

ENERGY ACT 2010

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the Energy Act 2010 which received Royal Assent on 8th April 2010. They have been prepared by the Department of Energy and Climate Change in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.
2. These Notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.
3. The term Ofgem is used throughout this document to refer to both the Office for Gas and Electricity Markets (Ofgem) (the regulator of the downstream gas and electricity markets) and the Gas and Electricity Markets Authority (GEMA), a group of executive and non-executive members who govern Ofgem, determining strategy, setting priorities and taking decisions on a range of issues.

SUMMARY AND BACKGROUND

4. The Act implements elements of: *The UK Low Carbon Transition Plan – a national strategy for climate and energy* (published in July 2009: www.decc.gov.uk/en/content/cms/publications/lc_trans_plan/lc_trans_plan.aspx). This Plan will deliver emission cuts of 18% on 2008 levels by 2020 (and over a one-third reduction on 1990 levels) on the way to achieving a reduction of at least 80% by 2050. The Plan makes it clear that we need to cut emissions in a way that helps the sustainable development of our economy, society and environment. This means keeping energy supplies safe and secure, maximising economic opportunities and protecting the most vulnerable consumers.
5. The Act has three principal objectives: the introduction of a framework for a financial incentive to support commercial-scale demonstration of carbon capture and storage (CCS) and funding for the fitting of additional CCS capacity to those projects at a later stage, should it be required; the introduction of schemes for the reduction of fuel poverty (which will introduce mandated social price support); and the strengthening of the powers of Government and the regulator to ensure that the energy markets are working fairly for consumers and delivering secure and sustainable energy supplies.

OVERVIEW OF THE STRUCTURE OF THE ACT

6. The Act is in four Parts with one Schedule:

Part 1: Carbon Capture and Storage and Decarbonisation

These provisions create the framework for a financial mechanism to support CCS demonstration projects on commercial-scale electricity generation (which may be powered by any kind of fuel). The Government's intention is for the mechanism to support four CCS demonstration projects on coal-fired power stations, including the winner of the original competition for a CCS demonstration project launched in 2007.

The mechanism will, should it be needed, be able to provide support for additional CCS capacity to be fitted to these initial demonstration projects. There will be a levy imposed on electricity suppliers and funds will be disbursed through assistance schemes or via contractual means to projects selected by a competitive process.

In addition, there is a requirement for the Government to prepare regular reports on the progress that has been made on the decarbonisation of electricity generation in Britain and the development and use of CCS.

Part 2: Schemes for Reducing Fuel Poverty

These provisions create the framework for schemes that will oblige energy suppliers to provide benefits to vulnerable consumers, for the purposes of reducing fuel poverty, when the current Voluntary Agreement¹ with energy suppliers comes to an end in March 2011. An integral part of these schemes will be social price support which, subject to consultation, will be in the form of an electricity bill rebate to a specified group of households.

Part 3: Regulation of Gas and Electricity Markets

This Part contains a number of provisions relating to the energy market framework –

- ***General duties of the Gas and Electricity Markets Authority and the Secretary of State*** – clarification of Ofgem’s principal objective in relation to tackling climate change, ensuring secure energy supplies and the role of measures other than competition in protecting the interests of consumers.
- ***Exploitation of electricity trading and transmission arrangements*** – powers for the Secretary of State to introduce a Market Power Licence Condition for electricity generators that will make it easier for Ofgem to address certain issues arising from the exploitation of market power where there are constraints on the amount of electricity that can be transmitted.
- ***Time limit for the imposition of financial penalties by the Gas and Electricity Markets Authority*** – extension of the time limit within which Ofgem can impose financial penalties for breaches of licence conditions from twelve months to five years.
- ***Notification period for changes to domestic gas and electricity supply contracts*** – introduction of a power for the Secretary of State to modify supply licences for the purpose of ensuring that domestic consumers are notified about changes, by their gas or electricity supplier, to the terms of their contracts or the price charged for their gas or electricity, within a specified period.
- ***Adjustment of energy charges*** – introduction of a power for the Secretary of State to address situations where cross-subsidies between gas and electricity businesses lead to groups of consumers being disadvantaged.

Part 4: Final Provisions

This Part contains provisions concerning the application of the general duties of the Secretary of State and Ofgem under the Gas Act 1986 and the Electricity Act 1989, statutory instruments, the modification of licences, interpretation and the extent, commencement and short title of the Act. It also introduces a Schedule containing consequential amendments to the Gas Act 1986, the Electricity Act 1989 and the Utilities Act 2000.

7. **Annex A** to these notes contains a glossary of terms used in the Act and the explanatory notes.

¹ Government negotiated an agreement with the energy suppliers that will deliver £125m spend on social programmes for vulnerable consumers in 2009-10, rising to £150m in 2010-11.

TERRITORIAL EXTENT AND APPLICATION

8. The Act extends to England and Wales and Scotland. Where the Act makes amendments to existing legislation, the amendments will have the same extent as that legislation. With regard to Wales, all matters contained within the Act are non-devolved.
9. The Scottish Parliament's consent has been sought and obtained for the provisions in the Act that trigger the Sewel Convention (those in sections 1 to 3, which relate to the disbursement of funds under the CCS financial support mechanism). The Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland, or alter the executive competence of Scottish Ministers, without the consent of the Scottish Parliament.

