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Crown Estate Devolution: Assessing the Process, Substance and Rationale

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ABSTRACT:

This main goal of this thesis is to set out and analyse the process that led to the devolution of responsibility for the management of the Crown Estate to the Scottish Ministers, evaluating the strengths of that process with a view to determining whether it proceeded in a cohesive and logically consistent manner. This consideration of the process is accompanied by detailed scrutiny of aspects of the legislation that resulted out of that reform, arriving at a determination of whether the legislation is conducive to the resolution of the various issues that led to the consistent calls for reform.

The thesis begins with a literature review that sets out the relevant academic writing and official publications concerning the Crown Estate in Scotland. This offers a foundation on which to proceed with analysing the strengths of the devolution of the Crown Estate. Also detailed is an example of dissatisfaction with the manner in which the Crown Estate Commissioners carried out their functions, focussing on their statutory duty to maximise revenues.

The second chapter focusses on the political backdrop against which the reform of the Scottish elements of the Crown Estate took place, also providing insight into the politically divisive debates that were taking place in the Scottish Parliament and elsewhere, and whether the extent of this divisiveness hampered reform. The view can be taken that the Crown Estate is a particularly useful issue through which to analyse the transfer of power between legal and political institutions in the United Kingdom. The reasons for this are numerous: for example, the way in which management of the Crown Estate is governed and carried out has profound implications for the achievement of public policy goals in Scotland.

Chapter three deals with the legislation that resulted out of this process, the Scottish Crown Estate Act 2019. The process that was engaged in during that Bill's passage through the Scottish Parliament is found to be encouraging in terms of its rigorous Committee stages, under which a very wide variety of relevant stakeholders were consulted on how they believed long-term management of the assets should be guided. The chapter then analyses in detail the Bill at various stages, taking a specific interest in the economic and social duties placed on Crown Estate managers, as well as the provisions concerning further devolution to local authorities and community bodies.

The thesis then adopts a theoretical perspective in Chapter 4 by seeking to ascertain whether a certain conception of property theory can be identified at each stage of reform.

By this, it is possible to demonstrate the extent to which the Crown Estate in Scotland exemplifies an expansion in the obligations owed by property owners towards society, particularly by reference to the manner in which the new legislation broadened the duties of Crown Estate managers.

The thesis concludes by taking the view that the initial reservation of management functions relating to the Crown Estate along with the continued reservation during the first decade of the Scottish Parliament were borne out of a desire to preserve the integrity of the United Kingdom. The Crown Estate, due to its proximity to the monarchy, is embedded with both emotional and practical relationships with the Union, and as such the Crown Estate is an understated focal point of any such devolution. The view is then taken that the Crown Estate demonstrates a divergence in policy between Scotland and the UK, with the former placing a greater emphasis on the extent of the obligations owed by property owners to wider society.

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AUTHOR'S DECLARATION

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution

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INTRODUCTION

A. THE CROWN ESTATE: CONSTITUTION AND EXTENT

The Crown Estate consists of a diverse and complex range of land and property interests that span the United Kingdom, belonging to the reigning monarch "in right of the Crown"[1] and thus forming part of a separate patrimony to that of the private possessions of the monarch. It has been suggested that these rights and interests are not to be managed for the benefit of the Crown but should instead be managed for the "common good" of the people,[2] meaning that the revenues from the land flow back to the treasury for public spending. A central issue that is explored in this thesis is the conflict between the notion that revenues from the Crown Estate should be maximised to best benefit the public purse, or whether management for the "common good" requires a greater focus on non-economic factors and thus whether economic metrics represent an accurate calculation of public benefit. Legislators have remarked on the "quirky nature of the estate"[3] and its "unique position"[4], and it is indeed novel in the sense that the relevant land is neither truly public nor private, since it is managed for the public benefit and is owned by the monarch, yet without the monarch's control. The land overall has an undoubtedly unique character when compared with other categories of land in Scots law, particularly in terms of the extent of the statutory obligations placed on those responsible for its management.

The pecuniary value of the Scottish parts of the Crown Estate is relatively low when compared to the wider estate, with a recent CEC annual report placing the value of Scottish assets at "£261.5 million, which represents 2.6 per cent of the value of the Crown Estate's wholly owned property".[5]

Scottish assets forming part of the Crown Estate are as follows:[6]

- *Marine (£151.5m total value)*
  - *Rights to lease seabed and fish farms, plus telecommunications and electricity cables and oil & gas pipelines, out to the 12-nautical mile limit.*

[1] The Crown Estate, "FAQs", available at: *https://www.thecrownestate.co.uk/en-gb/resources/faqs/*
[2] Crown Estate Review Working Group, *The Crown Estate in Scotland: New Opportunities for Public Benefits* (December 2006) 27.
[3] House of Commons, Treasury Committee, *The Management of the Crown Estate* (March 2010) para 8.
[4] Ibid.
[5] Crown Estate, "Integrated Annual Report 2015", available at: *https://www.thecrownestate.co.uk/en-gb/our-business/integrated-annual-report/annual-reports-archive/*
[6] Crown Estate Scotland, "Annual Reports and Accounts to 31 March 2018" 8, available at: *https://www.crownestatescotland.com/maps-and-publications*

- *Rights to lease seabed for renewable energy generation and gas and carbon dioxide storage out to the 200-nautical mile limit.*

- *Rural (£123.9m total value)*
  - *The Glenlivet, Whitehill, Fochabers and Applegirth estates covering 37,000ha (inc. agricultural, commercial and residential tenancies, 5000ha forestry, sporting and mineral rights).*
  - *Rights to fish wild salmon and sea trout in river and coastal areas, as well as rights to naturally-occurring gold and silver across most of Scotland.*
- *Coastal (£32.5m total value)*
  - *Right to lease seabed out to the 12-nautical mile limit, plus just under half of Scotland's foreshore, for marine infrastructure.*
- *Urban (£16.7m total value)*
  - *Currently consists of one property in central Edinburgh with retail and office space.*

It is apparent that the most significant aspects of the Crown Estate in Scotland are the linked marine and coastal interests that together constitute around 57% of the Scottish property portfolio in terms of value. These assets are particularly crucial in that they involve responsibility for infrastructure that is relied on by countless economic and social interests. Further to this, the responsibility for the leasing of renewable energy sites and the maintenance of infrastructure in this area is a significant role when considering the Scottish Government's aim of generating 50% of Scotland's overall energy consumption from renewable sources by 2030, with full decarbonisation the target by 2050.[7] An idea that is explored in greater detail in this thesis is the notion that one should be hesitant to place merely a financial value on assets as unique and of such intrinsic importance as the seabed and coastal environment. Coastal assets can be distinguished from all others in the sense that they constitute a 'monopoly' in terms of the uniqueness of the resources they provide access to, such as fisheries and renewable energy, whilst their importance to the Scottish economy and society as a whole is far-reaching.

Rural interests, whilst financially significant, are arguably less socially or economically significant in the long term when compared with the *sui generis* importance of coastal and marine management. This is not to suggest that the rural interests are insignificant, however, since they are large estates mostly let out for "farming, residential,

[7] Scottish Government, "Renewable and low carbon energy policy", available at: https://www.gov.scot/policies/renewable-and-low-carbon-energy/

commercial, sporting and mineral operations",[8] and are thus vital to those living on and around the land.

The reigning monarch is the owner of the lands that comprise the Crown Estate, yet for centuries many of the rights associated with this ownership have been exercised by bodies other than the monarch.[9] Responsibility for managing the Crown Estate moved between various different Government departments until the 20th century, which saw the gradual transfer and consolidation of responsibility from disparate groups to the Commissioners of Crown Lands, who eventually became the Crown Estate Commissioners (CECs) in 1961.[10] By virtue of the Crown Estate Act 1961, the CECs took responsibility for management of the UK-wide Crown Estate portfolio and became subject to the various requirements of management under that Act.[11]

The CECs summarised their position as being such that they exercised "the powers of ownership, although we are not owners in our own right".[12] The CECs were in many ways constituted as a business, in that they sought to maximise revenues and retain the value of their assets, yet as a business whose net revenue surplus must be surrendered to the Treasury each year.[13] The CECs were thus directly responsible for the majority of functions relevant to the management of the Crown Estate, such as setting and collecting rents, as well as guiding the overarching strategy of the business. They were subject to accountability in the form of answering directions from the Chancellor of the Exchequer or Secretary of State for Scotland,[14] whilst also being required to furnish the Treasury with annual accounts.[15]

The devolution settlement arrived at under the Scotland Act 2016 resulted in a significant alteration to the structure of the Crown Estate, with the effect being the transfer of responsibility for the management of Scottish Crown Estate assets from the CECs to the Scottish Ministers.[16] It must be highlighted that the transfer had no effect on the actual ownership of the Crown Estate, with this still being vested in the monarch in right of the Crown. This transfer was the result of over 20 years of campaigning by politicians, land

[8] Crown Estate Scotland, "What we do: Rural", available at: *https://www.crownestatescotland.com/what-we-do/rural*
[9] Crown Estate Review Working Group, *The Crown Estate in Scotland: New Opportunities for Public Benefits* (December 2006) Annex 1.
[10] Ibid.
[11] Crown Estate Act 1961 s 1(2).
[12] House of Commons, Treasury Committee, *The Management of the Crown Estate* (March 2010) para 10.
[13] Ibid., para 23.
[14] Crown Estate Act 1961 s 1(4).
[15] Ibid., s 2(3).
[16] (Or to a person nominated by the Scottish Ministers) – Scotland Act 2016 s 36 (1).

rights activists and a plethora of stakeholders both on and off the affected land. The process, rationale and implications of this transfer are a main focus of this thesis, with the process in particular providing a useful basis by which to reflect on and assess two decades of devolution in a broader sense. This debate is of an overtly political nature for various reasons, firstly because its central issue concerns the integrity of the United Kingdom and, further to this, highly contentious questions regarding the role and relevance of the monarchy in modern society. The economic issues that are at the core of the debate are also inherently political, pertaining to how key assets should be managed and the extent to which the public should have a role in this management. In a deeper sense, the political element of the debate also lies in whether purely economic metrics should be used to guide or determine the success of a particular policy.

B. THESIS: CROWN ESTATE REFORM

Criticisms have frequently been levelled at the management of the Crown Estate in Scotland, in particular focussing on the statutory rules under which the CECs operated when in control of the Scottish aspect of the Crown Estate, along with the manner in which they carried out some of their functions. What becomes apparent when examining the various publications relevant to the Crown Estate since the creation of the Scottish Parliament is the extent to which the initial settlement, in terms of reserving responsibility for management functions to Westminster, was inadequate from a Scottish policy perspective. As is demonstrated, stakeholders frequently complained of the lack of accountability and financial focus of the CECs, whilst many in Government took the view that the governance of the CECs in some cases had the effect of cutting across public policy

This thesis considers the process and substance of the devolution of CEC functions, in particular analysing why this reform has occurred under the Scotland Act 2016 as opposed to during the first devolution settlement, and whether the reform arrived at has been or is likely to be effective in rectifying the perceived issues. The importance of the first aspect of this lies in determining why, despite fairly consistent calls to transfer the power of management to the Scottish Government and local authorities, the control remained for many years with the CECs, and whether there was any logical basis for this reservation beyond political motivation. These questions tie in with a wider debate in Scotland around land reform, and in turn with notions of property theory and the purpose of property in general.

Various theories of property exist that attempt to understand, *inter alia*, the purpose and basis of the rights and duties that are created and regulated by property law. The theories can operate at both normative and descriptive levels; offering conceptions of how property may best be organised as well as an understanding of how it currently functions or is likely to function under a certain theoretical framework[17]. By engaging with these theories, Chapter 4 of this thesis seeks to determine whether the way in which management of the Crown Estate has been carried out and the separate but linked issue of the structure under which this management operates can be said to adhere to one particular understanding of the purpose of property law and the values it should serve to protect, and whether the Scottish Government have acknowledged a particular theoretical position. Far-reaching obligations are placed on those responsible for managing the Crown Estate; the nature of these obligations will be analysed with a view to determining their theoretical underpinnings.

C. METHODOLOGY

Varying methodological approaches are adopted at different points in this thesis, an approach that is necessitated by the highly politicised nature of Crown Estate reform, along with the scarcity of academic analysis in the area. A sociolegal approach is useful when evaluating the political process that led up to the relevant Acts of the Scottish Parliament, specifically involving the analysis of Parliamentary debates, briefing papers and Committee reports. These documents make it possible to gain a deeper understanding of the legislative intent behind the Scottish Crown Estate Act 2019, particularly in terms of the argumentation advanced during the debating around key amendments in that Act.

A doctrinal approach is also adopted at points to describe and contrast the specific legislative terminology and construction that emerged out of those debates. This enables a focus on how the situation regarding the Crown Estate has changed over the past two decades, and in particular how the scheme of management that has recently emerged in Scotland can be contrasted with the management when the Crown Estate was overseen on a UK-wide basis.

[17] G. Alexander & E. Peñalver, *An Introduction to Property Theory* (Cambridge, 2012), 18.

CHAPTER 1: LITERATURE REVIEW

A. THE CROWN ESTATE COMMISSIONERS IN SCOTLAND

Prior to engaging with the work of Government, Parliament, campaigners and others concerning the Crown Estate in Scotland, a useful basis on which to begin this literature review is by examining a specific example of discontent with how the Crown Estate Commissioners (CEC) have exercised their functions in Scotland, particularly from the perspective of communities and those who live on the affected land. This will frame the publications and analyses that follow with the roots of the issues that have led to calls for reform. The limited range of academic commentary concerning the Crown Estate (explored in section C of this chapter) necessitates the use of news publications to reference the concerns and disputes over the CEC's management of the Crown Estate in Scotland, whilst representations from MSPs are also used as examples of dissatisfaction with management.

The Tarbert (Loch Fyne) Harbour Authority (THA) have previously taken issue with elements of how the CEC have discharged their functions, particularly in terms of the statutory obligation placed on the Commissioners to "maintain and enhance its value and the return obtained from [Crown Estate land], but with due regard to the requirements of good management"[18]. The particular issue at hand concerns the rents charged by the CEC to the THA "for use of the seabed within its own harbour area",[19] which the Chairman of Trustees for the THA at that time contended would "restrict the authority's ability to raise grants and loans".[20] This particular harbour authority oversees a "Trust Port",[21] making it a "not for profit organisation recognised as a social enterprise",[22] under which "[a]ll surpluses are reinvested to ensure that the facilities and infrastructure are properly maintained and improved for the benefit of its users".[23] Referencing the CEC, the chairman of Trustees made the point that "[the CEC] state that 'it is not in the Crown Estates' interest to discourage or limit development', but this will be the direct consequence of their demands"[24]. Michael Cunliffe, then the Head of Scottish Estates for the CEC, responded to THA with reference to the aforementioned statutory duty placed on the CEC to obtain "a

[18] Crown Estate Act 1961 s 1(3).
[19] Herald Scotland, "Crown demands Tarbert Harbour rent" (2000), available at: *https://www.heraldscotland.com/news/12215728.crown-demands-tarbert-harbour-rent/*
[20] Ibid.
[21] Tarbert Harbour Authority, "About Tarbert Harbour", available at: *https://www.tarbertharbour.co.uk/tarbert-harbour-information.html#about_tarbert_harbour_authority/*
[22] Ibid.
[23] Ibid.
[24] Herald Scotland, "Crown demands Tarbert Harbour rent" (2000), available at: *https://www.heraldscotland.com/news/12215728.crown-demands-tarbert-harbour-rent/*

return from the seabed and other parts of the estate"[25], suggesting that this duty had necessitated the rents being charged.

In defence of the charges, Michael Cunliffe highlighted how the CECs "deal even-handedly with all users"[26], refuting the notion that the THA had been disproportionately affected by the charges. Missing from this response is engagement with the notion that the mere existence of the charges was inappropriate, particularly when one considers the status of Tarbert Harbour as a trust port as opposed to a profit-generating entity. This is therefore a case that can be seen to highlight the potential issues with placing a blanket requirement to seek economic return on the CECs, particularly when considering the diverse range of land interests under their management, some of which potentially requiring a more considered approach. An obvious alternative statutory framework might be one that enables the CECs to take wider social and environmental factors into account, beyond the ambit of economic return.

B. OFFICIAL PUBLICATIONS

This section of the literature review, through reference to the debates, reports and publications of the UK Parliament, Scottish Parliament and other administrative bodies, explores the key changes and criticisms of the management of the Crown Estate and its legal status. Because the management of much of the Crown Estate has until recently been reserved to the Westminster Parliament, also of importance is how the Crown Estate in Scotland has been managed when compared to the rest of the UK. Conducting a thorough review of Governmental and Parliamentary publications will enable a more meaningful analysis of the subsequent academic and political debate that has emerged.

(i) Pre-1998 Act

Prior to the enactment of the Scotland Act 1998 and the devolution of various powers to the newly created Scottish Parliament, the rules surrounding the legal status and management of the UK-wide Crown Estate were contained in the Crown Estate Act 1961. The first devolution settlement did not transfer all aspects of the Crown Estate to the Scottish Parliament, and the 1961 Act thus retained relevance in Scotland long after the 1998 Act came into force. The main function of the 1961 Act is to regulate the

[25] Herald Scotland, "Tarbert Harbour" (2000), available at: https://www.heraldscotland.com/news/12216201.tarbert-harbour/
[26] Ibid.

management of the Crown Estate by imposing various obligations[27] on the CECs, whom the Act identifies as the managers of the Crown Estate,[28] as well as providing them with several statutory rights.[29] Parts of the Act also provide the Chancellor of the Exchequer and, where relevant, the Secretary of State for Scotland with a power of direction over those commissioners.[30] The thrust of the 1961 Act was thus to create a new statutory body in the Crown Estate Commissioners as well as the creation various rights and obligations for that body. The practical effect of this for Scotland was that full responsibility for management of the UK-wide Crown Estate lay with the CEC.

(ii) Scotland Act 1998

Under the 1998 Act, control over the management of the Crown Estate was retained by the CECs[31] and thus lay outwith Scotland. Meanwhile, legal control over Crown property rights in Scotland, and the authority to regulate these property rights, lay with the Scottish Parliament[32], meaning that they would have some degree of control over the manner in which Crown property was used. The following section of the relevant legislation demonstrates the reserved nature of CEC functions: [33]

> *"**1** The following aspects of the constitution are reserved matters, that is—*
>
> *(a) the Crown, including succession to the Crown and a regency,*
>
> *(b) the Union of the Kingdoms of Scotland and England,*
>
> *(c) the Parliament of the United Kingdom,*
>
> *(d) the continued existence of the High Court of Justiciary as a criminal court of first instance and of appeal,*
>
> *(e) the continued existence of the Court of Session as a civil court of first instance and of appeal.*
>
> ***2** (1) Paragraph 1 does not reserve—*

[27] One significant example is the highly contentious requirement for Commissioners to "maintain and enhance" the "value and return" obtained from the CE, contained in s.1(3) – this is discussed at greater length in subsequent chapters.
[28] Crown Estate Act 1961 s 1(1).
[29] Ibid., s 6, for example, such as the power to make regulations for CE land open to the public.
[30] Crown Estate Act 1961 s 1(4).
[31] Scotland Act 1998 Sch 5 para 2(3).
[32] Ibid., Sch 5 s 3(1). - See also, Crown Estate Review Working Group, *The Crown Estate in Scotland: New Opportunities for Public Benefits* (December 2006) Annex 1, which provides a brief historical overview of Crown lands and explains the distinct legal nature of those lands in Scotland.
[33] Ibid., Sch 5.

