confers on the Scottish Ministers the ability to transfer, by regulations, the function of managing a Scottish Crown Estate asset, and rights and liabilities in relation to the asset, to certain persons. The persons who may be the recipient of a transfer are set out in section 3(2).

Amendment relating to significant assets

Provision

4. During Stage 1 scrutiny, the Delegated Powers and Law Reform Committee (DPLRC) and the Environment, Climate Change and Land Reform Committee (ECCLRC) recommended that the Scottish Government set out on the face of the Bill a definition of what would constitute 'significance' or 'significant value' in relation to an asset. The Committees also recommended that the affirmative procedure should apply to regulations, which would transfer the management of assets, which are of significance or of significant value. At Stage 2, section 40 of the Bill was amended to insert new subsection (1A) providing that regulations under section 3(1) are subject to the affirmative procedure if they relate to an asset which is wholly or partly situated in or relates to the Scottish marine area or the Scottish zone (as defined by new subsection (1B)).

Reason for taking power

5. In response to the DPLRC and ECCLRC recommendations, the Scottish Government considers that a transfer of the management of any part of the seabed (unless it lies wholly within the foreshore area) would amount to the transfer of a "significant" asset or an asset of "significant value" and should therefore be subject to the affirmative procedure. It is considered appropriate to regard these marine assets as significant or of significant value as they are ancient, hereditary rights rather than more recently acquired assets such as the rural estates and the urban commercial property. Marine assets have greater commercial value than the remaining salmon fishing rights and mines royal. They are also of wider economic, environmental and strategic national infrastructure as assets in the Scottish marine area and the Scottish zone may include ports; harbours; interests relating to aquaculture; offshore wind; wave energy; cables and pipelines; and carbon capture and storage activities.

Choice of procedure

6. Section 40(1A) and (1B) provides that regulations under section 3(1) which transfer the management of all or part of an asset which is wholly or

partly situated in or relating to the Scottish marine area or the Scottish zone (as defined) are subject to the affirmative procedure. Affirmative procedure allows for a more detailed level of Parliamentary scrutiny as recommended by the DPLRC and ECCLRC, which is considered appropriate for regulations, which transfer the function of managing these assets of national significance.

Amendment relating to records

Provision

7. Subsection (3) of section 3 has been amended to include a new paragraph (a)(ii) to clarify that regulations under section 3(1)(a) may include provision about the management of records of a manager.

Reason for taking power

8. The Public Records (Scotland) Act 2011 (Part 1) makes provision about the management of records for certain authorities and places obligations on a number of bodies who may become Scottish Crown Estate asset managers including the Scottish Ministers, Crown Estate Scotland (Interim Management), many public authorities and local authorities. This legislation however does not apply to all Scottish public authorities or any community organisations who may also become managers of a Scottish Crown Estate asset by way of a transfer under section 3(1) of the Bill. Where a manager is not subject to the record management arrangements under Part 1 of the Public Records (Scotland) Act 2011, new section 3(3)(a)(ii) (as read with section 3(7)) ensures that the Scottish Ministers can make provision in regulations under section 3(1) in relation to the management of records of a manager of a Scottish Crown Estate asset.

Choice of procedure

9. The regulation-making power under section 3(1) is subject to the negative procedure, unless the transfer of management relates to an asset all or part of which is situated in or relates to the Scottish marine area or the Scottish zone (as defined), or textually amends an Act. The addition of section 3(3)(a)(ii) and (7) does not change this.

Amendment relating to manager, which is a community organisation, ceasing to exist

Provision

10. Section 3(4) provides that regulations under section 3(1) may provide that (where a community organisation ceases to exist) the function of managing the asset which transferred to the organisation, and any rights or liabilities relating to that asset which transferred to the organisation, are

to transfer to another person who is eligible to be a manager of a Scottish Crown Estate asset.