PART 1: CARBON CAPTURE AND STORAGE AND DECARBONISATION

Summary and Background

10. Carbon Capture and Storage (CCS) is a process involving the capture of carbon dioxide from the burning of fossil (or other combustible) fuels, its transportation, and permanent storage in underground geological formations, for example in old oil and gas fields, or in saline aquifers. CCS could reduce the carbon dioxide emissions from a range of industrial processes, including coal-fired and gas-fired electricity generation, by around 90%.
11. The Stern Review² highlighted the potential role that CCS could play in tackling climate change and analysis by the International Energy Agency (IEA)³ shows that CCS will need to deliver almost 20% of the total greenhouse gas emissions reductions we need to achieve by 2050 if we are to stabilise carbon dioxide concentrations in the atmosphere at an acceptable level cost-effectively. The same analysis by the IEA concluded that the global costs of tackling climate change would increase by 70% without CCS available as a proven technology. While pilot CCS projects for power generation (up to about 30MW) have been taken forward and will provide valuable lessons, CCS has never been applied at commercial-scale on a power station – and this transition to commercial-scale use is the critical next step.
12. The Government launched a competition in November 2007 to build one of the world's first commercial-scale CCS demonstration projects in the UK. In June 2009 the Government published a consultation document: *A Framework for the Development of Clean Coal*⁴. Amongst other things, this consultation set out proposals for a financial incentive mechanism to support up to four commercial-scale CCS demonstrations, including the winner of the competition launched in 2007. In the response to this consultation⁵ (published in November 2009) the Government announced that this financial support mechanism would also provide funding, if required, for the retrofit of CCS to the full capacity of power stations hosting demonstration projects funded by the Government. The 2009 Pre-Budget Report confirmed that the mechanism would be used to support four commercial-scale demonstration projects on coal-fired power stations.
13. This Part of the Act sets the statutory framework for establishing a mechanism to provide financial assistance to commercial-scale CCS demonstration projects and, should it be needed at a future date, support for additional CCS use at those initial demonstration projects which will have received funding.
14. The mechanism will be funded through a levy paid by electricity suppliers in Great Britain which will be collected by an administrator (which will be Ofgem unless regulations under section 6 provide for it to be another public body). The administrator

² *The Stern Review – The Economics of Climate Change*. Nicholas Stern, 2006

³ *Energy Technology Perspectives 2008 – International Energy Agency (IEA)*

⁴ http://www.decc.gov.uk/en/content/cms/consultations/clean_coal/clean_coal.aspx

⁵ http://www.decc.gov.uk/en/content/cms/consultations/clean_coal/clean_coal.aspx

will also be responsible for disbursing financial assistance to CCS projects (for demonstration and the subsequent installation of additional CCS capacity) either in the form of payments made directly to projects, or to the Government to fund payments to such projects made by the Secretary of State. The Government intends to select the projects that will receive financial assistance through one or more competitive processes.

15. Where the administrator is providing financial assistance direct to CCS projects, arrangements for this will be set out in assistance schemes established specifically for this purpose. These schemes will be made by the Secretary of State and may include provisions such as the requirements to be met in order for CCS projects to receive financial assistance, the level of that assistance, and any requirements about the provision of information. CCS project developers must comply with the terms of the scheme to which they have consented as failure to do so may leave the developer subject to the imposition of civil penalties or, depending on the provisions of the scheme, to its termination.

Decarbonisation of electricity generation

16. The Climate Change Act 2008 sets a legally binding target of reducing carbon dioxide emissions by 80% by 2050. *The UK Low Carbon Transition Plan*⁶ (published in July 2009) set out policies to deliver emissions reductions of 34% by 2020, on the pathway to 2050. These policies are expected to deliver around 40% of electricity generation from low carbon sources by 2020. A forthcoming document will explore a range of possible pathways towards our 2050 emissions target and will take account of advice given by the Climate Change Committee regarding the need for a substantially decarbonised electricity system by 2030.
17. There are two main elements to decarbonising electricity generation – increasing the amount of generation from renewable and nuclear sources and reducing the amount of carbon emissions from fossil fuel power stations.
18. In terms of reducing emissions from fossil fuel power stations, the Government has focused on tackling emissions from coal-fired power stations as these are significantly greater than the emissions from gas-fired power stations. The Government set out its strategy for achieving this, and ensuring there is only a very limited role for unabated coal in the 2020s, in “*A Framework for the development of clean coal*” (referred to in paragraph 13). As well as the programme of four commercial-scale demonstration projects to be supported through the CCS Incentive in this Act, the Framework:
 - Sets out a requirement (to be implemented through guidance on development consents under s. 36 of the Electricity Act 1989 and the Planning Act 2008) that any new coal fired power station must demonstrate the full CCS chain (capture, transport and storage) at commercial-scale;
 - States the Government’s expectation that coal-fired power stations with CCS demonstration projects will retrofit CCS to their full capacity by 2025;
 - Sets out the ambition that CCS will be ready for wider deployment from 2020 and that any new coal plant constructed from then to have CCS fitted to its full capacity; and
 - Commits the Government to a rolling review process, which will report by 2018, to consider the appropriate regulatory and financial framework required to facilitate the transition to clean coal.
19. **Section 5** requires the Government to report on progress towards the decarbonisation of the electricity sector, including the decarbonisation of coal-fired power stations, and on progress made in the development and use of CCS technology. This will include

⁶ http://www.decc.gov.uk/en/content/cms/publications/lc_trans_plan/lc_trans_plan.aspx

reporting on progress of the implementation of the Framework as well as wider policies to promote decarbonisation.

Commentary on Sections

Financial Assistance

Section 1: Financial Assistance

20. This section gives the Secretary of State the power to provide financial assistance for CCS demonstration projects, and for the installation of additional CCS capacity (referred to in the Act and below as additional CCS use) at a future date (subsections (1) and (2)). The Government intends that the additional CCS use will be the retrofit of further CCS capacity limited to the power stations that already have a CCS demonstration project receiving financial support. The section also provides an alternative mechanism for disbursing financial assistance for CCS demonstration projects and additional CCS use, by enabling the Secretary of State to make “assistance schemes” through which the administrator provides the financial assistance (subsections (3) and (4)).

