

# FORTH CROSSING ACT 2011

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part 1 – Works

17. This Part provides specific powers for the Scottish Ministers to construct the works ([section 1](#)), it also describes the works ([schedules 1 and 2](#) and [sections 2 and 3](#)), the location of the works ([section 4](#)) and how the works are to be carried out ([sections 5 to 10](#)).

#### *Section 1 – Power to construct Forth Crossing etc.*

18. [Section 1](#) gives the specific statutory authority which is required for the works. It gives Ministers powers to carry out the works. In the absence of this section the activities permitted by the Act would potentially be liable to challenge in the courts e.g. on the grounds that the bridge and roads constituted a legal nuisance. Such an action could potentially result in an order preventing the nuisance by stopping the works (called an interdict). The protection of statutory authority is therefore important to the viability of the scheme.
19. Subsection (1)(a) makes clear that the Scottish Ministers can construct the bridge and construct new roads and structures or improve existing roads and structures associated with the bridge. These works are known collectively as the principal works and a full description of the principal works is set out in [schedule 1](#). The subsection also introduces the term the Forth Crossing. That should not, however, be misconstrued as meaning that the bridge must be called the Forth Crossing.
20. Subsection (1)(b) gives effect to [schedule 2](#), which describes the types of works which may be required in connection with the principal works. Ancillary works will only be authorised if they are necessary or expedient in connection with the construction of the principal works or as a consequence of the maintenance of those works. [Schedule 2](#) provides a description of the types of works and operations that are normally necessary for the construction and operation of bridges and also mitigation works and works for the protection of neighbouring land interests. It is possible that other types of ancillary works, not listed in [schedule 2](#), may be necessary to give effect to the works and therefore subsection (1)(b)(ii) provides authority to the Scottish Ministers to undertake other ancillary works not listed within [schedule 2](#).
21. Subsection (1)(b) recognises that once the bridge and associated roads are operational any maintenance will be authorised under the [Roads \(Scotland\) Act 1984 \(c.54\)](#) (as a result of their designation as trunk roads under Part 2) and ties the ancillary power to the Act's authorisation for construction and its recognition that maintenance will be under the 1984 Act. The term Forth Crossing works, which is applied throughout the Act, is defined in subsection (2).

## ***Section 2 – Bridge proportions***

22. This section sets out limitations on the construction of the proposed bridge to ensure its safe operation and the safe operation of shipping and aviation interests that will pass respectively below and above the bridge.
23. The Firth of Forth is a navigational water. To provide certainty to vessels passing under the new bridge, **section 2(a)** sets out the headroom for the bridge. The headroom is the minimum height between the water level and the lowest point of the underside of the bridge or any attachments to the bridge. In the United Kingdom, heights above sea level are defined in terms of Ordnance Datum Newlyn, which is the mean sea level at Newlyn in Cornwall.
24. There are two navigational channels which pass under the area where the new bridge is proposed to be located. The three towers to support the bridge are not to be located in the navigational channels of the Forth. The navigation channel which passes between the proposed Central Tower of the bridge and the proposed North Tower is known as the Rosyth Navigational channel and the channel between the proposed Central Tower and the proposed South Tower is known as the Forth Deep Water Channel. The minimum distance between the towers as referenced in paragraphs (c) and (d) includes the whole of the relevant channel under that part of the bridge. The location of the proposed Central Tower will be, as stipulated within paragraph (b), on an islet known as Beamer Rock.
25. Paragraphs (e) and (f) provide a limit as to maximum height of the towers once constructed to ensure there is no interference with air traffic in the area.

## ***Section 3 – Maximum construction height***

26. **Section 3** requires the Scottish Ministers to obtain the consent of the operator of Edinburgh Airport when carrying out or maintaining the works on the bridge above a prescribed height. That prescribed height is known as the maximum construction height and is defined for each of the towers within paragraphs (a) and (b). No consent is required when undertaking operations below the maximum construction height.

## ***Section 4 – Limits of deviation etc.***

27. **Section 4** allows for a degree of flexibility within defined limits. The Parliamentary plans show the centre line of the principal works (see **schedule 1**) and the limits of deviation around those centre lines. Subsection (1)(a) allows lateral deviation of the works from the centre line provided that the principal works remain within the limits of deviation as shown on the plans. The Act does not permit the construction of the principal works outwith the limits of deviation.
28. The Parliamentary sections show the vertical dimensions and situations of the proposed principal works. Subsection (1)(b) allows the Scottish Ministers to vary the vertical location of the principal works. The ability to deviate upwards is constrained by the provisions within **sections 2 and 3**. The ability to deviate to any extent downwards enables the Scottish Ministers to construct the principal works at whatever depth is required to achieve stability.
29. Subsection (2) enables the Scottish Ministers to carry out and maintain ancillary works (see **section 1(1)(b)**) only within Act limits which are defined at **section 78**.

## ***Section 5 – Bridge marking and lighting***

30. This section places an obligation on the Scottish Ministers to ensure that the bridge is adequately marked and lit during, and at all times after, construction, to consult with the operator of Edinburgh Airport on the placing of markings and obstacle lighting on the bridge prior to construction, following construction, prior to any renewal or replacement of any marking or lighting and at any other time as the Scottish Ministers think fit,

which may include periods of maintenance activity and to comply with any reasonable request by the operator of Edinburgh Airport in meeting specific obligations in respect of marking and lighting. Subsection (1) sets out the obligation to ensure the bridge is adequately marked and lit, subsection (2) sets out the obligation on consultation with the operator of Edinburgh Airport and subsection (3) describes what the Scottish Ministers must do after having consulted with the operator .

### ***Section 6 – Interference with navigation***

31. **Section 6** provides a power to allow interference with navigation within the Firth of Forth during the construction and maintenance of the works. That power is limited by subsection (1) so it can only be exercised within the Act limits shown on the Parliamentary plans. Therefore, the power to interfere with navigation cannot be exercised in relation to any part of the Firth of Forth which is outwith the Act limits. Subsections (1)(a) and (b) provide the specific circumstances in which the Scottish Ministers are permitted to interfere with navigation. The application of such a power is usual in works of this kind.<sup>1</sup>
32. Subsection (2) provides an illustrative list of things that the Scottish Ministers may do that will interfere with navigation. Before interfering with any navigational rights the Scottish Ministers must under subsection (3) consult with the navigation authority<sup>2</sup> and ensure that any interference or obstruction or delay caused as a consequence of that interference is kept to a minimum. Subsection (4) advises that the Scottish Ministers are not liable for any loss arising as a consequence of their interference with navigation.

### ***Section 7 – Dredging etc.***

33. Dredging in the Firth of Forth may be required to be carried out as part of the Forth Crossing works to enable the pillars and towers of the bridge to be located. Blasting of Beamer Rock may also be required to provide a platform for the Central Tower.
34. **Section 7** provides the Scottish Ministers with the power to undertake activities such as dredging and blasting which affect the bed of the Firth of Forth. Subsection (1) provides that the Scottish Ministers may carry out such activities within the limits of deviation. Similar powers have been applied in previous Acts authorising such works.<sup>3</sup>
35. Subsection (2) permits the Scottish Ministers to use or otherwise dispose of anything removed as a result of dredging or blasting. Activities such as dredging, blasting or other activities associated with the carrying out of the works in the Firth of Forth are likely to result in an obstruction or danger to navigation.

### ***Section 8 – Marine (Scotland) Act 2010***

36. The Marine (Scotland) Act 2010 establishes a consent regime for such works as described in **section 7**. It is not appropriate for the Forth Crossing works once authorised by the Parliament under the Act to be subject to a further consent regime. Accordingly, **section 8** enables the Scottish Ministers to undertake the Forth Crossing works without having to obtain a license for any activity that may be required under the Marine (Scotland) Act 2010 .

### ***Section 9 – Interference with railways***

37. This section places the Scottish Ministers under a duty to consult with relevant railway undertakers and consider any representations that they might have. The purpose of the section is to ensure that the relevant railway undertaker is fully aware of the nature of the ancillary works, which unlike principal works (which are set out in **schedule 1** and

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<sup>1</sup> See, for example, section 29 (works affecting river Severn) of the [Severn Bridges Act 1992 \(c.3\)](#).

<sup>2</sup> Currently Forth Ports plc.

<sup>3</sup> See, for example, section 30 (dredging etc.) of the [Severn Bridges Act 1992 \(c.3\)](#).

illustrated on the Parliamentary plans) are only defined in general terms (see [section 1](#) and [schedule 2](#)).

