

# **ENERGY ACT 2004**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### ***Chapter 3: Special Administration Regime for Energy Licensees***

##### ***Section 154: Energy administration orders***

370. This section provides that a court may make an energy administration order appointing an energy administrator in relation to a protected energy company i.e. a company which holds a gas transportation licence or an electricity transmission or distribution licence.
371. Subsections (1), (2) and (3) explain the terms “energy administration order” and “energy administrator” and how the energy administrator is to perform his duty.
372. Subsection (4) establishes that an energy administration order can only apply to the affairs and business of a non-GB company (i.e. a company incorporated outside Great Britain and including a Northern Ireland company) which are carried out in Great Britain and to its property in Great Britain.
373. Subsection (5) sets out which licence holders may be subject to an energy administration order. These are all regulated natural monopolies.

##### ***Section 155: Objective of an energy administration***

374. Subsection (1) establishes that the objective of the energy administrator in performing his duty is (i) to secure that the company’s system (as defined in subsection (6)) is maintained and developed efficiently and economically, and (ii) to render the continuation of the energy administration unnecessary for this purpose by one of the means in subsection (2).
375. Subsection (2) defines the means by which energy administration may be rendered unnecessary. These are either the rescue of the company as a going concern or transfers which satisfy subsection (3).
376. Subsection (4) provides examples of the types of transfer which may satisfy subsection (3).
377. Subsection (5) provides that rescue is to be preferred to transfer in achieving the objective of energy administration. Transfers are only to be effected when rescue is not reasonably practicable without transfers, where the objective of the energy administration cannot be achieved through rescue without transfers or where such transfers would produce a better result for the creditors or members of the company.

##### ***Section 156: Applications for energy administration orders***

378. This section sets out that an application for an energy administration order can only be made by the Secretary of State or by GEMA with the consent of the Secretary of State. It also requires the applicant to give notice to relevant persons, listed in subsection (2), as soon as reasonably practicable after the making of the application.

### **Section 157: Powers of court**

379. This section sets out the powers of the court in relation to an energy administration order.
380. Subsection (1) sets out the court's powers on hearing an application for energy administration.
381. Subsection (2) provides that the court can only make an energy administration order if it is satisfied that the company is insolvent, facing insolvency or that on a petition from the Secretary of State under section 124A of the [Insolvency Act 1986 \(c.45\)](#) it would be just and equitable (aside from the objective of energy administration) to wind up the company in the public interest.
382. Subsections (3) and (4) provide that in certain circumstances the court cannot make an energy administration order.
383. Subsection (6) provides that an interim order made under subsection 1(d) may, amongst other things, restrict the exercise of a power of the company or its directors or confer a discretion on a qualified insolvency practitioner in relation to the protected energy company.
384. Subsection (8) provides that the company will be deemed to be insolvent in accordance with sections 123 or 222 to 224 of the [Insolvency Act 1986 \(c.45\)](#).

### **Section 158: Energy administrators**

385. This section defines the status of the energy administrator. It further provides that he must exercise his management functions for the purpose of achieving the objective of the energy administration as quickly and efficiently as is reasonably practicable and that he must exercise and perform his powers and duties in the manner which, insofar as it is consistent with the objective of the energy administration, best protects the interests of the creditors of the company as a whole and, subject to those interests, the interests of the members of the company as a whole.

### **Section 159 and Schedules 20 and 21: Conduct of energy administration, transfer schemes etc**

386. This section gives effect to Schedules 20 and 21 and applies the rule making power in section 411 of the [Insolvency Act 1986 \(c.45\)](#) for the purpose of giving effect to this Chapter.
387. [Schedule 20](#) provides for certain provisions of Schedule B1 of the 1986 Insolvency Act (introduced by section 248 and Schedule 16 of the [Enterprise Act 2002 \(c.40\)](#)) to have effect in relation to energy administration. A version of Schedule B1 to the 1986 Act as amended to apply to energy administration is available on the DTI website<sup>1</sup>. The Schedule also grants the Secretary of State a power to make modifications to the provisions of insolvency law having effect in the case of unregistered companies in relation to energy administration (paragraph 33). This power is subject to the negative resolution procedure. It also grants the Secretary of State the power to make such modifications to primary legislation relating to insolvency including the Energy Act as he considers appropriate in relation to energy administration (paragraph 46). This power is subject to the affirmative resolution procedure.
388. [Schedule 21](#) covers the content and effect of transfer schemes which can be made as described in section 155(3) i.e. transfers to another company or companies as a going concern of so much of the protected energy company's assets as are necessary to ensure that the objective of the energy administration is met. The transfer may include assets other than the network system (vehicles, for example) but must include enough assets

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1 [www.dti.gov.uk/energy/leg\\_and\\_reg/acts/index.shtml](http://www.dti.gov.uk/energy/leg_and_reg/acts/index.shtml)

to constitute a going concern as a transportation, transmission or distribution company. It may be the case that all of the protected energy company's assets will be transferred to one company but the protected energy company may also be separated into several going concerns; for example in the case of an electricity distribution company it might be possible to separate the assets on geographical lines creating several smaller regional distribution networks. All transfers are subject to veto or amendment by the Secretary of State.