Section 2: Assistance schemes: further provision

21. This section makes provision about assistance schemes made by the Secretary of State under section 1(3) and section 1(4). Subsection (1) provides that an assistance scheme may impose obligations or confer functions on a person. This would include the imposition of obligations or functions on the participants (those carrying out the CCS demonstration projects and additional CCS use) and the administrator, but might also be used, for example, to confer monitoring functions on persons such as the Environment Agency.
22. Subsection (2) provides a non-exhaustive list of matters which may be covered by schemes, including:
- activities to be carried out as part of the CCS demonstration project or installation of additional CCS capacity;
 - level of financial assistance to be provided and how that amount may be calculated;
 - arrangements for the postponement, reduction or withdrawal of financial assistance;
 - administration of the scheme;
 - monitoring and assessment of CCS demonstration projects and additional CCS use;
 - arrangements for the publication of knowledge generated by the project;
 - changes to activities or the participants in the scheme (e.g. as result of changes in ownership);
 - termination of the scheme;
 - compliance with the scheme; and
 - establishment of a review and/or appeal process for resolving disputes.
23. Subsection (3) gives the Secretary of State power to amend or revoke assistance schemes. Before making, amending or revoking an assistance scheme, subsection (4) places a requirement on the Secretary of State to consult the administrator of the scheme, the Scottish Ministers (if the assisted activities are in Scotland) and any other person that the Secretary of State thinks appropriate. There is also a requirement for the Secretary of State to lay before Parliament any assistance scheme that has been made or amended

(subsection (5)) and a requirement that where an assistance scheme is revoked the Secretary of State lay a memorandum of revocation before Parliament (subsection (6)).

24. Subsections (7) and (8) require that an assistance scheme can only be made with the consent of all those who would be participants in it (those carrying out the CCS demonstration project or additional CCS use). These subsections also set out that a scheme can be amended with the consent of the participants (or those who would be participants) and can be revoked with the consent of the participants. The Secretary of State may also amend or revoke a scheme, without the consent of participants, where the conditions set out under the scheme, or regulations relating to the scheme, allow it.

Section 3: Regulations relating to assistance schemes

25. This section gives the Secretary of State the power to make regulations regarding assistance schemes. These regulations may make provision about any of the matters specified in section 2(2) (see paragraph 22 above), including provision to impose civil penalties for non-compliance with assistance schemes (which can only be made in regulations). Regulations may not apply to an existing assistance scheme without the consent of all participants (subsection (3)). Before making regulations, subsection (4) places a requirement on the Secretary of State to consult the administrator of the scheme, the Scottish Ministers and any other person that the Secretary of State thinks appropriate. This consultation may occur before or after commencement of this power.

Electricity supply levy

Section 4: Electricity supply levy

26. This section gives the Secretary of State the power to make regulations that place a levy on electricity supplies, to be paid by electricity suppliers, based on the provision of financial assistance for CCS demonstration projects and for additional CCS use at those projects (subsections (1) and (2)).
27. Subsections (3) and (4) provide flexibility in the charging of the levy. Under subsection (3), the Secretary of State can make regulations so that the levy varies in different cases; this might be used, for example, to set different rates for different classes of energy suppliers. Subsection (4) allows provision to be made to exempt certain types of electricity supplies from the levy (for example, based on who the consumer of the electricity will be).
28. Subsection (5) provides a non-exhaustive list of matters about which the regulations may make provision, including:
- what constitutes, for the purposes of the levy, an electricity supply and an electricity supplier;
 - the payment of the levy, including the payment of interest in respect of late payments;
 - enforcement of payment of the levy, including through the imposition of civil penalties;
 - the general arrangements for the administration of the levy;
 - requirements for the provision, and audit, of information by suppliers;
 - insolvency of persons liable to pay the levy (which would enable provision to be made to ensure that there is no shortfall in the funds raised in the event a supplier becomes insolvent); and
 - the establishment of a review and/or appeals process for resolving disputes.

29. Before making regulations regarding the levy, subsection (6) places a requirement on the Secretary of State to consult the administrator of the levy mechanism and any other person that the Secretary of State thinks appropriate. This consultation may occur before or after commencement of this power.

Reports

Section 5: Reports on decarbonisation and CCS progress

30. This section requires the Government to produce reports every 3 years (starting in 2012) on progress towards decarbonisation of (i.e. reducing the amounts of carbon dioxide emitted into the atmosphere from) electricity generation. The report will need to include specific coverage of the progress made in reducing emissions from coal-fired power generation and progress in the development and use of CCS technologies (subsection (1)).
31. The report will also need to include an assessment of whether CCS technology has been successfully demonstrated (or, if not, when it will be demonstrated) in terms of capturing and storing the carbon emissions from commercial-scale electricity generation and whether coal-fired power stations given planning consent from 1st January 2020 can be expected to have CCS technology fitted to their full generating capacity (subsection (2)).
32. The final required element of the report is a review of whether, in the light of its other findings, Government policies should be revised (subsection (3)).
33. When preparing the report, the Secretary of State will need to consult Scottish and Welsh Ministers, and the report will need to take into account any relevant points raised by the Climate Change Committee in their regular reports on progress towards the Government's carbon reduction targets made under the Climate Change Act 2008 (subsection (4)).
34. Subsection (5) and the definitions of "reporting period" in subsection (6) mean that the first report will need to be produced in 2012 and cover the period between the Act coming into force and the end of 2011. The second report will be published in 2015 and cover the 3 year period between 2012 and 2014. Subsequent reports will be published at 3-yearly intervals thereafter.