### ***Section 10 – Trees and shrubs***

38. The powers under [section 1](#) of the Act include the power to clear ground in respect of vegetation and that power also applies under [section 41](#). [Section 10](#) further enables the Scottish Ministers to cut down, lop or cut back the roots of any tree or shrub on land that is not within the Act limits or subject to the power in [section 41](#). The power being taken in this section can only be exercised if the Scottish Ministers reasonably believe it to be necessary to prevent the tree or shrub from obstructing or interfering with the works or apparatus used in connection with the works or from constituting a danger to persons carrying out or using the works.
39. Subsection (2) requires that the Scottish Ministers make reasonable efforts to avoid unnecessary damage to the tree or shrub.
40. Subsection (3) disapplies any tree preservation order made under section 160(1) of the [Town and Country Planning \(Scotland\) Act 1997 \(c.8\)](#) or any prohibition on interfering with trees in conservation areas made under section 172 of the same Act which might otherwise apply.
41. The approach taken is to ensure that as far as possible consents are authorised or disapplied under the Act in order that the Forth Crossing works are not compromised in their delivery. Compensation for cutting down, lopping or cutting back roots of trees and shrubs is covered in [section 52](#). Any dispute over compensation is to be determined by the Lands Tribunal of Scotland.

### ***Part 2 – Roads***

42. This Part enables the Scottish Ministers to designate special and trunk roads ([section 11](#) and [section 12](#)) and to transfer roads to the management of the local roads authority ([section 13](#)). It also provides powers to stop up roads ([section 14](#)) and accesses ([section 15](#)), extinguish rights of way over a stopped up road or access ([section 16](#)) as well as setting out a process for determining the ownership of the solum of a stopped up road ([section 17](#)). Part 2 additionally, sets out what the Scottish Ministers must do when undertaking works in roads vested in a local roads authority and requires them to enter information in the Scottish Road Works Register when carrying out works in such roads ([section 18](#)). This Part also disapplies the need for consent from the local roads authority in certain circumstances but requires the Scottish Ministers to consult and consider any representation from the local roads authority ([section 19](#)) and references technical provisions ([section 20](#)) in the [Roads \(Scotland\) Act 1984 \(c.54\)](#) that are required to be disapplied to enable the appropriate operation of the Act.

### ***Section 11 – Special roads***

43. The term “special road” is used to describe a road which is prescribed for the use of certain classes of traffic<sup>4</sup>. Subsection (1) introduces [schedule 3](#) which lists those roads or parts of road that the Scottish Ministers may designate as being a special road. Subsection (2) provides the notification procedures that the Scottish Ministers must follow when designating a road under the Act as a special road.
44. Subsections (3) and (4) are technical provisions to ensure that a designation of special road status made under the Act can be treated as though it were made under section 7 of the [Roads \(Scotland\) Act 1984](#) and therefore attract the provisions of the 1984 Act as they relate to special roads. If a special road designation were to change, section 145 of the 1984 Act would need to be applied to modify or repeal [section 11](#). This ensures

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<sup>4</sup> A common type of special road is a motorway which is prescribed for traffic which falls within Classes I and II of schedule 3 to the [Roads \(Scotland\) Act 1984 \(c.54\)](#).

that any future re-designation of roads as special roads or otherwise can be done using the powers under section 7 of the 1984 Act, and is subject to the relevant procedures in Schedules 1 and 2 to that Act.

### ***Section 12 – Trunk roads***

45. **Section 12** provides for the designation of new roads and existing roads as trunk roads. The expression trunk road applies to roads within the trunk road network<sup>5</sup> for which the Scottish Ministers are responsible. **Section 12(1)** introduces **schedule 4** which provides details of all new roads which are to be trunk roads on the date that the section comes into force. The subsection also ensures that a proposed road identified in **schedule 3** also becomes a trunk road when the section is commenced.
46. Subsection (2) introduces **schedule 5** which lists existing roads (or parts of roads) currently maintained by local roads authorities. These roads will become trunk roads on a date determined by the Scottish Ministers and accordingly transfer to the Scottish Ministers.
47. Subsection (3) makes provision for a special road to become a trunk road on the date that the road is designated as being a special road if it is not already a trunk road under the Act or the Roads (Scotland) Act 1984. This subsection therefore ensures that any road designated as a special road will also be a trunk road.
48. The mechanism for notifying various parties when an existing road is to become a trunk road is set out in subsection (4).
49. Subsection (5) applies section 112 of the 1984 Act which provides that when a road transfers from a local roads authority to the Scottish Ministers all liabilities associated with the road (except for any loans or loan charges) will transfer at the time the road becomes a trunk road.
50. Subsection (6) enables a designation of a road as a trunk road made under the Act to be changed in the future under section 5 of the 1984 Act (which includes detrunking of roads).
51. Subsection (7) ensures a trunk road designated under the Act is included in the definition of a trunk road in the 1984 Act and therefore attracts the maintenance and other provisions of the 1984 Act as they relate to trunk roads.

### ***Section 13 – Roads to be transferred to local roads authorities***

52. The Scottish Ministers will need to create or improve a number of roads as part of the Forth Crossing works. Once created or improved the responsibility for some of these roads will transfer to the relevant local roads authority. Subsection (1) places the Scottish Ministers under an obligation to consult and consider representations from a local roads authority regarding works on roads that once built or improved are to be transferred to that local roads authority. Subsection (2) introduces **schedule 6**, which lists in column (3) the works associated with each road and in column (4) the relevant local roads authority.
53. Subsection (3) advises of the date of transfer of roads from the Scottish Ministers to the local roads authority. It is usual on any roads scheme undertaken by the Scottish Ministers under the Roads (Scotland) Act 1984 for any transfer of road responsibilities to occur on the 1 April following the date on which such a road is opened to traffic. The Act, for reasons of consistency, follows that approach.

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<sup>5</sup> The Trunk Road Network is a system of strategic routes of national importance that caters for the through movement of long distance traffic. The network includes motorways (“M”) and all-purpose (“A”) roads.

54. Subsection (4) by attracting section 112 of the Roads (Scotland) Act 1984 ensures that on transfer of the road to the local roads authority particular liabilities attached to the construction of the road remain with the Scottish Ministers.

#### ***Section 14 – Stopping up of roads***

55. Subsection (1) authorises the permanent stopping up<sup>6</sup> of each road as identified in **schedule 7** for the purposes of the Forth Crossing works. Without a power to stop up, existing roads would interfere with the construction and operation of the proposed scheme and provide public rights of way at inappropriate locations.
56. **Part 1 of schedule 7** provides a list of those roads to be stopped up where the Scottish Ministers have determined that they are satisfied that another reasonably convenient road exists or that no alternative road is necessary. Subsection (2) introduces **Part 2 of schedule 7** which lists those roads that are to be stopped up but which may not be stopped up until a substitute road is open for public use or an alternative is provided.
57. Where a road is closed subsection (3) allows the Scottish Ministers to use the site for the Forth Crossing works. **Section 53** provides for the payment of compensation in respect of stopping up. Subsection (4) sets out that a road can not be permanently stopped up before the Scottish Ministers have notified the public of the closure date. Subsection (5) provides for the notification procedure for the opening of a new road as described in **Part 2 of schedule 7**.

#### ***Section 15 – Stopping up of means of access***

58. Subsection (1) authorises the permanent stopping up of each access as identified in **schedule 8** for the purposes of the Forth Crossing works. Without a power to stop up, existing accesses could interfere with the construction and operation of the proposed scheme and provide public rights of passage at inappropriate locations.
59. **Part 1 of schedule 8** provides a list of those accesses to be stopped up where the Scottish Ministers have determined that they are satisfied that another reasonably convenient access exists or that no alternative access is necessary. Subsection (2) introduces **Part 2 of schedule 8** which lists those accesses that are to be stopped up but which may not be stopped up until a substitute access is open for use or an alternative is provided. Subsection (3) sets out that an access can not be permanently stopped up before the Scottish Ministers have notified the closure date to the owner and occupier of any land affected by the stopping up.
60. Subsection (4) sets out the notification procedure for the opening of the access as described in **Part 2 of schedule 8**.
61. If an owner disputes that the access is complete then under subsection (5) an objection can be made to the Scottish Ministers. That objection must be made within 28 days of receiving a completion notice from the Scottish Ministers. On receipt of the objection notice the Scottish Ministers have two options under subsection (6): they can withdraw the notice and carry out further works and then re-issue the completion notice; or they can, if they believe, for instance, that the access is ready for use, notify the owner that they are referring the matter to the Lands Tribunal for a determination. The latter option ensures that there is resolution of any dispute.
62. Subsection (7) places the Scottish Ministers under a duty to carry out reasonable maintenance of the substitute access for a specified period.
63. In order to provide a substitute access for an owner of land the Scottish Ministers may require access to land in order to create the access. There is no requirement to take that land permanently since the intention is to ensure that the access, once constructed,

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<sup>6</sup> “Stopping up” is a technical term for closing a road to traffic and terminating public rights of passage over it. A road may include a road, cycletrack, footway or footpath all of which have the status of a road.

reverts to the ownership of the person or persons for whom the access was created. Therefore [section 37](#) provides within subsection (1) a power to enter and take land temporarily and under subsection (2) ensures that the land can be taken for a specified period.

