

# FORTH CROSSING ACT 2011

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 5 – Powers to Enter and Use Land**

132. This Part creates powers to take temporary possession of land ([section 37](#)), sets out other purposes for which land may be entered ([section 38](#)), when possession can occur ([section 39](#)), the notification procedures ([section 40](#)), what can be done on the land ([section 41](#)), the state of the land on return from temporary possession ([section 42](#)), the restrictions preventing entry to any home ([section 43](#)), the powers to gain entry where entry is prevented ([sections 44 and 45](#)) and matters relating to the duration of the possession ([section 46](#)).

#### *Section 37 – Temporary possession of land*

133. [Section 37](#) permits the Scottish Ministers to take temporary possession of specified land for the period required for specific purposes. Provision of this sort is standard in legislation authorising works.
134. Subsection (1) provides that the Scottish Ministers may enter and take temporary possession of the land specified in columns (1), (2) and (3) of [schedule 10](#) for either the specified purposes mentioned in column (4) or for any other purpose in connection with or in consequence of the works specified in column (5) of that schedule where the purpose is considered necessary or expedient by the Scottish Ministers.
135. Subsection (2) provides for the duration of temporary possession and subsection (3) ensures that any lease (including a sub-lease) on the land is terminated on the date Ministers first enter the land (compensation is provided for at [section 54\(1\)](#)).
136. As the land under [section 37](#) is being taken only temporarily the Scottish Ministers are obliged as a consequence of the provisions within [section 42](#) to remedy any damage that is caused to the land and ensure the security of the land whilst they are in occupation. They are not obliged, however, to replace any buildings or apparatus or vegetation that may be removed during the temporary possession of the land.
137. To ensure any person whose interests are affected by temporary occupation is compensated for any loss suffered the Scottish Ministers are required under [section 54](#) to pay compensation.

#### *Section 38 – Power to enter land for other purposes*

138. This section allows the Scottish Ministers to enter any land in order to survey the land, to carry out archaeological or other investigations, to maintain an access, to protect the Forth Crossing works or to protect any flora, fauna or property. The land so entered could be land within the limits of deviation or land within [schedule 9](#) but might also be land sitting outside those designations. The power to enter land, however, is circumscribed in that it can only be for purposes connected with the Act.

139. There are existing powers in section 121 (Power to obtain road-making materials) and 140 (Powers of entry) of the [Roads \(Scotland\) Act 1984 \(c.54\)](#) which provide powers of entry for certain purposes. However, those powers do not cover the specific purposes as set out in [section 41](#) of the Act.
140. The reasons for which the Scottish Ministers can take entry to land under [section 38](#) are set out in paragraphs (a) to (e). The Scottish Ministers may use the powers conferred by paragraph (a) to access land to survey or assess, for instance, the visual impact of an embankment from a distance in order to confirm environmental mitigation. Paragraph (b) provides a power to carry out archaeological or other investigations. Paragraph (c) permits entry for the purposes of maintaining an access under the terms of the provisions of [section 15\(7\)](#).
141. Paragraph (d) is included to provide the Scottish Ministers with an emergency power of entry in order to protect the Forth Crossing works. This could arise, for instance, where a neighbouring landowner is undertaking works on their own land which may affect the stability of the Forth Crossing works. Paragraph (e) enables the Scottish Ministers to gain access to protect someone else's land or property or the flora or fauna of that land which may be affected by the carrying out of the works.

### ***Section 39 – Advance entry on land to be acquired***

142. The 1845 Lands Act permits entry on land under compulsory purchase powers only after full payment has been made (section 83) or after the body with the compulsory purchase powers has deposited in a bank as security either the compensation claimed by the landowner or a sum representing the value of the land as valued by a valuer appointed by the sheriff (section 84). Sections 85 and 86 require the money to remain in the bank as a security to be distributed as directed by the sheriff. Section 87 imposes financial penalties on entering land without complying with the procedures, and in the event of a landowner refusing entry even after full payment has been made, the only recourse is to apply to the sheriff for a possession order. The procedures are cumbersome and time consuming. [Section 21](#) of the Act has disapplied these provisions and the purpose of [section 39](#) of the Act is to provide for a modern procedure to apply so as to ensure that the works are not delayed by negotiations with landowners about the compensation to which they are entitled. As landowners are to be obliged to give up their land in any event, the amount of compensation is a completely separate issue from possession of the land.
143. It can be seen from the explanation to [section 35](#) that a general vesting declaration could take at least three months to take effect (that is two months for the serving of the compulsory purchase order and a further 28 days for the declaration to take effect). To wait three months under the general vesting process or conceivably longer in respect of a notice to treat or a general vesting declaration which is subject to a notice of objection to severance initiated by the land owner could have implications for the construction schedule of the scheme. So as to ensure that the delivery of the scheme is not unduly affected [section 39](#) permits the Scottish Ministers to enter and take possession of land before they have title to that land.
144. [Section 39](#) specifies that the Scottish Ministers may only enter and take possession of land on which they have either served a notice to treat ([section 30](#)) or made a general vesting declaration ([section 35](#))