General

Section 6: The administrator

35. This section provides (subsection (1)) for Ofgem to be the body that administers both the collection of the levy and the provision, through assistance schemes, of financial assistance for CCS demonstration projects and for additional CCS use. It also gives the Secretary of State power, through regulations, to transfer the function of administrator to another public body, including to himself (subsection (2)). Before making regulations, subsection (3) places a requirement on the Secretary of State to consult the administrator and any other person that the Secretary of State thinks appropriate.

Sections 7 & 8: CCS demonstration projects and additional CCS use & Interpretation of Part

36. These sections set out the definitions for a number of terms used in this Part. In particular, section 7(1) defines "CCS demonstration project" to mean the demonstration and assessment of CCS technology through its use in commercial electricity generation, and work required to prepare for or assess the feasibility of this (for example, a Front-End Engineering and Design study). Section 7(2) defines "additional CCS use" as the use of CCS technology in commercial electricity generation outside the confines of

a CCS demonstration project as well as work required to prepare for or assess the feasibility of such use. This means the retrofit of additional CCS capacity to power stations that already have a CCS demonstration project.

37. “Commercial electricity generation” is defined in section 7(4) to mean the generation of electricity on a commercial scale. The financial support mechanism could therefore be used to support CCS demonstration projects on any form of commercial electricity generation; however, as set out at paragraph 13, the Government’s intention is to use the mechanism to support projects on 4 coal-fired power stations.
38. A number of the terms used in these definitions (e.g. “carbon capture and storage technology” and “carbon dioxide”) are also defined.

PART 2: SCHEMES FOR REDUCING FUEL POVERTY

Summary and Background

39. The Warm Homes and Energy Conservation Act 2000 set the framework for the definition of fuel poverty in England and Wales such that a person is regarded as living “in fuel poverty” if the person is a member of a household living on a lower income in a home which cannot be kept warm at reasonable cost. This Act committed Government to publishing and implementing a strategy to tackle fuel poverty.
40. The UK Fuel Poverty Strategy was published on 21 November 2001 and explained that Government policy to tackle fuel poverty would be based on the widely accepted definition that a fuel poor household is one which would need to spend more than 10% of its income on all fuel use and to heat its home to an adequate standard of warmth. This definition encompasses the three drivers of fuel poverty: the energy efficiency level of the home; the level of household income; and energy prices. The impact of rising fuel prices in recent years has been to increase the number of fuel poor households as quantified by the *UK Fuel Poverty Strategy: 7th annual progress report 2009*⁷.
41. As part of the Fuel Poverty Strategy, the Government negotiated an agreement with UK gas and electricity suppliers in 2008 under which they agreed to offer assistance with energy costs to vulnerable customers. The combined spending by suppliers will be at least £150 million in the final year of the agreement (April 2010 to March 2011). Suppliers are free to choose the level and type of assistance offered to vulnerable customers within a broad framework monitored by Ofgem. Support measures provided include social tariffs⁸, debt relief, the installation of energy efficiency measures and trust funds (which fund measures such as direct assistance to customers in debt, third party projects or organisations aimed at helping customers in fuel poverty).
42. This Part sets the statutory framework for schemes to replace and extend the support mechanisms available under the Voluntary Agreement when it comes to an end in March 2011. It will also set the framework for the provision of mandatory social price support (direct assistance with energy bills) to more of the most vulnerable consumers by energy suppliers. The details of the schemes, such as the nature of the benefit and eligibility criteria, will be set out in secondary legislation after consultation during Summer 2010. The 2009 Pre-Budget Report confirmed that suppliers will be required to make available at least £300 million p.a. by 2013-14.
43. In order to avoid any unforeseen distortions to the market, the framework will include a reconciliation mechanism to allow the costs of the schemes to be shared equitably between suppliers.

⁷ http://www.decc.gov.uk/en/content/cms/what_we_do/consumers/fuel_poverty/strategy/strategy.aspx

⁸ Defined by Ofgem as the lowest tariff available from that supplier in that region on any payment method

Commentary on Sections

Section 9: Schemes for reducing fuel poverty

44. This section gives the Secretary of State the power to make regulations to create schemes that will require energy suppliers to give benefits to defined groups of customers for the purpose of reducing fuel poverty (subsections (1) to (3)). Subsection (4) provides that such schemes can apply to suppliers of electricity and/or gas.
45. Subsections (5) and (6) give the Secretary of State the power to specify in a scheme which types of customers would be eligible to receive support through the scheme. A scheme may provide for eligible customers to be identified through membership of a fuel poverty risk group (as defined by the Secretary of State), by energy suppliers or by the Secretary of State directly determining eligibility (for example through a data-matching scheme⁹ or by issuing vouchers or letters which confirm that a person is eligible to receive benefits through the scheme). Subsection (6) provides that where eligibility is determined by scheme suppliers, provision may be included setting out requirements about criteria to be applied in determining which customers are eligible.
46. Subsections (7)(a) and (8) give the Secretary of State the power to set the form of benefits and the ways in which benefits are to be given to customers. This could, for example, include a rebate on customers' electricity bills. They also allow for benefits to be provided in the form of goods or services.
47. Subsections (7)(b) and (9) give the Secretary of State power to make provision in a scheme about the amounts of benefits to be provided under the scheme. Subsections (9)(a) and (b) enable this to include provision to set the total value of benefits to be provided by all energy suppliers or the aggregate value of benefits that each individual supplier is required to make available in a specified time period, and the value of the benefit that energy suppliers are required to provide to individual customers.
48. Subsection (9)(c) enables a scheme to make provision as to how any amount is to be determined for the purposes of the scheme: that is to say, either an aggregate amount of benefits provided or to be provided by a scheme supplier, or an amount provided or to be provided to an individual customer. These provisions may in particular be for:
 - determining the amount of any benefit provided under the scheme (paragraph (c)(i));
 - any determination to be made by a scheme supplier (paragraph (c)(ii));
 - allowing benefits required to be provided under one scheme to be calculated by reference to benefits provided under another scheme (paragraph (c)(iii));
 - treating payments by a supplier (for example, in respect of the costs of identifying which customers are entitled to benefits, or in continuing existing support mechanisms which are being provided under the Voluntary Agreement) as benefits provided under the scheme (paragraph (c)(iv));
 - adjustment of amounts of benefits provided by a supplier by reference to payments made or received by the supplier under a reconciliation mechanism (see section 11) (paragraph (c)(v)); and
 - making arrangements for allowing energy suppliers certain flexibilities in the time profile of expenditure (paragraph (c)(vi)).