### ***Section 16 – Extinction of rights of way***

64. This section provides that, in stopping up a road or an access under [section 14 or 15](#), all rights of way over any part of that road or access are extinguished. Any person who suffers loss or disturbance by extinguishment of any private right of way under [section 14 or 15](#) shall be entitled to compensation under [section 53](#) of the Act.

### ***Section 17 – Solum of stopped up road***

65. The solum of a road means the soil or ground beneath the road upon which the road is built. A road vests in the appropriate roads authority but the roads authority does not necessarily own the solum of the road. Often the roads authority will have a right to use, or authorise the use of the road by the public, or maintain the road without having ownership of the solum itself.
66. This section provides that where a road ceases to be used as a road, the solum of the road will vest in the owner of the land which adjoins the former road unless there is a person, who by reason of title, has a prior claim or the Scottish Ministers will become the adjoining land owner under the terms of subsection (1)(b). This section is consistent with the provisions that apply in relation to the vesting of solum of a stopped up road under the Roads (Scotland) Act 1984<sup>7</sup>.
67. Subsection (2) provides that the resolution of any dispute as to the vesting of the solum will be heard before a sheriff in whose sheriffdom the land is located.

### ***Section 18 – Works in roads where the Ministers are not the roads authority***

68. This section relates to works on existing roads that are the responsibility of a local roads authority. Subsection (2)(a) places the Scottish Ministers under a duty to consult with and consider representations from the relevant local roads authority prior to commencing any works in such local roads. The Scottish Road Works Register is the national database system for the electronic transfer, retention and management of road works data and is the central tool for road works authorities and statutory undertakers (utility companies) to enter information to assist them in the planning and coordination of works on Scottish roads. Under subsection (2)(b) the Scottish Ministers must enter relevant information in the register in a manner which is in accordance with provisions of the New Roads and Street Works Act 1991 (c.22) which apply when they propose to carry out works on roads for which they are not the roads authority. Such action will ensure that statutory undertakers and the relevant local roads authority are appropriately informed of the timing and nature of works that are due to take place.
69. Subsection (3) sets out matters on the transfer of rights and liabilities between the Scottish Ministers and the local roads authority arising from carrying out the Forth Crossing works in local roads. Subsection (4) provides for an appropriate dispute resolution if those rights or liabilities are contested and will attract the provisions of the [Arbitration \(Scotland\) Act 2010 \(asp 1\)](#).

### ***Section 19 – Access to public roads***

70. It will be necessary for the Scottish Ministers to provide or improve access from existing public roads to land to be used for the Forth Crossing works or to land on which there is a requirement under [section 38](#) to construct or improve a new means of access. [Section 38](#) enables the Scottish Ministers to facilitate such access by the dropping of kerbs

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<sup>7</sup> See section 115 of the [Roads \(Scotland\) Act 1984 \(c.54\)](#).

and similar works. The locations of these works are shown on the Parliamentary plans. **Section 19** allows the Scottish Ministers to carry out such works without having to seek consent from the local roads authority but places a duty on the Scottish Ministers to consult and consider any representations from the local roads authority prior to carrying out any work to provide or improve an access to or from a road for which the local roads authority are or will be responsible.

### ***Section 20 – Application of the Roads (Scotland) Act 1984***

71. This section contains technical provisions which disapply specific provisions of the Roads (Scotland) Act 1984, which would otherwise apply to “roads”, in order to enable the appropriate operation of the Act. Subsection (1) is disapplied because specific provision has been made in **section 12** to ensure that a special road may be a trunk road. As the Act is providing the authority under **section 1** (for the Forth Crossing works, which include the construction of new roads), subsection (2) disapplies Part 3 of the 1984 Act and under subsection (3) certain other provisions of that Act. The manner in which the works are to be carried out under the Act are covered by provisions in a number of sections (see for example **sections 2 to 10**) as well as procedures contained within accompanying documents (see the code of construction practice as defined in section 79). Sections 103 to 111 (acquisition of land) of the 1984 Act are disapplied by subsection (4) as **Part 3** of the Act makes specific provision for matters relating to which land may be acquired.

### **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>8</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

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<sup>8</sup> These are the Acts collectively known as “the Lands Clauses Acts” and incorporated by section 21(1).



addresses compensation) and sections 71 to 78 (which cover mines) of the 1845 Railways Act<sup>9</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 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>10</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.

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<sup>9</sup> See notes on section 28 (minerals) of the Act.

<sup>10</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).

***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>11</sup> or real burden<sup>12</sup> over land that is within the limits of deviation or is specified in **schedule 9**. Paragraph (b) similarly provides for the automatic disapplication of any development management scheme<sup>13</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.

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**11** 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."

**12** 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.

**13** 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.

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.

### **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>14</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.

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<sup>14</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.

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.

#### **Part 4 – Taking Title to Land**

101. This Part deals with the procedures associated with the acquisition of title to land. There are two standard procedures commonly known as “notice to treat” and “general vesting declaration” and provisions for each procedure (see respectively **sections 30 to 34** and **sections 35 and 36**) are contained within the Act
102. The **notice to treat** procedure involves the serving of a special notice by the person authorised to purchase the land to the landowner offering to correspond with the landowner with a view to agreeing compensation. The special notice is known as a “notice to treat”. The person authorised to acquire the land, in this case the Scottish Ministers, may enter the land before the compensation is agreed and the land has been formally transferred by serving a “notice of entry” on the owner. If the owner is unwilling to sell the land or cannot be traced then the Scottish Ministers can acquire the land by executing a deed, called a “notarial instrument”. This provision is to ensure that the landowner cannot hold up the scheme unreasonably by refusing to sell and that the scheme can go ahead even if the landowner cannot be traced. The level of compensation will be the same whether acquisition is conducted by means of a “notarial instrument” or with the agreement of the owner.
103. The process for assessing compensation is contained within the 1845 Lands Act and the **Land Compensation (Scotland) Act 1963 (c.51)**. If a dispute should arise about the amount of compensation it is referred to the Lands Tribunal for Scotland which is a specialist tribunal for dealing with such disputes.
104. The procedure known as **general vesting declaration** is discussed at the explanation of **section 35**.

#### **Section 30 – Service of a notice to treat**

105. **Section 30** sets the procedure that is to apply for the serving of a notice (called a notice to treat) on each landowner whose land is required. The procedure is set out in section 17 of the 1845 Lands Act which has been incorporated within the Act under section 21(1).
106. Under subsection (2) the notice to treat must be served in the manner prescribed under **section 75** (Formal communications), provide a description of the land and ensure that any person receiving or reading the notice will know that it is an important document.

#### **Section 31 – Partial acquisitions using notice to treat procedure**

107. The Act disapplies, by virtue of section 21(1), section 90 of the 1845 Lands Act, which sets out the procedures where an acquiring authority wishes to acquire part only of certain types of property required for the works. Section 90 of the 1845 Lands Act provides that the owner of a house, building or factory cannot be compelled to sell only part of his or her property if he or she is willing to sell the whole. This would enable a landowner to insist on the acquisition of the whole of his or her property, however large, even where the part proposed for compulsory acquisition is only a very small fraction of the whole.
108. **Section 31** together with **section 32** replaces section 90 of the 1845 Lands Act so as to enable the Scottish Ministers to acquire only part of a property where this can be done without material detriment to the rest of the property and in the case of a park

*These notes relate to the Forth Crossing Act 2011 (asp  
2) which received Royal Assent on 20 January 2011*

or garden without also seriously affecting the amenity or convenience of the house. Provision made by **sections 31 and 32**, in place of section 90 of the 1845 Lands Act, is common in private Scottish Acts<sup>15</sup>.

