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## THE ERSKINE BRIDGE TOLLS BILL

On 30 August 2001 the Minister for Transport and Planning, Sarah Boyack, announced the suspension of tolling on the Erskine Bridge. This was as a result of the failure to renew an order extending the Executive's power under the Erskine Bridge Tolls Act 1968 to toll vehicles crossing the Bridge. The Scottish Executive have introduced, using the Scottish Parliament's emergency legislation procedure, a Bill that now makes the provision that would have been made in the renewing order and addresses the possible consequences of the failure to renew. The Scottish Parliament will debate the Bill on Thursday 6<sup>th</sup> September 2001.

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# THE ERSKINE BRIDGE TOLLS BILL

## Introduction

The [Erskine Bridge Tolls Bill](#)<sup>1</sup> was introduced in the Scottish Parliament on 5 August 2001 under emergency legislation procedure<sup>2</sup>. The Bill is a measure to reinstate the powers of the Scottish Ministers to charge vehicles crossing the River Clyde by way of the Erskine Bridge. These powers previously existed under the Erskine Bridge Tolls Act 1968, but ran out as the previous Order extending these powers lapsed on 2 July 2001. The Bill is in two sections and was introduced with 5 accompanying documents:

- Explanatory Notes;
- Financial Memorandum;
- Executive Statement on Legislative Competence;
- Presiding Officer's Statement on Legislative Competence<sup>3</sup>; and
- A Policy Memorandum.

The Policy Memorandum sets out the policy objectives of the Bill:

" 2. The objective of the Bill is to restore tolling on the Erskine Bridge, originally allowed for by the Erskine Bridge Tolls Act 1968 ("the 1968 Act"). The Bill puts right an administrative failure to promote an Order extending tolling beyond 1 July 2001.

3. The Bill seeks to remedy this legislative gap by authorising the levying of tolls on the bridge for 5 years from 2 July 2001 as if an Order had in fact been made under the 1968 Act. Given that major estuarial crossings are very expensive to build and maintain but provide exceptional benefits to users, it has been the policy of successive administrations that those who use the crossings should contribute towards paying for them. The measures in the Bill will enable this to continue.

4. The Bill seeks to reinstate the position which existed prior to 2 July 2001, in accordance with the provisions of the Erskine Bridge Toll Order 1992 (SI 1992/433) and other regulations. The 1992 Order, made under section 2 of the 1968 Act, determines what vehicles should pay tolls and when, and sets the level of tolls to be charged. The Bill does not affect the power to vary or revoke that Order under the terms of the 1968 Act."

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<sup>1</sup> [http://www.scottish.parliament.uk/parl\\_bus/bills/b33s1.pdf](http://www.scottish.parliament.uk/parl_bus/bills/b33s1.pdf)

<sup>2</sup> Rule 9.21 of the Scottish Parliament Standing Orders outlines the procedure for the introduction of emergency legislation. The only previous use in the Scottish Parliament was with the Mental Health (Public Safety and Appeals) (Scotland) Bill in 1999. Motions \*S1M-2169 and \*S1M-2168 in the business bulletin of 5 September allow for this, if accepted by Parliament.

<sup>3</sup> The Explanatory Notes, Financial Memorandum, Executive Statement on Legislative Competence and Presiding Officer's Statement on Legislative Competence are published as [SP Bill 33-EN Session 1 \(2001\)](#). Policy Memorandum published as [SP Bill 33-PM Session 1 \(2001\)](#).

## AIMS OF THE BILL

The Bill aims to restore, with retrospective effect, the power for Scottish Ministers to levy tolls on vehicles using the stretch of the A898 Trunk Road over the Erskine Bridge, as conferred by section 1(1) of the Erskine Bridge Tolls Act 1968. The Bill sets out to declare that every piece of legislation that was in force on 1 July 2001 (i.e. the last day the latest five-year extension was in force) are regarded as having been in force from 2 July 2001, and will continue to be in force until 1 July 2006.

## STRUCTURE OF THE BILL

The Bill is in two sections. **Section 1** deals with the power to levy tolls, and **section 2** gives the short title.

**Section 1(1)** makes provision that section 1(1) of the Erskine Bridge Tolls Act 1968 is regarded as having been exercisable during the period of five years beginning on 2 July 2001, as if a further extension order had been made under section 4(3) of the 1968 Act. In fact, a further extension order was not made, and this retrospective legislation is designed to remedy that.

**Section 1(2)** declares "for the removal of doubt" that the most recent order (S.I. 1992/433) made under section 2 of the 1968 Act remains in force. Section 2 of the 1968 Act gives the Scottish Ministers the power to set toll tariffs. S.I. 1992/433 was the last order made under this section setting, amongst other things, the standard toll at sixty pence. Section 1(2) of the Erskine Bridge Tolls Bill further indicates that regulations made under section 5, section 7 and section 9 of the Act (S.I. 1989/530) with regard to securing payment of tolls, removal of stationary vehicles and prevention of damage, remain in force and have done so through July and August 2001.