⁹ Where personal data owned by Government is compared with a third party's data, and where a match is found a specific action is taken. It is necessary to have primary powers in order to share and match data in this way. An example is the powers taken in the Pensions Act 2008 which gave the Secretary of State for Work and Pensions the power to share data on Pension Credit recipients with energy suppliers for the purpose of offering social assistance. A data-matching process in this case would compare DWP records for a selected subset of Pension Credit recipients with the energy suppliers' customer base data, to identify a particular subset of that customer base to receive assistance in the form of a fixed rebate.

Section 10: Schemes for reducing fuel poverty: supplementary

49. This section makes further provision about how the schemes for reducing fuel poverty may work.
50. Subsection (1) allows a scheme to make provision about arrangements to ensure that customers receive any benefits they may be entitled to. This can include making:
- arrangements to help suppliers identify eligible customers;
 - arrangements for scheme customers to be made aware that the benefits exist and how to apply for them; and
 - arrangements for how the benefits should be paid or otherwise provided.
51. Subsection (2) allows schemes to make provision for prohibiting discrimination against customers who are within a scheme, or would be within a scheme if they were customers of a scheme supplier. An example of such discrimination would be where a scheme supplier refused to take on, as customers, people who would be eligible for benefits under a scheme.
52. Subsection (3) allows a scheme to provide for the Secretary of State or Ofgem to recover costs related to providing evidence of customer eligibility. This could, for example, include vouchers or letters of eligibility.
53. **Section 10 (4)** explains that a scheme could require different suppliers to use different criteria to identify customers or to give different customers different benefits. Paragraph (c) allows requirements under a scheme to be framed as requirements to continue spending commitments under the Voluntary Agreement. This subsection does not affect the breadth of section 31(5), which will allow a scheme to make different provision for different cases.
54. Subsection (5) allows a scheme to make provision for requiring suppliers to provide information to Ofgem that Ofgem requires in order to carry out its functions in relation to the scheme, including its functions of keeping the scheme under review and monitoring compliance (see section 13(1)).
55. Subsection (6) allows the Secretary of State, in such cases or circumstances as are specified in a scheme, to determine that scheme requirements either do not apply to a certain supplier, or apply subject to modifications. When such a determination is made, amended or revoked, subsection (7) provides that the Secretary of State must lay a memorandum of the determination, amendment or revocation before Parliament.

Section 11: Reconciliation mechanism: regulations

56. It is possible that some suppliers could have a disproportionate number of eligible people in their customer base. Depending on the design of the scheme, this could lead to an inequitable distribution amongst suppliers of the obligations to provide benefits. If that happens, it is the Government's intention to put in place a mechanism to redistribute some of the costs of the scheme.
57. Subsections (1) and (2) allow the Secretary of State to establish a reconciliation mechanism for the purposes of ensuring the amounts of benefits provided by a scheme for reducing fuel poverty are distributed equitably, as far as reasonably practicable, amongst suppliers. It would be possible for Ofgem to be the operator of the mechanism (see subsection (5)).
58. Subsection (3) provides for the mechanism for balancing payments to be made, by enabling the Secretary of State to require suppliers to make payments to the operator of the reconciliation mechanism or other suppliers and to confer on scheme suppliers entitlements to receive payments from the scheme operator or other suppliers.

59. Subsection (3)(c) allows regulations to provide that the reconciliation mechanism operator can determine the payments required. If such a provision is included, subsection (4) requires the regulations also to include provision for appeals where Ofgem is not the mechanism operator. Where Ofgem is the operator, provision for appeals is not needed because judicial review will be available as a means of challenging its decisions.
60. The regulations may require suppliers to provide such information to the operator of the scheme as the operator might require in order to carry out its functions in relation to the reconciliation mechanism (subsection (6)).

Section 12: Reconciliation mechanism: licence modifications

61. This section provides that the Secretary of State may, for the purposes of creation or operation of a reconciliation mechanism, modify the conditions of transmission licences or supply licences issued under the Electricity Act 1989 or documents or agreements related to such licences, such as codes of practice (subsection (1)). This provides the Government with two possibilities in relation to the implementation of the reconciliation mechanism. The first would allow Government to amend the Balancing and Settlement Code (BSC) to allow the operator of the balancing and settlement mechanism to be the operator of the reconciliation mechanism. To do this it may be necessary to make an initial amendment to National Grid's transmission licence. The second possibility would be to create a new industry code specifically to govern the operation of the reconciliation mechanism.
62. Subsection (2) provides that modifications to licences, or a document or agreement relating to licences, need not relate to the activities authorised by the licence. This means, for example, that if a reconciliation mechanism were to be operated by the current operator of the balancing and settlement mechanism, the Secretary of State may modify the BSC to include detail about the operation of the mechanism (even though that does not relate to the activity of electricity transmission). The Secretary of State would also be able to apply the modifications only to parties to the BSC which are to participate in the reconciliation mechanism.
63. Subsection (3) provides that modifications to a document or agreement relating to licences may make different provision for different cases.
64. Before making modifications, the Secretary of State is required to consult the holders of any licence being modified, Ofgem and any other persons the Secretary of State considers appropriate (subsection (4)). This consultation may occur before or after commencement of this power.