109. Subsection (1) provides that where a notice to treat is served under **section 30** the person on whom the notice is served may serve an objection within 28 days, objecting to the sale of part of the land. If no objection is made within 28 days the landowner is obliged to sell the land detailed in the notice to treat.
110. Subsection (2) sets out that an objection must be served on the Scottish Ministers and that it must contain a statement that the owner is willing to sell the whole of the land and identify that land.
111. Subsection (3) sets out the procedure that the Scottish Ministers must follow when dealing with an objection. Subsection (3)(a) provides that where the Scottish Ministers agree to take the land which is the subject of the objection, the notice to treat is deemed to apply to the land in the objection as well as in the original notice to treat. Subsection (3)(b) enables the Scottish Ministers on receipt of the objection to withdraw the notice to treat and accordingly notify the objector. The reasons for withdrawing the notice may be varied and could include, for instance, the Scottish Ministers withdrawing the notice to treat so that another notice to treat can be issued in different terms, for instance, with lesser land being taken as a result of informal agreement of both parties. Subsection (3)(c) provides that where the Scottish Ministers do not agree to take the whole land as specified within the objection the Scottish Ministers must refer the question as to what land the owner shall be required to sell to the Lands Tribunal for Scotland and accordingly notify the objector. The Lands Tribunal must consider the referral in the terms as set out in **section 32**.
112. If within 3 months of receipt of an objection the Scottish Ministers fail to agree, withdraw or refer that objection the notice to treat will be deemed as withdrawn, under subsection (4).

***Section 32 – Severance disputes (notice to treat procedure): Lands Tribunal***

113. **Section 32** sets out the matters that the Lands Tribunal for Scotland must consider and the outcome of the objection as a consequence of their determination.
114. Subsection (1) provides that on receipt of a referral from the Scottish Ministers the Tribunal must consider whether some or all of the land within the notice to treat can be acquired without material detriment to the rest of the property and in the case of a park or garden without also seriously affecting the amenity or convenience of the house.
115. Subsection (2) provides that if the Tribunal determines that the land in the notice to treat can be taken without material detriment and in the case of a park or garden without also seriously affecting the amenity or convenience of the house then the owner is obliged to sell the land that the Scottish Ministers wish to acquire.
116. Subsection (3) provides that the Tribunal may determine that (a) only some of the land within the notice to treat can be acquired or (b) that some or all of the land within the notice to treat can be acquired together with some or all of the additional land identified in the objection. Under this subsection a notice to treat can be deemed to include other land whether or not that land is subject to compulsory purchase under the Act.
117. Under subsection (4) the Scottish Ministers have 6 weeks within which to withdraw the notice to treat and notify the owner rather than proceed with the acquisition of land as determined by the Lands Tribunal. The six week period is necessary to enable the Scottish Ministers to assess any consequential implications for the design and operation of the scheme as a result of the Lands Tribunal's determination.

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<sup>15</sup> See, for example, section 26 (acquisition of part of certain properties) of the [Edinburgh Airport Rail Link Act 2007 \(asp 16\)](#).

118. Matters of compensation in respect of land are addressed under **Part 6**.

### ***Section 33 – Severance of agricultural land***

119. The scheme impacts on agricultural land, particularly south of the Forth. **Section 33** ensures that **sections 31** and **32** do not apply in relation to agricultural land<sup>16</sup>, which is covered by specific provisions within sections 49 (notice to treat in respect of part of agricultural land) and section 50 (effect of counter-notice under section 49) of the **Land Compensation (Scotland) Act 1973 (c.56)**.

### ***Section 34 – Notice to treat: time limit***

120. Section 17 of the 1845 Lands Act requires an acquiring authority to give notice of its intention to take land by way of service of a notice to treat. That section is incorporated with the Act by virtue of **section 21**. In relation to compulsory purchase orders, section 78 of the **Planning and Compensation Act 1991 (c.34)** limits the life of a notice to treat served under section 17 to three years from the date on which it is served. Section 78 only applies for the purposes of any compulsory purchase orders and a corresponding 3 year time limit is therefore applied in the Act by **section 34**.
121. Subsection (1) provides that the time limit shall be three years unless any of the reasons listed in paragraphs (a) to (c) apply.
122. Subsection (2) allows the three year time limit period to be extended for any period of time provided that the Scottish Ministers and the owner of the land both agree to that extension.
123. Subsection (3) ensures that the Scottish Ministers must inform the relevant person when a notice to treat becomes invalid because it has not been served either within 3 years or within such period as agreed.

### ***Section 35 – General vesting declarations***

124. **Section 35** attracts the “general vesting declaration” procedure to the Act. This is a compulsory acquisition procedure which is an alternative to serving notice to treat and notices of entry on every owner. The procedure is set out in Schedule 15 to the **Town and Country Planning (Scotland) Act 1997 (c.8)** and provides a more convenient way to acquire a large number of parcels of land in different ownership.
125. The procedure involves sending a compulsory purchase notice of the intention to execute a “vesting declaration”. That notice is served on various specified parties who own or have an interest in the land which is to be subject to compulsory purchase. Those persons have two months in which to respond to the notice. On the expiry of that period of two months, or such longer period as may be specified in the notice, the acquiring authority, which for the purposes of the Act will be the Scottish Ministers, can execute a declaration in the prescribed form (the prescribed forms are set out in the schedules to the **Compulsory Purchase of Land (Scotland) Regulations 2003 (S.S.I 2003/446)**) vesting the land in the Scottish Ministers from such period as may be specified in the declaration.
126. Once the declaration has been made it does not take effect until at least 28 days notice of its making has been served on every owner or occupier. At that point the declaration is treated as if it had been a notice to treat and the Scottish Ministers, as the acquiring authority, have the power to enter and take possession of the land without serving notices of entry.
127. To enable the general vesting declaration procedure to apply within the Act specific provision is required and this is given by subsection (1) which provides the power for the Scottish Ministers to make a general vesting declaration for land that they wish to

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<sup>16</sup> Agricultural land is defined in section 80(1) (general interpretation) of the **Land Compensation (Scotland) Act 1973 (c.56)**.

acquire compulsorily. That land, under [section 22](#), is land within the limits of deviation and land identified in [schedule 9](#).

128. Subsection (2) clarifies how the general vesting procedure of the Town and Country Planning (Scotland) Act 1997 should be applied for the purposes of the Act.

### ***Section 36 – Duty to publicise general vesting declarations***

129. [Section 36](#) sets out the procedure for publicising the making of a general vesting declaration and notifying those persons whose land or interest in land is affected by the declaration.
130. Subsection (1)(a) places a duty on the Scottish Ministers to publish a compulsory purchase notice in at least one local newspaper circulating in the area where land or an interest in land is to be acquired. The content of the compulsory purchase notice is described in subsection (2).
131. Subsection (1)(b) provides that a compulsory purchase notice, together with a copy of the Act once enacted and a copy of the Parliamentary plans, which will show the geographic impact of the scheme, must be issued to those persons specified. Explanations of a real burden and a development management scheme are provided in the explanation to [section 25](#).