(a) Her Majesty's prerogative and other executive functions,

(b) functions exercisable by any person acting on behalf of the Crown, or

(c) any office in the Scottish Administration.

(2) Sub-paragraph (1) does not affect the reservation by paragraph 1 of honours and dignities or the functions of the Lord Lyon King of Arms so far as relating to the granting of arms; but this sub-paragraph does not apply to the Lord Lyon King of Arms in his judicial capacity.

(3) Sub-paragraph (1) does not affect the reservation by paragraph 1 of the management (in accordance with any enactment regulating the use of land) of the Crown Estate [F1(that is, the property, rights and interests under the management of the Crown Estate Commissioners)]."

The Crown Estate Review Working Group (CERWG) summarised this position in their 2006 report, stating that "While the administration and revenues of the property rights which make up the Crown Estate in Scotland are reserved to Westminster, control over the Crown's ownership of these property rights and the regulation of their use are devolved to Holyrood."[34]

Whilst the effect of the 1998 Act was to reserve the majority of control over the management of the Crown Estate to Westminster, calls for further Scottish autonomy over Crown Estate management have been identifiable from figures within Parliament since before the 1998 Act came into force. It is evident that, during the course of debates in the UK Parliament that concerned devolution of the Crown Estate under the 1998 Act, arguments were made in support of devolving CEC functions to the Scottish Parliament and local authorities that have been echoed in the more recent debates over the Scottish Crown Estate Bill. One example of a key and vocal proponent of further devolution of the Crown Estate was SNP MSP (an MP at the time in question) Roseanna Cunningham who, during a 1998 sitting of the UK Parliament, argued that "in many areas, the Crown Estate Commissioners act as a direct barrier to economic development in Scotland", and also that they "constitute one of the most secretive and unaccountable bodies in Scotland".[35] Further to this, a ten-minute Bill introduced by Liberal Democrat MP James Wallace, also in March 1998, sought to "transfer (the regulatory function of the Crown Estate) to relevant

[34] Crown Estate Review Working Group, *The Crown Estate in Scotland: New Opportunities for Public Benefits* (December 2006) 29.
[35] HC Deb 30 March 1998, col 907.

local authorities in Scotland".[36] In these examples, both arguments suggest an explicit dissatisfaction with the CECs' standard of management and the extent to which those who are affected by the management of the Crown Estate have a say in it, and it is argued that the substance of the relevant parts of the Scotland Act 1998 failed to address these concerns. Criticisms of the manner in which the CEC operated were, even at this early stage of reform, identifiable across much of the political spectrum.[37]

(iii) The movement towards devolution

Following on from the early calls for further devolution of CEC functions outlined above, one now considers the subsequent suggestions from administrative figures that greater reform in this area would be desirable. The first significant published consideration of the arrangement reached under the 1998 Act came from the Scottish Law Commission and their 2003 report concerning the law of the foreshore and seabed in Scotland.[38] The report identified a "tension between the Commissioners on the one hand and harbour and local authorities on the other",[39] and whilst the report stopped short of recommending further devolution of control to those local authorities, it clearly identifies strong negative sentiment with regards to the rules deriving from the 1998 Act. The report can be seen to echo the aforementioned concerns of various MPs during the drafting of the Act with reference to the combination of the somewhat unaccountable nature of the Commissioners and the duty placed on them to maximise economic return.[40] The report itself acknowledges that making a wholesale recommendation as to the future of the control and ownership of the Crown Estate would be outwith its scope.[41]

A body that was far more openly critical of the CEC was the aforementioned CERWG, whose 2006 report[42] found firstly that "the overall lack of accountability of the CEC's management in Scotland before devolution remains",[43] and that this is "at odds with the wider public policy towards devolution".[44] It is possible to identify a degree of continuity at this stage: calls were being made in the UK Parliament for further devolution prior to enactment of the 1998 Act and those calls continued elsewhere for at least the next

[36] HC Deb 24 March 1998, col 186.
[37] HC Deb 30 March 1998, cols 907-914.
[38] Report on *Law of the Foreshore and Sea Bed* (Scot Law Com No 190, 2003).
[39] Ibid., para 1.10.
[40] Ibid., para 5.4.
[41] Ibid., para 1.10.
[42] Crown Estate Review Working Group, *The Crown Estate in Scotland: New Opportunities for Public Benefits* (December 2006).
[43] Ibid., 79.
[44] Ibid., 78.

decade. The report, whilst now outdated in certain respects from a legal perspective, remains one of the more comprehensive enquiries into the history and status of the Crown Estate and is referenced throughout the thesis. The CERWG comprised the six local authorities covering the Highlands and Islands, the Highlands and Islands Enterprise and the Convention of Scottish Local Authorities, thus representing a range of Scottish interests, particularly those relating to the rural and coastal land on which much of the Crown Estate is concentrated. The purpose of the Highlands and Islands councils publishing this report was both to provide some clarity in a little known area, and to address a "concern over the ways in which the property rights which make up the Crown Estate in Scotland…are managed"[45] Of particular concern to the CERWG was the unaccountable nature of the CEC, with the report highlighting the absence of any reporting by the CEC to the Scottish Parliament as well as the failure of the CEC to comprehend the distinction between management and ownership.[46] This distinction, along with the view one takes regarding the purpose of property in general, is central to the issue of the Crown Estate in Scotland and the wider scheme of land reform.

The next significant Governmental/institutional consideration of the management of the Crown Estate in Scotland came in the form of the 2009 report of the Calman Commission (the Calman report),[47] which involved several political parties but excluded the SNP, with the latter publishing their proposals for further devolution and independence several months later in *Your Scotland, Your Voice: A National Conversation* (the SNP proposals).[48] It is useful to consider how the findings of these two publications can be contrasted, and the extent to which the "mutually antagonistic"[49] nature of the publications may have resulted in less meaningful and pragmatic recommendations emerging from each. Firstly, with regards to the Calman report, the key recommendation of the Commission was that "legislative competence for the Crown Estate in Scotland should [not] be devolved",[50] largely basing this decision on the notion that Scotland would be better off staying part of a "wider, diverse Crown Estate encompassing interests across the

[45] Crown Estate Review Working Group, *The Crown Estate in Scotland: New Opportunities for Public Benefits* (December 2006) 3.
[46] Ibid., 78.
[47] Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* (June 2009).
[48] Scottish Government, *Your Scotland, Your Voice: A National Conversation* (November 2009).
[49] T. Mullen, 'Scotland's Constitutional Future' (2009) 15 *European Public Law* 38.
[50] Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* (June 2009) para 5.122.

United Kingdom".[51] This position, one which seeks to maintain the existing structure of power and control over the Crown Estate, is in many ways in keeping with the overarching aim of the Calman Commission, which was to "secure the position of Scotland within the United Kingdom".[52] Whilst the Calman report made some concessions for those who sought further devolution of CEC functions, such as by recommending the appointment of a Scottish Crown Estate Commissioner and in acknowledging that too great an emphasis may have been placed on maximising economic return,[53] it may be argued that the Commission's focus on maintaining the integrity of the Union was a limiting factor on its ability to conduct meaningful analysis of the individual issues relating to Scotland's role in the UK.

Contrary to the recommendations of the Calman Commission, the SNP proposals found the reserved nature of CEC functions to be a limiting factor to various aspects of the Scottish economy and the country's autonomy in general. The first example of this relates to the seabed: [54]

> *"The Crown Estate, a reserved body, determines the use of the seabed, and coastguard services are run by the Maritime and Coastguard Agency, an executive agency of the United Kingdom Government. Scotland has executive (but not legislative) responsibility for marine renewables. Legislative and executive competence for marine nature conservation and installations at sea are devolved, but only out to 12 nautical miles. Despite recent agreements, the underlying fragmented nature of responsibilities does pose a risk to the successful management of marine issues, for example supporting the emerging wind and tidal energy industry in Scottish waters."*

In this instance, the SNP proposals are critical of the divided and uncoordinated methods of marine management apparent in Scotland, with the CEC being referenced as a potential barrier to the development of the marine economy, possibly preventing the achievement of public policy aims through the existence of an incoherent management regime. This critique of the legal position of the Crown Estate is echoed with reference to Carbon Capture and Storage, with the proposals suggesting that further devolution of

[51] Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* (June 2009) para 5.121.
[52] Ibid., para 1.
[53] Ibid., para 5.122.
[54] Scottish Government, *Your Scotland, Your Voice: A National Conversation* (November 2009) para 5.9.

responsibilities relating to offshore energy could create a "seamless regulatory framework for low carbon-based energy activity in the Scottish offshore area".[55] Whilst the SNP proposals thus present the Crown Estate as being emblematic of a somewhat disjointed approach to the management of crucial land and resources in Scotland, they do little to acknowledge potential issues arising from the manner in which CEC functions were exercised, nor do they critique the legal framework that is relevant to the confusing status of the Crown Estate. Instead, the main issue identified pertaining to the Crown Estate is the notion that "revenues collected from Scottish coastal businesses by the Crown Estate bring very little visible benefit to Scotland".[56] This conclusion is evidently at odds with that of the Calman report in the sense that, whilst the former presents the existence of a UK-wide body for managing the Crown Estate as a barrier to economic development in Scotland, the latter suggests that unity in this area is more likely to benefit multiple interests through the ability to pursue mutual aims in a cohesive way. The reasons for and implications of the contradictory conclusions arrived at by these two publications will be considered in detail in the subsequent chapter, with the divisive political climate in Scotland being of particular importance.

A report[57] published in 2010 by the House of Commons Treasury Committee (Treasury report) reflects the extent to which key stakeholders in Scotland retained the view that greater or full devolution of CEC functions was necessary, and also reinforces the degree of dissatisfaction apparent from various parties concerning the recommendations of the Calman Commission. Referring to the Calman recommendations, the treasury report suggests that: [58]

> *"Further steps are also required. The Scottish Government saw merit in having a more formal memorandum of understanding or concordat with the CEC, and during oral evidence the CEC stated that they 'would obviously be receptive to that if it was felt that would be helpful.' We also see merit in this. The extent of the Scottish Government's powers and responsibilities, including those over Scotland's marine environment and renewable energy development, mean that it is essential that there is a close and constructive working relationship between the CEC and*

[55] Scottish Government, *Your Scotland, Your Voice: A National Conversation* (November 2009) para 5.45.
[56] Ibid., para 5.15.
[57] House of Commons, Treasury Committee, *The Management of the Crown Estate* (March 2010) paras 101-112.
[58] Ibid., para 110.

the Scottish Government. Finally, we consider that in order to engage with the Scottish Government, and to adapt as necessary to the different public policy environment in Scotland, the CEC will need greatly to strengthen their management arrangements within Scotland."

Whilst the Treasury Committee thus took the view that further cooperation between the Scottish Government and the CEC would be crucial in effectively managing Scotland's resources, the report stops short of recommending full devolution of CEC functions. The question of further devolving the administration of Scotland's Crown property rights does not seem to be properly addressed in the report, and whilst this might be due to the Committee's admission of the report's limited scope,[59] it is also important to consider the sensitive political climate at the time of its publication. The tension between those who sought to maintain the integrity of the United Kingdom and the parties who sought further devolution of power can be seen to have guided much of the debate where issues relevant to devolution and independence were concerned.

The Treasury Committee's recommendation that a wider study into the Crown Estate be undertaken came to fruition, in relation to Scotland at least, with the Scottish Affairs Committee's 2012 inquiry into the Crown Estate in Scotland (SAC report).[60] The report in sum offers a scathing critique of the CEC's operations in Scotland, both echoing the dissatisfaction found in previous reports and enquiries whilst also expounding a range of other issues relating to the operation and structure of the CEC. The SAC report addresses the restructuring of the CEC that occurred in 2002, which will be considered in more depth in subsequent chapters, and the extent to which this restructuring indicated the incompatibility of the CEC with the pace of devolution in Scotland: [61]

"While we accept the points made in relation to the benefits of the economies of scale, the CEC's decision to close the operating division in Scotland appears to have
been an unusual move, given that, at the time, most organisations were opening Scottish divisions and offices in the context of the new devolved arrangements. In practice, this has had a negative impact, both upon the CEC's accountability in

[59] House of Commons, Treasury Committee, *The Management of the Crown Estate* (March 2010) page 4.
[60] House of Commons, Scottish Affairs Committee, *The Crown Estate in Scotland* (March 2012).
[61] Ibid., para 30.

Scotland and on its relationships—as there is no longer a single person in the Scotland office responsible for its operations in Scotland. The decision was indicative of the CEC's out-dated attitude towards the UK post-devolution."

This passage is striking in both its direct nature and in terms of its reference to the wider scheme of devolution being carried out in Scotland. This is in contrast to the Calman and Treasury reports, in the sense that both seem to shy away from the notion that devolution should progress in a cohesive manner, without the unreasoned omission of certain administrative functions from the wider programme of devolution. Further to this, the report states: [62]

"We are concerned by the very narrow interpretation of the Crown Estate Act 1961 employed by both the CEC and the Treasury, and agree with the Treasury Committee,
which, in 2010, suggested that the remit of the CEC could be interpreted more broadly to include wider public policy objectives. The CEC should be more accommodating of other public interests in its day to day operations."

This is in reference to the aforementioned statutory requirement placed on the CEC that it adopts a scheme of land management that serves "to maintain and enhance its value and the return obtained from it".[63] This expands upon the Treasury Committee's suggestion that the CEC should facilitate a greater degree of local socio-economic benefit through their management[64] to in general include public interests and goes further still in stating that "the CEC has no statutory capacity or willingness to meet multiple public interest objectives and reinvest appropriately".[65] This is novel in its suggestion that the CEC were entirely ill equipped to manage the vital Scottish interests for which it was responsible. The degree of discontent expressed in the report of the Scottish Affairs Committee when compared to that of the Treasury Committee may be somewhat explained by the membership of each respective committee; whilst the latter comprised mostly English MPs, the former represented a far wider cross-party range of Scottish interests in terms of its membership. This is explored in greater detail in the subsequent chapter.

[62] House of Commons, Scottish Affairs Committee, *The Crown Estate in Scotland* (March 2012) para 74.
[63] Crown Estate Act 1961 s 1(3).
[64] House of Commons, Treasury Committee, *The Management of the Crown Estate* (March 2010) para 100.
[65] House of Commons, Scottish Affairs Committee, *The Crown Estate in Scotland* (March 2012) para 76.

Despite the significant strength of feeling expressed in the SAC report, the majority of the recommendations contained within were roundly rejected by the UK Government in their response.[66] The main thrust of the response is not dissimilar to the findings of the Calman Commission; the UK Government considers the benefits derived from the economies of scale associated with a UK-wide scheme of management to outweigh the various examples of negative sentiment apparent from the evidence given to the Committees.[67] Division of responsibility for the UK marine offshore estate could have the effect of presenting "additional institutional and practical obstacles, making it more difficult to attract global offshore renewables companies to invest in the UK."[68], according to the report. The response does not address the notion that policy pertaining to investment in this area might be unified through cooperation between the distinct coastal authorities. Offering an alternative to the Scottish Affairs Committee's recommendation of devolution beyond Edinburgh to local authorities, the UK Government accepts the CEC argument that informal Local Management Agreements should suffice in achieving the correct level of community engagement.[69] In accepting this, the Government failed to address the concerns raised in the original Scottish Affairs Committee report, namely that informal agreements had often not been adhered to by the CEC in the past.

Another key concern of the Scottish Affairs Committee was the lack of financial transparency arising from the Crown Estate being treated as one financial body, since this prevented financial reporting specifically for Scottish land holdings.[70] The UK Government addressed this issue, yet their conclusion that "publishing such figures would be misleading, since estimated allocations could not be used either to generate reliable conclusions or make decisions"[71] seems to support the central argument posed by the Scottish Affairs Committee that the fundamental structure of the CEC makes it ill-equipped to deal with distinctly Scottish concerns. Overall, this response by the UK Government does not seem to fully address the points raised by the Scottish Affairs Committee, particularly in terms of the CEC's structural issues. This is in the sense that, whilst the Government engage with some specific criticisms levelled at the CEC, they fail to properly consider the notion that the existing arrangement for managing the Crown

[66] UK Government, *The Government response to the seventh report from the Scottish Affairs Committee* (July 2012).
[67] Ibid., para 4.3.
[68] Ibid., para 4.2.
[69] Ibid., para 1.5.
[70] House of Commons, Scottish Affairs Committee, *The Crown Estate in Scotland* (March 2012) para 41.
[71] UK Government, *The Government response to the seventh report from the Scottish Affairs Committee* (July 2012) para 3.3.

Estate was fundamentally flawed. Subsequent chapters will consider in greater detail the political landscape that led to the disparity between the respective conclusions of these publications.

Addressing the UK Government's response to their 2012 report, the Scottish Affairs Committee stated they were "disappointed at the Government's wholly inadequate response and ask it to reconsider its position as a matter of urgency"[72] Publishing their follow up paper (SAC report 2) two years after the first, the thrust of this report is that whilst they accepted that the CEC had taken some steps towards addressing the various issues identified in the 2012 report, the body was inherently unequipped to make the changes deemed necessary by the Committee. In terms of the aforementioned issue of financial accountability, the Committee points to a fundamental deficiency in the structure of the CEC, finding that the closure of the Scottish operating division in 2001-2002 and thus the cessation of separate financial reporting for Scotland had made it impossible for the body to be truly financially accountable.[73] This is consistent with the central contention of both SAC reports, that the "structures of the CEC are neither adequate or appropriate to meet the needs and aspirations of people living in the various parts of Scotland impacted by the Crown Estate nor of Scotland as a whole."[74]

The SAC report 2 also returns to the notion that the statutory duty placed on the CEC to prioritise economic return from the Crown Estate has had the undesired effect of preventing the proper consideration of non-economic interests. In considering this issue, the report references Conservative MP and former Economic Secretary to the Treasury Chloe Smith, who stated that the "Crown Estate is not a fund designed to invest public funds to secure government policy objectives. It cannot go further and support broader aims – whether local economic or environmental – because it would act *ultra vires* if it did so"[75]. Smith thus supports one of the central contentions of the SAC, namely that the legislative framework of the Crown Estate Act 1961, and particularly the obligation placed on the CEC to enhance the value of the land and maintain economic return, has severe implications for wider concerns relating to land management.

[72] House of Commons, Scottish Affairs Committee, *The Crown Estate in Scotland: follow up* (March 2014) para 54.
[73] Ibid., paras 20-23.
[74] Ibid., para 66.
[75] Ibid., para 27.

This concern regarding the restructuring of the CEC that occurred in 2001-2002 was echoed in a 2014 report published by the Land Reform Review Group (LRRG report), an independent group established by the Scottish Government with a view to, *inter alia*, "[e]nable more people in rural and urban Scotland to have a stake in the ownership, governance, management and use of land, which will lead to a greater diversity of land ownership, and ownership types, in Scotland."[76] The remit is thus somewhat in line with the focus of the Scottish Government's regime of land reform, namely the prioritisation of "sustainable development"[77], a concept that will be explored in greater detail in subsequent chapters. In terms of the LRRG report's consideration of the CEC's aforementioned response to devolution in ceasing to maintain Scotland as a separate operating division, the suggestion is made in the report that despite supposedly being for the purpose of achieving greater economic efficiency, one might alternatively view the change "as a tactical decision to minimise engagement with the new devolved Scottish Parliament, because of the longstanding issues in Scotland over the CEC's operations here."[78] This is a striking suggestion in that the LRRG state not just that the CEC was structurally deficient or even incompetent, as previous reports have frequently alleged, but more significantly that they may have intentionally structured their business with a view to maintaining a low level of accountability and scrutiny in Scotland.