Section 13: Duty of Authority to keep schemes under review

65. This section requires Ofgem to keep schemes made under the powers in this Part, and suppliers' compliance with them, under review.

Section 14: Regulations under Part 2: procedure etc

66. This section sets out further details about any regulations establishing either a scheme to reduce fuel poverty or a reconciliation mechanism under this Part of the Act.
67. Before making regulations under section 9, 11 or 15, the Secretary of State must, under subsection (1), consult Ofgem, licensed gas and electricity suppliers (where schemes or reconciliation mechanisms apply to them), and any other person that the Secretary of State thinks appropriate. This consultation may occur before or after commencement of this power (subsection (2)). The Secretary of State must also obtain Treasury approval for regulations under section 9 (subsection (3)).
68. Subsection (4) requires that when a scheme under section 9 is established it must contain provision stating how long the scheme will run (subsection (4)(a)). It may also,

under subsection (4)(b), include provision about when, or under what circumstances the scheme should be reviewed (for example, the Secretary of State may wish to include a power to trigger a review of the scheme if energy prices rise above a certain level). Once the scheme has effect it cannot, according to subsection (5), be amended or revoked except following a review in accordance with provision made under subsection (4)(b). Under subsection (6) a scheme can, however, be renewed through regulations under section 9 at the end of the period specified.

Section 15: Schemes for reducing fuel poverty: interpretation

69. This section sets out the key definitions used in this Part of the Act. Subsection (1) defines a reduction in fuel poverty for the purposes of this Part of the Act. Fuel poverty is reduced if the number of people living in fuel poverty is reduced or the extent to which any person is living in fuel poverty is reduced.
70. Subsection (2)(a) defines for the purposes of this Part what it means for a person to be living in fuel poverty. This is equivalent to the definition of fuel poverty contained in the Warm Homes and Energy Conservation Act 2000. Subsection (2)(b) defines what is a reduction in the extent to which a person is in fuel poverty.
71. Subsection (3) gives the Secretary of State the power to make regulations on what is to be regarded as living in fuel poverty, and what is to be regarded as a reduction in the extent to which a person is living in fuel poverty.
72. Subsection (4) provides that these regulations may specify, for the purposes of subsection (2)(a), what is to be regarded as a lower income, or a reasonable cost, or the circumstances in which a home is to be regarded for those purposes as being warm, or may amend this section.

PART 3: REGULATION OF GAS AND ELECTRICITY MARKETS

Summary and Background

73. The regulation of the gas and electricity markets in Great Britain is carried out by Ofgem, the unified regulator established by the Utilities Act 2000. The Secretary of State has some limited functions relating to the regulation of the gas and electricity markets, but the vast majority of functions are exercised by Ofgem. Separate arrangements are in place in Northern Ireland.
74. Ofgem's key functions are to license activity in the gas and electricity markets; control the charges for and access to the monopoly networks; supervise the numerous industry codes that govern the complex contractual and operational relationships between industry players and act concurrently with the Office of Fair Trading in applying general competition law in the gas and electricity markets.
75. This Part contains a number of provisions relating to the market framework with the intention of ensuring the framework promotes the delivery of secure and low carbon energy supplies whilst continuing to protect consumers.

General duties of the Gas and Electricity Markets Authority and the Secretary of State

76. In carrying out its duties, Ofgem must act according to its objectives as set out in statute. Ofgem has a principal objective to protect the interests of existing and future consumers. Wherever it is appropriate to do so, it must fulfil that principal objective by promoting effective competition. Before this Act the interests of consumers were not defined. Ofgem must also take into account a range of secondary objectives.
77. It is the Government's view that reducing greenhouse gas emissions (in order to mitigate climate change) and ensuring secure energy supplies are both in the interests of future and existing consumers and should be considered as such by Ofgem when carrying out

its functions. The Government does not intend to change Ofgem's principal objective nor to create multiple principal duties through these provisions, but to ensure that in its interpretation of its existing principal objective of protecting consumers, Ofgem gives due weight to the need to reduce greenhouse gas emissions and ensure security of supply.

78. Competitive solutions may take time to deliver, and the market may create barriers for some groups of consumers so that the promotion of competition may not be the most effective means of protecting their interests. These provisions clarify that Ofgem should consider using alternative types of solution to address the consumer detriment instead of, or alongside, measures to promote competition. Such solutions could include strengthened licence conditions and enforcement action, or other means that would prevent certain types of market behaviours.
79. These clarifications will also apply to those limited functions carried out by Scottish Ministers under the Acts.