**Section 1(3)** seeks to ensure that the power conferred under this Bill does not affect the ability of the Scottish Ministers to promote further orders under section 4(3) of the 1968 Act in the future.

Under section 6(1) of the 1968 Act the Scottish Ministers had the power to suspend the levying of tolls. **Section 1(4)** of the Erskine Bridge Tolls Bill deems such a suspension to have been in place from 8.50 pm on 30 August 2001 until the (*presumed*) day the Erskine Bridge Tolls Act comes into force.

**Section 1(5)** highlights that subordinate legislation made under the 1968 Act is regarded as having continued in force and effect. This section excludes those referred to in **section 1(2)** above, which have already been dealt with.

**Section 1(6)** declares that nothing in **section 1(2)** or **section 1(5)** of the Bill will prevent changes or revocation of the orders referred to in that section (see above for those orders).

**Section 1(7)** of the Bill provides that nothing in the Act makes criminal any act or omission occurring before it comes into force. This provision is needed to ensure that the Bill does not contravene Article 7 of the European Convention on Human Rights (ECHR), namely that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Without this provision, the Bill would make the non-payment of tolls during the period without legal cover a criminal offence. Anybody who refuses to pay the toll during the period without legal cover, is not at present guilty of a criminal offence but, in the absence of section 1(7), would have become guilty of an offence if the Bill was passed.

**Section 2** cites the short title of the Act as the Erskine Bridge Tolls Act 2001.

## **BACKGROUND TO THE BILL**

The A898 Trunk Road crosses the River Clyde between Erskine and Old Kilpatrick, running across the **Erskine Bridge**. The toll bridge is run by the Scottish Executive as an integral part of Scotland's Trunk Road network - it is the only toll bridge in Scotland run directly by the Executive. Of the others, the Skye Bridge is operated privately, whilst the Forth and Tay Bridges are run by Joint Boards. The Erskine Bridge was built by the Secretary of State under powers in the Trunk Roads Acts 1936 and 1946 and the Special Roads Act 1949, and was opened to traffic on 2 July 1971. It cost £10.7m (at 1971 prices) and strengthening works in the late 1970s cost approximately £7.3m<sup>4</sup>.

## **TOLLING AND RESERVED MATTERS**

The Bill is about a toll - the distinction between a toll and a tax is important with regard to the legislative competence of the Scottish Parliament. Taxes, except for local taxes to fund local authority expenditure, are reserved. The 1968 Act determines that tolls can be levied only for certain purposes (see extract from Bridge Accounts below). Surpluses created from the tolls could be alleged to be a tax. Surpluses have been registered in some years (including in the most recent accounts), but the Scottish Executive indicate that expenditure relative to tolls should be spread over the lifetime of the bridge (estimated at 120 years), and that expenditure required will increase as the bridge gets older<sup>5</sup>.

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<sup>4</sup> Personal correspondence, Scottish Executive Development Department, Transport Division

<sup>5</sup> Personal correspondence, Scottish Executive Development Department, Transport Division

The powers to levy tolls on the Bridge are set out in section 1 of the Erskine Bridge Tolls Act 1968. Toll revenue goes to Scottish Ministers. Tolling was due to cease 20 years after the Bridge opened, but section 4(3) of the Act allowed for extension orders. Five-year extensions were created by Order in [1991](#)<sup>6</sup> and [1996](#)<sup>7</sup>. The 1996 extension gave the Secretary of State (now Scottish Ministers) the power to charge tolls on vehicles crossing the Bridge until 1 July 2001. A further Order was needed to continue charging tolls, but this has not been forthcoming. As such, Scottish Ministers have not had the legal authority to levy tolls since 2 July 2001, although tolling did continue until the Minister for Transport and Planning, Sarah Boyack, announced their suspension on 30 August 2001.

Under the 1968 Act, Scottish Ministers have the power to implement, vary or suspend tolling on the Bridge. For instance, The [Erskine Bridge Tolls Order 1992](#)<sup>8</sup> sets toll levels and rules relating to voucher concessions. Powers to suspend tolls were used when the M8 Kingston Bridge in Glasgow was closed at certain times for essential repairs in October 1999 and August 2000<sup>9</sup>. Tolls have been set at 60 pence for most vehicles since 1992.