Much of the rest of the section of the LRRG report relevant to the Crown Estate reflects criticisms made in previous reports regarding the structure and statutory obligations of the CEC, albeit in a somewhat more direct and polemical manner, arriving at the conclusion that "the key issue is not about improving the CEC's public accountability, but ending its responsibilities in Scotland."[79]

The formation of the Smith Commission in 2014 and the subsequent publication of its report (Smith report) was a result of the 'No' outcome in the Scottish Independence Referendum, in the sense that the resultant Bill relinquished various powers that had previously been reserved with a view to maintaining the integrity of the Union. This came about to give effect to the 'vow' made by the three main political parties immediately before the independence referendum, under which they pledged to transfer wide-ranging

[76] Scottish Government, Land Reform Review Group, *The Land of Scotland and the Common Good* (May 2014) page 5.
[77] Ibid.
[78] Ibid., para 14.
[79] Ibid., para 20.

new powers to the Scottish Parliament if the electorate rejected independence.[80] The subsequent chapter contains more detailed analysis of the political elements that informed this stage of the debate, however it is useful to briefly consider in a more formalistic sense the content of the Smith report in order to provide a full consideration of key literature. The Smith Commission's recommendations regarding the Crown Estate are as follows:[81]

> *"32. Responsibility for the management of the Crown Estate's economic assets in Scotland, and the revenue generated from these assets, will be transferred to the Scottish Parliament. This will include the Crown Estate's seabed, urban assets, rural estates, mineral and fishing rights, and the Scottish foreshore for which it is responsible.*
> *33. Following this transfer, 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. It is recommended that the definition of economic assets in coastal waters recognises the foreshore and economic activity such as aquaculture.*
> *34. 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 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.*
> *35. Responsibility for financing the Sovereign Grant will need to reflect this revised settlement for the Crown Estate."*

The Smith Commission recommendations thus reflected the far-reaching conception of devolution expressed in the SAC and LRRG reports in the sense that emphasis was placed devolving power further than merely the Scottish Parliament; the report highlights the importance of enabling control to be exercised by local authorities who have a significant stake in how the land is managed. This evidently represents a stark departure from the prior trajectory of Crown Estate management when one considers the aforementioned centralisation of CEC functions into London through the closure of the separate Scottish office.

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[80] The Guardian, "UK party leaders issue joint pledge to give Scottish parliament new powers" (2014), available at: *https://www.theguardian.com/politics/2014/sep/16/cameron-miliband-clegg-pledge-daily-record*
[81] The Smith Commission, *Report of the Smith Commission for further devolution of powers to the Scottish Parliament* (November 2014) paras 32-35.

(iv) ACADEMIC PUBLICATIONS

There is very little published academic work concerning the Crown Estate in Scotland, and this section serves to examine this writing in full. Whilst one might view Crown Estate reform as an integral aspect of the wider programme of land reform, a number of academic publications deal with the wider scheme without focusing on the Crown Estate as an individual issue. Meanwhile, articles exist that serve to expound the recent history of the Crown Estate in Scotland, yet without providing an analytical perspective on the reform in this area.[82] The literature referred to in this section, along with the articles considered below, constitute the extent of the academic writing relevant to the modern Crown Estate in Scotland.

Aileen McHarg's article[83] concerning Crown Estate devolution is the most significant piece of academic analysis pertaining to the process and substance of recent Crown Estate reform. The 2016 article serves to both expound and analyse the extent of Crown Estate devolution at the time of writing, usefully laying out the arguments for and against devolution that have stemmed from various groups. The first section of the article briefly outlines the devolution process that has been explored above, highlighting some the key publications and points at which crucial settlements have been reached by those on opposing sides of the argument. A point in the article whose importance will be developed further in this thesis relates to the political gravity of Crown Estate devolution,[84] particularly in terms of the extent to which political discourse has informed the rate at which further powers have been handed to the Scottish Parliament.

In setting out the arguments in favour of further devolution to the Scottish Parliament, McHarg points to the fact that many policy responsibilities as well as some Crown property have already been devolved to the Scottish Parliament and may thus cause some degree of confusion and inefficiency with regards to effective management. McHarg then considers an issue frequently referenced above, namely the widespread dissatisfaction within Scotland regarding the operation of the CEC as a "commercial property business",[85] and the argument that this is an entirely inappropriate structure for a body dealing with

[82] A Duncan, "The Crown Estate in Scotland – time for a change?" (2014) 132 Prop.L.B. 7-8, A Duncan "Devolution of the Crown Estate – job done?" (2015) 138 *Property Law Bulletin* 3-5, P Todd "Crown Estate minerals – Devolution" (2017) 147 *Property Law Bulletin* 2-3.
[83] A McHarg, "Crown Estate Devolution" (2016) 20 *Edinburgh Law Review* 388-394.
[84] Ibid., 389.
[85] Ibid., 390.

crucial community interests and potential policy issues. In addressing the arguments against further devolution of CEC functions, McHarg critiques the suggestion that Crown property rights are indivisible and thus that devolution is impossible by reference to "the contemporary reality that the particular mix of Crown assets encompassed within the Crown Estate is essentially haphazard."[86] McHarg is also wary of the argument that a devolved Crown Estate could have an adverse impact on UK infrastructure and investment due to it resulting in there being multiple bodies responsible for maintaining and developing critical infrastructure and assets. Her article questions the extent to which the current arrangement, "whereby the Crown Estate exercises its monopoly powers purely for commercial gain",[87] is in any way preferable to further devolution and the potential issues it may cause in terms of competing interests and divided responsibility.

A more specific and narrowly focused publication by McHarg is a 2015 policy briefing that deals with the implications of Crown Estate devolution on energy policy in Scotland.[88] McHarg highlights the central role played by Crown Estate managers in planning and regulation in relation to offshore renewables, suggesting that a crucial aspect of this role is in "managing potentially conflicting uses of the seabed and establishing priorities amongst them".[89] McHarg was writing during an uncertain period for Crown Estate devolution, since the terms of the devolution settlement were unknown in 2015. As it transpired, McHarg's point regarding managing conflicting uses was particularly prudent in light of what became an increasingly intense debate regarding the financial duties that should be imposed after devolution that is covered in Chapter 3.

McHarg then proceeds to outline the case for devolving Crown Estate functions to Scottish Ministers, in particular highlighting the lack of clear rationale for the reservation of management functions when the Scottish Parliament has control over the definition of Crown property rights.[90] McHarg also makes specific reference to the requirement that existed under the Crown Estate Act 1961 that the CECs were required to "maintain and enhance" the value of the land comprising the Crown Estate, and the extent to which this statutory duty was a key reason for the numerous calls for reform.[91]

[86] A McHarg, "Crown Estate Devolution" (2016) 20 *Edinburgh Law Review* 391.
[87] Ibid.
[88] A McHarg, "Devolution of the Crown Estate and Energy Policy in Scotland" (2015) *University of Strathclyde International Public Policy Institute.*
[89] Ibid., 2.
[90] Ibid., 3.
[91] Ibid., 4.

Dr John MacAskill's 2018 book[92] concerning the management of the Crown aspect of Scotland's foreshore considers the historical development of this area whilst also providing an analytical lens through which to view current and impending reform. MacAskill chiefly considers the conflict between the management and exploitation of the foreshore for economic return, and the notion that "the public interest should be the touchstone for how the foreshore should be managed",[93] further examining whether there may be an inherent conflict between these objectives. A particularly striking element of the book is the extent to which MacAskill demonstrates that this same dispute over how and for what purpose management over the foreshore should be guided has ensued for centuries, and that the argumentation employed on each side has remained relatively consistent throughout this period.

The bulk of the text charts the historical development of how the Crown-owned part of the Scottish foreshore has been managed. Prior to 1866 the management of most of Scotland's foreshore was the responsibility of the Office of Woods, with rather narrow duties: "'under the [Crown Lands legislation] it has been [the duty of the Office of Woods] to exercise the rights of the Crown so as to realise the greatest amount of revenue that can legitimately be obtained.'"[94] Edward Pleydell-Bouverie, Member of Parliament for Kilmarnock, summarised the issue in the following passage in 1865:[95]

> *"For years a violent controversy has been going on between certain persons and the Commissioners of Woods and Forests. The latter had always considered themselves as trustees of the Crown, and had always acted with a view of making money out of the foreshores, instead of putting them to best use for the public advantage. The result had been that a vast amount of ill will had been created by this method of administering Crown lands, and many persons had cause for complaint"*

In 1866, responsibility for the foreshore was transferred from the Office of Woods to the Board of Trade with the idea being that if there were a "transfer from the embattled and heavily criticised Office of Woods (which had a duty to make a profit from its dealings with the foreshore) to the more neutral Board of Trade (which would not have such a duty), there might exist the possibility for a more rational and less excitable debate"[96], with

[92] J Macaskill, *Scotland's Foreshore: Public Rights, Private Rights and the Crown, 1840-2017* (2018).
[93] J MacAskill, "It should not be 'a matter of £. s. d.': The management of Scotland's Crown-owned foreshore 1833-2018" (Edinburgh, 2018), p 1.
[94] Ibid., p 3.
[95] J Macaskill, *Scotland's Foreshore: Public Rights, Private Rights and the Crown, 1840-2017* (2018), 68.
[96] Ibid., 64.

legislation being drafted so as to enable the sale or leasing of land under any terms, even those which may have seemed financially imprudent.

The 1866 Act that gave effect to the transfer to the Board of Trade was, according to MacAskill, "passed in a form which preserved for the Board [of Trade] the very difficulties under which the Office of Woods had laboured"[97], and emerged with the same duties regarding economic return being placed on the Board of Trade as had existed for the Office of Woods. Concerning this transfer of power from the Office of Woods to the Board of Trade, Thomas Farrer, then secretary at the Board of Trade, composed a memorandum with the thrust of which being as follows:[98]

> *"It is obvious that [the Office of Woods] have acted on the principle that [the foreshore] is property, out of which they are to make as much as they can. We shall be obliged to take a wider view – e.g. to consider whether if an undertaking is to be of considerable public advantage we should not forgo a portion of the proportion of profit properly belonging to the Soil rather than ask such a price as will stop the undertaking – to consider whether there are not rights or customs of landing, boating, walking, bathing, which, though incapable of pecuniary measurement and perhaps not legal, ought to be carefully preserved to the general public"*

Farrer thus highlighted the extent to which, in his view, the new Crown Lands Act under which the Board of Trade were required to exercise their duties could severely limit their ability to consider public interests beyond those pecuniary in nature. Indeed, MacAskill also contends that the amendments made to the 1866 Act meant that the Board of Trade were fettered in terms of their abilities in administering the foreshore.[99] Despite Farrer's concerns and the evident limitations of the 1866 Act, MacAskill contends that:[100]

> *"up to [1958] the Board of Trade and its successors, including the Crown Estate Commissioners, had all managed to work within the legislative framework 'and had [yet] satisfied the requirements of the public interest' because, it was observed, 'no rigorous policy of getting the best return' had, despite the apparently clear term of the legislation, been followed by the Board or the Commissioners"*

[97] J Macaskill, *Scotland's Foreshore: Public Rights, Private Rights and the Crown, 1840-2017* (2018), 81.
[98] Ibid., 74.
[99] Ibid., 104.
[100] J MacAskill, "It should not be 'a matter of £. s. d.': The management of Scotland's Crown-owned foreshore 1833-2018" (Edinburgh, 2018), p 7.

MacAskill suggests that this is due to the achievement of what Farrer had referred to in his memorandum as a "liberal construction of the legislation"[101], and points to various examples of the CECs and Board of Trade using techniques to avoid adhering to the 'best rent duty'. What emerged in the mid-20th century was a wide-ranging debate over whether the foreshore element of the Crown Estate, over which the Crown Estate could be seen as a "virtual monopoly"[102], should be managed on a different basis to the land-based parts of the Crown Estate, which could be viewed as a more ordinary property business. The resultant legislation, the Crown Estate Act 1961, did of course provide the requirement that the CECs were to pursue their economic aims "with due regard to the requirements of good management".[103] The rest of the thesis deals with the implications of that requirement in detail.

The final chapter of *Scotland's Forshore* deals with the contemporary issues surrounding the Crown Estate, focussing in particular on the recent devolution of management functions and the potential opportunities offered by it. Firstly, MacAskill highlights the "long-standing dissatisfaction with the operation of the CEC in Scotland"[104] that became apparent after the controversial reservation of Crown Estate functions to Westminster under the Scotland Act 1998. MacAskill then briefly analyses several of the reports covered in this chapter – it is unnecessary to cover this analysis here, other than that MacAskill identifies the "common thread that links the transfer of responsibility for the management of Scotland's foreshore in 1866…and its devolution in 2017: it is the issue of balancing the duty to administer the foreshore in the public interest with the legal requirement not to part with the property at less than full value".[105]

The reason for the limited range of academic commentary concerning the Crown Estate is unclear, although it likely involves its peculiar legal status. Academic work focussing on land reform, for example, rarely devotes significant space to consideration of the Crown Estate, instead opting to engage with issues such as access or the community right to buy. These are specifically legal concepts which have implications for the Scots law of property as a whole, whereas the Crown Estate represents a unique issue whose rules are only inwardly relevant. However, it is argued that the process of devolution of the Crown Estate offers great insight into the balance of political power in the United

[101] J MacAskill, "It should not be 'a matter of £. s. d.': The management of Scotland's Crown-owned foreshore 1833-2018" (Edinburgh, 2018), p 7.
[102] Ibid., p 9.
[103] Crown Estate Act 1961 s 1(3).
[104] J Macaskill, *Scotland's Foreshore: Public Rights, Private Rights and the Crown, 1840-2017* (2018), 228.
[105] Ibid., 233.

Kingdom, whilst the legislation that emerged as a result of that process is telling of the overall direction of property norms in Scotland.

CHAPTER 2: THE POLITICAL PROCESS OF DEVOLUTION

This chapter analyses the various political factors relevant to the Crown Estate in Scotland, considering in particular how these political elements have affected the process and substance of reform. Political discourse has formed a fundamental aspect of Crown Estate reform by virtue of the sensitive nature of the devolution of further powers to the Scottish Parliament, a divisive issue that has at its core contrasting notions of the utility of the Union. It is suggested that the sensitive nature of devolution as a political concern has stunted the discussion surrounding Crown Estate reform and, in some cases, prevented the arguments for or against further Crown Estate devolution from being viewed on their merits, which have instead been perceived in terms of their effect on the Union.

Using the political discourse surrounding the devolution settlement reached under the Scotland Act 1998 as a starting point, the chapter then moves to consider subsequent key moments in the progress of devolution that are relevant to the management of the Crown Estate, such as the politically and emotionally charged 2014 Scottish Independence Referendum. This will involve revisiting publications considered in the literature review, whilst the aforementioned limited nature of academic coverage of the Crown Estate makes a greater focus on Hansard reporting and Committee reports necessary in this chapter. In terms of the publications considered in the literature review, of particular importance are the differing party memberships of respective committees and the impact this may have had on their findings. This will also be relevant when utilising parliamentary debates as sources as well as the political affiliations of those involved in the debates.

A. THE SCOTLAND ACT 1998: THE FIRST DEVOLUTION SETTLEMENT

The first section of the literature review discussed the effect of the Scotland Act 1998 on the legal status of the Crown Estate, which was to devolve the power to legislate "over the nature of the ownership of the lands and other property rights and interests which make up the Crown Estate in Scotland to the Scottish Parliament together with the right to regulate the use of the Estate"[106], whilst reserving "to the UK Parliament, both the administration of the Crown Estate…and the revenues derived from it".[107] This legal arrangement is such that ownership and the ability to define that ownership is vested in an individual or body separate from those responsible for the management of the land. The reserved aspect of the Crown Estate was, therefore, Westminster's responsibility for setting relevant policy and

[106] Crown Estate Review Working Group, *The Crown Estate in Scotland: New Opportunities for Public Benefits* (December 2006) para 6.2.
[107] Ibid., para 6.3.

legislating for the framework in which the CEC would operate and thus in which management should be carried out, such as through the Crown Estate Act 1961 and the various obligations it entails.[108] The limited amount of literature or debates from this period makes determining the rationale behind this divided form of ownership and management, an undoubtedly complicated and opaque arrangement, somewhat difficult to ascertain. This section, however, argues that much of the argumentation in favour of the framework arrived at under the 1998 Act can be related to a politically motivated desire to preserve the integrity of the United Kingdom.

The period during and after the drafting of the Scotland Act was politically divisive, with many in Westminster in particular fighting vehemently to preserve the United Kingdom and, as a result, the supremacy of the Westminster Parliament. Regarded by many as having developed the initial basis for Scottish devolution, the Scottish Constitutional Convention (SCC) was initially formed of all major Scottish political parties until the SNP withdrew[109] from the SCC on the basis that the group was unwilling to consider Scottish independence as a constitutional option. The Conservatives also abstained from the SCC, although on a different basis than the SNP, namely that they were at the time unwilling to consider possibility of devolution.[110]

The report published by the SCC[111] bears a strong resemblance to the white paper,[112] published in 1997, that led to the drafting of the Scotland Act 1998 and the creation of the Scottish Parliament. The white paper states in clear terms the future constitutional arrangement between the UK and Scotland: "The UK Parliament is and will remains sovereign in all matters…to modernise the British constitution Westminster will be choosing to exercise that sovereignty by devolving legislative responsibilities to a Scottish Parliament without in any way diminishing its own powers".[113] The report of the SCC as well as the 1998 Act white paper are in this way permeated with the notion that Scotland should remain as part of the United Kingdom. This may be a result of the fragmented nature of the process in terms of the SNP and Conservatives being absent from the SCC, which paints a highly divisive picture of Scottish politics in which parties with deeply opposing views were unable to engage in discussion to reach a compromise. This

[108] Crown Estate Act 1961 s 1.
[109] Scottish Constitutional Convention, "Scotland's Parliament, Scotland's Right" (1995) p 3.
[110] B Winetrobe, "Enacting Scotland's 'Written Constitution': The Scotland Act 1998" (2011) *Parliamentary History* 88.
[111] Scottish Constitutional Convention, "Scotland's Parliament, Scotland's Right" (1995).
[112] The Scottish Office, "Scotland's Parliament" Cm.3658 (1997).
[113] Ibid., para 4.2.

can be argued to have prevented meaningful discourse regarding the creation of a settlement that would allow interests from throughout Scotland to be represented.