389. [Paragraphs 1 to 4](#) of Schedule 21 enable a protected energy company (through its energy administrator) to make a scheme or schemes for the transfer of property, rights and liabilities to a new company subject to the approval of the Secretary of State, who in turn must consult GEMA. Paragraph 5 provides that all or part of a licence can be included in a transfer scheme, whilst paragraph 6 provides that powers and duties which fall to the old energy company (i.e. the protected energy company in respect of which the energy administration order was made) under statutory provisions can be transferred to the extent that they are exercisable or required by the new energy company given the extent of the transfer of the business to it. The Secretary of State is given the power to modify the scheme before giving approval although he will require the consent of the old energy company and the new energy company to the modifications (paragraph 3). Similarly he may modify it subsequently with the consent of those parties and after consulting GEMA (paragraph 9).
390. [Paragraph 7](#) of Schedule 21 deals with a number of matters which provide for the smooth transition of property, rights etc from the protected energy company to the new energy company.
391. [Paragraphs 10 to 11](#) of Schedule 21 provide for cases where the energy company is a foreign company or foreign property, rights and liabilities are being transferred.

#### ***Section 160 to 164: Restrictions***

392. These sections prevent energy administration being frustrated by prior orders of various types being granted before the Secretary of State or GEMA have been given an opportunity to apply for an energy administration order or by other steps being taken when an energy administration order has been made or an application is outstanding.

#### ***Section 160: Restrictions on winding-up orders***

393. This section provides that a winding up order sought by a person other than the Secretary of State in respect of a protected energy company cannot be made unless notice has been served on the Secretary of State and GEMA and at least fourteen days have passed since the last of those notices was served. It also provides that if an application for an energy administration order is received before the winding up order is made the court can consider that application instead of making the winding up order.

#### ***Section 161: Restrictions on voluntary winding-up***

394. This section prevents a protected energy company voluntarily winding itself up without the permission of the court and prevents the court from granting permission unless notice has been served on the Secretary of State and GEMA and at least fourteen days have elapsed since the service of the last of those notices. It also provides that if an application for an energy administration order is received before such permission is given the court can consider that application instead of granting the permission.

#### ***Section 162: Restrictions on making of ordinary administration orders***

395. Subsection (2) prevents a protected energy company entering ordinary administration if it is already in energy administration, or an energy administration order has been made but is not yet in force.

396. Subsection (3) provides that an ordinary administration order must not be granted by the court and the court must not exercise its powers under paragraph 13 of Schedule B1 to the 1986 Act (including its powers to make interim orders) unless notice has been served on the Secretary of State and GEMA, fourteen days have elapsed since the service of the last of those notices, and no energy administration order is outstanding.

***Section 163: Restrictions on administrator appointments by creditors etc.***

397. This section provides that an administrator cannot be appointed for a company by its secured creditors, directors or the company itself, if an energy administration order in relation to the company is in force, has been made but is not yet in force, or has been applied for. An administrator cannot be appointed to a protected energy company unless none of the above conditions apply and, additionally, the Secretary of State and GEMA have been served with copies of all relevant documents filed or lodged with the court and at least 14 days have elapsed since the service of the last of these copies.

***Section 164: Restrictions on enforcement of security***

398. This section provides that security over the property of a protected energy company cannot be enforced unless the Secretary of State and GEMA have been notified of the intention to enforce the security and at least 14 days have elapsed since the service of the last of those notices.

***Section 165: Grants and loans***

399. This section enables the Secretary of State, with the consent of the Treasury, to give a grant or loan to a company in energy administration where this appears to the Secretary of State to be appropriate to achieve the objective of energy administration.
400. Subsections (2), (3), (4) and (5) enable the Secretary of State to set the terms of a grant or loan including: requiring whole or part of a grant to be repaid if other terms on which the grant is made are breached and setting terms for the grant of any loan – i.e. terms for repayment of a loan, the rates of interest due on it and changing these loan terms by direction.
401. Subsection (6) requires the Secretary of State to secure Treasury consent before giving grants or loans and giving any directions in respect of the terms on which any loan is granted under subsection (5) of this section.