Commentary on Sections

Section 16: Amendments of section 4AA of the Gas Act 1986 (c. 44)

80. This section amends the principal objective and general duties of the Secretary of State and Ofgem as set out in section 4AA of the Gas Act 1986.
81. The amendments clarify the relationship between the principal objective and the obligation to further this objective through the promotion of competition wherever appropriate. Subsection (2) amends section 4AA(1) of the Gas Act 1986 to remove the reference to 'promoting effective competition'. The reference to promoting competition is re-inserted in the new subsection (1B) (see subsection (3) of section 16) in which it is combined with the general duties in section 4AA(2) as to how the Secretary of State and Ofgem are to carry out their functions (see paragraph 79 below).
82. Subsection (3) adds three additional subsections (1A, 1B and 1C), between subsections (1) and (2) of section 4AA of the Gas Act 1986, to clarify the interests of consumers and how the Secretary of State and Ofgem are to carry out their functions.
83. The new subsection (1A) of section 4AA makes it clear that the interests of consumers include their interests in the reduction of greenhouse gas emissions caused by the shipping, transportation or supply of gas, and their interests in a secure supply of gas. Subsection (7) inserts a new subsection 4AA(5B) which inserts definitions for the purposes of new subsection (1A), and adopts the meanings of some words used in the Climate Change Act 2008.
84. The new subsection (1B) closely follows the phrase that was removed from section 4AA(1) by subsection (2) of section 16. It requires the Secretary of State or Ofgem to carry out their functions (in relation to the supply of gas) in a way best calculated to protect the interests of consumers, using the promotion of competition to do so where that is appropriate.
85. The new subsection (1C) provides that when carrying out their functions the Secretary of State or Ofgem must consider:
- to what extent the interests of consumers are protected by actions focused on the promotion of competition, and
 - if there are any other actions (whether or not they would promote competition) that might better protect the interests of consumers.
86. Subsections (4), (5), (6) and (8) make minor amendments to take account of the new subsections 4AA(1A), 4AA(1B) and 4AA(1C). Subsection (4) also makes a minor amendment to ensure that any financial obligations which may be imposed under this

Act are taken into account when the Secretary of State or the Authority are having regard to the need for licence holders to finance their activities.

Section 17: Amendments of section 3A of the Electricity Act 1989 (c. 29)

87. This section amends the principal objective and general duties of the Secretary of State and Ofgem in section 3A of the Electricity Act 1989 in a similar manner to the amendment of section 4AA of the Gas Act 1986 by section 16.
88. The amendments clarify the relationship between the principal objective and the obligation to further this objective through the promotion of competition wherever appropriate. Subsection (2) separates the two by amending subsection 3A(1) of the Electricity Act 1989 to remove the reference to ‘promoting effective competition’. The reference to promoting competition is re-inserted in the new subsection (1B) (see subsection (3) of section 17) in which it is combined with the general duties in section 3A(2) as to how the Secretary of State and Ofgem are to carry out their functions) by subsection (3) (see paragraph 89 below).
89. Subsection (3) adds three additional subsections (1A, 1B and 1C) between subsections (1) and (2) of section 3A of the Electricity Act 1989 to clarify the interests of consumers and how the Secretary of State and Ofgem are to carry out their functions.
90. The new subsection (1A) of section 3A makes it clear that the interests of consumers include their interests in the reduction of greenhouse gas emissions caused by the transmission, distribution, generation or supply of electricity, and their interests in a secure supply of electricity. Subsection (7) inserts a new subsection 3A(5B) which inserts definitions for the purposes of new subsection (1A), and adopts the meanings of some words used in the Climate Change Act 2008.
91. The new subsection (1B) closely follows the phrase that was removed from subsection 3A(1) by subsection (2) of section 17. It requires the Secretary of State or Ofgem to carry out their functions (in relation to the supply of electricity) in a way best calculated to protect the interests of consumers, using the promotion of competition to do so where that is appropriate.
92. The new subsection (1C) provides that when carrying out their functions the Secretary of State or Ofgem must consider:
 - to what extent the interests of consumers are protected by actions focused on the promotion of competition, and
 - if there are any other actions (whether or not they would promote competition) that might better protect the interests of consumers.
93. Subsections (4), (5), (6) and (8) make minor amendments to take account of the new subsections 3A(1A), 3A(1B) and 3A(1C). Subsection (4) also makes a minor amendment to ensure that any financial obligations which may be imposed under this Act are taken into account when the Secretary of State or the Authority are having regard to the need for licence holders to finance their activities.

Exploitation of electricity trading and transmission arrangements

Summary & Background

94. On 30 March 2009 Ofgem launched a consultation on *Addressing Market Power Concerns in the Electricity Wholesale Sector – Initial Policy Proposals*¹⁰. This initiative reflected the regulator’s observation that the current market structure, coupled with limitations in physical transmission capacity in some areas, allows companies to exploit unduly the market in a way that results in higher bills for the consumer. During

¹⁰ See www.ofgem.gov.uk/CustomPages/Pages/ArchivedPublications.aspx.

a recent investigation Ofgem also found that their existing competition law powers were unlikely to be effective due to difficulties in identifying the market in which a company could be perceived as dominant¹¹ and the possibility of companies having substantial market power without being dominant as understood in competition law. Their consultation considered a number of ways in which this regulatory loophole could be addressed, including the introduction of a Market Power Licence Condition (MPLC).