A strong focus on retaining Scotland's status within the UK can be identified in the founding documents of the Scottish Parliament, and it thus follows that this tradition extended into elements of policymaking. Furthermore, the status of Crown Estate management as a reserved matter also makes the prevalence of a Unionist perspective in Westminster relevant, particularly since committee work conducted in such an environment may not have fully engaged with positions deemed a threat to the Union. One example of this Unionist focus derives from a debate in the UK Parliament concerning the reserved aspects of the Scotland Act 1998, in which various arguments were made against the reservation of CEC functions. SNP MP Roseanna Cunningham, for example, argued:[114]

> *"It is clear that some issues critical to future land reform are not devolved. Those are the Crown Estate Commissioners' control of the foreshore, the sea bed, mineral rights and salmon, and of the revenues that accrue from those rights. The Government amendments are not enough. Any meaningful land reform will have to include the option of transferring control and revenues from the Crown's residual ownership of the foreshore, sea bed and mineral rights. Those are sources of income that could be used to revitalise our rural areas and enhance community involvement in the management of land."*

This argument was in relation to an amendment tabled by the MP that sought to modify the Crown Estate Act 1961 so as to give the Scottish Executive power to compel the CECs to comply with their directions, which had previously been the responsibility of the Chancellor of the Exchequer or Secretary of State.[115] Cunningham's argument was evidently centred around the notion that control over the management of land was crucial if the newly formed Scottish Parliament and Executive were to have a meaningful degree of influence over land policy in Scotland, particularly when the extent of CEC control over the foreshore and seabed were taken into account. Such control might be in the form of reduced rents for certain aquaculture or energy industries that the Scottish Parliament or Government sought to promote, or to pursue an energy policy that might be outwith the particular aims of the CECs.

[114] HC Deb 19 May 1998, col 808.
[115] Crown Estate Act 1961 s 1(4).

To Cunningham's plea for support for her amendment, Labour Minister for Home Affairs and Devolution Henry McLeish, responded:[116]

> *"The reservation of the Crown Estate Commissioners does not reserve the land and property of the Crown Estate. The reservation of business associations will not prevent the Scottish Parliament from enacting new laws on land owned by business associations, whether relating to the tenure of such land or to associated planning issues. Any provision that the Scottish Parliament chooses to make in respect of land reform or planning will simply form part of the framework in which all will have to operate…On amendment No. 113, the reservation means that the current power of direction over the Crown Estate Commissioners shared by the Secretary of State and the Chancellor of the Exchequer would not pass to the Scottish Ministers. We believe that it is right that it should remain with the United Kingdom Government, in line with the reservation of the commissioners. As things stand, the power would continue to be exercised by the Secretary of State."*

Whilst this position is correct to the extent that the reservation of CEC functions does not technically reserve the Crown Estate nor the ability to enact laws that would affect it, McLeish fails to address the central contention that "meaningful land reform will have to include the option of transferring control and revenues [to Scotland]".[117] The response seems merely to restate the aforementioned policy of the Government at the time, which was to deliver devolution in a manner that did not threaten the "integrity"[118] or stability of the United Kingdom. In this sense, issues that had the potential effect of limiting the legislative capabilities of the Scottish Parliament in key policy areas were arguably not afforded the appropriate level of consideration, partly due to the politically sensitive nature of the Union.

What has been identified as a failure to properly engage with key concerns of certain factions within Scottish politics is now demonstrated to have had implications that extended into the functioning of the Scottish Parliament. Liberal Democrat MSP Tavish Scott made frequent criticisms of the CECs in the Scottish Parliament, for example:[119]

> *"Does the minister accept the need for the Executive to examine the functions of the Crown Estate in Scotland and to seek to influence and control some of those*

[116] HC Deb 19 May 1998, col 813.
[117] Ibid., col 808.
[118] The Scottish Office, "Scotland's Parliament" Cm.3659 (1997) para 3.4.
[119] Scottish Parliament, S1O-1094.

activities? Does he recognise the unfairness of the Crown's role, when ports such as Lerwick in my constituency currently have to pay the Crown Estate for dredging the sea bed to improve the facilities? Furthermore, Scottish salmon farmers, in addition to paying corporation tax, are also paying a production tax to the Crown."

Scott was in this instance querying whether the Executive could have more of a role in directing the CECs or at least in assessing the effect of their influence on Scottish communities and industries. As the MSP for Shetland, an area reliant on aquaculture and industries relating to the foreshore, it follows that his constituents would have been impacted by the actions of the CECs, whether that be in a positive or negative sense. Jim Wallace, leader of the Scottish Liberal Democrats, replied as follows:[120]

"Like any other landowner, the Crown Estate in Scotland will be subject to any laws passed by the Scottish Parliament in respect of its land and property. However, as Mr Scott will be aware, the Crown Estate's functions and the statutory position of the Crown Estate commissioners are reserved to Westminster. As a result, he may wish to take the matter up with his Westminster MP."

This response reflects a continuation of the perspective outlined in relation to the founding documents of the Scottish Parliament; the failure or unwillingness to properly engage with the difference between the ability to legislate over the use of land and the separate issue of the actual management of said land that resulted in part from the focus on the Union that was built in to the Scottish Parliament. Tavish Scott was taking issue with aspects of how management had been undertaken by the CECs, an expressly reserved issue which legislation by the Scottish Parliament could not rectify without further devolution. There are several other examples[121] in which, during the early years of the Scottish Parliament arguments were made against the CECs that were met with similar responses regarding the reserved nature of the issue and were thus not fully engaged with.

One possible explanation for this lack of engagement with the problem might have been the party-political makeup of the Scottish Parliament in its early years; the 1999 election results meant that Scottish Labour and the Liberal Democrats formed a minority government.[122] The dominant Scottish Labour's 1999 manifesto clearly stated a strong

[120] Scottish Parliament, S1O-1094.
[121] Scottish Parliament, S2M-1327, S1O-3748 and S1O-2737, for example.
[122] BBC News, *Scottish Parliament Results 1999*, available at *http://news.bbc.co.uk/hi/english/static/vote_99/during/index.stm*

commitment to the Union,[123] and the Liberal Democrats omitted the issue from their manifesto entirely,[124] so it thus follows that there would be little room for robust discussions related to the dismantling of institutions that were emblematic of the Union. When one contrasts this with the manifesto of the SNP that expressly conveyed a fervent pursuit of independence,[125] what emerges is a highly divisive and antagonistic political climate, with arguably little chance of cooperation towards a common aim of rectifying the clearly identified issues with the CECs. The Crown Estate was at the time seen as a UK-wide land management company that pertained strongly to notions of monarchy and Union, so was arguably embedded with an emotional element and connection with Unionism that was not necessarily grounded in reality.

Along with this emotional element lay a deference to Westminster on reserved infrastructure issues that was identified in the previous paragraph. Further to this, the Crown Estate was at this stage simply not widely regarded as a pressing issue across the house and was merely mentioned by those MSPs whose constituents were directly affected by the management, such as the aforementioned Shetland MSP Tavish Scott. The issue was thus not engaged with on a cross-party basis, evidenced by the somewhat lacklustre parliamentary responses outlined above.

Whilst the political climate in Scotland at the turn of the century was undoubtedly centred around devolution and the movement of powers towards the Scottish Parliament, this can be contrasted with certain actions of the CECs during that period. The CERWG report draws attention to the actions of the CECs from 2002 onwards, referring to a restructuring in which they:[126]

> *"− Ended the management of the Crown Estate in Scotland as a distinct unit within the CEC's UK wide operations; and*
> *− Absorbed the management of the property rights which make up the Crown Estate in Scotland into its operations in the rest of the UK on a sector by sector basis."*

In doing so, the CECs can be seen to have acted contrary to the prevailing trend in Scotland for further devolution and the tendency against further centralised control from

[123] BBC News, "Scottish Labour", available at *http://news.bbc.co.uk/1/hi/events/scotland_99/parties_and_issues/313520.stm*
[124] Scottish Liberal Democrats, "Raising the standard: Scottish Parliament Manifesto 1999".
[125] Scottish National Party, 'Manifesto for the 1999 Elections', p10.
[126] Crown Estate Review Working Group, *The Crown Estate in Scotland: New Opportunities for Public Benefits* (December 2006), 32.

Westminster. From a political perspective, this might be viewed as an attempt to turn the tide of devolution, at least in terms of the responsibility for land management and the extent to which the Scottish Parliament would have a say in the management of the assets that make up the Crown Estate. The CERWG report suggests that safeguarding against further devolution was exactly the motivation behind this restructuring, also contrasting the post-devolution structure with that of the Forestry Commission (FC):[127]

> *"The FC has, like the CEC, re-structured its operations in Scotland since devolution. However, the results have been very different. The FC has re-structured to create Forestry Commission Scotland reporting to and funded through the Scottish Parliament, acting as a department of the Scottish Executive and implementing the Scottish Forestry Strategy with its focus on the delivery of public benefits in Scotland and widespread stakeholder involvement."*

It therefore follows that whilst the CECs made the argument that this restructuring was for the purpose of streamlining their business,[128] it evidently went against the grain in terms of the political climate post-devolution. The decision was heavily criticised by several different stakeholders pertaining to the Crown Estate, such as Comhairle nan Eilean Siar, which argued that "Devolution presented an opportunity to re-focus the way in which Crown Property rights are managed in Scotland to benefit local communities but this opportunity was missed…this move has lessened the accountability of the Crown Estate in Scotland and further limits local benefits from its management".[129]

Overall, the period leading up to and immediately following the creation of the Scottish Parliament has been shown as one of political entrenchment, in which Unionist politicians sought to strengthen the position of Scotland within the United Kingdom, whilst the CEC evidently attempted to safeguard their business against the effects of possible further devolution. Whilst the impetus behind the cessation of the separate operating division for Scotland may have been prudent, it is a move that takes on a political character when contrasted with the general trend in Scotland towards greater devolution. It is politically significant that a body with interests and responsibilities as far-reaching as those of the CECs found it appropriate to cut across public policy to this extent.

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[127] Crown Estate Review Working Group, *The Crown Estate in Scotland: New Opportunities for Public Benefits* (December 2006), 32.
[128] House of Commons, Scottish Affairs Committee, *The Crown Estate in Scotland* (March 2012) Ev 10.
[129] Ibid., Ev 135.

B. CONSTITUTIONAL REFORM & THE INDEPENDENCE REFERENDUM: 2007-2014

(i) The Calman Commission & The National Conversation

Despite the strong anti-CEC sentiment identified in the 2006 CERWG report as well as the frequent criticisms of the CECs being made in the Scottish Parliament, the Crown Estate did not return to the political fore in any significant sense until 2010. Devolution as a political issue, on the other hand, retained its prominence during this period. The SNP gained significant ground in the 2007 Scottish Parliament elections[130] with a manifesto that again displayed a strong focus on independence, suggesting that "[i]ndependence is the natural state for nations like our own."[131] The SNP were now the main party in Scotland and formed a minority government with support from the Scottish Green Party, yet this minority status would make the pursuit of independence impossible during that term.

This election result altered the status quo in Scottish politics, and what emerged were two distinct strands of constitutional discourse, the first of which having been ignited and led by the SNP, referred to as the "National Conversation".[132] Discussed briefly in the previous chapter,[133] aspects of this constitutional process were more open and inclusive than the Scottish Constitutional Convention that occurred prior to the creation of the Scottish Parliament, such as in the willingness of the SNP to consider a far greater degree of devolution as an alternative to independence.[134] The inclusion of such sentiments can in itself be viewed as politically motivated in the sense that it would prevent the alienation of those who opposed independence but might vote for the SNP at the next election, particularly since the SNP were clear to highlight their view that independence was the best option and as such that they would not push for devolution.[135]

The minority status of the SNP meant that they would need to "be innovative in using the mechanics of government and not parliament as a mechanism to discuss the constitutional issue",[136] meaning that the limited power they wielded in the Scottish Parliament necessitated an extra-parliamentary constitutional process that would inherently

[130] BBC News, "Scottish elections 2007", available at: *http://news.bbc.co.uk/1/shared/vote2007/scottish_parliment/html/region_99999.stm*
[131] Scottish National Party, "Manifesto 2007".
[132] Scottish Executive, "Choosing Scotland's Future: A National Conversation" (Edinburgh, 2007).
[133] See pages 5-6.
[134] Scottish Executive, "Choosing Scotland's Future: A National Conversation" (Edinburgh, 2007), 8.
[135] Ibid., V.
[136] M Harvey & P Lynch, "Inside the National Conversation: The SNP Government and the Politics of Independence 2007-2010" (2012) 80 *Scottish Affairs* 92.

engage less with the other parties. Indeed, despite the seemingly open-ended nature of aspects of the process in terms of its willingness to view further devolution as an option, other elements were particularly fractious and divisive. In particular, the fact that the SNP were the only party involved in the National Conversation led to an academic commentary that referred to the process as a "truncated and limited affair".[137] This specific aspect of the process thus bears a strong resemblance to the limitations of the Scottish Constitutional Convention, which was also hamstrung by its narrow political membership.[138]

To consider further the politically motivated nature of the National Conversation, the limited parliamentary power wielded by the SNP also meant they would need to build support for independence (polls show that support was lower in 2007 than it had been in 1998[139]) whilst simultaneously demonstrating the competence of an SNP government.[140] The latter would be necessary in order to secure the majority at the next election to enable the passing of an independence Bill. Indeed, much of the final publication related to the National Conversation is devoted to the virtues of independence as opposed to further devolution, with the SNP being quick to highlight the limitations of "continued interaction with matters reserved to the United Kingdom".[141] It can thus be suggested that the National Conversation had an overtly political aim that was preoccupied with securing the conditions necessary for independence as opposed to fully considering all of the options available for rectifying pressing issues, such as the Crown Estate.

The response of the other main Scottish political parties was to appoint the Commission on Scottish Devolution (Calman Commission) to consider Scotland's Constitutional future from an explicitly Unionist perspective, without the ambit to consider the particularly far-reaching devolution such as fiscal autonomy.[142] This was an entirely separate affair to the National Conversation, and the SNP refused to engage with the Commission on the basis that it was unwilling to consider independence. The limitations of the Calman Commission mirror those of the National Conversation; the adherence to notions of a singular UK-wide economic and infrastructure system stem from political propriety and a reluctance to pursue far-reaching constitutional change. Trench suggests that these issues relate to the Calman Commission's "composition and the ambition to

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[137] A Trench, "The Calman Commission and Scotland's disjointed constitutional debates" (2009) 4 P.L. 687.
[138] See page 15.
[139] Ipsos MORI, "35 years of Scottish attitudes towards independence" available at: *https://www.ipsos.com/ipsos-mori/en-uk/35-years-scottish-attitudes-towards-independence*
[140] T. Mullen, 'Scotland's Constitutional Future' (2009) 15 *European Public Law* 35.
[141] Scottish Government, *Your Scotland, Your Voice: A National Conversation* (November 2009) p17.
[142] Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* (June 2009), p3. See p5-6 for consideration of content of report.

produce a unanimous report"[143], which refers to the absence of the SNP, as well as the benign proposals arrived at despite the inclusion of the Liberal Democrats, a party traditionally supportive of extensive devolution. It is thus argued that the key limitation of the Calman Commission was its narrow remit as opposed to its membership, which prevented meaningful engagement with devolutionary proposals that might have given the perception, even merely a symbolic one, that aspects of the Union were coming to an end. The embedded status of the Crown Estate within notions of Union and monarchy made it a casualty of this reluctance to consider far-reaching reforms.

The picture that emerges when considering the affiliations and ambits of the two processes is of separate echo chambers, one of which engaging in a single-mindedly Unionist debate without the representation of more radical interests that would come from SNP inclusion, and the other organising its debate so as to bolster support for independence and thus its own government at the next election, without necessarily making a proper and earnest engagement with the opportunities offered by further devolution. The impact of this on the reform of the Crown Estate is represented by the modest proposals arrived at under the recommendations of the Calman Commission, namely that the Secretary of State for Scotland should "more actively exercise his powers of direction under the Crown Estate Act 1961"[144] and that a Scottish Crown Estate Commissioner should be appointed. The limitations of these proposals are that they do very little to address the various issues that have been identified throughout this thesis, especially those that relate to the requirement for the CECs to prioritise economic concerns. Encouraging the Secretary of State to take a greater role in management might enable a somewhat greater representation for Scottish communities yet would not affect that financial statutory obligation. In this sense, the report's recommendations failed to acknowledge that many concerns were related to the very framework of statutory obligations under which the CECs operated, as opposed to the degree of influence exerted on the CECs by the Secretary of State and other figures.

(ii) The contrasting reports of the Treasury Committee & the Scottish Affairs Committee

The limited efficacy of the reforms that were brought about as a result of the Calman Report in terms of the Crown Estate is further evidenced by the sustained calls for further

[143] A Trench, "The Calman Commission and Scotland's disjointed constitutional debates" (2009) 4 P.L. 695.
[144] Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* (June 2009) para 5.122.

devolution that followed the settlement. Far from marking the point at which consensus had been achieved and further devolution proven unnecessary, the period after the second settlement saw the debate surrounding the Crown Estate become significantly more divisive and politically charged.

The aforementioned 2010 report of the House of Commons Treasury Committee (Treasury report) was the first document pertaining to the Crown Estate to emerge after the Calman report. The report was somewhat critical of the benign nature of the recommendations of the Calman Commission,[145] yet was clear in its adherence to the principles of the Union and only nominally more radical in its proposals than the Treasury report. When attempting to determine the basis for the Treasury report's rejection of further devolution as the way forward for the Crown Estate, one might be tempted to consider the party-political affiliations of the members of the Committee, which it can be said were overwhelmingly Unionist; twelve of the fourteen committee members were Labour and Conservative MPs.[146] This is significant and somewhat reminiscent of the segregated nature of the prior constitutional processes characterised in this thesis, again pointing to a staunch focus on Unionist policies.

Another compelling element of the committee's membership relates to the geographical location of those members, with only two of the fourteen representing a constituency in Scotland. Whilst the report served to consider the Crown Estate as a whole as opposed to just in relation to Scotland, the significant preponderance of non-Scottish voices might easily have led to Scottish interests being less represented, whilst the Unionist affiliations of the membership made the engagement that did occur limited in terms of its scope. It is argued that, from the Scottish perspective, these points are suggestive of significant failings of elements of the committee process in Westminster; the Treasury Committee that purports to represent the interests of the entire UK was vastly imbalanced in terms of its membership, both geographically and politically.

In contrast with the membership of the Treasury Committee, the 2012 report of the Scottish Affairs Committee (SAC report) was produced by a committee made up largely of Scottish members from a somewhat more diverse range of party affiliations. Seven of the eleven committee members were from Scottish constituencies, whilst all of the main Scottish political parties were represented.[147] This was essentially the first point during the

[145] House of Commons, Treasury Committee, *The Management of the Crown Estate* (March 2010) para 110.
[146] House of Commons, Treasury Committee, *The Management of the Crown Estate* (March 2010).
[147] House of Commons, Scottish Affairs Committee, *The Crown Estate in Scotland* (March 2012).

debate surrounding the Crown Estate that the full spectrum of main political parties had engaged in a constitutional process with a view to reform. The committee was in this sense well placed to produce a report that would accurately reflect the strength of feeling found in some parts of Scotland regarding the Crown Estate, whilst the broad political composition of the committee allowed Unionist views to be represented alongside that of those seeking independence.

Considering the diverse political composition of the SAC, the extent to which the committee seemingly unanimously derided the activities of the CECs is striking, referring to them as "absentee landlord(s) or tax collector(s)".[148]A significant political development that occurred prior to the publication of the SAC report was the SNP's victory in the 2011 Scottish Parliament elections and the subsequent formation of a majority government. The fact that this represented a mandate for the SNP to push for an independence referendum might explain the pragmatism adopted by the SAC in calling for full devolution of CEC functions, since this could have appeased stakeholders who sought independence. The importance of the SNP's victory for the progression of Crown Estate reform cannot be overstated, particularly in how it shifted the balance of political power across the UK. The members of the committee with an interest in protecting the integrity of the Union, such as the Scottish Conservatives or Scottish Labour, now had a strong incentive to demonstrate that Scotland could take control of important assets without independence being necessary.

