

# FORTH CROSSING ACT 2011

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part 3 – Land

72. This Part is concerned with the acquisition of land. The sections set out provisions from earlier Acts that will be incorporated or disapplied ([section 21](#)) within the Act as well as the powers to acquire land compulsorily ([section 22](#)) or by agreement ([section 23](#)). The sections also cover matters relating to servitudes and other rights ([sections 24 to 27](#)) and mineral rights ([section 28](#)). This Part also contains a time limit within which the Scottish Ministers must exercise their powers of compulsory purchase ([section 29](#)).

#### *Section 21 – Incorporation of enactments*

73. Compulsory purchase under the Act will be on the same standardised basis as any other compulsory purchase in Scotland. This means that in the Act compulsory purchase will be subject to all the same procedural rules, safeguards and requirements regarding compensation as apply generally. However, the legislation covering compulsory purchase is both large and complex and is contained in a number of Public Acts some of which were authorised in the 1840s. Two options presented themselves on how to incorporate the provisions of these Public Acts within the Act, the first being to write out the relevant provisions from each of the Public Acts at length in the Act and the second to apply the existing Public Acts as if they had been included within the Act. The Act proposes the latter and in that respect the Act follows precedent set both in legislation authorising infrastructure works throughout Great Britain since the mid 19<sup>th</sup> century and in recent Private Acts for infrastructure purposes authorised by the Scottish Parliament.
74. The Act accordingly within [section 21](#) incorporates provisions of the [Lands Clauses Consolidation \(Scotland\) Act 1845 \(c.19\)](#) (in the remainder of these Notes, “the 1845 Lands Act”), the [Lands Clauses Consolidation Acts Amendment Act 1860 \(c.106\)](#) and Acts for the time being in force amending those Acts<sup>1</sup> and the [Railway Clauses Consolidation \(Scotland\) Act 1845 \(c.33\)](#) (in the remainder of these Notes, “the 1845 Railways Act”).
75. Subsection (1) specifies which sections of the 1845 Lands Act are excluded from incorporation. Subsection (2) provides for the incorporation of section 6 (which addresses compensation) and sections 71 to 78 (which cover mines) of the 1845 Railways Act<sup>2</sup>.
76. Subsection (3) provides that the incorporated sections of these Acts apply for the purposes of the Act except where the Act makes inconsistent provision or expressly varies the incorporated provision. Subsections (4) and (5) ensure that the provisions of the 1845 Lands Act and the 1845 Railways Act can be appropriately incorporated

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<sup>1</sup> These are the Acts collectively known as “the Lands Clauses Acts” and incorporated by section 21(1).

<sup>2</sup> See notes on section 28 (minerals) of the Act.

within the Act by specifying how certain terms used in those Acts are to be interpreted in applying the provisions for the purposes of the Act.

### ***Section 22 – Compulsory acquisition of land***

77. **Section 22** provides the power for the Scottish Ministers to compulsorily acquire land. Under paragraph (a) the land that may be acquired must be within the limits of deviation and it must be land that is required for the purposes of the Forth Crossing works. The limits of deviation are shown on the plans and the land is described in the Book of Reference (as defined in section 79).
78. Paragraph (b) provides that the land<sup>3</sup> specified in **schedule 9** may be acquired compulsorily provided that it is required for the purposes of the Forth Crossing works. **Schedule 9** is in two Parts: Part 1 describes land that is to be acquired compulsorily and Part 2 describes land over which only rights can be taken.
79. The power conferred by **section 22** is subject to the time limit in **section 29**.

### ***Section 23 – Acquisition of land by agreement***

80. This section enables the Scottish Ministers to acquire by agreement land which is within the limits of deviation or within **schedule 9** (see **section 22**). Ministers can also by agreement acquire land outwith the land detailed in **section 22** if it is to be used to mitigate adverse effects arising from the carrying out or operation of the Forth Crossing works or where the enjoyment of the land will be seriously affected by the carrying out or operation of such works.
81. **Section 23(2)** makes a necessary consequential amendment to the **Land Compensation (Scotland) Act 1973 (c.56)** to take works authorised by the Act out of the definition of “public works” contained in the relevant sections of that Act.

