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Convener
Devolution (Further Powers) Committee
c/o Clerk to the Committee
Room T3.40
The Scottish Parliament
Edinburgh EH99 1SP

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Dear Bruce

SCOTLAND BILL – DEVOLUTION OF THE CROWN ESTATE

Thank you for your letter of 8 February concerning the draft Crown Estate transfer scheme and complementary draft Memorandum of Understanding (MoU).

I welcome the interest that the Committee has shown in these drafts, which we have prepared and made available to assist in the scrutiny and discussion of the arrangements for devolution of the Crown Estate.

The Scotland Bill provides that the Treasury may only make the transfer scheme, which will be in a statutory instrument, once it has been agreed with the Scottish Ministers. Similarly, the MoU will require the agreement of both parties thereto. We anticipate that these will be agreed with the new Scottish Government after the forthcoming Scottish elections. In the meantime, Treasury and other UK Government officials are in discussion with Scottish Government officials to further consider and refine these drafts.

The Smith Commission referred to using a MoU to ensure that devolution is not detrimental to UK-wide critical national infrastructure including defence. However, since a MoU is not legally binding, it does not provide either the Scottish Government or the UK Government with the certainty which is necessary to protect these important interests. Nor would the MoU protect the employment rights of the Crown Estate staff connected with the management of the Scottish assets. Hence all these protections have been included in the transfer scheme, which must be agreed with the Scottish Ministers and made by statutory instrument, approved by both Houses of Parliament. This approach allows for full scrutiny by Parliament and provides transparency for all interested stakeholders, including tenants and customers affected by the changes.

The MoU is an informal agreement between the two parties. It will act to support the underlying legislation, covering those matters which it would not be appropriate to include in statute, helping to ensure a successful handover of the Scottish assets.

The transfer scheme provides powers for the Secretary of State for Defence to require the manager of the Scottish assets to exercise their functions in particular ways, when interests of defence or national security so require. As stated in the draft MoU, the MOD would first seek to negotiate and agree arrangements with all affected parties, and will pay market value for any rights it acquires. MOD would only use these powers when there was a defence imperative and all other avenues for agreement have been exhausted. Decisions on defence and national security must ultimately be taken by the Government, it is not appropriate to involve third party arbiters, although of course such decisions will be susceptible to judicial review. However, where there is a disagreement about the calculation of market value, the transfer scheme provides that the dispute must be referred to the Scottish Branch of the Royal Institution of Chartered Surveyors and that the parties must comply with the Institution's determination.

In relation to defence, the MoD has a significant number of leases and licences with the Crown Estate, in addition to arrangements under long established custom and practice, both in Scotland and in England and Wales. This is supported by Ministers already having a power of direction over the Crown Estate Commissioners, which is set out in the Crown Estate Act 1961. However, this power has never needed to be invoked. In this sense, having an arrangement, backed by a legal power, is consistent with the approach already in place for the rest of the UK.

It is hoped that the Secretary of State for Defence's overriding powers would rarely, if ever, be used and then only as a last resort. The draft transfer scheme and MoU contain detailed processes to ensure any exercise of the protections for defence and national security can proceed smoothly for all involved parties.

In relation to pipeline charging arrangements, we do not consider that Treasury's (backstop) power in relation to excessive oil and gas pipeline charges would make the management of the Scottish assets more onerous than management of the Crown Estate assets in the rest of the UK.

The Crown Estate Commissioners gave an undertaking to Parliament on the passing of the Crown Estate Act 1961 that it would submit to independent valuation of matters such as offshore pipeline charging, to ensure that industry was properly protected. That arrangement remains in place today (with commitment to involve the RICS in case of irreconcilable disagreement) and is supported by Ministers legal right to enforce under the power of direction

referenced above. Please note that the process to determine prices that is set out in the draft transfer scheme and MoU is based upon those that are currently applied UK-wide, so it does not follow that these should be more onerous to apply or comply with for Scotland.

The draft transfer scheme lists the main assets that are subject to the transfer of management. It is intended to provide transparency rather than being exhaustive as it would not be practicable to list all the assets in fine detail in a statutory instrument. Similarly, the liabilities have been listed in the scheme in a generic fashion because this ensures they are legally captured in their entirety, and also because they vary constantly and it would simply not be possible to comprehensively list them in a statutory instrument as at the point of transfer. The Crown Estate Commissioners have committed to openly sharing information on how they manage liabilities with the Scottish Government. This is in addition to access to the Crown Estate records in a specially created data room, so the Scottish Government can satisfy itself as to the nature and extent of transferring assets and liabilities. It should be noted that the Crown Estate Commissioners have undertaken a thorough exercise to identify relevant information, and have entered into various information sharing agreements and protocols with Scottish Ministers in order to facilitate that sharing of information. UK government officials are also discussing and sharing information with Scottish Government officials.

In relation to the tax status following devolution, the requirement in the Scotland Bill to hold the assets on behalf of the Crown extends the 'Crown exemption' to the new managers in the same manner as it does to the Crown Estate Commissioners. The Commissioners are exempted from corporation, income and capital gains taxes as the relevant Acts do not bind the Crown, but are still subject to the payment of transaction taxes such as SDLT and VAT, as the underlying Acts do expressly bind the Crown. No statutory provision in the Scotland Bill or a Finance Act is needed to preserve this position. Should a new manager also undertake activities other than management of Crown Estate assets, this exemption will not apply to those other activities. The Crown Estate is discussing the VAT implications of the transfer with HMRC.

As you say, Fort Kinnaird is not wholly and directly-owned by the Crown. It is owned, along with property in England, by an English limited partnership in which the Crown Estate Commissioners hold an interest alongside other commercial investors. A detailed description of that structure and its history has been provided both to Scottish Ministers and to the Rural Affairs, Climate Change and Environment Committee.

The nature of the joint venture arrangements mean that Fort Kinnaird, as an asset, does not fall within the ambit of devolution of management of the Crown Estate which was set out in the Smith Agreement.

The Crown Estate transfer scheme will contain important protections, including protections for defence and national security. A number of these important protections are reserved matters. For this reason, it would not be appropriate to require that the statutory instrument containing the transfer scheme must be approved by the Scottish Parliament. However, as I stated above, the scheme must be approved by the Scottish Ministers. It will then be subject to the scrutiny of MPs from all parts of the United Kingdom as it must be approved by both Houses of Parliament before it is made.

Yours ever

Damian

Damian Hinds
Exchequer Secretary to the Treasury