### **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.

## **Part 6 – Compensation**

155. This Part sets out the framework for compensation (**section 47**), matters that must be taken into account when considering compensation (**sections 48 and 49**), entitlement to compensation and the process for addressing any dispute as to that entitlement or the level of compensation (**sections 50 to 56**).
156. The Act applies the same procedural rules, safeguards and requirements regarding compensation as generally apply for land and rights purchased compulsorily. The rules for calculating the basis and amount of compensation are contained in the Land Clauses Acts (see paragraph 75) and the **Land Compensation (Scotland) Act 1963 (c.51)** and the **Land Compensation (Scotland) Act 1973 (c.56)**.
157. The 1963 Act, which deals with assessing compensation and resolving disputed compensation claims, applies to the compulsory acquisition of land. The 1973 Act covers compensation for a decrease in value of land caused by use of public works and defines the physical factors that will give rise to a claim for compensation. The general principles with regards to compensation that these Acts embody are collectively known as the “compensation code”.
158. The 1845 Lands Act provides that in estimating the compensation to be paid, regard is to be had first of all to the value of the land to be taken and secondly to the depreciation in the value of any remaining land caused by severance or injurious affection (section 61 of the 1845 Lands Act). This is the basic principle by which compensation is assessed. **Section 21(1)** of the Act incorporates section 61 of the 1845 Lands Act.
159. In addition to this basic principle it is generally accepted that any increase in value to land caused by the scheme underlying the acquisition is to be ignored. This principle is embodied within the 1963 Act which provides that:
- any depreciation in the value of land due to the prospect of the land being compulsorily acquired is to be ignored (section 16 of that Act);
  - any increase or decrease in the value of the land due to the scheme underlying the acquisition is to be ignored (section 13, schedule 1); and

*These notes relate to the Forth Crossing Act 2011 (asp 2) which received Royal Assent on 20 January 2011*

- any increase in the value of adjoining land in the same ownership as a result of the scheme is to be set off against the compensation for the land compulsorily acquired (section 14 and 15 and schedule 1).
160. Accordingly, compensation is generally available for:
- the value of land;
  - disturbance, being losses such as, for example, removal expenses or loss of profits, arising as result of displacement from the land acquired;
  - injurious affection being depreciation, for example, caused by the construction or use of works, in the value of land retained by a land owner; and
  - severance being a specific type of injurious affection arising when part of an area of land held by the same owner is taken.
161. The 1963 Act contains provisions on the assessment of compensation in respect of interest in land. In particular it sets out in section 12 the rules on assessing compensation and provides that the Lands Tribunal for Scotland is responsible for dealing with any disputes as to compensation for compulsory purchase.
162. **Part 6** of the Act makes particular reference to the aforementioned Acts and where appropriate explanations are provided as to the application or disapplication of various provisions within those Acts as they relate to provisions within the Act.

***Section 47 – Land Compensation (Scotland) Act 1963***

163. **Section 47** expressly adapts the application of the provisions of the Land Compensation (Scotland) Act 1963 in respect of land compulsorily acquired under **section 22**. Paragraph (a) ensures that the Act falls within the terms of a “special enactment” and therefore enables the provisions to be applied appropriately. Paragraph (b) disapplies section 14 of the 1963 Act, which makes provision for set-off. Since **section 48** of the Act addresses set-off of betterment against compensation, section 14 is accordingly disapplied.
164. Paragraphs (c) and (e) are technical provisions which ensure that the Act can attract appropriate provisions of the 1963 Act. Similarly, paragraph (f) ensures that the 1963 Act attracts the provisions of the Act in its construction.
165. Paragraph (d) ensures that references in sections 22 and 23 of the 1963 Act to the date of service of the notice to treat include references to the date the general vesting declaration is made where title to land is taken by general vesting declaration as both the procedure of notice to treat and general vesting declaration are available to take title under the Act.

***Section 48 – Matters to be considered when assessing compensation***

166. This section ensures that the value of land for compensation is unaffected by any increase in value arising as a consequence of the Forth Crossing works. Land close to the roads, their junctions and the bridge approaches may become attractive to developers and, as a result, increase in value. **Section 48** makes provisions for set-off, which is where the value of compensation to a land owner is set-off against any increase in value in any contiguous land that the land owner may have. This approach is consistent with that which applies under section 110 of the **Roads (Scotland) Act 1984 (c.54)** and in this way a land owner affected by the Forth Crossing works is treated in the same way as a land owner affected by a roads scheme made under the 1984 Act.
167. Paragraphs (a) to (c) set out what the Lands Tribunal for Scotland must do or have regard to when assessing compensation.

***Section 49 – Matters to be ignored when assessing compensation***

168. This section addresses the situation where a land owner does something with the deliberate purpose of seeking to obtain compensation or increased compensation. This principle has been put in statutory form by paragraph 7 of Schedule 2 to the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 (c.42) and applies to the compulsory acquisition of roads under the Roads (Scotland) Act 1984. A provision is required under the Act so that this principle is consistently applied. Accordingly, under subsection (1) the Lands Tribunal for Scotland, when making any determination on compensation, must not take into account either the creation of an interest in land or any land value enhancement if they are satisfied that the purpose of that interest or enhancement was to obtain compensation or increased compensation. These provisions are precedented.<sup>17</sup>
169. Subsection (2) provides a definition of “land value enhancement”.

***Section 50 – Compensation: partial acquisition etc.***

170. **Section 50(1)** ensures that the Scottish Ministers must in addition to paying compensation for the value of any interest (which includes servitudes and rights) in the land acquired pay compensation for any loss resulting from the severance of the land.
171. Subsection (2) provides that when the Scottish Ministers withdraw a notice to treat under **section 32(4)** they must pay the land owner compensation for any expense caused by the giving and withdrawal of the notice to treat. This provision is required so that the land owner is appropriately compensated for any disturbance that may be caused. If there is any dispute about entitlement to compensation or the amount of any compensation the matter will be determined by the Lands Tribunal for Scotland. Either the land owner or the Scottish Ministers can approach the Lands Tribunal for a determination.

***Section 51 – Compensation: servitudes and other rights***

172. There are at least four situations where compensation may be payable for the acquisition or extinguishment or disapplication of servitudes or other rights. Those situations are:
- (i) where a right is directly purchased permanently or temporarily (see **section 24**);
  - (ii) where land is purchased, rights in land are extinguished or disapplied and the owner’s other land (benefited property) suffers (see **section 25**);
  - (iii) where land is purchased, rights in land are extinguished under **section 25** and the holder of a personal real burden suffers loss; and
  - (iv) where a right is extinguished on land that the Scottish Ministers currently own.
173. Compensation for acquisition or extinguishment of a servitude or right under **section 22** (see categories (i) and (iv) above) is provided for by **section 51**.
174. Compensation for category (ii) above is provided by virtue of section 6 of the 1845 Railways Act which makes provision whereby a benefited proprietor is entitled to compensation where their interest in land has been injuriously affected when a servitude or other right is extinguished. Section 6 applies by incorporation under **section 21(2)** of the Act.
175. Compensation for category (iii) above is provided by **section 51(2)** which ensures that any person who loses the right to enforce a personal real burden is entitled to compensation.

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<sup>17</sup> See section 22 of the *Edinburgh Airport Rail Link Act 2007* (asp 16) and section 17 of the *Glasgow Airport Rail Link 2007* (asp 1).

176. **Section 51** ensures compensation is payable in respect of the circumstances set out above and provides that as part of the determination of the compensation payable that account is taken of any new servitude or real burden created by the Scottish Ministers. For illustration, this means that a person could be compensated for the loss of a right to do something on their land and further compensated because the Scottish Ministers have taken a right to do something such as to provide access to Forth Crossing works over that person's land thus further affecting the land owner's enjoyment of his or her land.
177. Subsection (3) sets out the process for resolving any dispute as to entitlement to compensation or the amount of any compensation.

***Section 52 – Compensation: cutting down, lopping, or cutting back roots of, trees or shrubs***

178. **Section 52** provides for the Scottish Ministers to pay compensation to any person who suffers loss arising from the exercise of the powers conferred by **section 10**.
179. Under subsection (2) any dispute as to entitlement to compensation or the amount of compensation will be determined by the Lands Tribunal for Scotland in accordance with the Land Compensation (Scotland) Act 1963.

***Section 53 – Compensation: stopping up***

180. **Section 53(1)** provides for compensation in respect of interests affected by the stopping up of a road or access by ensuring that any person with an interest in land who suffers loss or disturbance as a result of action taken by the Scottish Ministers in stopping up a road (see **section 14**) or an access (see **section 15**) is entitled to compensation.
181. Subsection (2) provides that any dispute as to entitlement to, or amount of, compensation is determined by the Lands Tribunal for Scotland under the Land Compensation (Scotland) Act 1963 although account must be taken, in terms of subsection (3) of any new road or means of access provided.

***Section 54 – Compensation: entering and using land temporarily***

182. This section also reaffirms the general principle of compensation for interests being affected in circumstances where a person with an interest in land suffers loss or disturbance as a consequence of the Scottish Ministers entering or using land temporarily. Subsection (1) provides for compensation to be payable where entry is taken to land under **sections 37 or 38**; where, having taken such entry, Ministers use the land in terms of **section 41**; or where leases are extinguished (**section 37(3)**) or rights or burdens are suspended during such entry (**section 46**).
183. Subsections (2) and (3) make provision as to how a dispute regarding compensation is to be determined and subsection (4) sets out what factors are to be taken into account in assessing compensation.
184. Subsection (5) ensures that compensation payable under **section 54** does not preclude compensation being paid for loss or damage arising as a result of the Forth Crossing works under section 6 of the 1845 Railways Act or any other enactment as long as a person is not compensated for the same thing twice.