11. Section 3(4)(a) has been amended to ensure that regulations under section 3(1) may make provision (where a community organisation ceases to exist) to transfer:

- the function of managing *any* assets managed by the manager (whether transferred under section 3(1) or subsequently acquired); and
- any rights or liabilities relating to *any* Scottish Crown Estate asset or former Scottish Crown Estate asset.

Reason for taking power

12. The adjustment of section 3(4)(a) takes account of potential acquisitions and disposals of assets by managers. There is a possibility that a manager may acquire a new asset on behalf of the Crown (and acquire the function of managing that asset on behalf of the Crown) or dispose of an asset on behalf of the Crown (and cease to exercise the function of managing that asset on behalf of the Crown), during the intervening period, between a management function being transferred to the manager and the manager ceasing to exist. The manager may acquire rights or liabilities in relation to new assets or retain rights or liabilities relating to an asset, which it has disposed of on behalf of the Crown. In general, it is anticipated that rights and liabilities relating to a Crown Estate asset will be transferred to the new manager if an asset is sold but this may not be appropriate in all circumstances and the manager may retain responsibility for some rights and liabilities for a former asset.

Choice of procedure

12. The regulation-making power under section 3(1) is subject to the negative procedure, unless the transfer of management relates to an asset all or part of which is situated in or relates to the Scottish marine area or the Scottish zone (as defined), or textually amends an Act. Amendment of section 3(4) does not change this.

Section 4 – Directions requiring delegation of management function

Power conferred on: the Scottish Ministers

Power exercisable by: direction

Revised or new power: revised

Parliamentary procedure: none

Provision

13. Section 4 of the Bill provides an alternative means of changing the arrangement for management of a Scottish Crown Estate asset whereby the Scottish Ministers may direct the existing manager to delegate the function of managing the asset to another person. This provides for such a direction to be made to a manager who is Crown Estate Scotland, a local authority or another Scottish public authority. The persons to whom a manager can be directed to delegate the function of managing Scottish Crown Estate assets are local authorities, other Scottish public authorities or community organisations (as defined in section 6).

14. During Stage 1, some stakeholders highlighted the need for more consultation under the delegation process. The Scottish Government has reflected on the process under section 4 of the Bill relating to directions requiring delegation of management functions (which is the means by which community organisations are likely to be enabled to manage a Scottish Crown Estate asset) and to how directions may be revised or revoked. It was considered that it would be appropriate to have a similar consultation process in respect of transfer and delegation of management functions, and revision and revocation of a delegation direction, to ensure increased engagement with the relevant managers, delegates and other relevant stakeholders.

Reason for taking power

15. In response to stakeholder concerns, new section 4(4A) has been inserted to require the Scottish Ministers, before giving a direction under section 4(1), to consult the manager, the proposed delegate and any other person whom they consider to be appropriate.

16. Furthermore, a new section 4(5A) has been inserted which requires the Scottish Ministers to consult, the manager, the proposed delegate and any other person whom they consider to be appropriate before revising or revoking a direction given under section 4(1). New section 4(5A) additionally provides that a proposed delegate must also consent to the revision or revocation of a direction given under section 4(1).

17. The DPLRC recommended (and the ECCLRC endorsed that recommendation) that the terms of the directions issued by the Scottish Ministers should be laid before the Parliament and published. The Scottish Government does not consider it to be necessary to lay directions before Parliament. However, section 4(6) has been amended to require the Scottish Ministers to publish any direction or revised direction itself either in part or whole, rather than just publish notice of a direction. The amendments allow for commercially sensitive or confidential information to be withheld from publication. Information about the manager to whom the delegation or revised direction was given, the proposed delegate and the asset to which the direction relates may not be withheld from publication.

Choice of procedure

18. This is an administrative direction-making power of the Scottish Ministers rather than a legislative power. The delegation will be effected on a contractual basis via a delegation agreement. The Scottish Ministers must, however, obtain the consent of the proposed delegate before making a delegation under section 4(1), or revising or revoking it. It is the view of the Scottish Government that it remains appropriate for this to be an administrative direction rather than a legislative power. Section 4(6) and (7) include requirements on the publication of directions and revisions, revocations of directions, the direction itself, and any revision of it must now be published.