### ***Section 24 – Acquisition of servitudes and other rights***

82. **Section 24** explains that the Scottish Ministers may acquire servitudes or other rights, such as real burdens, in land which is within the limits of deviation (which may have been acquired compulsorily under **section 22** or by agreement under **section 23**) or is land specified in **schedule 9**.
83. Subsection (1) explains that the Scottish Ministers may acquire existing servitudes or other rights or create new rights. The creation of new servitudes or rights is needed to allow access for construction and then maintenance of the road.
84. Subsection (2) ensures that when the Scottish Ministers are exercising their power to acquire a servitude or right they are not obliged to acquire the whole land where all that is required is some right over the land. In the absence of this provision the Scottish Ministers would be required to buy land outright even though all that is required for the carrying out or maintenance of the works is a right of access.

### ***Section 25 – Extinction of real burdens and servitudes etc.***

85. The purpose of **section 25** is to ensure that there are no servitudes or burdens on the land acquired by the Scottish Ministers that could conflict with the ability to carry out or to maintain the works. Accordingly, paragraph (a) provides for the automatic extinguishment of any servitude<sup>4</sup> or real burden<sup>5</sup> over land that is within

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<sup>3</sup> For the purposes of the Act the term “land” includes buildings, land covered by water, and any interest in land (an interest being any servitude or other right in land).

<sup>4</sup> A servitude is a right to make some limited use of another’s property. Cusine and Paisley (*Servitudes*, published by W. Green, 1998, ISBN 9780414010888) define servitudes as “a class of legally enforceable and real rights of varying content, held by one person in his capacity as owner of one piece of ground (the dominant tenement) over another piece of ground (the servient tenement) in the vicinity, but in separate ownership by which some benefit is conferred on the dominant tenement.”

the limits of deviation or is specified in [schedule 9](#). Paragraph (b) similarly provides for the automatic disapplication of any development management scheme<sup>6</sup> on the land acquired compulsorily. Any existing servitudes or real burdens or the application of the development management scheme will cease to apply to that land once the registration of the conveyance occurs. The section is qualified so that a servitude or burden acquired under [section 24](#) is not simultaneously extinguished under [section 25](#).

### ***Section 26 – Persons under a disability may grant servitudes, etc.***

86. Section 7 of the 1845 Lands Act permits certain persons (described as being under a disability as they are legally disabled from doing something) to convey existing rights in land and to dispose of land. However, those persons are legally disabled from being able to do other things such as creating a new right in their land. Provision is accordingly required to ensure that it will always be possible for the Scottish Ministers to acquire new rights under [section 22](#) or [section 23](#) from persons such as trustees.
87. [Section 26](#) allows persons under a legal disability to grant to the Scottish Ministers a servitude or right over their land. If they remained unable to do this people in this position could only sell the whole of the land and the Scottish Ministers could be left with land they did not need for the purposes of the Act.
88. There is a caveat, which is that rights in relation to water cannot be granted if others have an interest in that water. Where several landowners have interests in the same water, the law treats them as sharing a common interest: one of them cannot therefore do something that affects the interest of others. The provision within [section 26](#) addresses this matter.

### ***Section 27 – Registration of servitudes and other rights***

89. [Section 27](#) addresses an issue in relation to the construction of Scottish property law whereby a servitude is to be construed restrictively. As the works authorised by the Act are principally about the creation of a bridge and connecting roads, the benefit of a positive servitude (such as a right of access to maintain the bridge or roads) may be capable of benefiting considerably more than the land immediately adjoining the burdened property.
90. Without the provision contained in [section 27](#), if the deed creating a servitude does not define exactly the land being benefited by the servitude, then the servitude cannot be used to benefit that land. In the context of the Act, a servitude of access that defines the benefited property as being only some of the land comprised within the scheme could not be used to access land somewhere else within the scheme. Section 27(1)(a) ensures that servitudes acquired under the Act for the benefit of the scheme are not reduced in scope by the application of general Scots property law.
91. Subsection (1)(b) however does align with general Scottish property law in that where it can be clearly shown what is the benefited property then that will be detailed in the instrument creating the servitude.
92. Subsection (2) provides that a servitude under subsection (1) is effective whether or not the deed creating it is registered against the benefited property. Section 75(1) of the [Title Conditions \(Scotland\) Act 2003 \(asp 9\)](#) requires that a positive servitude must be registered against both the burdened and benefited property. This subsection ensures that servitudes acquired under the Act will be effective in terms of section 75 even if the servitude is only registered against the burdened property.