The response of the UK Government to the SAC report was to reject its recommendations and argue in favour of retaining Crown Estate management as a reserved matter. The argumentation of the response centred entirely around the notion that managing the Crown Estate as a single, UK-wide entity was preferable to devolving management functions further afield, through reliance on an argument that is effectively akin to economies of scale.[149] The response also made frequent reference to the expertise and certainty provided by the CECs due to their management of the entire Crown Estate, yet failed to explain why these benefits would be lost were the assets transferred to Scotland. For example, the report suggested that "the Crown Estate's unified management framework provides an incentive to investment in offshore renewable energy"[150]. These benefits could potentially be equally achieved through rigorous cooperation between two separate Scottish and rUK Crown Estate management bodies, a possibility which was not

[148] House of Commons, Scottish Affairs Committee, *The Crown Estate in Scotland* (March 2012) para 65.
[149] UK Government, *The Government response to the seventh report from the Scottish Affairs Committee* (July 2012) paras 4.1-4.8.
[150] Ibid., para 1.4.

considered by the Government. The strong Unionist focus of the response, whilst inevitable due to the UK Government's clear policy against independence, meant that it did almost nothing to address the issues outlined in the SAC report. For example, the response suggested that "the activity [of the CECs] is geared towards the grain of wider public policy objectives but within the scope of the Crown Estate's *vires*".[151] However, one of the central contentions of the SAC report was that the CECs were adopting a narrow interpretation of the 1961 Act and failing to take public policy into account, to the detriment of local communities and other stakeholders.[152]

Overall, it can be said that the SNP's ability to form a majority government in 2011 acted as a catalyst in the Crown Estate and other devolution issues being taken seriously, particularly in terms of the wide-ranging recommendations made by the Scottish Affairs Committee. It was the political environment that made it possible for a committee of the House of Commons of the United Kingdom to suggest reforms that would, symbolically at least, result in further division of the United Kingdom.

(iii) The independence referendum & the Smith Commission

The central element of the 2011 manifesto under which the SNP achieved a majority in the Scottish Parliament was their pledge to legislate for an independence referendum.[153] The extent of their majority enabled them to push through legislation, with the independence referendum taking place in September 2014. This section considers the impact of the 'No' outcome of the referendum on the management of the Crown Estate, along with determining the extent to which the Smith Commission truly gave effect to the 'vow' to devolve further powers to the Scottish Parliament that was made two days prior to the referendum. This period was characterised by intense political machinations from across the political spectrum, and it is crucial to consider the effect that this stark and ever-widening political divide had on rectifying the problems with the Crown Estate, especially when taking into account the opportunities afforded by both the referendum and the Smith devolution settlement.

The political climate in the lead-up to the independence referendum was dominated by the question of which outcome would make Scotland economically better off, with sustained economic decline and inequality having remained the key political talking points

[151] UK Government, *The Government response to the seventh report from the Scottish Affairs Committee* (July 2012) para 6.9.
[152] House of Commons, Scottish Affairs Committee, *The Crown Estate in Scotland* (March 2012) para 70.
[153] Scottish National Party, 'Manifesto 2011', p28.

in a debate that took place just after the UK endured "the worst recession in living memory".[154] Indeed, economic concerns were found to account for "more newspaper column inches and official publication pages than any other issue".[155] It would be outwith the scope of this thesis to consider the intricacies of the independence debate in any significant depth, yet it is useful at this point to demonstrate the extent to which the bitter, divisive political landscape identified above continued into the campaign. Whilst the Crown Estate was referenced to some extent during that debate, its obscure legal status and idiosyncratic nature, along with the fact that it would unlikely be a key concern for most urban voters, precluded it from becoming a central issue.

Whilst economic concerns thus formed the basis for much of the independence debate, it has been argued that there were deeper undercurrents to this element of the discourse. Scott suggests that:[156]

> *"[T]he economic segment of the constitutional debate, technical as often it was, tended to become a proxy for a much wider social and indeed philosophical discussion of Scotland's prospects…[with] the choice (presented) being between remaining in a Union in which Scotland's social democratic ethos was being compromised…and independent statehood where policies would not only ensure adequate social protection to Scotland's citizens but where the greater social cohesion that would result would, itself, become an added source of strength for the economy"*

The tendency to reference emotive political concepts and therefore to bring about an increasingly antagonistic and divisive debate is consistent with much of the rest of the process surrounding Crown Estate reform in terms of the lack of cooperation between opposing stakeholders, and it follows that the political chasm widened as a result of the referendum. This is further demonstrated by the UK Government and main party leaders' adherence to a 'hard exit' strategy under which there would be little or no "cooperation from the UK Government in managing the transition to independence",[157] a situation which would have stoked fear in the electorate due to the perceived short-term economic consequences of such an exit. Regardless of whether or not the reasons for the insistence

[154] A Scott, "Economics and National Autonomy", in A McHarg, T Mullen, A Page and N Walker (eds), *The Scottish Independence Referendum: Constitutional and Political Implications* (2016) 155.
[155] Ibid., 153.
[156] Ibid., 154.
[157] Ibid., 155.

on this method of exit were grounded in reality, it is argued that the fervency of this position was almost entirely politically motivated.

The crux of the economic arguments related to the possibility of a currency Union between Scotland and rUK, which Chief Secretary to the Treasury Nicholas Macpherson described as being "fraught with difficulty"[158] in a briefing to the then Chancellor of the Exchequer, George Osborne. The decision to make public what would usually have been a private briefing has been described as "really striking"[159] and "virtually unprecedented"[160], whilst Scott suggests "[i]t was clear that Macpherson's doubts were based on political reasons".[161] Whilst elements of the economic rationale against the virtues of a currency Union may have been well founded, the decision to publish what would usually be private advice is certainly suggestive of a politically calculated decision. Whichever side of the independence debate one sits, the overall picture that emerges is one of deep division and preconceived political action, conditions under which cooperation and compromise would be incredibly difficult to achieve.

Mentioned briefly in the previous chapter was the 'Vow' that was published in the Daily Record two days before the independence referendum, an agreement that "extensive new powers for the Parliament [would] be delivered"[162] if the 'no' vote prevailed. Whilst the joint statement did not make particularly clear the precise nature of these new powers, it restated the leaders' commitment to the Barnett formula, along with insisting that the Scottish Parliament would take control of NHS spending. Post-referendum, some took the view that the vow had a significant impact on the referendum and even that it swung the outcome towards the 'no' vote.[163] Research conducted by the University of Edinburgh, on the other hand, found that just 3.4% of 'no' voters gave the promise of further powers as their reason for voting against independence, whilst a far greater proportion said they were motivated by economic factors and general uncertainty.[164] Yet, as mentioned above, the prevalence and unconventional nature of how those economic concerns were publicised

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[158] BBC News, "Scottish Independence: Treasury 'strongly' against currency Union", available at: *https://www.bbc.co.uk/news/uk-politics-26179442*
[159] Ibid.
[160] A Scott, "Economics and National Autonomy", in A McHarg, T Mullen, A Page and N Walker (eds), *The Scottish Independence Referendum: Constitutional and Political Implications* (2016) 161.
[161] Ibid.
[162] Scottish Daily Record, Tuesday September 16th, 2014.
[163] The Scotsman, "Alex Salmond: The Vow did swing the indyref result", available at: *https://www.scotsman.com/news/politics/general-election/alex-salmond-the-vow-did-swing-the-indyref-result-1-4762146*
[164] The Guardian, "The Vow was 'not a decisive factor' in Scotland voting no to independence', available at: *https://www.theguardian.com/uk-news/scotland-blog/2015/mar/26/the-vow-was-not-a-decisive-factor-in-scots-voting-no-to-indepedence*

was a political factor that undoubtedly had a considerable impact on the outcome of the referendum. More relevant to this thesis is the effect the vow had on the post-referendum devolution process, in that it pointed to a clear altering of the status quo, setting in motion a new schedule of devolution which it would be politically imprudent to renege on. This marked the point at which what could be considered as arbitrary reservations of power[165] by Westminster became untenable, particularly because the vow set up a specific schedule for the transfer of those powers.

The Smith Commission was set up on a cross-party basis, led by Lord Smith of Kelvin, to give effect to the promises made under the vow and to reach a settlement that would be agreeable to all of the major parties.[166] Unlike other processes in modern Scottish constitutional history, such as the aforementioned Scottish Constitutional Convention, all of the major parties were involved in the Smith Commission. Due to being comprised of two members from each major Scottish party, the membership of the Commission might be seen to have rectified some of the issues that have been identified with other constitutional processes in terms of the lack of cooperation and compromise that resulted from certain parties abstaining at different stages. Despite this, various criticisms have been levelled at the manner in which the Smith Commission progressed. In his analysis of the Smith Commission process, Mullen points out two criticisms, namely that it was "too fast and that it [was] insufficiently comprehensive".[167] The possible implications of the rate at which the Smith proposals were reached are numerous: the lack of extensive deliberation may have caused the emergent reform to be insufficiently far-reaching to satisfy those who sought independence, or might conversely have been ill-conceived and thus a threat to the integrity of the Union that the commission sought to protect. The fact that all political parties were engaged in this particular process suggests an even greater need for strong deliberation and the achievement of a robust agreement, in the sense that wildly competing interests needed to be accurately represented in the proposals.

[165] As alluded to above when covering the various reports, it is submitted that there was little basis for the reservation of Crown Estate management that created the strange dichotomy between management of land and the ability to legislate over said land. Whether or not there was a compelling basis for this division, the UK Government failed in elucidating it.
[166] The Smith Commission, *Report of the Smith Commission for further devolution of powers to the Scottish Parliament* (November 2014).
[167] T. Mullen, 'The Referendum and After: Scotland's Constitutional Future' (2014) 22 *European Public Law* 191.

There is a sense in which the Smith proposals that pertained to the Crown Estate only addressed aspects of the criticisms identified in the SAC report. The relevant proposals are as follows:[168]

> *"32. Responsibility for the management of the Crown Estate's economic assets in Scotland, and the revenue generated from these assets, will be transferred to the Scottish Parliament. This will include the Crown Estate's seabed, urban assets, rural estates, mineral and fishing rights, and the Scottish foreshore for which it is responsible.*
> *33. Following this transfer, 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. It is recommended that the definition of economic assets in coastal waters recognises the foreshore and economic activity such as aquaculture.*
> *34. 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 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.*
> *35. Responsibility for financing the Sovereign Grant will need to reflect this revised settlement for the Crown Estate."*

One of the perennial issues with Crown Estate management, identified in several reports above, is the Commissioners' adherence to s1(3) of the Crown Estate Act 1961, and the fact that a strict reading of this section appears to be a statutory responsibility. In providing evidence for the first SAC report, Roger Bright, the ex-chief executive of the Crown Estate, stated that the terms of the 1961 Act do "not allow us to act in the wider public interest in a non-specific way", but that the CECs would "consciously seek to act in the interest of tenants, the communities where we operate and our various stakeholders, provided we can be satisfied that there is a clear business benefit".[169] It is clear from these statements that the 1961 Act, or at least the interpretation of the 1961 Act arrived at by the CECs, in many cases precluded meaningful engagement with the social, environmental or other elements that might not be factored in when making a solely economic decision. This

[168] The Smith Commission, *Report of the Smith Commission for further devolution of powers to the Scottish Parliament* (November 2014) paras 32-35.
[169] House of Commons, Scottish Affairs Committee, *The Crown Estate in Scotland* (March 2012) para 69.

issue's absence from the Smith report can be seen as a failing on the part of the commission due to the significance of the problem and the weight given to it in various reports. Whilst the Smith recommendations did not explicitly preclude the Scottish Government from removing the contentious obligation from the Crown Estate legislation that they would eventually draft; it is argued that the problem should have been afforded greater weight during that commission's deliberations.

The overall impression that one can take from the process leading up to the Smith proposals, which undoubtedly represent a major success for those who had been striving for Crown Estate devolution for several decades, is that constitutional change is in Scotland a hard-fought battle. It has been demonstrated that as early as 2006[170] there were compelling arguments being made for, at the very least, decentralisation of CEC functions so as to ensure that Scottish policy objectives could be met, and that local communities could benefit from and guide the management of the land on which they live. It is argued that the potency and immediacy of these arguments was missed by those with the power to rectify the issues, namely those in Westminster, due to a fervent insistence on doing nothing that was perceived to have the potential of putting the integrity of the UK at risk. Examples of legally flawed arguments made by monarchists such as Jacob Rees-Mogg, such as the notion that the Crown Estate "ought not to be divisible", [171] suggest a reluctance of many in Westminster to properly engage with any policy aims that would result in even a symbolic fracturing of the Union, regardless of whether that fracturing might hugely benefit the Scottish people. The debate should not have so consistently centred around what was best for maintaining the Union but should have instead adopted a more pragmatic approach to how those living in the UK could benefit from the reform.

[170] Crown Estate Review Working Group, *The Crown Estate in Scotland: New Opportunities for Public Benefits* (December 2006)
[171] HC Deb 06 July 2015, col 78.

CHAPTER 3: THE TRANSITION PERIOD & EMERGENT LEGISLATION

Having analysed the political and constitutional processes that led to the Smith agreement that was reached in 2014, this chapter considers the implementation of those proposals and the extent to it has been consistent with the spirit of the Smith recommendations and other significant moments in the reform of the Crown Estate. Of further relevance is the manner in which the legislation was drafted along with the efficacy of the consultation in ascertaining the views of those affected by the management of Crown Estate land. This enables a determination of the degree to which the enacted legislation is likely to resolve the many issues with how Crown Estate management was previously carried out.

A. THE SCOTLAND ACT 2016 & THE INTERIM TRANSFER SCHEME

The Crown Estate elements of the Smith recommendations were given effect by Section 36 of the Scotland Act 2016, which amended Part 5 of the Scotland Act 1998. In essence, the main effect of the Act was to enable the Treasury to make a transfer scheme to bestow upon the Scottish ministers all of the Scottish functions of the CECs, with the former then being empowered to further transfer those powers to a nominated person.[172] The rules contained in the 2016 Act were temporary and applied only during the interim transfer period, prior to the drafting of full legislation for the long-term management of the Scottish assets. In 2016, the Scottish Government engaged in a consultation process to determine the best means by which to set up the interim body that would oversee this management, and what form that body should take.[173] Due to the fact that the interim management scheme and body was entirely temporary, it is unnecessary to consider its constitution or operation in any great detail here.

With regards to the contentious financial obligation placed on the CECs by s1(3) of the Crown Estate Act 1961, the 2016 Act makes it clear that this obligation would continue to be imposed by default on the transferee under the transfer scheme, and thus that aspects of the 1961 Act would continue to apply.[174] The interim body established by an Order in Council under the 2016 Act would thus need to operate within the boundaries of the 1961 Act.[175] However, it would be within the remit of the Scottish Ministers to adopt a different

[172] Scotland Act 1998 s 90B (1)
[173] Scottish Government, *Crown Estate – Consulting on Proposals for Establishing the Interim Body to Manage the Crown Estate Assets in Scotland Post-Devolution* (October 2016).
[174] Scotland Act 1998 s90B (7)
[175] Scottish Government, *Crown Estate – Consulting on Proposals for Establishing the Interim Body to Manage the Crown Estate Assets in Scotland Post-Devolution* (October 2016), para 1.4.

long-term scheme of management for the Scottish assets,[176] such as to empower the new Crown Estate managers to consider wider socioeconomic factors.

B. THE SCOTTISH CROWN ESTATE ACT 2019

During the transition period set out above, the Scottish Government engaged in a consultation process that sought proposals on the best form of management for the newly devolved Scottish Crown Estate,[177] whilst the Scottish Parliament legislated for what would become the Scottish Crown Estate Act 2019. Prior to assessing these consultative and legislative processes and their substantive effects, it is useful to outline the legal boundaries within which the Scottish Parliament acted when drafting the legislation:[178]

- *The Scottish Crown Estate assets must continue to be managed on behalf of the Crown;*
- *The assets must be maintained as an estate in land, or estates in land managed separately i.e. the existing assets must be maintained and any capital proceeds from asset sales must be reinvested in the existing estate or in other land, and assets acquired in the course of management will be owned by the Crown;*
- *The payment of hereditary revenues from the Crown Estate's wholly owned assets in Scotland is to be paid into the Scottish Consolidated Fund (in accordance with the Civil List Act 1952).*

The first point to be taken from this, and one that was presumed throughout this devolution process, is that the ownership of the Scottish part of the Crown Estate is still vested in the monarch. Another significant issue relates to the implications of the requirement that revenues be paid into the Scottish Consolidated Fund (SCF). At this stage, it can merely be pointed out that it is possible to view the payment of revenues into the SCF as being contrary to the devolutionary spirit of much of the reform, since this would prevent the relevant local authorities to which CEC functions are to be devolved from taking on full financial responsibility, accountability and benefits.[179] Beyond these above restrictions, which are set out in s 90B of the Scotland Act 1998, the Scottish Parliament had the

[176] HL Deb, 23 March 2017, c281
[177] Scottish Government, *A Consultation on the Long Term Management of the Crown Estate in Scotland: Analysis of Consultation Responses* (January 2018).
[178] Scottish Parliament, *Scottish Crown Estate Bill: Policy Memorandum* (January 2018), para 9.
[179] Further devolution from the Scottish Ministers out to the various local authorities on which Crown Estate land is situated was a specific recommendation of the Smith Commission and has been called for throughout much of the debate surrounding Crown Estate reform.

competence to legislate for a framework of management that would be entirely different to that which had been arrived at by the UK Parliament under the Crown Estate Act 1961.

The aforementioned consultation process for the long-term management of Crown Estate assets began on the 4th of January 2017, with views requested from a range of stakeholders by the 29th of March 2017.[180] At an early stage in the initial document setting out the terms of that consultation, the Scottish Government were overt in their belief in "the principle of Scotland's communities benefitting directly from Scotland's natural resources", along with the connected view that "decisions on the use of Crown Estate assets in Scotland [should be] more transparent and take account of the priorities of Scotland and its communities".[181]

Consultation responses were received from a total of 212 individuals and groups representing a wide range of interests, including leisure/tourism bodies, local authorities, commercial industry/research groups and community groups, amongst others.[182] The representation of these key interested groups imbued the process with a sense of legitimacy, partly due to their proximity to Crown Estate land, as well as in that representatives from groups of that nature had often been highly critical of the manner in which CEC functions were exercised. It can thus be seen as crucial that the views of those negatively impacted organisations were represented in the process, so as to prevent a mere transfer of Crown Estate management to Scotland without rectifying the potentially inherent issues with the previous structure of those functions. This represents the first point in the modern history of the Crown Estate that those living on the affected land were directly included in discussions relating to its reform.

The consultation process was essentially pursued under three main heads: 'Vision', which sought to determine points at which the 1961 Act should be departed from, particularly in terms of the commercial focus of that Act; 'Managing Crown Estate Assets for Scotland and Communities', which related to possible management options and whether the management of certain assets should be centralised or devolved; 'Securing the

[180] Scottish Government, *A Consultation on the Long Term Management of the Crown Estate in Scotland: Analysis of Consultation Responses* (January 2018), para 1.2.
[181] Scottish Government, *Crown Estate: A Consultation on the Long Term Management of the Crown Estate in Scotland* (2017), p11.
[182] Scottish Government, *A Consultation on the Long Term Management of the Crown Estate in Scotland: Analysis of Consultation Responses* (January 2018), p7.