***Section 166: Indemnities***

402. This section enables the Secretary of State, with the consent of the Treasury, to indemnify persons in respect of liabilities incurred or loss or damage sustained in connection with the exercise of the energy administrator's powers and duties.
403. Subsections (2), (3), (4) and (5) enable the Secretary of State to set the terms of an indemnity including requiring that where any sums are paid out by him in respect of the indemnity to the energy administrator, to direct that the protected energy company pay such amounts as are directed towards the repayment of those sums and interest on them.
404. Subsection (6) provides that subsection (4) does not apply if the sums paid out by the Secretary of State are paid to the company in energy administration.
405. Subsection (7) requires the Secretary of State to secure Treasury consent before setting any of the terms of an indemnity under subsections (2), (4) and (5).
406. Paragraph (b) of subsection (8) enables the Secretary of State to agree to indemnify persons who become relevant to the energy administration subsequent to the initial agreement e.g. persons who become employees of the energy administrator in the course of the energy administration.

407. Subsection (9) specifies the categories of person who may be indemnified under the terms of this section.

***Section 167: Guarantees where energy administration order is made***

408. This section enables the Secretary of State, with consent of the Treasury, to provide guarantees in relation to a protected energy company in energy administration.
409. Subsections (2) and (3) set out that the Secretary of State may guarantee sums borrowed by the protected energy company, the payment of interest on those sums and the discharge of any other related financial obligation, and that the Secretary of State may set the terms of the guarantee as he sees fit.
410. Subsection (4) requires the Secretary of State to lay a statement before Parliament as soon as practicable after any guarantee is made.
411. Subsections (5) and (6) enable the Secretary of State, where any sums are paid out by him in respect of the guarantee to direct that the protected energy company pay such amounts as are directed towards the repayments and interest on those amounts whilst they are outstanding.
412. Subsections (7) and (8) require the Secretary of State to lay a statement before Parliament about any sum paid out under such a guarantee as soon as practicable after the end of the first financial year in which a payment is made and at the end of every subsequent year until the company has discharged the liability.
413. Subsection (9) requires the Secretary of State to obtain Treasury consent before giving any guarantee or direction under subsection (5) or (6) of this section.

***Sections 168 to 169: Licence modifications relating to energy administration***

414. These sections enable the Secretary of State to modify the conditions of gas and electricity licences. It outlines that such modifications can provide for circumstances where there is a shortfall in the property of a protected energy company, which is or has been in energy administration, for meeting the costs of energy administration. In particular, the Secretary of State can require that in such circumstances the protected energy company or its successor raises a levy on other protected energy companies and uses the sums raised to discharge debts incurred during energy administration. These will include sums paid by the Secretary of State under sections 165, 166 and 167.

***Section 168: Modifications of particular or standard conditions***

415. Subsection (1) enables the Secretary of State to modify the conditions of any one particular licence and the standard conditions of gas and electricity licences in relation to the new regime for energy administration.
416. Subsection (2) extends the power under subsection (1) to include the making of incidental, consequential or transitional modifications.
417. Subsection (3) and (4) require the Secretary of State to consult the holder of any licence being modified and anyone else he thinks appropriate before making a modification.
418. Subsections (5) and (6) require the Secretary of State to publish modifications made under this section.
419. Subsection (8) requires GEMA to incorporate any modification of standard conditions made by the Secretary of State into new licences it grants and to publish these modifications.
420. Subsection (9) limits the exercise of the powers under this section to the eighteen months after commencement of this section.

***Section 169: Licence conditions to secure funding of energy administration***

421. This section outlines how the Secretary of State can amend the conditions of gas and electricity licences to secure the funding of energy administration.
422. Subsection (1) specifies that the modifications that the Secretary of State can make to gas and electricity licences include requiring the holder of the licence to raise the charges imposed by him so as to raise such amounts as may be determined and to pay the amounts raised to specified persons for the purpose of making good a “shortfall” (as defined in subsection (3)) in the property of a protected energy company available to meet the expenses of energy administration, or for contributing to the making good of such a shortfall.
423. Subsection (2) provides that the modifications may require a licence holder to which the sums raised under subsection (1) are paid to apply those sums towards discharging the “shortfall”.
424. Subsection (3) defines a “shortfall” in meeting the expenses of energy administration as the property of the company being insufficient to meet the costs of energy administration. It also defines making payment to make good the shortfall as discharging “relevant debts” which cannot otherwise be met out of the available property.
425. Subsection (4) defines “relevant debts”. These include obligations to repay the grants, loans, sums paid out under an indemnity and sums paid out under guarantees under sections 165, 166 and 167.

***Section 170: Modification of Chapter 3 of Part 3 under Enterprise Act 2002***

426. This section provides that the power to modify or apply enactments which is conferred on the Secretary of State by sections 248, 277 and 254 of the Enterprise Act (c.40) includes a power to make consequential modifications to this Chapter of the Act (i.e. these energy administration provisions) where the Secretary of State considers this appropriate in connection with other provisions made under the powers conferred by those sections.

***Section 171: Interpretation of Chapter 3 of Part 3***

427. This section defines the terms used in sections 154 to 170.