### ***Section 40 – Notice of entry***

145. [Section 40](#) sets out the notice arrangements which the Scottish Ministers must apply when seeking entry to land. It ensures that landowners will know when the Scottish Ministers intend to enter their land and for what purposes.
146. When the Scottish Ministers wish to take temporary possession of land for a purpose set out in [schedule 10](#) or authorised by [section 37\(1\)\(b\)](#) or wish to take advance entry

to land under **section 39** they must give at least 28 days notice. This time period is so that the owner or occupier can undertake any arrangements that they need to make in consequence of the possession of their land by the Scottish Ministers. An example might be to make necessary arrangements, in an agricultural setting, to relocate stock.

147. Subsection (1)(b) requires the Scottish Ministers to give on the first occasion seven, and thereafter under subsection (1)(c) three, days' notice to the owner or occupier where entry is to be taken under **section 38**. The shorter time given for entry under **section 38** is consistent with the timescale that applies under section 140 of the Roads (Scotland) Act 1984 for the purposes of surveying, boring, inspecting and the like. To ensure that the land owner is fully apprised of the activities that are to be carried out on his or her land the Scottish Ministers must under subsection (2) provide details in the notice of the purposes for which they wish to enter land.
148. It may not be practical to give advance notice to a landowner that entry is required for a particular purpose under **section 38**. Subsection (3), accordingly, allows a disapplication of the noticing procedures if the Scottish Ministers require access urgently and the purposes of entry are for the purposes of protecting the interests listed.

### ***Section 41 – Use of land***

149. **Section 41** sets out the action that may be taken after land is entered. Subsection (2) provides, by way of illustration, a list of things the Scottish Ministers may do in relation to the land. That list is similar to matters under section 140 of the Roads (Scotland) Act 1984 which is applied in respect of constructing or maintaining roads. It should be noted that any purpose for which entry is required must be stated in the notice issued in accordance with **section 40**.

### ***Section 42 – Duty to remedy damage etc.***

150. **Section 42** ensures that the Scottish Ministers, before giving up temporary possession of land, remedy any damage that they have caused on that land and ensure that they leave that land in a state of security that is no worse than when they took possession. The character of the land may be fundamentally changed as a consequence of its temporary use and consequently the Scottish Ministers under subsection (2) are not obliged to replace any building, apparatus or vegetation that was removed from land in order to facilitate the purposes for which the Scottish Ministers required possession. **Part 6** of the Act makes provision for compensating landowners for losses incurred.

### ***Section 43 – No power to enter homes***

151. The purpose of **section 43** is to prohibit the Scottish Ministers from entering any house or building occupied as a residence. This is because under the terms of **sections 37** and **38**, which provide entry to land for particular purposes, there is no requirement for the Scottish Ministers to enter such a house or building.

### ***Section 44 – Warrants authorising entry***

152. **Section 44** reflects the position that applies in section 140(8) of the Roads (Scotland) Act 1984 by requiring a warrant to use, if necessary, reasonable force to enter land. Subsection (1) sets out the terms of warrant and subsection (2) provides the test that the sheriff or justice of the peace must apply prior to granting a warrant. Subsection (3) provides that a warrant cannot authorise the use of force against individuals. Subsection (4) provides for the extent of the life of the warrant which will expire either when the purpose for which it is granted is no longer required or, if earlier, the time period specified in the warrant has expired.

***Section 45 – Obstruction***

153. Under section 140(9) of the Roads (Scotland) Act 1984 a person intentionally obstructing entry commits an offence. **Section 45** applies similar provisions in respect of the Act.

***Section 46 – Suspension of real burdens and servitudes etc.***

154. Section 106 of the **Title Conditions (Scotland) Act 2003 (asp 9)** provides for the extinguishment of real burdens and servitudes etc. on the permanent compulsory acquisition of land but not where the occupation is temporary. To ensure that the Forth Crossing works are not compromised by existing servitudes, real burdens or development management schemes **section 46** provides that these rights are unenforceable or disapplied in respect of land under **section 37** or **39** for the period of possession. A definition is provided within **section 46** for the period of possession over which servitudes, burdens or development management are unenforceable or disapplied.