According to the Erskine Bridge 1999/2000 Accounts, laid before the Scottish Parliament on 7 February 2001 under section 17(1) of the 1968 Act:

"The Scottish Executive is empowered by the Erskine Bridge Tolls Act 1968 to levy tolls on vehicles using the bridge during a period of 20 years from its opening or as subsequently extended by order. These may be sufficient, to defray the costs of the construction, improvement, maintenance and repair of the bridge, and to make provision for the cost of its administration and for its continued operation after the end of the toll period."<sup>10</sup>

According to the Bridge Accounts for 1999/2000, there were 8,376,940 vehicle crossings of the Erskine Bridge of which 323,192 were exempt from toll charges. Based on these figures, and given that the standard toll is 60 pence, it can be calculated that the revenue losses as a result of the suspension of the charges are over £13,000 per day<sup>11</sup>.

Toll collection on behalf of the Scottish Executive was tendered out with effect from 1 April 1998 to APCOA Parking (UK) Ltd. The implications for APCOA of suspending the tolls are not yet clear, although the company have said they will not be seeking redress for loss of earnings<sup>12</sup>.

Meanwhile, according to reports, opposition MSPs have been calling for the Scottish Parliament Audit Committee to examine the wider issues of

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<sup>6</sup> Statutory Instrument 1991 No. 1402 (S. 133): The Erskine Bridge Tolls Extension Order 1991

<sup>7</sup> Statutory Instrument 1996 No. 1370 (S.128): The Erskine Bridge Tolls Extension Order 1996

<sup>8</sup> Statutory Instrument 1992 No. 433 (S. 49): The Erskine Bridge Tolls Order 1992

<sup>9</sup> Scottish Statutory Instrument 1999 No. 116: The Erskine Bridge (Temporary Suspension of Tolls) Order 1999

<sup>10</sup> Scottish Executive Development Department: Erskine Bridge Accounts 1999-2000. Reference copy available in Scottish Parliament Information Centre.

<sup>11</sup> Average taken across the year, vehicle flow rates likely to be seasonal

<sup>12</sup> The Herald 'Boyack rejects calls for payouts after toll blunder' 1 September 2001

administrative spending, particularly with regard to why such orders are not automatically flagged up when they are due for renewal<sup>13</sup>.

Figures for annual toll income, maintenance costs and surplus/deficit figures in relation to the Erskine Bridge are set out below:

Year	Maintenance costs	Tolls collected	Surplus / shortfall
	£	£	£
1971-72	52,458	194,775	142,317
1972-73	88,274	312,273	223,999
1973-74	100,037	359,570	259,533
1974-75	121,185	380,557	259,372
1975-76	456,192	417,495	-38,697
1976-77	681,976	471,743	-210,233
1977-78	934,462	524,666	-409,796
1978-79	817,467	583,760	-233,707
1979-80	814,800	525,059	-289,741
1980-81	772,151	679,171	-92,980
1981-82	1,564,378	843,467	-720,911
1982-83	2,051,090	1,194,705	-856,385
1983-84	966,915	1,257,592	290,677
1984-85	267,609	1,373,882	1,106,273
1985-86	264,615	1,394,421	1,129,806
1986-87	278,810	1,506,547	1,227,737
1987-88	289,941	1,627,605	1,337,664
1988-89	269,878	1,786,179	1,516,301
1989-90	40,409	2,360,403	2,319,994
1990-91	110,446	2,644,825	2,534,379
1991-92	67,157	2,814,503	2,747,346
1992-93	188,812	3,888,352	3,699,540
1993-94	134,310	4,042,217	3,907,907
1994-95	5,370,000	4,038,487	-1,331,513
1995-96	947,031	4,288,113	3,341,082
1996-97	427,990	3,775,926	3,347,936
1997-98	241,525	4,373,916	4,132,391
1998-99	264,330	4,513,415	4,249,085
1999-00	610,840	4,775,450	4,164,610
<b>TOTALS</b>	<b>19,195,088</b>	<b>56,949,074</b>	<b>37,753,986</b>

Note: Bridge closed 4-29 August 1996 due to oil platform collision.

Source: Scottish Executive

The Scottish Parliament has already had before it an Order under the 1968 Act authorising the suspension of tolls during repair work on the Kingston Bridge. The Erskine Bridge (Temporary Suspension of Tolls) Order 1999 was referred by the Subordinate Legislation Committee to the Transport and the Environment Committee which examined the instrument on 10 November 1999. Neither Committee had anything to report on the general policy of toll charging on the Erskine Bridge. Nor was the matter raised with regard to the Transport Bill (now Act), which had provisions for the Joint Board for the Forth Bridge.

<sup>13</sup> The Scotsman 'Demand for inquiry on bridge blunder' 1 September 2001

## **WHY IS A BILL NEEDED?**

Section 4(1) of the Erskine Bridge Tolls Act 1968 states that the power to levy tolls is exercisable only for 20 years from the date on which the Bridge opened (this is known as a 'sunset' section); but in 1991 the Conservative Government used the powers in Section 4(3) to extend the tolling regime for 5 years. These same powers were used again in 1996 to extend the regime for the five years up to 1 July 2001. The caveat for the extension of the tolling regime seems to be that the powers to extend must be used within the original twenty year period, or within the subsequent 5 year extensions. Given that period has now expired it may be that the powers to extend the tolling regime have now been lost. As such, primary legislation is required to reinstate the tolling regime for the present, and to ensure that the power to extend the tolling regime applies for the future. Primary legislation is also required to validate the collection of tolls during the period without legal cover.

