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Devolution of the Crown Estate and energy policy



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POLICY BRIEF

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Devolution of the Crown Estate and Energy Policy in Scotland

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Abstract

This policy briefing explains the role of the Crown Estate in energy policy and explores the potential significance of its devolution to Scotland. Energy – and particularly renewable energy – is an important policy area for the Scottish Government, both for its potential contribution to Scotland’s economic development, and for its role in meeting Scotland’s ambitious climate change mitigation targets. Currently, though, the Scottish Government and Scottish Parliament control relatively few energy policy levers, with most relevant powers being reserved to the UK Parliament and Government under the Scotland Act 1998.¹ However, the Smith Commission, which was established in the wake of the ‘no’ vote in the independence referendum to consider further devolution of powers to Scotland, has recently recommended that there should be some additional devolution of energy policy and related powers to Scotland.² Assuming that the recommendations are implemented, one of the most significant of these new powers is control over the Crown Estate in Scotland.³

I What is the Crown Estate and What Does it Do?

The Crown Estate controls some, but not all, of the land vested in the Queen in her governmental capacity (as distinct from her personal capacity). The institution dates back to 1760, when George III surrendered the revenues from Crown lands to Parliament in return for support from the Civil List; an arrangement confirmed by each subsequent Monarch. Crown Estate lands are therefore effectively public lands held in trust for the benefit of the nation. Today, the Crown Estate encompasses certain hereditary property rights deriving from feudal times, as well as more recent rights vested in the Crown by statute, and modern property acquisitions. The powers of ownership over the assets included in the Crown Estate are exercised by the Crown Estate Commissioners under the Crown Estate Act 1961. The Commissioners are legally independent, but subject to direction by the Chancellor of the Exchequer and the Secretary of State for Scotland.

¹ Scotland Act 1998, Sch 5, Pt II, Head D.

² *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament*, 27 November 2014, available at: <https://www.smith-commission.scot/smith-commission-report/>.

³ Currently reserved by Scotland Act 1998, Sch 5, Pt I, para 2(3).

The Crown Estate's holdings in Scotland are legally distinct from those in the rest of the UK. In contrast to the position in England, the most important Crown Estate assets in Scotland are rights over the seabed and foreshore (the so-called 'Marine Estate'). Under Scots common law, the Crown owns around 50% of the foreshore and almost all of the seabed within Scotland's territorial waters (out to the 12 nautical mile limit). Under the Continental Shelf Act 1964, the Crown Estate also exercises rights over the seabed and subsoil in the UK Continental Shelf, including its natural resources other than coal and hydrocarbons.⁴ In addition, the Crown Estate has been granted rights over the production of energy from water and winds in Renewable Energy Zones by the Energy Act 2004 and over the offshore storage of natural gas and carbon dioxide (CO₂) in Gas Storage and Importation Zones by the Energy Act 2008.

Historically, the Crown Estate played only a minimal role in relation to offshore energy production. However, the expansion of offshore energy uses together with new statutory rights mean that it now has a crucial role to play in the development of offshore renewables and energy storage. Anyone seeking to build an offshore windfarm or a wave or tidal generator, to lay offshore transmission cables, or to develop offshore gas or CO₂ storage facilities or pipelines requires a lease from the Crown Estate,⁵ as well as the relevant statutory consents and licences.

The allocation of marine property rights to the Crown Estate has a dual significance. First, it gives the Crown Estate a planning and regulatory role in relation to the offshore renewables and storage industries, through the selection of sites for development and the specification of leasing terms. In particular, the Crown Estate plays an important role in managing potentially conflicting uses of the seabed and establishing priorities amongst them. Secondly, the extraction of rents for the use of the seabed and marine resources for energy purposes provides a potentially significant revenue stream which currently flows to the Treasury through the Consolidated Fund. It is obviously essential that both sets of powers are exercised in a manner which is compatible with the sustainable use of the marine environment and consistent with wider energy policy goals.

II The Case for Devolution

There is long-standing dissatisfaction with the operation of the Crown Estate in Scotland, which in some respects pre-dates devolution. However, devolution has intensified the case for reform, not least because the Crown Estate has become *more* centralised since 1999, having abolished its Scottish division in 2001 in favour of a functional structure across the whole of the UK. The

⁴ Ownership rights to coal are vested in the Coal Authority, and the Crown's property rights in relation to hydrocarbons are exercised by the Department of Energy and Climate Change.