Section 6(1)(b) – Meaning of “community organisation”

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Revised or new power: revised

Parliamentary procedure: negative

Provision

19. Section 3(2) sets out the categories of persons to whom the management of a Scottish Crown Estate may be transferred. Section 4(1) sets out, by reference to the relevant subsections of section 3(2), the categories of persons who can be the recipient of a delegation of the function of managing a Scottish Crown Estate. One such category of persons is “community organisations”.

20. Section 6(1) sets out a definition of a “community organisation” for the purposes of the Bill. A body is a community organisation if it satisfies the requirements of section 6(1)(a), or if it is designated as a community

organisation under section 6(1)(b). Designation under subsection (1)(b) means that the body has been designated as a community organisation by the Scottish Ministers by regulations. The Scottish Ministers can also designate a class of bodies as community organisations under this power. Section 6(1)(b) has been amended to ensure only incorporated bodies may be designated as a community organisation.

Reason for taking power

21. Section 6(1)(a) sets out the criteria that need to be met by a body to be automatically classed as a community organisation. However, there may be circumstances in which a body does not meet that criteria but there are good reasons for that body taking on the function of managing an asset, as a transferee or delegate. The power to designate a body (or a class of bodies) as “community organisations” under section 6(1)(b) enables a degree of flexibility to enable a body to be eligible to become a manager where it is appropriate.

22. It is considered that there are a number of risks associated with allowing unincorporated community organisations to become asset managers. Section 6(1)(b) has been amended to ensure only incorporated bodies may be designated as eligible bodies under this section.

Choice of procedure

23. The regulation-making powers in section 6(1)(b) are subject to the negative procedure. The nature of the power is that it may involve the addition, from time to time, of particular bodies or classes of bodies and only in relation to this Bill. It is the view of the Scottish Government that this remains the appropriate procedure for designating other incorporated bodies as eligible community bodies.

Section 14A – Rights and liabilities

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Revised or new power: new

Parliamentary procedure: affirmative if amending primary legislation, otherwise negative

Provision

24. Section 14A is a new section which confers power on the Scottish Ministers to make regulations to transfer rights and liabilities between

managers, even if the management function is not to be transferred or delegated. It complements the existing power in section 3 of the Bill.

Reason for taking power

25. The new section 14A follows the ECCLRC's recommendation that further consideration is given to whether the Bill as introduced adequately covers liabilities. It allows the Scottish Ministers to transfer by regulations a right or liability relating to a Scottish Crown Estate asset, a former asset or a historic Scottish asset (an asset which once formed part of the Crown Estate in Scotland) from one manager to another without also requiring the transfer of the management function.

26. It is considered prudent to make this possible to cover the potential scenario that a manager may encounter difficulties in managing a liability, but does not require the Scottish Ministers to transfer the management of an asset at the same time (which is the case under the section 3 regulation-making power). The current policy is that liabilities relating to an asset will normally be transferred to the manager of the asset, and it is intended that the manager will continue to manage the liabilities associated with the asset. Nevertheless, it may be necessary in some circumstances to transfer the responsibility for management of a liability to another manager at some point in the future. For example, if experience shows that the manager of the asset does not have the capability to manage a liability associated with the asset that has been transferred to them.

Choice of procedure

27. The current regulation-making power for the transfer of liabilities under section 3(1) is normally subject to the negative procedure (unless the regulations textually amend an Act or relate to an asset all or part of which is situated in or relates to the Scottish marine area or the Scottish zone, as defined). It is the view of the Scottish Government that the negative procedure is also the appropriate procedure for any regulations made under section 14A, unless they textually modify an Act, in which case the affirmative procedure would apply.

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