## **PROVISIONS WITH RETROSPECTIVE EFFECT**

There is no power in the primary legislation (the Erskine Bridge Tolls Act 1968) for the Scottish Ministers to make subordinate legislation with retrospective effect. In general, and subject to any ECHR or other legislative competence issues, the law in the UK recognises the right of Parliament to make primary legislation that has retrospective effect, although in reality the power is rarely used. The usual approach is that legislation deals with future acts, and will not be ascribed retrospective force by the courts, unless it is deemed that it is absolutely obvious that the intention of the legislature was to provide for retrospective force.<sup>14</sup> In the case of the Erskine Bridge, the intention of the legislature is clear. The Bill makes express retrospective provision to reinstate the tolling regime from the period beginning on 2 July 2001.

The power of the Scottish Parliament to make retrospective legislation is not in doubt - the first piece of legislation passed by the Parliament, the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 (also made under the emergency legislation procedure) contained a retrospective provision.

## **CHARGES LEVIED WITHOUT LEGAL AUTHORITY**

The relevant law in England and Scotland differs, as each had derived principles from different sources. The leading relevant case in England, under the head of the law of restitution,<sup>15</sup> is that of the Woolwich Equitable Building Society, which was able to recover principal and interest on payments unlawfully demanded by the Inland Revenue.<sup>16</sup> In that case, the House of Lords was of the opinion that money paid by a citizen to a public authority which had gone beyond its powers in

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<sup>14</sup> See Willes J in *Phillips v Eyre* (1870) LR 6 QB 1, at 23

<sup>15</sup> i.e. restoration

<sup>16</sup> *Woolwich Equitable Building Society v Inland Revenue*, (1992) 3 WLR 366

demanding such, would appear in the first instance to be recoverable by the citizen as of right.

Such a specific right cannot be asserted under Scots Law, although it seems that without the Erskine Bridge Tolls Bill those who have paid tolls in July and August would have some claim for their recovery, subject to difficulties of proof. In Scotland the relevant law relates to unjustified enrichment - the case most relevant is that of Glasgow Corporation, where the Corporation paid tax in the belief it was due<sup>17</sup>. The Corporation was barred from recovering the money partly due to the belief of the court that, on equitable grounds, someone should not be allowed to recover where payment was based on an error of law. That decision though was based on English Law and has been undermined by the subsequent *Woolwich* judgement. Recently, the [Scottish Law Commission](#) has been examining the law in this area, producing a Discussion Paper and Report on the subject.

Further, a Scottish judgement, based on the law of unjustified enrichment, saw a merchant bank recover payments made to a local authority (acting beyond its lawful powers) with regard to a common interest and currency exchange agreement.<sup>18</sup> The Court of Session found that the bank was entitled to recover payments made under an error of law. This judgement would, in the absence of this Bill, lend support to the view that those that have paid tolls in July and August would theoretically be able to recover their payments under Scots law.

## **EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)**

Article 1 of Protocol 1 of the ECHR allows for the right to property, except in the public interest and provided for by law. Article 1 has three distinct rules: the peaceful enjoyment of possessions; deprivation of possessions; and recognition that Contracting States are entitled to control the use of property in accordance with the general interest or to secure the payment of taxes, other contributions and penalties. A 1997 case based on the provisions of Article 1 saw building societies paying tax for which they claimed there was no lawful cover, and they laid legal claim to restitution of their assets<sup>19</sup>. The Court expressed no conclusive view on whether the building societies' claims could be considered "possessions" as laid out in Article 1. If the claims that people had during the July and August period relate to "possessions" for the purposes of this Article of the ECHR, the question is whether the State's interference with the possession is justified. In the Building Societies case, the court thought that there was an obvious and compelling public interest to ensure that private entities do not enjoy the benefit of a windfall and deny the Exchequer money simply on account of inadvertent defects.

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<sup>17</sup> *Glasgow Corporation v Inland Revenue*, 1959 SLT 230

<sup>18</sup> *Morgan Guaranty Trust Co of New York v Lothian Regional Council* [1995 SC 151]

<sup>19</sup> *the National and Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society v the United Kingdom* (117/1996/736/933-935)

A separate ECHR issue relates to Article 6(1). If people have valid claims to recover monies, which this Bill removes, then the Bill is interfering with the right that those persons have to access a court. Again, the issue is whether there are public-interest considerations which justify the measure.

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