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Bruce Crawford MSP  
Convener  
Devolution (Further Powers) Committee  
c/o Clerk to the Committee  
Room T3.40  
The Scottish Parliament  
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24 February 2016

Dear Bruce

Thank you for your letter of 4 February 2016 on the Scotland Bill and the Crown Estate.

### Engagement with HM Treasury on the draft Transfer Scheme and MoU

In early November, in advance of the Report Stage at the House of Commons the UK Government published the draft Crown Estate Transfer Scheme and a complementary draft 'Memorandum of Understanding between the UK Government and Scottish Government following the devolution of the Crown Estate in Scotland'. The Scottish Government were not involved in drafting these documents but Scottish Ministers received advance copies of these documents in mid-October.

Since then, and in parallel with the fiscal framework negotiations, UK Government and SG officials have been engaged in discussions on the content of these draft documents. Our aim has been to understand the UK Government's perceived need for the various elements, reach a view on the reasonableness of the proposed controls on the manager of Crown Estate assets and seek amendments where necessary. Scottish Ministers' approval for both documents is required before they can be implemented.

Some of the discussions with the UK Government are about technical matters that need to be adequately resolved, and Scottish Government officials have highlighted a range of more specific issues with the documents which are listed in the **Annex** to this letter. Our more substantive concerns are set out below. These concerns are also subject of correspondence between Scottish Ministers and UK Ministers. Scottish Ministers have also written to the convener of The Rural Affairs, Climate Change and Environment Committee.

### Scottish Government views on the draft Transfer Scheme and draft MoU

Our initial concern is that the draft statutory transfer scheme is not consistent with the Smith Commission, which recommended that the Scottish and UK Governments agree a MoU rather than statutory provision. Our strong preference is for the requirements for protection

of UK-wide critical national infrastructure to be covered by the MoU rather than the transfer scheme.

Furthermore, we remain unconvinced about the arguments for exclusion of non-wholly owned assets from the transfer.

In addition, we are concerned that the Scottish Parliament will not have legislative competence to make new laws about revenues.

We are also seeking changes to the MoU that ensure Scottish Ministers' priorities are better reflected and that there is parity between UK and SG Government responsibilities.

The geographic scope of the procedures for protection of defence is extensive and would seem to apply to a wide range of activities of the Crown Estate. The restrictions for pipelines and electricity infrastructure are also a concern. In total, these amount to significant constraints on the devolved management of the Scottish assets with no equivalent controls for the manager of Crown Estate assets in other parts of the UK.

### The Scottish Parliament's ability to modify the Crown Estate Act 1961

Our understanding of the Scottish Parliament's ability to modify the current requirements of the Crown Estate Act 1961 is that clause 34(4) reserves the requirements of section 90B (5) to (8). This means the Scottish Parliament will have legislative competence to make changes about how the Crown Estate in Scotland is managed subject to the normal limits on legislative competence and ensuring that the following principles are not breached:

"90B

(5) The property, rights and interests to which the existing Scottish functions relate must continue to be managed on behalf of the Crown.

(6) That does not prevent the disposal of property, rights or interests for the purposes of that management.

(7) Subsection (5) also applies to property, rights or interests acquired in the course of that management (except revenues to which section 1(2) of the Civil List Act 1952 applies).

(8) The property, rights and interests to which subsection (5) applies must be maintained as an estate in land or as estates in land managed separately (with any proportion of cash or investments that seems to the person managing the estate to be required for the discharge of function relating to its management)."

In terms of whether there will be sufficient discretion in relation to the management of Crown Estate assets in Scotland, our concern is focused on the issues set out above and in the Annex to this letter.

### Scottish Ministers' plans and timetable for the appointment of a transferee

The UK Government's approach to the implementation of the Smith Commission's recommendation on the Crown Estate through Clause 34 of the Scotland Bill requires substantial planning and preparatory work. We will implement interim arrangements, through a single entity, to manage the assets following devolution until a new framework is

consulted on and legislated for at the Scottish Parliament. It is not possible to give a definite timetable now as the timescales in the short term are dependent on the Westminster legislative process. We have begun to progress work with the Crown Estate on the interim arrangements while also recognising the need to plan for the longer-term framework. In the meantime, we are continuing to engage through the Crown Estate Stakeholder Advisory Group and individual meetings.

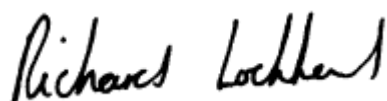
### Scottish Parliament's scrutiny role with regards to the Transfer Scheme and MoU

You asked us to agree that a legislative process should be put in place to enable the Scottish Parliament to scrutinise the detail of the transfer scheme. My understanding is that there is no legislative process that would provide the Scottish Parliament with a formal role in scrutinising a Statutory Instrument at Westminster. Scottish Ministers will of course work to ensure that the draft transfer scheme is finalised in an appropriate way for Scotland and, as I said above, Scottish Ministers' consent for the scheme is needed before it can proceed.

I will also endeavour to explore to ensure that the appropriate Scottish Parliament Committees will have sight of the details of the proposals for the transfer scheme in advance of the UK Government legislating.

I hope my response is helpful.