Benefits for Scotland and Communities', which involved mostly the revenue implications of the proposals.[183] The first two groupings are the most relevant to the focus of this thesis.

Arguably the most significant section of the consultation in terms of its impact on the overarching scheme of management was that concerning 'Vision', largely in the sense that its questions relate to the basis on which the most crucial and central management issues would be governed. The section also contains issues to which several of the reports that were critical of the management of the Crown Estate in Scotland referred as being particularly egregious problems,[184] including the commercial focus and transparency concerns. These issues have consistently lain at the core of the debate – the 2006 CERWG report stated:[185]

> *"The CEC has a strong institutional culture to improve financial performance as a property investment company and it appears that questions of the need for distinctiveness and accountability in Scotland have been over-ridden by the interests of UK performance…[t]he reason that the CEC does not deliver more public benefits in Scotland is that the CEC does not recognise a need to do so"*

The consultation paper asked respondents to answer three questions in relation to the possibility of varying the duty placed on Crown Estate managers to carry out their functions on a commercial basis. 75% of all respondents stated that the future approach should be changed from the duty to manage the assets on a commercial basis, whilst 89% of respondents who replied positively to that question believed that there should be a power to take account of "wider socio-economic or other benefits".[186] The respondents who were most positive about these prospects were community groups and local authorities.[187] It is clear from the consultation report that most respondents recognised the fact that different approaches should be taken to manage the varying categories of Crown Estate assets, in the sense that certain assets would be best managed on a commercial basis whilst others should be guided mostly by socio-economic factors.[188] These consultation

[183] Scottish Government, *Crown Estate: A Consultation on the Long Term Management of the Crown Estate in Scotland* (2017), p14.
[184] See Crown Estate Review Working Group, *The Crown Estate in Scotland: New Opportunities for Public Benefits* (December 2006), or more recently; House of Commons, Scottish Affairs Committee, *The Crown Estate in Scotland* (March 2012).
[185] Crown Estate Review Working Group, *The Crown Estate in Scotland: New Opportunities for Public Benefits* (December 2006), p 82.
[186] Scottish Government, *A Consultation on the Long Term Management of the Crown Estate in Scotland: Analysis of Consultation Responses* (January 2018), p 8.
[187] Ibid., para 3.3.
[188] Ibid., para 3.9.

responses in essence seek to rectify what was frequently deemed an excessively commercial scheme of management, and to do so on a statutory basis.

The Scottish Crown Estate Bill was introduced by Roseanna Cunningham, the Cabinet Secretary for the Environment, Climate Change and Land Reform (ECCLR) Committee, on the 24th of January 2018. The Bill underwent a process led by the ECCLR Committee, with additional scrutiny carried out by the Delegated Powers and Law Reform Committee.[189] The Scottish Parliament Information Centre (SPICe) published a report soon after the Bill was introduced, which provides a useful background to the Bill, along with an explanation of the Bill's proposals.[190] The following subchapters consider the effects of the Bill at its different stages on what have been identified in this thesis as the key areas requiring reform.

(i) The duty to "maintain and enhance" value and return

The duty placed on the Crown Estate Commissioners, by virtue of the Crown Estate Act 1961, to "maintain and enhance"[191] the value of the assets along with the return obtained from them has been identified throughout this thesis as one of the most significant and apparent criticisms of Crown Estate management. One example of the censuring of that approach by stakeholders lies in evidence given by the Orkney Fisheries Association to the Scottish Affairs Committee:[192]

> *"The Crown Estate Commissioners announced last year (March) the leasing of large areas of seabed predominantly on the West Coast of Orkney. No consultation or discussion took place with fisherman prior to this announcement despite the area encompassing key lobster and crab fishing grounds. Commercial confidentiality with developers was cited as the reason for secrecy however the significant commercial significance of the fishing industry was not recognised as an important factor. Tardily the CEC attempted to engage with fishing interests however demonstrated very poor public relations ability and a corporate attitude of arrogance towards local fishing interests. It remains that if the unilateral disposal of large areas of the sea to renewable interests goes ahead, the impact on (non subsidised) Orkney fisherman [sic] and the inter-related processing and factory jobs will be devastating. Enshrined in the legal duties of the Crown Estate is the*

[189] Scottish Government, *Scottish Crown Estate Bill – Bill Stages*, available at *https://www.parliament.scot/parliamentarybusiness/Bills/107415.aspx*
[190] Scottish Parliament Information Centre, *SPICe Briefing: The Scottish Crown Estate Bill* (March 2018).
[191] Crown Estate Act 1961 s 1(3).
[192] House of Commons, Scottish Affairs Committee, *The Crown Estate in Scotland* (March 2012), ev 153.

duty to uphold the right to fish. The CEC operate as a feudal entity with the attitudes that append to that. They are wholly unaccountable and non-transparent. Fishermen provide no income to the Crown Estate so are dispensable to them. The commercial motive to maximise revenue for the Crown is in conflict with upholding the right to fish. The commercial motive to maximise income for the Crown estates is driving a modern day clearance of fishermen from the sea in much the same way as the Duke of Sutherland cleared his tenants for sheep."

The central issue to be taken from that evidence is the perceived inability or unwillingness on the part of the CECs to factor in wider socioeconomic issues when making leasing and other business decisions. It is clear that leasing of the seabed for the purpose of renewable energy is in line with the Scottish Government's strong focus on sustainable non-carbon energy production, along with also potentially generating higher revenues than leasing for fisheries. However, the fact that seabed off the west coast of Orkney encompasses "key lobster and crab fishing grounds", and thus represents a crucial form of employment and industry, suggests that it should be within the ambit of the Crown Estate managers to take that into account when making leasing decisions. An ad-hoc approach to seabed leasing in which factors beyond merely the maximisation of revenue could be taken into account might serve to prevent situations such as this, in which a body that represents part of an important Scottish industry feels as though their interests are being ignored.

The Scottish Crown Estate Bill as introduced disapplied the 1961 Act,[193] with one effect of that disapplication being the modification of the duty to maintain and enhance the value and return obtained from Crown Estate assets. The new Bill introduced a similar yet expanded duty, contained in section 7:[194]

"***7 Duty to maintain and enhance value***

(1) The manager of one or more Scottish Crown Estate assets must maintain and seek to enhance—

(a) the value of the assets, and

(b) the income arising from them.

[193] Scottish Parliament Information Centre, *SPICe Briefing: The Scottish Crown Estate Bill* (March 2018), p 3.
[194] Scottish Crown Estate Bill [AS INTRODUCED], s 7.

(2) The manager may do so in a way that is likely to contribute to the promotion or the improvement in Scotland of—

(a) economic development,

(b) regeneration,

(c) social wellbeing,

(d) environmental wellbeing,

(e) sustainable development."

The Bill as introduced thus retained the requirement that any manager "must maintain and seek to enhance" the value of Crown Estate assets, whilst also enabling them to have regard the factors listed in subsection 2. During the committee stage of the Bill, Roseanna Cunningham explained the fiscal importance of retaining the subsection 1 requirement:[195]

> *"[T]he Scottish Crown estate has not brought any new money into Scotland. The UK Government's block grant to Scotland has been reduced by the estimated annual amount of net revenue earned by the Scottish Crown Estate assets. Under the terms of the Scotland Act 2016, the net revenue from the estate—the income from leasing, licensing and all the other Crown Estate Scotland activities, minus the costs of managing the assets—is paid into the Scottish consolidated fund. We are clear that whoever manages the assets has to "maintain and seek to enhance" the value of those assets and the income arising from them, otherwise Scotland as a whole is out of pocket."*

It is in this sense possible to view subsection 1 as a contributor to sustainable development, in that an increase in revenue from the Crown Estate assets would result in greater spending being available through the Scottish consolidated fund, which could be used to benefit local communities and other interested parties. What Cunningham advocates for here is the value of taking a balanced approach to the management of the assets, by ensuring that management is carried out in a way that takes account of various factors without sacrificing Scotland's economic welfare.

Despite the seemingly balanced approach taken by Cunningham in drafting this aspect of the legislation, section 7 was highly controversial throughout the committee stage

[195] Scottish Parliament, Official Report, Environment, Climate Change & Land Reform Committee, p 25-26 (24 April 2018).

and was debated at length. A key element in the construction of this proposed section was that the manager "may" take account of the wider factors in subsection 2, whilst they "must" maintain and seek to enhance the value of the assets and the income from them. The legislation being structured in this way would have evidently obliged the manager to ensure value and economic return, giving primacy to that duty, whilst it would technically enable them to entirely ignore the wider factors contained in subsection 2. In their written submission to the ECCLR Committee, Professors Andrea Ross and Colin Reid of Dundee Law School expressed concern about the section:[196]

> *"This provision currently drafted gives undue pre-eminence to pursuing economic interests over other concerns. Although subsection (2) does allow other considerations to be taken into account, this is discretionary, rather than mandatory, and there is no obligation to pay heed to any of these. This seems to conflict with other statutory duties affecting all public bodies in Scotland in relation to promoting biodiversity (Nature Conservation (Scotland) Act 2004, s.1), and contributing to meeting climate change targets and sustainability (Climate Change (Scotland) Act 2009, s.44). Is it intended that the economic aspects should take absolute precedence over all other considerations? This is both undesirable and in conflict with Scottish Government policy."*

Ross and Reid thus highlight the constructional deficiencies of section 7, pointing to its potential for representing an entirely imbalanced section that would fail to resolve the restrictions placed on managers by s 1(3) of the Crown Estate Act 1961. These concerns were echoed by several members of the ECCLR Committee.[197] In sum, the stage 1 report of that Committee recommended that section 7 be reworded to "make it clear that all managers are required to operate in a way that is likely to contribute to sustainable development".[198]

Cunningham's response to the notion that the s 7(2) duty was not far-reaching enough was to suggest that "any environmental duties that are imposed by statute will have to be complied with anyway; managers are not exempted from any of those formal

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[196] A Ross & C Reid, *Written Submission: Environment, Climate Change and Land Reform Committee, Scottish Crown Estate Bill* (SCEB009).
[197] Scottish Parliament, Official Report, Environment, Climate Change & Land Reform Committee, p 4 (17 April 2018).
[198] Scottish Parliament, Stage 1 Report, Environment, Climate Change & Land Reform Committee, para 182 (29 May 2018).

duties".[199] This response is inadequate in the sense that many of the "formal duties" to which Cunningham refers were also in place when the CECs were responsible for Crown Estate management, yet were evidently insufficient in ensuring that the CECs didn't act or weren't seen to act in an excessively commercial fashion. The thrust of this perennial issue was always that statute placed commercial return above other factors in a hierarchical sense; section 7 as introduced failed to resolve this issue. Whilst the proposed section undoubtedly had effect in a symbolic sense by introducing the option of taking other factors into account, it failed to provide the legal certainty that has often been called for in critiques of Crown Estate management. Furthermore, it is argued that this certainty would be of increased importance were there to be a diverse and extensive range of managers,[200] as opposed to a centralised body.

At stage 2 of the Scottish Crown Estate Bill, Roseanna Cunningham sought to ameliorate section 7 by rewording it in order to somewhat strengthening the duty placed on the manager to consider the wider socioeconomic and environmental factors. Were amendment 18 agreed to, section 7 would have been enacted as follows:[201]

> "***7 Duty to maintain and enhance value***
>
> *(1) The manager of one or more Scottish Crown Estate assets must maintain and seek to enhance—*
>
> *(a) the value of the assets, and*
>
> *(b) the income arising from them.*
>
> *(2) In complying with subsection (1), the manager must have regard to the desirability of managing the assets in a way that is likely to contribute to the promotion or the improvement in Scotland of—*
>
> *(a) economic development,*
>
> *(b) regeneration,*
>
> *(c) social wellbeing,*
>
> *(d) environmental wellbeing,*

[199] Scottish Parliament, Official Report, Environment, Climate Change & Land Reform Committee, p 40 (24 April 2018).
[200] As was a central recommendation of the Smith report.
[201] Scottish Parliament, Scottish Crown Estate Bill: Marshalled List of Amendments for Stage 2, Section 7 (2018).

(e) sustainable development."

This rewording would result in a minor alteration of the duty placed on managers under subsection 2, requiring them to "have regard to the desirability" of taking into account the listed factors. Cunningham's rationale for formulating the amendment in this manner, which would continue to give managers quite a degree of discretion as to which factors they regarded the most important, was a desire not to "tie manager's hands where it is not appropriate to do so".[202] This was along with the belief that making subsection 2 imperative "could have unintended consequences for such a diverse portfolio".[203]

At the division stage all non-SNP members of the ECCLR Committee voted against the amendment, which meant that it was not agreed to. Members from the Labour and Green parties tended to oppose the amendment on the basis that it was insufficiently far-reaching: Labour MSP Claudia Beamish described it as being "in line with what I seek, but the word "desirability" is weak, and I would like the measure to be firmed up".[204] Conservative member John Scott was also wary of the level of precision afforded by the word "desirability", yet also took a different line of criticism: "the Scottish Conservatives are of the view that the Bill [at stage 1] is absolutely fine as it is", since it would give Crown Estate managers "maximum flexibility to maximise all the benefits of the Crown estate to the Scottish people and the Scottish Government".[205] He thus found amendment 18 to be an unnecessary alteration to what he deemed a perfectly good section at stage 1.

With these criticisms in mind, it is argued that amendment 18 was imprecise and failed to offer the certainty and clarity that several members of the committee felt was required. There are many management decisions, particularly relating to aquaculture and the marine environment, that can have profound and unintended consequences for the local environment. Whilst it is not suggested that this particular issue is a result of Crown Estate management, the recent decision to move two sea loch salmon farms away from Loch Ewe and Loch Duich due to their "proximity to sensitive wild salmonid habitats"[206] strongly highlights the importance of management decisions being made in light of the surrounding environment. The placement of salmon farms at the mouths of sea lochs has been

[202] Scottish Parliament, Official Report, Environment, Climate Change & Land Reform Committee, Section 7 (18 September 2018).
[203] Ibid.
[204] Ibid.
[205] Ibid.
[206] BBC News, *Mowi offers to exit two 'contentious' Scottish sites*, available at: *https://www.bbc.co.uk/news/uk-scotland-scotland-business-48923807*

described as having ""devastated" sea trout stocks".[207] Whilst planning permission for salmon farms is most often dealt with by local authorities and other bodies, Crown Estate managers have a significant role to play through their leasing responsibilities and by providing additional checks and "interactions management, primarily with wild fish but also with neighbouring farmed stocks".[208] The delicate ecosystems that exist in the marine environment are very often subject to Crown Estate management decisions, and it is argued that a robust set of statutory rules is required to ensure that all relevant factors have been considered in all instances. Whilst amendment 18 would have somewhat strengthened section 7 when compared with stage 1 of the Bill, it failed to provide that necessary degree of legal certainty.

Due to the level of discontent expressed by committee members towards the construction of section 7 during stages 1 & 2 of the Bill's passage, stage 3 saw the tabling of amendment 17 by Roseanna Cunningham. Under this amendment, section 7 was passed as follows:[209]

> "***7 Duty to maintain and enhance value***
>
> *(1) The manager of one or more Scottish Crown Estate assets must maintain and seek to enhance—*
>
> *(a) the value of the assets, and*
>
> *(b) the income arising from them.*
>
> *(2) In complying with the duty under subsection (1), the manager must*
>
> *(a) act in the way best calculated to further the achievement of sustainable development in Scotland, and*
>
> *(b) seek to manage the assets in a way that is likely to contribute to the promotion or the improvement in Scotland of—*
>
> *(i) economic development,*
>
> *(ii) regeneration,*

[207] The Press and Journal, *Fish farm giant to close two of its sea loch sites*, available at: *https://www.pressandjournal.co.uk/fp/business/north-of-scotland/1792817/fish-farm-giant-to-close-two-of-its-sea-loch-sites/*
[208] Crown Estate Scotland, *Written Submission: Rural Economy and Connectivity Committee, Salmon Farming in Scotland* (April 2018).
[209] Scottish Crown Estate Act 2019, s 7.

(iii) social wellbeing,

(iv) environmental wellbeing."

This amendment transformed the s 7 duties, placing on managers an imperative duty to contemplate and strive towards the factors listed under subsection 2 when carrying out any of their management functions. There are evident and stark differences between section 7 as introduced and the section as it appeared in the Act. Under the Act, managers now have a wide array of interests to keep in consideration, with there being no discernible hierarchical structure to those duties, unlike the case under the proposed Bill. There are also similarities; subsection 1 was carried into the Act verbatim from the proposed legislation, with none of the committee members arguing against its retention. Cunningham's aforementioned prior view had been that the various other statutory and regulatory frameworks under which managers carried out their duties were sufficient in preventing an excessively commercial approach from being adopted.[210] Discussions with committee members who took a strong stand against that early drafting of the section highlighted to Cunningham the need to "place beyond doubt the fact that something must be considered rather than perhaps being regarded as an optional extra".[211]

Overall, it is argued that the legislation as enacted is drastically more powerful and effective in terms of rectifying the various issues pertaining to the commercial focus of Crown Estate management. As introduced, the Bill appeared somewhat toothless due to the absence of any binding duty on managers to give regard to factors beyond commercial return, factors that are central to both the Scottish and UK Governments' policies on the environment, renewable energy, aquaculture and other issues. The charge made by the Scottish Affairs Committee in 2012 that the CECs "[behave] 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"[212] would be very difficult to sustain when discussing a statutory body operating under the Scottish Crown Estate Act, due to the plethora of duties placed on such a body. The statutory process relating to section 7 of the Act should therefore be seen as a success in terms of ensuring that the Crown Estate is managed in a manner consistent with Scottish policy aims and the interests of society at large.

[210] Scottish Parliament, Official Report, Environment, Climate Change & Land Reform Committee, p 40 (24 April 2018).
[211] Scottish Parliament, Official Report, Crown Estate Bill: Stage 3 (21 November 2018).
[212] House of Commons, Scottish Affairs Committee, *The Crown Estate in Scotland* (March 2012) para 65.

(ii) Further devolution or continued centralisation?

An overriding and contentious issue surrounding devolution of the Crown Estate is the extent to which management functions should be devolved, namely whether responsibility should be retained by a centralised body chosen by the Scottish Ministers, or whether it should pass further to interested local authorities and other groups. Excessive centralisation, under which responsibility for devising the management scheme of varied and sometimes unique Scottish assets lay with a relatively small London-based body, has been identified as a key issue with the Crown Estate prior to devolution.[213] This centralised arrangement was said to exacerbate the existing issues regarding the lack of accountability and transparency that have been identified in several reports on the matter.[214] Further to this, it has been highlighted that this approach was "at odds with wider public policy towards devolution",[215] and thus out of step with the prevailing attitude in Scotland regarding how assets should be managed.

