

# SCOTTISH CROWN ESTATE ACT 2019

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## EXPLANATORY NOTES

### THE ACT

#### Part 3 – Management of Scottish Crown Estate assets

##### Managers’ powers and duties

24. **Section 7(1)** obliges a manager of a Scottish Crown Estate asset to maintain and seek to enhance the value of the asset and the revenue arising from it. Section 7(2)(a) provides that, in complying with the subsection (1) duty, a manager must act in the way best calculated to further the achievement of sustainable development in Scotland. Section 7(2)(b) also requires managers, in complying with the subsection (1) duty, to seek to manage the asset in a way that is likely to contribute to the promotion or improvement in Scotland of wider socio-economic and environmental benefits.
25. **Section 8(1)** provides that, within the constraint that ownership of the asset rests with the Crown, managers have the power to do anything the Crown could do as owner. Section 8(3) provides that managers are able to transfer ownership of Scottish Crown Estate assets under their management and to acquire land on behalf of the Crown in the course of management. Under section 8(4), where land is acquired, that land becomes a Scottish Crown Estate asset under the management of the manager that acquired it. (“Land” is defined in subsection (7) as including buildings and other structures, land covered with water, and any right or interest in or over land).
26. **Section 8(5)(a)** provides that the ability of a manager to do anything on behalf of the Crown in respect of the asset that the Crown could do as owner of the asset is subject to restrictions or limitations contained in the Act or in another enactment relating to Scottish Crown Estate assets. That includes transfer regulations made under section 3 of the Act which may contain provisions of the type mentioned in section 3(3)(a). Under section 8(5)(b), a manager is not to be subject to any restriction on its powers that would not restrict the powers of the Crown as owner, which is to disapply any limitation on the powers imposed on a person who is a manager if that person were acting in a capacity other than as a manager of a Scottish Crown Estate asset, such as a local authority. Subsection (6) provides that, where a provision of the Act, or any provision made under the Act, requires the consent of the Scottish Ministers for the transfer of ownership of an asset or for an acquisition, if such consent is not obtained the transaction is void. For instance, consent is required for the transfer of ownership of a portion of the seabed under section 10(3).
27. **Section 9(1)** provides that when entering into transactions the manager is not subject to any formalities that would apply if Her Majesty were transacting i.e. the manager may enter into a transaction as if the person were acting on behalf of a person other than the Queen. Subsection (2) provides that any document relating to such an asset that is executed by the manager is to be construed and registered as if the manager were acting on behalf of a person other than Her Majesty. Subsection (3) defines “registered” for these purposes, with subsection (4) enabling the Scottish Ministers to modify that definition.

28. **Section 10** provides that the Scottish Ministers' consent is required for the transfer of ownership of a Scottish Crown Estate asset, if the transfer would result in the manager no longer managing any assets or if the transfer relates to a portion of the seabed.
29. **Section 11** requires a manager to obtain market value when transferring the ownership of an asset or granting a lease or other right in or over a Scottish Crown Estate asset ("a relevant transaction"). Section 11(2) allows managers to exercise discretion to obtain less than market value when it is likely to contribute to the promotion or improvement of any of the socio-economic or environmental factors listed in subsection (2). In deciding whether to exercise this discretion, managers must have regard to the likely effect of making the relevant transaction for less than market value on the overall value of the Scottish Crown Estate (section 11(3)). Subsection (4) disapplies the subsection (1) duty where the transaction is made for the purpose of complying with an obligation enforceable against the Crown or against the manager, or in pursuance of Part 1 of schedule 4 of the Crown Estate Transfer Scheme 2017 ( 2017/524) (the "Transfer Scheme"). Paragraph 3 of Part 1 of schedule 4 of the Transfer Scheme enables the Secretary of State for Defence to require a manager of an asset to renew a right held by the Secretary of State in the asset. Paragraph 4 of Part 1 of schedule 4 of the Transfer Scheme enables the Secretary of State for Defence to require a manager of an asset to grant the Secretary of State a new right in that asset where the Secretary of State is of the view that, for reasons of defence or national security, there is an overriding public interest in the right being granted to the Secretary of State.
30. **Section 12(1)** defines "market value" which accords with the definition of "market value" (and "market rent") adopted by the Royal Institution of Chartered Surveyors (RICS) in RICS Valuation - Global Standards 2017 ("the Red Book")<sup>1</sup> based on current International Valuation Standards. This contains mandatory rules, best practice guidance and related commentary for all members undertaking valuations. Section 12(4) enables the Scottish Ministers to modify this definition.
31. **Section 12(2)** provides that where an agreement is made to make a relevant transaction (or consider the making of a relevant transaction) in respect of an asset more than 10 years after the date of the agreement, the asset is to be valued at the time the transaction occurs and not at the time of the initial agreement. Subsection (3) provides that, where the transaction is made in pursuance of paragraph 15 of Part 3, or paragraph 25(1) of Part 4, of the Transfer Scheme (in relation to oil or gas pipelines or electricity cables etc.), "market value" has the meaning given in those paragraphs instead.
32. **Section 13** enables the Scottish Ministers to direct a manager (or managers) as to the amount that may be charged (or how that amount is to be calculated) by way of rents for the lease of an asset or in connection with any other agreement for the use of the assets. At present, the calculation of aquaculture rents, for example, is set by a standard formula. For finfish, charges depend on net gutted weight and species, and for shellfish, the calculation is based on species, length of rope and other types of equipment. The provisions in the Act could be used to enable similar arrangements to be followed in future whereby similar rates are charged for certain type of leases. Where a direction made in pursuance of section 13(1) applies to the lease, or other agreement for the use, of an asset, section 11 is disapplied (section 13(3)(a)). This is to avoid potential conflict between a manager's duty under sections 11 and 13. Where a direction is in place, a manager can depart from the direction only with the consent of the Scottish Ministers. If such consent is not obtained the lease or other agreement is void (section 13(3)(b)). Subsection 13(4) provides that the power of the Scottish Ministers in section 13(1)(a) (ii) to make a direction in relation to the amount that a manager may charge does not apply to the following agreements: an agreement under paragraph 64(1) of schedule 3A of the Communications Act 2003 (granting of rights relating to tidal waters); an agreement within the meaning of paragraph 15 of Part 3 of schedule 4 of the Transfer Scheme (the granting of rights in respect of pipelines); and an agreement within the