⁵ Crown Estate leasing takes place in two stages: an initial 'Agreement for Lease' permits the developer to explore the site and seek necessary consents and licences; once these have been obtained, a lease is granted.

Calman Commission's 2009 report noted the strength of criticism of the Crown Estate and recommended reforms to ensure that it had greater regard to Scottish interests and the Scottish policy context, but rejected the argument that it should be devolved to the Scottish Parliament.⁶ An attempt in 2011 by the SNP to amend the subsequent Scotland Bill to remove the reservation of the Crown Estate was also comprehensively rejected. However, in 2012, the case for devolution gained cross-party support in a highly critical report by the House of Commons Scottish Affairs Committee,⁷ although none of the Unionist parties committed unambiguously to this in their pre-referendum proposals for further devolution.

The case for devolution of the Crown Estate is twofold. First, there is no clear rationale for the current division of competences between the Crown Estate and devolved institutions in Scotland. As already noted, the Crown Estate administers only some of the Crown's property holdings, others of which are already devolved in Scotland, and the Scottish Parliament also has control over the *definition* of Crown property rights, insofar as these derive from common law rather than statute. In addition, the Scottish Parliament and Scottish Government control most of the policy responsibilities relevant to the administration of the Crown Estate in Scotland. In the energy field, for instance, the Scottish Government has the lead role on promotion of renewables, and also controls marine licensing⁸ and energy consents.⁹

The current division of ownership rights and regulatory responsibilities is highly problematic. For one thing, it is cumbersome, costly and potentially confusing for developers to have to seek both a lease from the Crown Estate and the necessary licences and consents from the Scottish Government. This goes against the grain of recent marine legislation which has sought to streamline regulatory procedures as far as possible. More importantly, it also poses a risk of lack of co-ordination between the leasing and regulatory regimes. While regulation seeks to influence the nature and location of offshore developments, ownership rights remain a crucial determinant of how, when and by whom such development takes place. Since the Crown Estate is not accountable to the Scottish Parliament, nor under any obligation to co-ordinate with the Scottish Government, there is a clear risk that it could undermine the achievement of Scottish energy policy goals. Further, the Scottish Government has no opportunity to use the revenue gained from exploitation of Scotland's natural resources in ways that benefits the people of

⁶ Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century*.

⁷ *The Crown Estate in Scotland*, 7th Report 2010-12, HC 1117

⁸ Marine licensing within Scottish territorial waters is legislatively devolved and is governed by the Marine (Scotland) Act 2010; marine licensing outwith territorial waters is governed by the Marine and Coastal Access Act 2009, but is executively devolved to the Scottish Ministers.

⁹ Consents to offshore generating stations and power lines are governed by ss. 36 and 37 of the Electricity Act 1989 and are executively devolved to the Scottish Ministers. N.b., licensing and permitting of gas and carbon storage facilities is governed by the Energy Act 2008 and is shared between the UK and Scottish Governments.

Scotland or the communities' directly affected,¹⁰ thereby enhancing the public acceptability and hence the success of its energy policies.

The second argument for devolution stems from the way in which the Crown Estate currently operates. Its statutory duty is to maintain the Crown Estate *'as an estate in land ..., to maintain and enhance its value and the return obtained from it, but with due regard to the requirements of good management.'*¹¹ It interprets this (with the Treasury's support) to mean that it should act as a commercial property business, aiming to maximise revenues, subject to requirements of integrity and good stewardship,¹² but prohibited from taking account of wider public interest or policy objectives. This commercial rather than governmental conception of its role also leads, it is claimed, to a lack of transparency, accountability and public participation in its decision-making processes, and a lack of communication and engagement with key stakeholders and local communities. In its 2012 report, the Scottish Affairs Committee concluded that:

*'the organisation has a fundamental misunderstanding of the needs and interests of local communities and indigenous industries on the Scottish coast. At best, it has little regard for those needs and interests other than where it serves [the Crown Estate's] business interests. At worst, it behaves as an absentee landlord or tax collector which does not re-invest to any significant extent in the sectors and communities from which it derives income.'*¹³

For the Committee, the Crown Estate was simply not *'fit for purpose'* as the administrator of Scotland's seabed: *'a publicly owned national asset, which requires proper multiple objective management in the public interest to benefit the people of Scotland and its many coastal communities.'*¹⁴

Devolution of the Crown Estate thus represents an opportunity to reform the purposes for which the seabed is managed; to integrate the leasing and regulatory regimes more effectively; and to ensure a more satisfactory distribution of the financial benefits arising from offshore energy and other developments. Care will have to be taken, however, to avoid conflicts of interest between revenue objectives and regulatory responsibilities. The agreement to devolve the Crown Estate is also subject to the proviso that:

'The Scottish and UK Governments will draw up and agree a Memorandum of Understanding to ensure that such devolution is not detrimental to UK-wide critical

¹⁰ Although the Treasury does return most of the revenue to Scotland via its Coastal Communities Fund.