In their evidence submitted to the Scottish Affairs Committee in 2012, the Highland Council opined that "the management of the Crown Estate in Scotland should be devolved to the Scottish Parliament in the first instance and from there to the appropriate level in national and local government. In the present circumstances the management and governance of the CE in Scotland is not sufficiently responsive to delivering Scottish public policy objectives".[216] This view was echoed by many other groups and individuals that provided evidence to the Scottish Affairs Committee, as well for several of the reports discussed in previous chapters. The point at which these calls for reform had achieved the necessary political impetus for their adoption to be taken seriously was as part of the Smith recommendations which, as has been discussed, stated:[217]

> *Following this transfer [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. It is recommended that the definition of economic assets in coastal waters recognises the foreshore and economic activity such as aquaculture.*

[213] House of Commons, Scottish Affairs Committee, *The Crown Estate in Scotland* (March 2012) para 86.
[214] Ibid., paras 77-78.
[215] Crown Estate Review Working Group, *The Crown Estate in Scotland: New Opportunities for Public Benefits* (December 2006) p 78.
[216] House of Commons, Scottish Affairs Committee, *The Crown Estate in Scotland* (March 2012) ev 133.
[217] The Smith Commission, *Report of the Smith Commission for further devolution of powers to the Scottish Parliament* (November 2014) para 33.

The recommendations were therefore such that they sought to avoid the mere transfer of centralisation from London to Edinburgh; the clear intention of the relevant Smith recommendation was that those local to the land should take control of management, as far as would be practical. David Mundell, then Under-Secretary of State for Scotland, expressed a similar view in 2012 when he stated that "[c]entralising something in Edinburgh is no more attractive than the perception that it is centralised in London".[218] Consistent with the policy of the Conservative Party, Mr Mundell was entirely opposed to the idea of any devolution whatsoever of Crown Estate functions, yet his comment in this instance reflects the view that centralising Crown Estate management in Edinburgh could result in the continuance of many of the issues relating to said management. This is indicative of a cross-party desire to prevent devolution resulting in centralisation moving to Edinburgh.

In attempting to fulfil the spirit of the Smith recommendations and go some way towards rectifying the issues relating to the centralisation of management functions, the Scottish Crown Estate Act brought in several new powers whereby Scottish Ministers could transfer or delegate management functions to numerous different types of manager.[219] There was little substantive change made to these sections between the Bill's introduction and its enactment, and as such it is unnecessary to engage in the stage-by-stage analysis carried out in the previous sub-chapter relating to the commercial focus of management. The relevant sections of the Act mean that groups and bodies which previously had no practical control over Crown Estate management are able to take up those functions, if chosen by the Scottish Ministers. Below is the first part of Section 3, which is the most prominent means of moving ownership from Crown Estate Scotland to another body:[220]

3 Transfer of management function

> *(1) The Scottish Ministers may by regulations make provision for or in connection with the transfer of—*
>
> > *(a) the function of managing a Scottish Crown Estate asset from the manager of the asset to another person mentioned in subsection (2) ("the transferee"),*

[218] House of Commons, Scottish Affairs Committee, *The Crown Estate in Scotland* (March 2012) ev 120.
[219] Scottish Crown Estate Act 2019, ss 3-6.
[220] Ibid., s 3.

(b) any right or liability the manager has in relation to the asset to—

(i) the transferee,

(ii) another person mentioned in subsection (2).

(2) The persons referred to in subsection (1)(a) and (b)(ii) are—

(a) the Scottish Ministers,

(b) Crown Estate Scotland,

(c) a local authority,

(d) another Scottish public authority with mixed functions or no reserved functions (within the meaning of the Scotland Act 1998),

(da) a Scottish harbour authority,

(e) a community organisation.

A clear and immediate contrast between Section 3 and the Smith recommendations is that whilst the latter stated that "responsibility for the management of those assets will be further devolved to local authority areas", the Act provides ministers with a discretionary power under which they "may" make provisions for that sort of transfer. It is thus suggested that the provisions relating to the transfer of management beyond the Scottish Parliament are significantly less far-reaching than the Smith recommendations had suggested they should be. Whilst these powers, if properly exercised by the Scottish Ministers, might go some way towards better addressing the "needs and interests of local communities",[221] this relies very much on the Scottish Ministers choosing to transfer or delegate those powers. This situation might be viewed positively, in the sense that it provides Scottish Ministers with a degree of flexibility, or it might alternatively be seen as reminiscent of the initial s 7 provisions when the Bill was introduced, which were shown to be inadequate in solving the issues they sought to address. Green MSP and land campaigner Andy Wightman expressed the following view during the stage 3 debate:[222]

"As has already been mentioned, the Smith commission recommended in paragraph 33 of its final report that, following the devolution of the management of the Crown estate, "responsibility for the management of those assets will be further devolved to

[221] House of Commons, Scottish Affairs Committee, *The Crown Estate in Scotland* (March 2012) p 59.
[222] Scottish Parliament, Official Report, Crown Estate Bill: Stage 3 (21 November 2018).

local authority areas". Nowhere in the Bill is that pledge fulfilled. Section 3(1) of the Bill gives authority to the Scottish ministers to make regulations to transfer those management functions to any person mentioned in section 3(2), but it remains possible that ministers might choose not to make regulations or might choose to revoke any regulations; in addition, it remains possible that regulations might be drafted in a way that makes the transfer of management functions unduly onerous or complex."

As well as making this statement at stage 3 of the Bill, Wightman also tabled several amendments in relation to the devolution provisions over the course of the Bill's progress through the Scottish Parliament. He is one of a small group of MSPs who have been fervently critical of these provisions of the Act, with others being Liberal Democrats MSPs Liam McArthur and Tavish Scott, for example.[223] McArthur and Scott can be said to have taken a particular interest in this aspect of the bill due to their constituencies being located on islands to which the aquaculture industries are hugely important. The first amendment tabled by Wightman was at stage 2 of the Bill's passage and sought to "uphold that cross-party agreement…that responsibility "will be" further devolved to local authorities".[224] Wightman introduced several similar amendments in this grouping, with one example being amendment 30, marked with asterisks, which would have amended subsection 1 of section 3 as follows:[225]

3 Transfer of management function

<( ) Local authorities are to have a right to be transferred the matters referred to in subsections (1)(a) and (b) insofar as they relate to the foreshore.>

(1) The Scottish Ministers may by regulations make provision for or in connection with the transfer of—

(a) the function of managing a Scottish Crown Estate asset from the manager of the asset to another person mentioned in subsection (2) ("the transferee"),

(b) any right or liability the manager has in relation to the asset to—

(i) the transferee,

(ii) another person mentioned in subsection (2).

[223] Scottish Parliament, Official Report, Crown Estate Bill: Stage 3 (21 November 2018).
[224] Scottish Parliament, Official Report, Crown Estate Bill: Stage 3 (18 September 2018).
[225] Scottish Parliament, Scottish Crown Estate Bill: Marshalled List of Amendments for Stage 2, p 1.

The effect of amendment 30 would therefore have been to bestow on all local authorities situated on the foreshore a substantive right, as opposed to a discretionary right, to have management functions transferred to them, along with the rights and liabilities that run alongside those functions. Whilst this is undoubtedly a far-reaching and radical amendment, particularly when contrasted with the Bill as introduced, its legal effect is not *ultra vires* to the recommendations contained in Smith. As discussed in the previous chapter, some of the Smith proposals were fairly radical precisely because they represented an alternative settlement to that which would have been reached had the outcome of the independence referendum been different, at a time of continued discontent with the perceived democratic deficit in Scotland. It follows that there was a post-referendum appetite for significant reform in terms of continued devolution, as opposed to the largely piecemeal approach adopted for the previous decade. It is argued that Wightman's proposal in this instance was consistent with the spirit of Smith, in that it merely restated that cross-party commitment to further devolution. However, as will be examined, there is no clear rationale for the fact that the amendment solely concerned local authorities, without providing scope for the right created by the amendment to also be held by community organisations or the other bodies mentioned in the legislation. The amendment could in this sense be viewed as being somewhat imprecise.

Wightman justified his amendment's focus on the foreshore through what he refers to as its status as "one of the distinctive ancient Crown property rights", along with the fact that it "plays a distinct and critical role in coastal management, a function that more widely falls into the realm of local authorities".[226] Reference is also made to John MacAskill's 2018 publication on the matter,[227] which is discussed in the literature review, to highlight the historical dichotomy between the public interest in the foreshore and the commercial need to obtain the best return. Wightman's view is that devolving responsibilities out further would ameliorate the risk of this issue persisting. This focus on the foreshore continued into the Bill's third stage of passage, during which a far less radical amendment was tabled by Wightman which would have inserted into section 3 "a presumption in favour of transferring the matters referred to in subsections 1(a) and (b), insofar as they relate to the foreshore, to local authorities"[228]. Evidently less radical and thus less divisive than his previous amendment, Wightman was in this case attempting to place on a statutory footing at least

[226] Scottish Parliament, Official Report, Crown Estate Bill: Stage 3 (18 September 2018).
[227] J MacAskill, *Scotland's Foreshore – Public Rights, Private Rights and the Crown 1840-2017* (2018).
[228] Scottish Parliament, Scottish Crown Estate Bill: Marshalled List of Amendments for Stage 3, p 1.

some form of recognition for the Smith agreement. The other amendments in the group, many of which were introduced by Liberal Democrat MSP Liam McArthur, were of similar effect and tended to relate to the further devolution of management of the foreshore.

The amendments tabled by Wightman at stage 2 were withdrawn at the request of Roseanna Cunningham, on the basis that the two would engage in further discussions on the matter. The stage 3 amendment was also not agreed to, receiving 33 supporting votes and 85 abstentions. All of the Conservative and SNP MSPs abstained from the vote, whilst all Labour, Liberal Democrat and Green Party MSPs supported it.[229] The thrust of the argument against the stage 2 amendments, which would have given local authorities a substantive right to take on management responsibilities of relevant parts of the foreshore, was summed up by Roseanna Cunningham:[230]

> *"It is my clear intention to use the new powers in the bill to enable further devolution of management on a case-by-case basis. That will allow decisions to be taken carefully, while recognising that a one-size-fits-all approach is simply not suited to such a diverse range of assets."*

A further concern held by Cunningham and several other members was that giving local authorities the express right to take on management functions might preclude community groups and others from taking on those responsibilities.[231] This is certainly a valid concern, compounded by the absence of any hierarchical structuring of these different groups in any other section of the bill. Whilst Wightman points out that "there is nothing to prevent local authorities from further delegating the responsibilities to community bodies",[232] he fails to explain why the right should in the first instance be held by local authorities. His amendment at stage 3, on the other hand, arguably rectified this issue by merely placing a "presumption in favour" of local authorities, which clearly means that a community group could supersede the local authority, provided it were better placed to take on management responsibilities. Despite this, the government chose not to support the stage 3 amendment on the basis that it "cut across the policy of giving community organisations the opportunity to take on the management of a Scottish Crown Estate asset".[233] Little reasoning was provided for this

[229] Scottish Parliament, Official Report, Crown Estate Bill: Stage 3 (21 November 2018).
[230] Scottish Parliament, Official Report, Crown Estate Bill: Stage 3 (18 September 2018).
[231] Ibid.
[232] Ibid.
[233] Scottish Parliament, Official Report, Crown Estate Bill: Stage 3 (21 November 2018).

conclusion being reached – reasoning that was necessary to explain why a mere "presumption" could be said to cut across the policy.

Another side to the argument regarding devolution of management functions can be found at several points during the committee stage. Throughout the process, concern was expressed by various parties about the risks associated with devolving certain elements of the Crown Estate beyond the national level. The most prevalent and frequently restated of these concerns came from tenant farmers and those who represent their interests, most of whom were fervently against the idea of devolving management functions beyond a national framework. Jim Innes, a tenant farmer from the Glenlivet estate, provided the following analysis to the ECCLR committee:[234]

> *"We do not really want things to be devolved down to councils, because Moray Council, for example, has a big enough job running its own show. As you know, it is in deep trouble financially. I should perhaps not say that, but it has already been picked up on. The estates that we represent form a big portfolio; you need expertise to manage them, and in my opinion, that expertise lies in Bell's Brae [Crown Estate Scotland's office]. Those people have been doing the work for years, and I do not think that we should diverge from the original format in the slightest. It is the same with community involvement. Do communities have the money or the expertise to dip their toe in the water? There might be certain avenues—bike trails or whatever—that they could go down, but we in the rural farming sector see it as a no-no."*

This view was mirrored by all of the tenant farmers consulted during the process. There was a prevailing consensus that management decisions in terms of rural farming are best made from the perspective of a national framework, partly due to expertise and partly due to the workload already placed on tenant farmers, that would make it difficult for them to take on management responsibilities.[235] The key arguments in this area suggested that a national scheme of management would be far preferable to the fragmented scheme that could result out of community or local authority management, particularly due to some of the intricacies that are specific to tenant farming, such as the provision of starter farms. Comments to a similar effect were made at a separate meeting of the ECCLR committee, which involved

[234] Scottish Parliament, Official Report, Environment, Climate Change & Land Reform Committee, p 30 (13 March 2018).
[235] Scottish Parliament, Official Report, Environment, Climate Change & Land Reform Committee, p 30-32 (13 March 2018).

stakeholders affected by Crown Estate management, particularly in relation to the foreshore and seabed. Patricia Hawthorn, director of Scottish Renewables, said the following:[236]

> *"From an offshore renewables perspective, particularly with large commercial offshore wind farms, it is critical that management is done at national level…Our experience so far is that a centralised process is best, so we are keen to make sure that that approach prevails. Another licensing round is imminent—we think that it will take place at the start of next year. In order to remain competitive in the offshore sector in the UK overall, it is important to have a centralised streamlined process that is able to look at all the opportunities, and then to select the best combination for optimising renewable energy and for Scotland."*

The views presented above strongly support the need for retaining a national scheme of management for some Crown Estate assets. More significantly, the views suggest that the best approach would be to proceed on an ad-hoc basis, which the Act allows for. This highlights the useful role played by a committee process in which the actual stakeholders on the land are consulted, along with the individuals and groups with expertise in that particular area. Whilst the legislation as enacted contains the requisite powers to transfer or abstain from transferring as the Scottish Ministers see fit, there is no clear reason why Wightman's amendment to place a "presumption" that management is to be transferred could not work within an ad-hoc system. The presumption that a local authority should take responsibility for their section of the foreshore, for example, could be overridden by the need to maintain a strong national management framework. There is also little to suggest that a localised, fragmented scheme of management could not work effectively alongside a national regulatory framework, which could support the local management groups with expertise and oversight.

The picture that emerges of this legislative process is overall a positive one, particularly in terms of the extent to which attention was paid to consultees, as well as to those involved in the committee stage. Directly seeking and implementing the views of those who live and work on the land, or are responsible for industries based on it, was undoubtedly a necessary step in avoiding the continuation of problems identified earlier in this thesis. This is most evident with regards to the section 7 duties placed on managers, due to the

[236] Scottish Parliament, Official Report, Environment, Climate Change & Land Reform Committee, p 38 (27 March 2018

historically nefarious influence of the commercial duties placed on Crown Estate managers. A previously singular focus on commercial return was eventually overridden by a wide range of interests, due to the rigorous committee process and subsequent parliamentary debates. However, the rationale for retaining the devolutionary arrangements as an option open to Scottish Ministers as opposed to an obligation is not fully apparent from the available documentation. Whilst there were various strong arguments made for engaging in further devolution on an ad-hoc basis during the committee stage, the situation arrived at in the legislation seems a very narrow interpretation of the Smith recommendation regarding devolution. A preferable settlement may have been to compel Ministers to seek to further devolve management functions where it was found to be likely to further sustainable development, for example. A possible drawback with the devolutionary arrangement that was arrived at is that further reform may be required in future.

CHAPTER 4: THE CROWN ESTATE & PROPERTY THEORY

Much of this thesis has analysed the political and legal processes that led to the reform of the Crown Estate in Scotland, particularly through reference to the argumentation deployed at various stages of the debate. This chapter seeks to ascertain the theoretical underpinnings of those arguments, with a view to determining whether a particular conception of property theory has been adhered to at each stage of the reform, although this adherence is unlikely to be conscious on the part of politicians and legislators. Property law is a fluid concept, with distinct jurisdictions taking differing views as to the nature, purpose and extent of property rights and obligations. It must be highlighted at the outset that space prevents deep engagement with the full spectrum of property theories. Property theory is a diverse field with a long history, and it thus follows that certain aspects of the field are more relevant to this thesis than others. The most pertinent aspects of the theories are therefore engaged with, although the fact that this this does not represent an exhaustive consideration of property theory should again be reinforced.

Whilst Governments and legislators are usually oblique as to the theoretical perspective they have adopted when drafting property norms, it is often possible to determine this from the legislative intent or policy aim. In doing so, this chapter introduces to the thesis an additional analytical perspective from which to view the reform of the Crown Estate, as well as enabling one to determine whether said reform is cohesive, or indeed whether it progressed in a disparate manner. This chapter enables the thesis to take on added significance in that it exemplifies a theoretical shift within Scotland, specifically in relation to how institutions of property are guided and what they seek to achieve. Much like the main conclusion of the thesis, this chapter demonstrates the scale of the change that has occurred in relation to the Crown Estate. The chapter takes a specific focus on the extent of the financial duties placed on Crown Estate managers, which is considered the central issues of the debate.

Two important points must be highlighted with regards to the nature of the concepts being engaged with. Firstly, property theorists tend to deal primarily with issues surrounding private property and the varying degrees of rights and obligations that it should impose, seeking to justify the existence of private property when compared to other more communal options. Thus, the unique legal status of the Crown Estate means that it is not always possible to apply every element of each theory of property to the issues being dealt with in this thesis.

The approach of this chapter is therefore to extract the most pertinent elements from the different perspectives on the nature of property and apply these to the principles surrounding the *management* of the Crown Estate. Through this analysis it is also possible to demonstrate the differences between the ownership of land and control over it, a tension that has not always been properly understood during the debate surrounding Crown Estate management.[237] Furthermore, the contention by the CECs that they "exercise the powers of ownership, although we are not owners in our own right"[238] indicates that in this case the distinction between management and ownership may not be as stark as might typically be expected. Secondly, modern property theory is largely dominated by North American thinkers. Whilst the implications of this are less significant than those of the first point, it is nonetheless an issue that one must bear in mind when applying theory to principles and jurisprudence of Scots or UK law. North American property law is heavily rooted in notions of liberty and freedom, evidenced most obviously by the central role of the U.S. Constitution, which means that some of the concepts might appear alien within a UK context. This chapter acknowledges these issues as they arise.

A. AN OVERVIEW OF THE KEY THEORIES OF PROPERTY

It should be restated at this early stage that space precludes the exhaustive engagement with every school of thought within property theory, and that such engagement would also be superfluous for the purposes of this thesis. It is fairly uncontroversial to state that Western theories of property can be placed into two broad groups, the first of which taking "the notion of property as presocial, a natural right expressing the rights of persons which are prior to the state and law"[239], with John Locke and Immanuel Kant being examples of key formative thinkers in these natural rights-based conceptions of property. Natural rights theories of property tend to consider institutions to be unnecessary in the creation of property rights, instead finding that the right to property came into existence prior to those institutions. Waldron summarises the majority of natural rights-based theories of property as suggesting that "men have a general right to private property because being the owner of something is in some sense constitutive of freedom."[240]

[237] Indeed, even by the committee stage of the Scottish Crown Estate Act 2019, Roseanna Cunningham was at pains to remind members that merely management functions would transfer, as opposed to ownership: Scottish Parliament, Official Report, Environment, Climate Change & Land Reform Committee, p 36 (24 April 2018).
[238] House of Commons, Treasury Committee, *The Management of the Crown Estate* (March 2010) para 10.
[239] J Getzler, "Theories of Property and Economic Development" (1996) 26(4) *Journal of Interdisciplinary History*, p641.
[240] J Waldron, *The Right to Private Property* (1990) p 290.