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<sup>5</sup> A real burden is an encumbrance on land constituted in favour of the owner of other land in that person's capacity as owner of that other land (section 1 of the [Title Conditions \(Scotland\) Act 2003 \(asp 9\)](#)). A real burden, as defined in section 1 of the 2003 Act, includes a personal real burden.

<sup>6</sup> A development management scheme is defined by section 71 of the 2003 Act as schemes or rules for the management of land as is set out in an order made, either, in consequence of that section; under section 104 of the [Scotland Act 1998 \(c.46\)](#) (which provides a power to make provision consequential on legislation of, or scrutinised by, the Scottish Parliament); or in relation to a particular development, that scheme as applied to the development.

### **Section 28 – Minerals**

93. **Section 28** prevents the Scottish Ministers from acquiring the mineral rights to any land that they may acquire compulsorily under **section 22** unless the rights concern mines or minerals that affect the carrying out of the Forth Crossing works or have been expressly included within any conveyance transferring the land.
94. This section is required as **section 21(2)** of the Act does not incorporate section 70 of the 1845 Railways Act which provides for the exclusion of minerals from land purchased.
95. **Section 21(2)** does however incorporate sections 71 to 78 (as originally enacted)<sup>7</sup> of the 1845 Railways Act. These sections place restrictions on a person with rights to work the minerals beneath the land that has been acquired and also on working minerals within 40 yards of the land. The person seeking to work those minerals would have to give the authority thirty days notice. If the authority, which for the purposes of the Act is the Scottish Ministers, is of the view that the working of the mines (or part of them) will damage their works and the Scottish Ministers are willing to make compensation for the minerals (or any part left unworked), the Scottish Ministers can issue a counter notice to the person with rights to work the minerals advising that person of the intention of the Scottish Ministers to pay compensation. If minerals are worked in contravention of that counter-notice, the person must make good any damage caused at their own expense; the Scottish Ministers can also make good any damage and recover any costs from the party who carried out the works.
96. If these sections are not incorporated it would mean that the Scottish Ministers would not have the benefit of what is effectively a 40 yard exclusion zone of mineral working around the Forth Crossing works. The lack of a right to determine an exclusion zone could have potential consequences for the Forth Crossing works, for instance, in ensuring the stability of the ground.
97. These provisions are generally applied in respect of compulsory purchases: the **Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 (c.42)** provides that a compulsory purchase order may make provision for the incorporation of sections 71 to 78 of the 1845 Railways Act as originally enacted. The **Roads (Scotland) Act 1984 (c.54)**, which is the principal Act for the construction of roads, also includes at section 110(5) of that Act provisions for the incorporation of sections 71 to 78 as originally enacted of the 1845 Railways Act.

### **Section 29 – Time limit for compulsory acquisition**

98. **Section 29** provides that the compulsory purchase powers of the Act will expire 5 years from the date on which the Act receives Royal Assent. This is with the exception that if either a notice to treat (see **section 30**) has been served or if the Scottish Ministers have made a general vesting declaration (see **section 35**) within the 5 year period then for those notices/declarations, the time limit does not apply.
99. Setting a time limit in the Act within which the compulsory purchase powers can be exercised ensures that landowners are not prejudiced. Otherwise landowners would find that for so long as their land was at risk of compulsory purchase it would be difficult to sell their land, or its value would be reduced. **Section 72** (blighted land) provides for the situation where a landowner needs to sell land that is affected in this way.
100. It is normal practice for legislation authorising the construction of works to impose a time limit on the exercise of compulsory purchase powers.

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<sup>7</sup> Sections 71 to 78 of the 1845 Railways Act were modified by the **Mines (Working Facilities and Support) Act 1923 (c.20)**. The amended version is applied to railways whereas the original version is employed for other compulsory purchases.