¹¹ Crown Estate Act 1961, s.1(3).

¹² See <http://www.thecrownestate.co.uk/who-we-are/our-values/>.

¹³ Above n 7, para 65.

¹⁴ *Ibid.*, para 75.

*national infrastructure in relation to matters such as defence & security, oil & gas and energy, thereby safeguarding the defence and security importance of the Crown Estate's foreshore and seabed assets to the UK as a whole.*¹⁵

III The Crown Estate and Islands Communities

The Smith Commission report also contains a second proviso to the effect that following transfer of the Crown Estate to the Scottish Parliament *'responsibility for the management of those assets will be further devolved to local authority areas such as Orkney, Shetland, Na h-Eilean Siar or other areas who seek such responsibilities*.¹⁶ It is unusual for devolution to be conditional in this way, and it is not yet clear whether this principle of double devolution will be included in the implementing legislation itself, or merely contained in a side agreement. However, the commitment to further transfer of management of the Crown Estate reflects a successful campaign by the three islands councils during the referendum campaign¹⁷ to extract promises from both the Scottish and UK governments to secure greater powers irrespective of the result.¹⁸

The prospect of transferring control over the seabed to the three islands councils – and possibly also to Argyll & Bute, Highlands, and North Ayrshire councils – is by far the most radical implication of Crown Estate devolution. It means that island and coastal communities will for the first time gain meaningful control over the use that is made of their marine resources, as well a revenue stream which can be reinvested for locally-determined purposes. The evidence suggests that equity in the division of the benefits and burdens of renewable energy development is crucial to its public acceptability, and that the opportunity to share in the ownership of renewable energy projects offers far greater benefits than the *ex gratia* community benefit payments normally made by developers.¹⁹ Indeed, the evidence from onshore renewables projects is that community ownership – such as on Gigha and Eigg – can have a transformative impact on often fragile economies in remote highlands and islands areas,

¹⁵ Smith Commission, above n 2, para 34.

¹⁶ *Ibid*, para 33.

¹⁷ *Our Islands Our Future*, June 2013, available at:

<http://www.shetland.gov.uk/OIOF/documents/ourislands-ourfuture-JointPositionStatement-17june2013.pdf>.

¹⁸ See Island Areas Ministerial Working Group, *Empowering Scotland's Island Communities*, June 2014, available at: <http://www.scotland.gov.uk/Publications/2014/06/2708>; UK Government and the Three Scottish Islands Councils, *A Framework for the Islands*, August 2014, available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/344446/UKG_ISLANDS_FRAMEWORK_-_15_August.pdf.

¹⁹ See, e.g., G Allan *et al*, *The Importance of Revenue Sharing for the Local Economic Impacts of a Renewable Energy Project: A Social Accounting Matrix Approach*, Strathclyde Discussion Papers in Economics, No 8-11, 2008, available at:

<http://www.strath.ac.uk/media/departments/economics/researchdiscussionpapers/2008/08-11strathecon.pdf>.

enabling them to exploit the renewable energy potential of their geography and climate to offset those same geographic and climatic disadvantages. Double devolution of the Crown Estate therefore offers the prospect of similar advantages from offshore renewables development, but on a much larger and more systematic scale.

Use of the seabed will, of course, still be subject to Scottish (and UK) Government licensing and consenting powers, and co-ordination will be required to avoid new problems of conflicting objectives. The Scottish Government's Land Reform Review Group has also recently warned that *'whatever arrangements might be reached to decentralise the control and use of the seabed, the overall integrity of Scotland's ownership of its own territorial seabed should be maintained and safeguarded in the long term national interest.'*²⁰ Nevertheless, as the north of Scotland faces its third wave of transformative energy development – first, the post-war electrification of the Highlands, then the oil boom of the 1970s and 1980s, and now the development of wind and marine renewables – double devolution of the Crown Estate offers for the first time a guarantee that the benefits to be gained from Scotland natural energy resources will flow directly to those communities most immediately affected.

²⁰ *The Land of Scotland and the Common Good*, May 2014, p 65, available at: <http://www.scotland.gov.uk/Resource/0045/00451087.pdf>.

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