In the other grouping of theories, property is "social, a positive right created instrumentally by community, state or law to secure other goals".[241] A theory of property being positivist in nature does not suggest any particular normative perspective, it merely indicates that a certain view has been taken with regards to the provenance of property rights. Unlike natural rights-based theories, positivist theories consider property rights to be derived from and protected by legal institutions, as opposed to predating those institutions. The questions that surround the debate on Crown Estate devolution mostly relate to which political and legal institutions should have the responsibility for managing the land, and in turn the rules under which that management should be carried out. It is therefore understandably the theories that lie within the latter, positivist understanding of property that provide a more useful perspective from which to analyse this area, since those theories concern how those institutional rules should be arranged and to what end.

The most obvious distinguishing features of property law between jurisdictions tend to pertain to how far private property rights should extend and the connected issue of which obligations, if any, are owed by holders of private property towards the rest of society. There is a clear and stark contrast between Scotland's statutory access rights under the Land Reform (Scotland) Act 2003, for example, under which "[e]veryone has the statutory access rights established by this Part of this Act"[242], providing the public with access to the vast majority of land in Scotland that would typically be viewed as private, and the North American position, in which the Supreme Court "has clearly and unequivocally stated that the right to exclude is a fundamental element of private property".[243] These two approaches towards access rights suggest a divergence in the understanding of what end property should strive towards, and in a connected sense what metric, if any, should be used to determine the extent to which that end has been met. Whilst the Scottish access rules still place protections on private property rights,[244] allowing access to what would typically be understood as private land indicates a movement by the legislature towards a situation in which exclusionary private property rights should in some instances give way to various forms of social good. It is not suggested that legislators are consciously pursuing a particular strand of property theory, however, merely that these changes are the likely effect of the legislation.

[241] J Getzler, "Theories of Property and Economic Development" (1996) 26(4) *Journal of Interdisciplinary History*, p641.
[242] Land Reform (Scotland) Act 2003, s 1.
[243] D Callies & J.D Breemer, "The Right to Exclude Others from Private Property: A Fundamental Constitutional Right" (2000) 3 *Washington University Journal of Law & Policy* 40-41.
[244] Land Reform (Scotland) Act 2003, s 2.

The rest of this chapter focusses on positivist theories of property, further dividing these into two broad categories that are useful for evaluating the Crown Estate. The examples outlined above regarding the disparity between property norms in Scotland and North America can be applied in a general sense to illustrate the distinctions between these two further groupings. The first of these are the "utilitarian"[245] theories of property, under which the value of property norms is assessed "in terms of their tendency to maximise utility or welfare".[246] Utilitarian theories are wide-ranging, yet one common thread is that the calculation of utility or welfare in assessing the efficacy of norms tends to involve a reliance on economic metrics, such as aggregate welfare, which is used to measure the total economic benefit that results from a certain approach to property.[247] There is thus a strong link between utilitarian theories of property and capitalist economic theory; Panesar suggests that:[248]

> *"this economic justification for private property argues that there are costs or disutilities when there is no ownership of resources. If these costs are much greater than the costs involved in having a private property regime, then a system of private property is justified by considerations of economic efficiency".*

In this sense, whilst utilitarian theories of property may differ in terms of the particular economic metric they apply to measure utility, they all commit to a unitary aggregate measure of said utility. This is an evident flaw in the utilitarian mode of thinking about property in the sense that many valuable human goods are unquantifiable in terms of an economic metric. It is useful to return to the example of access rights to illustrate this; access rights provide social goods in the forms of sociability and engagement with nature, for example, that would likely escape economic quantification. This is one of the key reasons why this thesis adopts the viewpoint that utilitarian analysis offers an excessively thin conception of the obligations borne by property owners and managers.

The prevalence of utilitarianism as a moral theory, from which the utilitarian theory of property is derived, is described by Philippa Foot in her seminal critique of the theory: "It is remarkable how utilitarianism tends to haunt even those of us who will not believe in it. It is as if we for ever feel that it must be right, although we insist that it is wrong…the theory

[245] S Panesar, "Theories of Private Property in Modern Property Law" (2000) 15 *Denning Law Journal* 132.
[246] G.S Alexander & E Peñalver, *An Introduction to Property Theory* (2012) p 11.
[247] G.S Alexander & E Peñalver, "Properties of Community" (2009) 10 *Theoretical Inquiries in Law* 130.
[248] S Panesar, "Theories of Private Property in Modern Property Law" (2000) 15 Denning Law Journal 137.

occupies a central place in the moral philosophy of our time".[249] Utilitarianism, this notion that "right actions are those maximize utility for all",[250] can thus be seen as a guiding force behind many of our institutions of property. As previously alluded to, utilitarianism is innately connected with the economic analysis of law and the view that it is possible to measure human satisfaction. Peñalver posits the pertinent question why, considering the "inadequacy of economic cost-benefit analysis as a decisive evaluative standard for land-use decision making, does law and economics retain such a grip on contemporary land-use discussions?".[251] The second part of this chapter argues that devolution of Crown Estate functions, along with the changes in land use policy that said devolution has brought about, demonstrate the insistence of some within the Scottish Parliament that property institutions take interests into account that escape utilitarian analyses.

The second group of property theories that are relevant to this chapter offer a significant expansion in terms of what property law should seek to achieve, beyond the "monist theory"[252] of utilitarianism, which is monist in the sense that utilitarian theories tend to focus on the maximisation of one particular metric. Drawing heavily on the work of Gregory S. Alexander and Eduardo Peñalver of Cornell Law School, this chapter argues that the theory of property which most accurately reflects elements of Crown Estate reform is that of "human flourishing".[253] One of the central critiques of utilitarianism advanced by proponents of human flourishing-based theories of property relates to how the monist view of utility and welfare "means that goods are always substitutable".[254] The issue with this reliance on the substitutability of goods is that it misses the situations in which humans form an attachment to land or property that cannot be easily quantified; "human beings form connections with particular pieces of property such that the property becomes inextricably bound up with their pursuit of the well-lived life".[255] The implications of this argument are that utilitarianism fails to pay due regard to the multifaceted nature of human interests, which returns us to the earlier point that noted the relative thinness of utilitarian property theory. As is demonstrated in the next section, a rigidly utilitarian view of property can lead to an excessive focus on its economic value, possibly to the detriment of the countless other needs of society and the natural environment.

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[249] P Foot, "Utilitarianism and the Virtues" (1985) 94 *Mind* 196.
[250] S.R Munzer, *A Theory of Property* (1990) p 193.
[251] E Peñalver, "Land Virtues" (2009) 94 *Cornell Law Review* 860.
[252] G.S Alexander, *Property and Human Flourishing* (2018) p 14.
[253] G.S Alexander, "Ownership and Obligations: The Human Flourishing Theory of Property" (2013) 653 *Cornell Law Faculty Publications* 1.
[254] G.S Alexander & E Peñalver, *An Introduction to Property Theory* (2012) p 32.
[255] Ibid.

Contrary to the utilitarian notion that property norms are validated by the single moral good that total human preference satisfaction is maximised according to a certain metric, theories based on human flourishing take a far wider view of what property should seek to achieve. The human flourishing view of property theory builds upon the Aristotelian concept that: [256]

> *"humans are social animals and that the human condition is marked by dependency on (and friendship with) others…although human beings value and strive for autonomy, dependency and interdependency are inescapable aspects of well-lived lives."*

Firstly, this introduces a range of immeasurable and nebulous values to which our institutions of property should contribute. The ability of property to foster well-lived lives in society should, under theories of human flourishing, be understood as requiring a complex and at time imbalanced scheme of rights and obligations, with those obligations in particular going far beyond those which would be imposed on owners and managers of property under a utilitarian framework.

A further crucial element to the theory is that in order for human beings to flourish and contribute in a meaningful way to society, property institutions must be guided so as to foster the fundamental "capabilities"[257] necessary for that flourishing. Unlike the resource-focused nature of utilitarianism, in which "human welfare is a matter of satisfying subjective individual preferences",[258] the capabilities sought under the principles of human flourishing instead represent the ability of those within a community to attain "certain objectively valuable personal states and [perform] certain valuable activities".[259] Returning to access rights, proponents of a theory of property based on flourishing might advocate a situation in which access rights enable people to socialise and carry out recreational activities on land, even if the existence of those access rights prevented some particular economic activity from being carried out on that land. The rationale behind this is in part that those forms of activity

[256] G.S Alexander & E Peñalver, *An Introduction to Property Theory* (2012) p 87.
[257] G.S Alexander, *Property and Human Flourishing* (2018) p 9.
[258] G.S Alexander, "Ownership and Obligations: The Human Flourishing Theory of Property" (2013) 653 *Cornell Law Faculty Publications* 4.
[259] G.S Alexander & E Peñalver, *An Introduction to Property Theory* (2012) p 89.

might lead to the achievement of certain capabilities, which could in turn foster human flourishing across a wide spectrum of society.

B. PROPERTY THEORY & THE ALTERNATIVE SCHEMES OF CROWN ESTATE MANAGEMENT

One of the more prevalent and divisive issues that was debated during the process of Crown Estate reform was, as identified in the preceding chapters, the question of how management should be guided, and whether managers should be required to give regard to non-financial interests. It has been highlighted that the new duties placed on managers under the Scottish Crown Estate Act 2019 represent a sharp divergence from the almost entirely pecuniary duty that existed under the Crown Estate Act 1961. The crux of the change is that the new duties require managers to "seek to manage the assets in a way that is likely to contribute to the promotion or the improvement in Scotland of economic development, regeneration, social wellbeing [and] environmental wellbeing",[260] whereas managers under the 1961 Act were merely required to "maintain and enhance"[261] the value and return obtained from the land. It is argued that the framework for management arrived at by the Scottish Parliament under the new legislation suggests a wider understanding of the obligations owed by property owners and managers towards society, particularly when compared with the 1961 Act rules.

In the 2012 Scottish Affairs Committee report on the Crown Estate it was found that the CEC's interpretation of s 1(3) of the Crown Estate Act 1961 "had a detrimental impact on local communities".[262] This was held to be a result of their being "largely driven by the pursuit of revenue",[263] as opposed to interpreting the 1961 Act as empowering them to guide their management so as to enrich the lives of local communities, or the pursuit of other non-pecuniary social interests. Whilst the CECs were carrying out management functions and in no way owned the Crown Estate land, the nature of their responsibilities and the wide level of discretion they held regarding management decisions makes their role much akin to that of a property owner. This is in the sense that their rights and obligations in respect of the Crown Estate closely matched those of a property owner; the CECs were responsible for setting rent charges, administering maintenance activities and controlling use of the land.

[260] Scottish Crown Estate Act 2019, s 7.
[261] Crown Estate Act 1961, s 1(3).
[262] House of Commons, Scottish Affairs Committee, *The Crown Estate in Scotland* (March 2012), para 72.
[263] Ibid., para 66.

They were also able to buy or sell the land comprising the Crown Estate, within certain constraints.

The management approach adopted by the CECs suggests a utilitarian understanding of the purposes of property in that the primary focus of all of the activities relating to said property was the maximisation of revenues. Whilst this thesis accepts the contention of the SAC report that "[the CEC's] is a narrow interpretation of the terms of the Crown Estate Act 1961",[264] it is also argued that the framework under which they operated already suggested a narrow conception of property purposes. The Act compelled the CECs to maximise revenue, with the only qualification being that this was done with regard to the "requirements of good management",[265] a term that is not defined in the Act or any similar legislation. The central component of utilitarian theories of property is, as discussed above, this single-minded focus on the maximisation of an economic metric. The example alluded to in the first chapter regarding CEC charges levied on the Tarbert Harbour Authority to the detriment of the development of that harbour is indicative of this utilitarian approach. It is argued that this utilitarian focus is apparent not only in the management decisions taken by the CECs, it is also possible to discern a utilitarian focus from the construction of the Crown Estate Act 1961. Whilst it is possible to interpret "good management" in many ways, the fact that pecuniary value is the only explicit management requirement is telling of the approach taken by those drafting the Act.

Section 7 of the Scottish Crown Estate Act 2019 represents a turning point in the management of the Scottish Crown Estate, and from the perspective of property theory suggests a movement away from utilitarian-based conceptions of property. Chapter 3 covered in detail the passage of the Bill through the Scottish Parliament, finding that the most striking amendment was that which changed the duties placed on managers so as to require them to give regard to "economic development, regeneration, social wellbeing [and] environmental wellbeing"[266], as opposed to those merely being optional considerations. It is suggested that this expansion of responsibilities significantly thickens the "social-obligation norm"[267] in terms of those managing the Crown Estate, in particular through the removal of a hierarchical structure that places financial return at the top.

[264] House of Commons, Scottish Affairs Committee, *The Crown Estate in Scotland* (March 2012), para 71.
[265] Crown Estate Act 1961, s 1(3).
[266] Scottish Parliament, Official Report, Environment, Climate Change & Land Reform Committee, Section 7 (18 September 2018).
[267] G.S Alexander, "The Social-Obligation Norm in American Property Law" 94 *Cornell Law Review* 745.

Returning to the notion of human flourishing, it is suggested that the management framework under which Crown Estate Scotland operates is significantly more conducive to the achievement of human flourishing due to the greater number of factors which can guide management of the estate. Section 7 of the Act opens up multifarious avenues down which goals can be pursued that would have the likely effect of enabling those on proximate land and in proximate communities to flourish in the Aristotelian sense. One example of this relates to the "capabilities approach"[268] derived from Sen & Nussbaum and expanded by Alexander *et al*; the Act empowers land managers to direct their management in a way that could increase employment or lifestyle opportunities for local communities, potentially to the detriment of the aggregate financial return of the Crown Estate.

[268] G.S Alexander & E Peñalver, *An Introduction to Property Theory* (2012) p 89.

CONCLUSION

The overall picture that emerges of much of the 20 years that preceded the devolution of the Scottish aspects of the Crown Estate is one that exemplifies the very process of devolution, particularly when that process concerns an issue as emotive and embedded within notions of Union as the Crown Estate. It has been demonstrated that the devolution of power within the United Kingdom, especially when it comes to matters such as these, can involve a highly antagonistic process that is often based on political propriety as opposed to practical concerns relating to which devolutionary arrangements are likely to best serve the interests of UK citizens. Whilst this might seem an obvious point in that many legal issues progress along similar divisive political lines, an inherent characteristic of our constitutional arrangements, the Crown Estate and the course of management adopted over it have profound implications for the many people living on or around the land, as well as for critical infrastructure and other public policy concerns. It follows that this is a matter which deserved and continues to deserve pragmatic and reasoned consideration based on the lived experience of those affected by the management of the Crown Estate, along with regard being given to the requisite financial concerns.

The second chapter concerns the political developments leading up to the Smith recommendations and thus details the period after the initial devolution settlement during which the Crown Estate was still effectively under the control of Westminster, albeit at arm's length. The findings of that chapter are firstly that there was very little practical basis provided by the UK Government for the reservation of management functions relating to the Crown Estate in light of the devolution of responsibility for defining Crown property. During the point at which the 1998 Act was being drafted, few of the concerns regarding the activities of the CECs in Scotland had truly come to light, and therefore little time was devoted to the issue. Regardless, the arrangement that was arrived at was undoubtedly peculiar, and the absence of any truly persuasive argument for that situation suggests a desire to preserve any elements that are seen to typify the Union. Indeed, the second chapter finds several instances in which reasoned criticisms of the CECs were made during the early years of the Scottish Parliament yet were brushed away and not fully engaged with. This theme undoubtedly continued into the following decade, with the UK Government's response to the Scottish Affairs Committee's 2012 inquiry into the Crown Estate[269] offering a

[269] UK Government, *The Government response to the seventh report from the Scottish Affairs Committee* (July 2012).

particularly lacklustre and superficial analysis of the pervasive issues. It is argued that what was truly missing during this period was compromise; the UK Government was excessively attached to the ideal of preserving the Union, which resultingly meant that they grew increasingly ideologically distant from the rapidly growing SNP.

Some semblance of encouragement is found in terms of the efficacy and stringency of the legislative process during the period after the Smith recommendations, when power was being transferred to the Scottish Ministers and the groundwork was being set for the Scottish Crown Estate Act 2019. As is highlighted in the third chapter, Smith as a constitutional process was imbued with greater validity due to the involvement of all of the main political parties, a fact that can be contrasted with many of the other constitutional processes in modern Scottish history. It is found that the process continued in this positive manner when it came to the passage of the Scottish Crown Estate Act through Parliament, due in part to the in-depth committee process that was engaged in. The wide range of interests represented at the committee stage were instrumental in reaching a settlement that resolved some of the crucial issues that had previously affected the Crown Estate. This was the first point at which interested parties had been afforded such a significant role in guiding policy surrounding the Crown Estate.

A central theme of the thesis and an issue that is considered to be of key importance when assessing the reform of the Crown Estate is the nature of the duties placed on the managers of the land, whether pecuniary or otherwise. Several of the reports detailed in the literature review found the duty placed on the CECs by the Crown Estate Act 1961, to "maintain and enhance" the value of the land, to be the most pernicious issue with the estate. Indeed, the statutory construction of the 1961 Act is argued to have placed undue weight on the financial interests of an estate in land that has deep ties with Scottish society and culture in ways that escape financial calculations. The legal implications were that it had the very likely effect of cutting across Scottish public policy aims, particularly with regards to the foreshore and seabed. The third chapter demonstrates that this inappropriate financial focus was successfully disapplied under the new Act, finding that it was precisely the aforementioned inclusive and rigorous legislative process that enabled this change. The framework within which Crown Estate managers now operate is found to be wholly more appropriate in terms of the prevailing devolutionary spirit in Scottish politics, tying in with the wider programme of land reform embarked upon by the Scottish Government & Parliament.

Other criticisms of the CECs identified in the reports were that they were unaccountable in Scotland and thus appeared out of touch with the interests of Scottish people. This is one problem that has undoubtedly been rectified during this period of reform by virtue of the fact that the Scottish Crown Estate is now a body directly accountable to Scottish Ministers. The Committee stage saw various stakeholders comment on how their working relationship with the Scottish Crown Estate has improved significantly when compared with their interactions with the CECs.

This thesis has demonstrated that the Westminster Parliament's motivation for reserving power is not always based on practical and thorough reasoning but was in this case driven by a fervent desire to protect the integrity of the United Kingdom. That fervency had implications for the people of Scotland, firstly in that their devolved legislature was to an extent hamstrung in terms of their ability to enact certain laws relating to the foreshore, seabed and other crucial affected land. Another point that can be taken from the thesis is the divergence in terms of property policy between Scotland and rUK. The UK Government was evidently content with the situation in which the CECs were required, or at least believed they were required, to maximise return from the Crown Estate, evidenced by the aforementioned response to the Scottish Affairs Committee in which the UK Government saw no compelling reasons to devolve or alter CEC functions in Scotland. Conversely, the Scottish Government took the opportunity as soon as it was given to them to enact wide-ranging reforms in this area, reforms which Chapter 4 finds suggest a somewhat different underlying conception of the purpose of property institutions, under which the social goods that can be achieved by property are far broader than merely financial gain.

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