***Section 55 – Compensation: advance entry***

185. **Section 55** provides that where the Scottish Ministers take advance entry to land under **section 39**, compensation is payable from the point that entry is taken as if the provisions in the 1845 Lands Act on entry on lands had been complied with or the land had vested in the Scottish Ministers (depending on whether the notice to treat or general vesting declaration procedure is used).

186. Where an acquiring authority, which in the case of the Forth Crossing works will be the Scottish Ministers, have taken possession of any land they are obliged under the terms of section 48 of the Land Compensation (Scotland) Act 1973 to make an advance payment on account of any compensation payable by them for the compulsory acquisition of any interest in that land. The process and the calculation of the amount of the advance payment are set out in section 48 of the 1973 Act. Subsection (2) ensures that the operation of the provision in the 1973 Act is not precluded by **sections 37 or 55** of the Act.

### ***Section 56 – Compensation where notice to treat becomes invalid***

187. **Section 56** provides that a person is entitled to compensation from the Scottish Ministers for any loss arising as a result of a notice to treat subsequently being invalidated under the terms of **section 34**. This would cover, for example, the situation where a person may have taken actions in the expectation that the notice to treat would have progressed and resulted in their land being taken.
188. Subsection (2) ensures that the Lands Tribunal will determine any dispute and subsection (3) provides that interest is payable at the rate prescribed under section 40 of the Land Compensation (Scotland) Act 1963 from the date of the notice becoming invalid until the date of payment.

### **Part 7 – Statutory Undertakers**

189. This Part sets out the rights and responsibilities of the providers of public utilities (**sections 57 and 58**), the compensation procedures for owners or occupiers where reconnection to utilities is required (**sections 59 and 60**) and what may happen to apparatus in a stopped up road (**section 61**).

### ***Section 57 – Apparatus affected by works***

190. **Section 57** concerns the rights of providers of certain utilities, including water, gas, electricity, sewerage and telecommunications services to maintain their supplies through apparatus that will or may be affected by the Forth Crossing works. These providers are frequently referred to as “statutory undertakers” and that is the expression used in sections 224 to 227 of the **Town and Country Planning (Scotland) Act 1997 (c.8)**. Those sections provide a statutory code that applies in certain cases where the use of land for planning purposes makes it necessary to extinguish statutory undertakers’ rights in relation to apparatus.
191. The code provides for the acquiring authority to require the relocation of apparatus of the statutory undertakers and for the statutory undertaker to object to the proposal with disputes being determined by the Scottish Ministers. Compensation for relocation is payable by the acquiring authority under section 232, 233 and 235 of the 1997 Act.
192. The extinguishment of statutory undertakers’ rights has precedence when constructing roads<sup>18</sup> or the construction of other works authorised by Acts of the Scottish Parliament<sup>19</sup>.
193. **Section 57(1)** provides that provisions in respect of the 1997 Act may apply in respect of land that is to be acquired (whether compulsorily or voluntarily), appropriated or used or about to be used for the purposes of the Act. Such land may include land that is already owned by the Scottish Ministers. Subsection (1)(a) specifically applies sections 224 to 227 and subsection (1)(b) applies all other provisions of sections of the 1997 Act that are needed to ensure the effective operation of sections 224 to 227, including provisions in respect of compensation.

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**18** Section 134 of the **Roads (Scotland) Act 1984 (c.54)**, which applies and extends the relevant sections within the 1997 Act.

**19** Section 34 of the **Glasgow Airport Rail Link Act 2007 (asp 1)**.

194. Subsection (2) limits the purpose for which sections 224 to 227 apply to the carrying out of the Forth Crossing works.
195. Subsection (3) ensures that Scottish Water as suppliers of sewers and sewage disposal works are included within the term of statutory undertakers for the purpose of the Act. Under the 1997 Act Scottish Water would only be caught as being a statutory undertaker for the supply of water.
196. Section 142 and 143 of the [New Roads and Street Works Act 1991 \(c.22\)](#) provide for a separate code governing works in roads and which will apply to certain of the Forth Crossing works. Accordingly, subsection (4) provides that [section 57](#) of the Act and therefore the provisions of the 1997 Act have no effect in relation to apparatus affected by such works.

### ***Section 58 – Works for roads purposes***

197. Part 4 of the New Roads and Street Works Act 1991 sets out matters for dealing with road works in Scotland. Sections 142 to 144 of the 1991 Act, set out what an authority executing “works for road purposes” (including “major works for road purposes”) shall do in relation to apparatus that is likely to be affected by the works. Section 145 of the 1991 Act defines works and major works for road purposes. Under the requirements of section 142 the authority must take all reasonable steps to give the statutory undertaker to whom the apparatus belongs reasonable facilities to monitor the work and comply with any reasonable requirements for the protection of the apparatus or securing access.
198. Where apparatus is likely to be affected by major works for roads purposes, section 143 sets out what the authority must do, along with the undertaker, to deal with apparatus, and section 144 sets out how the costs of executing the measures that are necessary are to be shared between the authority and the undertaker. The [Road Work \(Sharing of Costs of Works\) \(Scotland\) Regulations 2003 \(SSI 2003/509\)](#) have been made under the powers in section 144 of the 1991 Act and specify how the cost sharing between the authority and the undertaker is to be regulated.
199. [Section 58](#) defines what Forth Crossing works are to be considered works for road purposes, under paragraph (a) or, under paragraph (b), major works for road purposes, so the relevant regime under the 1991 Act applies.
200. Paragraph (c) ensures that the Act can properly apply the provisions of the 1991 Act.

### ***Section 59 – Compensation for removal of water, gas, electricity or communications apparatus***

201. Under section 134(3) of the [Roads \(Scotland\) Act 1984 \(c.54\)](#) where apparatus of a statutory undertaker is removed under section 224 of the Town and Country Planning (Scotland) Act 1997 any person who is an owner or occupier of premises to which a supply (e.g. gas, electricity etc.) was given from that apparatus is entitled to be compensated for having to connect the premises to other apparatus from which a supply is given. The purpose of [section 59](#) is to ensure that the principle of compensating for a loss of supply applies under the Act.
202. Accordingly subsection (1) enables an owner or occupier to seek compensation from the Scottish Ministers for reconnection of a supply, provided that the supply was provided by apparatus of those described within subsection (2).

### ***Section 60 – Compensation for removal of public sewer***

203. This section is similar to section 135 of the Roads (Scotland) Act 1984 which relates to compensation in respect of connection to, or construction of, sewers or a sewage disposal plant. [Section 60\(1\)](#) provides that, where a public sewer is removed, an owner or occupier is entitled to compensation in respect of reasonable costs incurred in linking

to other sewers or a private disposal plant or under subsection (1)(b) constructing a sewage disposal plant and linking to that plant.

204. **Section 60(2)** makes provision in a scenario in which the owner of a private sewer is entitled to compensation in respect of reasonable costs incurred in linking to public sewers or a private disposal plant or, under subsection (2)(b), constructing a private disposal plant and linking to that plant.

### ***Section 61 – Apparatus in stopped up roads***

205. **Section 61** provides that statutory undertakers preserve their rights in relation to or over any apparatus that may be placed under, in, on, over, along or across a road stopped up under **section 14**. In this respect the statutory undertakers are treated in a similar manner to that which applies under section 12 of the Roads (Scotland) Act 1984. Subsection (1)(a) preserves those rights whilst subsection (1)(b) provides a power to statutory undertakers to remove and reposition that apparatus. Subsection (2) however places a duty on statutory undertakers to exercise their power to remove and relocate equipment if the owner of the land of the stopped up road so reasonably requests. **Section 17** makes provision for ownership of the solum of a stopped up road.
206. Subsection (3) ensures that the costs of relocating apparatus in consequence of subsection (2) will be shared between the statutory undertaker and the Scottish Ministers according to the regime for determining and sharing costs in section 144 of the New Roads and Street Works Act 1991 and any regulations made under that Act.