I am copying this letter to Rob Gibson MSP, David Mundell, Secretary of State for Scotland and Damian Hinds, Exchequer Secretary to the Treasury.



**RICHARD LOCHHEAD**

## Annex

1. If any requirements for the protection of UK-wide critical national infrastructure are retained in the draft transfer scheme, it should be clearly stated in the transfer scheme that the Secretary of States' powers are 'last resort' powers.

2. The provisions in schedule 4 of the draft transfer scheme relating to reserved defence interests cover over 5 pages and are inappropriate and excessive. The implications for the managers of Scottish assets - who could be harvesting seaweed or leasing the seabed for an offshore wind farm - are wide-ranging and not explicitly limited to exceptional circumstances, with the potential for delays when granting, varying or transferring a right or agreeing to any plan with the manager. They would require the manager of the asset to:

- Renew existing leases that the Secretary of State (SoS) requires to be renewed, including a power for the SoS to determine the term to be granted.
- Grant a new lease where the SoS is of the view that, for reasons of defence or national security, there is an overriding public interest in the right being granted to the SoS.
- When granting, varying or transferring a right or agreeing to any plan which the manager considers is likely to affect 'any defence operations or capabilities' the manager must inform the SoS in writing; the SoS has a period of 30 days to notify the manager of the effects on defence operations or capabilities and (where relevant) to the SoS' opposition to the request; the manager must have regard to the SoS representation and, unless the manager proposes to reject the request, must notify the SoS in writing of its proposed decision; after notifying the SoS, the manager must not make a decision and await a notification from the SoS which could either be:
  - a notice that for reasons of defence or national security there is an overriding public interest in the manager's proposed decision being amended;
  - a direction in writing for the manager to make its decision in accordance with the terms of the direction (the transfer scheme includes a requirement to comply with the direction);
  - confirmation in writing that the SoS has no objection to the proposed decision.
- The transfer scheme also sets out a SoS power to require that third party rights be sold or assigned to SoS at market value. This appears to disregard principles set out in compulsory purchase legislation which provide for compensation for loss incurred when a party is compelled to sell their rights.

3. The proposed mechanisms for price control for oil and gas pipelines and electricity infrastructure is that the process can be controlled by the Treasury in an opaque process and without recourse to assessment by an independent expert. Electricity payments in Scotland would be determined by reference to charging in other parts of the UK, rather than the Scottish Parliament, Scottish Ministers or the manager being able to take a charging approach which is different from the rest of the UK. This could disadvantage Scottish suppliers and the proposed procedures risk having cost implications. Furthermore, it is inappropriate to define in the draft scheme how this procedure would operate.

4. The current proposals for pipelines exemplify the potential for undue control on the part of the UK Government and the scope for bureaucracy and delay. The transfer scheme as currently drafted appears to enable any person to notify the Treasury that it objects to a payment that the manager proposes to require from a pipelines operator in connection with an agreement. The Treasury must then 'as soon as reasonably practicable' notify the manager in writing, who in turn must then notify the Treasury in writing of the amount of payment within one month and immediately suspend any payments required but not yet

made. If the Treasury considers that payment is excessive they may give notice in writing to the manager with a period of three months. Where the Treasury has given notice the Treasury or a person appointed by them must determine a maximum amount for the payment. As soon as reasonably practicable after the determination the Treasury must notify the manager, the pipeline operator and the person who made the objection. The manager must refund any excess and there is recourse for recovery as a civil debt.

5. Similar provisions apply to the price mechanism for price control by the Treasury for the rate set within agreements relating to new electricity infrastructure, or for an increase to the rate for an existing electricity infrastructure.

6. These measures will constrain management of assets in Scotland and there is no equivalent of any of these measures applying to Crown Estate Commissioners in other parts of the UK following devolution in terms of the requirements to be followed to protect UK-wide critical national infrastructure. This will result in lack of parity between the new managers in Scotland and the Commissioners.

7. It is normal practice for a dispute resolution process to set out that parties to the dispute are to jointly agree and appoint a suitably qualified and experienced independent expert or arbitrator, with provision to refer the matter to appropriate professional or legal body to appoint such an expert in the event of failure to agree.

8. In cases where payment is to be made, 'market value' should be defined by reference to the definition of the Royal Institution of Chartered Surveyors Valuation Professional Standards. The definition is periodically updated to reflect current practice and this will help to ensure it is future-proofed. Furthermore, where there is an element of compulsion, market value alone would be insufficient and provision should be made for appropriate compensation, guided by the Compensation Code, to include disturbance, injurious affection and severance.

9. The list of assets in the draft transfer scheme is incomplete. The limited partnership rights should not be excluded from the transfer.

10. Continuing arrangements for contingent liabilities for offshore renewable energy installations and/or carbon capture and storage following devolution of management of Crown Estate assets in Scotland need to be resolved.

11. In relation to the MoU, Scottish Ministers' priorities need to be better reflected and there needs to be parity between UK and SG Government responsibilities.

12. There should be no overlap between the draft transfer scheme and the Annexes of the MoU as this can lead to confusion. It would be preferable if only the MoU would have sections which set out processes for handling instances where the MoD requires the use of an asset or processes for taking into account the need for reasonable protection for UK-wide critical national infrastructure.