meaning of paragraph 25(1) of Part 4 of schedule 4 of the Transfer Scheme (granting of rights in respect of transmission or distribution of electricity).

33. **Section 14** prohibits managers from leasing or granting another right in or over an asset for more than 150 years unless the manager or the Crown is under an obligation to do so. A potential example is if the Secretary of State for Defence is exercising powers under Part 1 of schedule 4 of the Transfer Scheme such that a manager is required to enter into a lease of, or other right in or over, the asset for a period of more than 150 years.
34. **Section 15** prevents a manager of a Scottish Crown Estate asset from granting a right to remove wild kelp from any area of the seabed they manage, if either of two cases apply. The first case (section 15(2)) is where such removal would inhibit the regrowth of the individual plant and the kelp is intended for commercial use. The second case (section 15(3)) is where the removal of kelp is a licensable marine activity (as construed in accordance with section 21 of the Marine (Scotland) Act 2010 and no marine licence has been granted by the Scottish Ministers under Part 4 of the Marine (Scotland) Act 2010). It is a licensable marine activity to use a vehicle or vessel etc. to remove any substance or object from the seabed with the Scottish marine area. Any right granted by a manager to remove sea kelp from the seabed where either of those two cases applies is void. Wild kelp means any of five types of sea kelp listed in the definition in subsection (5).
35. **Section 16** requires a manager to meet its Scottish Crown Estate liabilities from the Scottish Crown Estate accounts it keeps. Subsection (2) provides that the Scottish Ministers may by regulations transfer a right or liability from one manager to another manager. The rights and liabilities which can be transferred in this way are those relating to a Scottish Crown Estate asset, a former Scottish Crown Estate asset or a historic Scottish asset (within the meaning of paragraph 1 of schedule 2 of the Crown Estate Transfer Scheme 2017 – meaning an asset in Scotland which once formed part of the Crown Estate but which did not form part of the Crown Estate in Scotland on 1 April 2017 when most of the Crown Estate Commissioners’ functions relating to the management of the Crown Estate in Scotland transferred to Crown Estate Scotland).
36. **Section 17** prohibits a manager from granting a heritable security over a Scottish Crown Estate asset. (“Heritable security” is defined in section 45(1) by reference to section 9(8) of the Conveyancing and Feudal Reform (Scotland) Act 1970, meaning a security which is capable of being constituted over any land or real right in land by disposition or assignation of that land or real right in security of any debt and which is capable of being registered in the Land Register of Scotland or recorded in the Register of Sasines).
37. **Section 18** makes provision restricting the type of investment that may be made by managers. Managers may invest a sum of money from the manager’s capital account if it is invested in a heritable security in Scotland or in a security over land in the rest of the United Kingdom, in an interest-bearing account or in an investment of such other description as the Scottish Ministers may specify in a direction. Managers may invest a sum of money from their income accounts in an interest-bearing account.
38. **Section 19** allows a manager to make charitable donations out of the manager’s income account (within the meaning of section 28(2)(a)). A “charitable donation” is defined as one made for a charitable purpose (within the meaning of section 7(2) of the Charities and Trustee Investment (Scotland) Act 2005) and which provides public benefit in Scotland such as making a positive difference to the public in Scotland.
39. **Section 20** requires managers to exercise their functions in a way that is transparent and accountable and consistent with good governance principles. Section 21 requires managers to exercise their functions in a way that encourages equal opportunities.