## **Part 8 – Planning Permission, Listed Buildings and Conservation Areas**

207. This Part deems planning permission for the works (**section 62**) and provides for the relaxation of controls in respect of listed buildings so that work affecting those properties can proceed without requiring further separate authority (**sections 63 to 65**)

### ***Section 62 – Planning permission***

208. **Section 62** provides for planning permission to be deemed to have been granted for the Forth Crossing works authorised by the Act as though an application made to the planning authority had been called in and granted by the Scottish Ministers under section 46 of the **Town and Country Planning (Scotland) Act 1997 (c.8)**.
209. Subsection (2) provides that this planning permission will lapse if the Forth Crossing works have not commenced within five years of Royal Assent

### ***Section 63 – Relaxation of listed building controls***

210. As explained above, the Act will deem planning permission for the Forth Crossing works to have been granted. It is appropriate that all planning issues should be considered at the same time. This section accordingly disapplies a separate statutory requirement to obtain listed building consent so that the Act effectively ensures that all works can progress without the need for additional planning consents which might otherwise impact on the execution of the works.
211. Subsection (1) refers to the Listed Buildings Act which is defined in **section 65** as the **Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (c.9)**. This is the Act that requires consent (called listed building consent) for works and operations affecting buildings that are listed under the Act as being of special architectural or historic importance. Subsection (1) disapplies section 6 of the Listed Buildings Act in respect of works that are specified in column (3) of **schedule 11** to the Act in relation to the listed buildings that are set out in column (1) of the schedule. It is also disapplied in respect of any Forth Crossing works to a building that has been listed after 1 January 2009. Under section 6 works to demolish, alter or extend a listed building are restricted unless authorised. The disapplication of section 6 ensures that the works as specified



in **schedule 11** to the Act, or Forth Crossing works to a building listed after 1 January 2009, can proceed without the need to acquire listed buildings consent.

212. Subsection (2) ensures that a listed building enforcement notice does not apply where the work required by the notice would be rendered ineffective by Forth Crossing works to the listed building concerned. Under section 38(1) of the Listed Buildings Act the local authority has the power to do the things required by an enforcement notice if the recipient of the notice fails to comply. This subsection also ensures that the local authority cannot take such a step if the same circumstances apply.
213. Subsection (3) prevents the local planning authority from exercising its powers under section 49 of the Listed Buildings Act in relation to those properties listed in **schedule 11**, or a building listed after 1 January 2009, to carry out urgent preservation works if those works would be rendered ineffective, or substantially ineffective, by the Forth Crossing works.
214. Subsection (4) disapplies section 53 of the Listed Buildings Act in relation to the works specified in column (3) of **schedule 11**, or Forth Crossing works that may be carried out on a building listed after 1 January 2009. Section 53(1) of the Listed Buildings Act makes it a criminal offence to do or permit anything which causes or is likely to result in damage to a listed building. The works that may be done to a listed building under the Act may amount to damage giving rise to an offence. Section 53(3) provides that section 53(1) does not apply to the execution of works authorised by planning permission or for which listed building consent has been given. As the Act provides for the effective grant of planning permission by virtue of **section 62** and the effect of **section 63** and the inclusion of **schedule 11** is effectively to grant listed building consent for specified works, section 53 of the Listed Building Act ought not to apply to the Forth Crossing works.
215. Subsection (5) applies definitions of “affected listed buildings” and “authorised listed building works” for the purposes of **section 63**.

#### ***Section 64 – Demolition in conservation areas***

216. This section disapplies the provisions of section 66 (control of demolition in conservation areas) of the Listed Buildings Act from any building (which is not a listed building), which may be affected by Forth Crossing works authorised under the Act and which may be included in a conservation area designated after 1 January 2009. The section therefore permits the demolition of a building within a conservation area without requiring consent.

#### ***Section 65 – Interpretation of Part 8***

217. This section defines terms used within this Part.

#### ***Part 9 – Environmental Matters***

218. This Part sets out duties to mitigate the impact of the scheme on the environment (**section 66**), to comply with environmental undertakings (**section 67**) and the process to amend or replace those undertakings (**section 68**). It also ensures compliance with existing consent regimes protecting the water environment (**section 69**) and sets out procedures in respect of the control of noise (**section 70**) and what matters may constitute a statutory nuisance (**section 71**)

#### ***Section 66 – Mitigation of environmental impact***

219. **Section 66** imposes a positive duty on the Scottish Ministers regarding the environmental impacts of the Forth Crossing works (see **section 1**). The environmental statement (as defined in section 79) proposes certain mitigation measures. The effect of these measures will be to prevent or reduce environmental impacts being caused by the

works. This section obliges the Scottish Ministers to do everything that is reasonably practicable to ensure that the environmental impacts of the construction or operation of the Forth Crossing works are no worse than the residual impacts identified in the environmental statement (the residual impacts are measurable environmental impacts).

***Section 67 – Compliance with code of construction practice and noise and vibration policy***

220. **Section 67** imposes a duty on the Scottish Ministers to ensure compliance with the code of construction practice and noise and vibration policy, contained within the environmental statement. The test of ensuring compliance is everything which is reasonably practicable.

***Section 68 – Amendment of code of construction practice and noise and vibration policy***

221. **Section 68** enables the Scottish Ministers to amend or replace the code of construction practice or the noise and vibration policy. Subsection (1) ensures that an amendment to or replacement of those documents must not reduce the standards of mitigation or protection provided for in an earlier version.
222. Subsection (2) sets out a process of notification and consultation with specified bodies which the Scottish Ministers must follow before making an amendment to or replacement of the code of construction practice or the noise and vibration policy. The specified bodies which are listed at subsection (3) are not obliged to respond to any consultation but, if they do so, the Scottish Ministers must have regard to their views. Copies of any amended or replaced documents must be sent to the bodies consulted and reasonable steps taken to bring them to the attention of the public.

***Section 69 – Protection of water environment***

223. The Forth Crossing works include works that will include activities which need to be controlled in order to protect the water environment and such controls are applied by regulations made under the [Water Environment and Water Services \(Scotland\) Act 2003 \(asp 3\)](#). **Section 69** ensures that, where appropriate, authorisation will be sought under those regulations and the relevant works will be carried out in accordance with that authorisation.

***Section 70 – Control of noise: Control of Pollution Act 1974***

224. The carrying out of the Forth Crossing works will inevitably cause a high level of noise and vibration. The regulation of construction noise is dealt with by the [Control of Pollution Act 1974 \(c.40\)](#) and the [Environmental Protection Act 1990 \(c.43\)](#). The regime for control of construction noise under the 1974 Act is operated by local authorities. The Forth Crossing works will affect more than one local authority area.
225. Under section 60 of the 1974 Act a local authority can serve a notice on persons responsible for construction in order to impose requirements on the way that the construction is carried out. An appeal can be made against such a notice and the existing grounds of appeal include provision that the local authority did not have regard to some or all of the provisions in section 60(4) of the 1974 Act, including the provision that before serving a notice the local authority shall have regard to the need for ensuring best practicable means were employed to minimise noise.
226. **Section 70(1)** applies section 60 of the 1974 Act and allows under paragraph (a) an additional ground of appeal for the Scottish Ministers' contractor for the Forth Crossing works to any notice served by a local authority to control noise or vibration on a construction site under section 60. The section provides that the grounds of appeal could also include that the works were, or were going to be, carried out in accordance with the Scottish Ministers' duties in relation to noise in the Code of Construction Practice.

*These notes relate to the Forth Crossing Act 2011 (asp  
2) which received Royal Assent on 20 January 2011*

Accordingly, the provision introduces a ground of appeal that the works to which a notice served under section 60 of the 1974 Act were, or were going to be, carried out in accordance with authorisation at [section 67](#) of the Act to carry out the works in accordance with Code of Construction Practice.

227. Subsection (1)(b) sets out further matters where such an appeal is made. The notice is suspended until the appeal is determined or abandoned. The sheriff must recall the notice if he or she determines that the grounds of the appeal are met
228. Subsection (2) disapplies subsection 61(9) of the 1974 Act which has the effect that if a consent is granted under section 61 in respect of any Forth Crossing work, that consent will not contain a statement that the consent is not a defence to any proceedings under section 82 of the 1990 Act.

***Section 71 – Statutory nuisance: noise under the Environmental Protection Act 1990***

229. [Section 71](#) sets out modifications of the Environmental Protection Act 1990 in relation to noise which is alleged to be a statutory nuisance. Subsection (2) provides that noise which is caused by the Forth Crossing works in accordance with a consent granted under section 61 of the Control of Pollution Act 1974, cannot be a statutory nuisance as defined in section 79(1) of the Environmental Protection Act 1990. The effect of this is that a statutory nuisance abatement notice cannot be served under section 80 of the 1990 Act and a summary application to abate a statutory nuisance under section 82 of the 1990 Act cannot be successful, if the conditions set out in a consent given by a local authority under section 61 of the 1974 Act are met.
230. Otherwise the statutory nuisance provisions of the Environmental Protection Act 1990 apply with modifications. The general grounds of appeal against a notice under section 80 of the 1990 Act are set out in regulation 2 of the Statutory Nuisance (Appeals) (Scotland) Regulations 1996. Section 71(3)(a) provides an additional ground of appeal for the Forth Crossing works: that the works to which a notice served under section 80 or 80A of the 1990 Act were or were going to be carried out in accordance with the Scottish Ministers’ duties as provided for at [section 67](#) of the Act to carry out the works in accordance with Code of Construction Practice. Section 71(3)(a) means that the Scottish Ministers’ contractor will have to demonstrate compliance with noise elements of the Code of Construction Practice.
231. Subsection (3)(b)(i) provides that a notice will be suspended pending determination of the appeal and subsection (3)(b)(ii) provides that the sheriff must recall the notice if he or she determines that the grounds of the appeal are met. Paragraph (c) applies the same “code of construction practice” defence in relation to a summary application raised under section 82 of the 1990 Act.

**Part 10 – Miscellaneous**

232. This Part includes general provisions concerning matters such as the definition of blight (as it relates to the Act) ([section 72](#)), the certification and adjustment of the Parliamentary plans and the book of reference ([sections 73 and 74](#)), the provision of information to specified persons ([section 75](#)), the procedures for issuing formal communications ([section 76](#)), ancillary provision ([section 77](#)), the application of the Act to the Crown ([section 78](#)) the interpretation of terms used within the Act ([section 79](#)), the date on which provisions are to come into force ([section 80](#)) and what the Act is to be called ([section 81](#)).

***Section 72 – Blighted land***

233. [Section 72](#) applies the planning blight provisions of Chapter 2 of Part 5 of the [Town and Country Planning \(Scotland\) Act 1997 \(c.8\)](#). Those provisions enable persons with a qualifying interest in land to access the statutory provisions set out in the 1997 Act

to allow them to claim blight on their qualifying interest in land and seek to have that land acquired by the Scottish Ministers.

234. The effect of **section 72** is that:

a resident owner-occupier of a residential dwelling;

an owner-occupier of land with an annual value of £28,000<sup>20</sup>; or

an owner-occupier of an agricultural unit,

whose land is subject to compulsory purchase under the Act may require the Scottish Ministers to purchase land at market value if, having tried to sell the property, the landowner has been unable to sell except at a lower price than might reasonably have been expected had the land not been subject to compulsory purchase.

### ***Section 73 – Certification of Parliamentary plans, etc.***

235. **Section 73** makes provision for the authentication of a copy of the book of reference, the plans and the sections that accompany the Act, to enable certified copies once the Act is enacted to be admissible in any future proceedings as evidence of the content of the proceedings without the need of the Scottish Ministers to prove the authenticity of the copy documents.

236. The Parliament's Guidance on Hybrid Bills makes it clear that the book of reference, the plans and the sections are documents that the Clerk to the Parliament does not arrange to have printed and published. These documents may be required to execute any compulsory purchase authorised by the Act. Since these documents are not published by the Parliament they will necessarily be a copy of the book of reference, plans and sections submitted to the Parliament and a copy of that produced by the Scottish Ministers and not the Parliament. There is therefore a need to ensure that the content of the book of reference, plans and sections can be proved as being accurate and a true record of the documents that had been submitted to the Parliament. The Clerk to the Parliament is the appropriate authority to check the accuracy of these copies and certify them as being a true record. The certified copies will be admissible in any court proceedings without the need for any further proof of the authentication of their contents.

237. Subsection (1) confirms the list of documents. Subsection (2) places the Clerk under a duty to certify the documents and subsection (3) confirms that a certified document is admissible in any court proceedings.

### ***Section 74 – Changes to Parliamentary plans or book of reference***

238. **Section 74** provides a procedure allowing changes to be made to the Parliamentary plans or book of reference after the Act has been passed. The provisions of this section have precedence in private Acts of the Scottish Parliament authorising works.

239. Subsection (1) allows the Scottish Ministers, where they need to correct an inaccurate description of land, ownership or occupation to make an application to the sheriff to correct the inaccuracy. If the sheriff is satisfied that the description is inaccurate they must certify that and how it is to be corrected.

240. Prior to making that application, under subsection (3), the Scottish Ministers must provide the owner and any occupier with at least 10 days' notice of their intention to make an application. If the sheriff decides to approve and certify the change that certification must, under subsection (6), be deposited in the office of the Clerk to the Parliament. The Parliamentary plans or book of reference shall be deemed, under subsection (7), to be corrected or amended according to the certificate.

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<sup>20</sup> The value is currently £28,000 (*Town and Country Planning (Limit of Annual Value) (Scotland) Order 2005 (SSI 2005/594)*).

241. Subsection (2) provides that, where a binding obligation has been entered into not to acquire the land within the limits of deviation or within **schedule 9**, the Scottish Ministers or the owner of the land may apply to have the Parliamentary plans and book of reference altered to reflect the agreement. The procedure of notification and determination is the same as that laid out in the procedure for addressing an inaccuracy.
242. This section ensures that binding obligations not to acquire land may be recorded by either party to that agreement and that implementation of the Act is not prevented by mistaken misdescriptions. The Act authorises under **section 22** the compulsory acquisition of land. That land is shown on the Parliamentary plans and described in the book of reference. A minor error in a description in one document might result in it being inconsistent with the other, which might in turn prevent proper identification of land to be acquired compulsorily. In the absence of the procedures as set out in **section 74** the compulsory purchase powers of the Act could not be used in relation to that land.
243. Subsection (8) defines sheriff as the sheriff for the area in which land is situated.

### ***Section 75 – Provision of information on the progress of the Forth Crossing works***

244. This section places the Scottish Ministers under a duty to inform those persons, as specified in subsection (2), of the progress of the construction of the Forth Crossing works and the implications of the works for those persons.

### ***Section 76 - Formal communications***

245. This section provides details of how a notice or an objection can be served. Subsections (3)(c) and (4) set the context within which documents can be served electronically. Subsection (3)(b) describes the proper address for the serving of notices by post. In those instances where the proper address cannot be ascertained and the matter relates to an interest in land subsection (5) provides for a notice to be addressed to either the owner or as the case may be the occupier and affixed to a building or object on or near the land.

### ***Section 77 – Ancillary provision***

246. This section allows the Scottish Ministers to make provision for ancillary matters and to enable unforeseen circumstances which may arise following enactment to be addressed without having recourse to primary legislation. The scope of this power is restricted. It can only be used to make provisions which are of a supplementary, incidental, consequential, transitional, transitory or saving nature. Subsection (2) provides that an order for the purposes of subsection (1) can make different provision for different purposes and may amend or repeal any other enactment. Subsection (3) requires that every order which makes supplementary, incidental or consequential provisions to be made under affirmative procedure. Any other statutory instrument containing such an order will, under subsection (4), be subject to a negative resolution.

### ***Section 78 – Crown application***

247. Subsection (1)(b) enables a right over or in Crown land (not in itself being a Crown right) to be acquired by compulsion with agreement from the appropriate authority. The right over or in Crown land may, for example, relate to a third party right of access over Crown land to provide access to other land. A right in Crown land can be acquired compulsorily if the interest is owned by the Crown as stipulated under subsection (2) and if the relevant Crown interest agrees, as set out in subsection (3).
248. Subsection (1)(a) when read with subsection (2) allows a right belonging to the Crown to be affected by any provision in the Act with agreement from the appropriate authority.

***Section 79 – Interpretation***

249. This section defines terms used within the Act.

***Section 80 – Commencement***

250. This section deals with commencement. Those provisions set out in subsection (1) come into force on enactment. It is for the Scottish Ministers, as explained in subsection (2), to make provision commencing other sections of the Act. Subsection (3) requires that the provisions on works and the manner of their construction in sections 1 to 7 will be commenced simultaneously.

***Section 81 – Short title***

251. This section provides the short title which is the name by which the Act if enacted may be cited.