95. Under the electricity market arrangements in Great Britain (the British Electricity Transmission and Trading Arrangements) generation companies are entitled to operate power stations without taking into account network limitations. This would not be an issue if the existing transmission network had sufficient capacity to send the required electricity to and from all parts of Great Britain but, in some areas, the existing capacity of the wires does not always allow this. Such scenarios are called transmission-related 'constraints' and require action to be taken by the system operator¹², National Grid, to ensure that supply and demand is balanced on both sides of this constraint.
96. Currently, the most significant constraint boundary is that between Scotland and England (known as the "Cheviot Boundary") and the most common scenario is one known as an 'export constraint', where there is too much generation 'behind' a constraint (in the smaller region – Scotland) and it cannot be transmitted to the larger region (England). The reverse scenario, where there is too much generation in the larger region, is known as an 'import constraint'.
97. To balance supply and demand, National Grid can accept, as part of the 'balancing mechanism'¹³, both 'offers' to increase generation and 'bids'¹⁴ to reduce generation at specific plants. They may also have long term bilateral contracts in place with companies, including a category called inter-trip contracts. These involve National Grid paying the company an 'arming fee' that, via an automated trip-switch, means a particular plant could be taken off the system if the network becomes overloaded. This 'tripping' happens very rarely, nationally less than once a year, but the existence of inter-trip contracts allows National Grid to increase safely the electricity flow on the system and, therefore, is an effective way of expanding the available capacity of the network.
98. Ways in which companies could unduly exploit the above arrangements are by:
 - manipulation of where electricity is generated in order to achieve excess profit from either 'offers' or 'bids' in the balancing mechanism. This hinges on whether, because of the limited number of generation plants in particular locations, the company can predict when National Grid would have no choice but to accept an offer or bid from them to be able to balance electricity supply and demand. In this case the consumer may meet costs over and above those expected if power stations operate in economic merit order;
 - making exploitative 'bids' to take advantage of both being behind an 'export constraint' and being the only company with which National Grid can arrange balancing actions. For example, they may be the only generator available to reduce output in a particular location and so can name their 'bid' price and/or they might use such a locational advantage to extract unduly high 'arming fees' for inter-trip contracts with National Grid.

11 For the purposes of the ongoing balancing actions, the geographic definition of the 'electricity market' will be subject to constant change.

12 The system operator is responsible for the operation of the national electricity transmission system.

13 The wholesale market is divided into 30 minute periods for trading purposes and 'normal' trading occurs until one hour prior to the start of each period – a point known as 'gate closure'. After gate closure electricity generators and purchasers may not trade any further with each other, but may trade with National Grid. The 'balancing mechanism' is one market arrangement by which such trading with National Grid occurs.

14 Importantly, a 'bid' put forward by a company equates to an amount that *they* will pay National Grid not to generate. The company will, however, still realise a net financial benefit because it will have already received payment from its original contract with a supplier to produce electricity, while saving on avoided fuel and other costs by not running.

99. These sections will allow the Secretary of State to introduce a licence modification that will enable Ofgem to use its existing licensing powers to monitor and act on any examples of the actions described in paragraph 90 above. The objective is to provide a targeted and proportionate provision that will address the exploitation of market power whilst avoiding unnecessary uncertainty in the electricity wholesale market in Great Britain which could undermine investment in generation and, hence, security of energy supply.
100. The sections will not provide the long-term solution to the problem of ‘constraints’ – this will be resolved by the increased transmission capacity that will be delivered between now and approximately 2015 with additional capacity expected to be delivered by 2018. Reinforcement work on the Cheviot Boundary is already underway. The Energy Network Strategy Group (chaired by DECC and Ofgem) set out a vision for the network for 2020 needed to support a low carbon energy system¹⁵. The sections will, however, give protection to the consumer during a time when the required upgrading of the transmission system may create more potential for exploitation to occur. Using primary legislation to introduce the MPLC will also allow the introduction of a tailored appeals process, which provides the generation companies the right to appeal directly to the Competition Appeal Tribunal (CAT) against enforcement orders or penalties imposed by Ofgem.

Commentary on Sections

Section 18: Power to make modifications

101. Subsection (1) provides the Secretary of State with the power to introduce a modification to electricity generation licences (including standard conditions incorporated in licences and documents maintained in accordance with the conditions of licences (such as industry codes) or agreements that give effect to those documents). When exercising powers under this section, the Secretary of State (and Ofgem) must carry out functions in accordance with the principal objective and general duties set out in sections 3A to 3D of the Electricity Act 1989 (section 30).
102. Subsection (2) limits the power in subsection (1) so that it may only be exercised for the purpose of limiting or eliminating the circumstances in which a generation licence holder may obtain excessive benefits from electricity generation in a particular period. Subsection (3) provides that a licence holder will be taken to obtain an excessive benefit if they have entered into arrangements regarding the generation of electricity with the transmission system operator and one or more of the conditions set out in subsections (4)-(7) is met. These conditions are:
- the licence holder does not notify electricity generation that would have been economic to carry out and may receive excessive payments in connection with an increase in electricity generation in the relevant period;
 - the licence holder may pay an excessively low amount, or may receive an excessively high amount, in connection with a reduction in electricity generation in the relevant period;
 - the licence holder is paid an excessively high amount for an inter-trip arrangement; or
 - there is an increase or reduction in the licence holder’s electricity generation in a specific period, compared to their notified generation, as a result of which the licence holder may obtain an excessive benefit.

15 <http://www.ensg.gov.uk/index.php?article=126>

103. Subsection (8) provides that modifications may include provisions relating to operation of power stations, amounts payable to generation licence holders or offers by the licence holder to pay amounts.
104. Subsection (9) requires the Secretary of State to consult on the detail of any modification made under subsection (1) before it is implemented. Those consulted must include any generation licence holders, Ofgem and such other persons as the Secretary of State considers appropriate. Subsection (10) specifies that this requirement may be satisfied by consultation either before or after the passing of the Act.
105. Subsections (11) to (14) contain definitions and interpretation provisions for the purposes of this section. In particular, subsection (11) specifies the meaning of “notified electricity generation” for a period, and subsection (12) defines references to an increase or reduction in electricity generation in a period.

Section 19: The Authority’s interpretation and enforcement of modifications

106. This section requires Ofgem to publish a document that will set out how they will approach the interpretation and enforcement of the MPLC. Before publishing the document, subsection (2) requires Ofgem to consult generation licence holders, the Secretary of State and any other persons they consider appropriate. This consultation may occur before or after commencement of this power.

Section 20: Final and provisional orders: appeals

107. This section sets out a special process for appealing against any order which Ofgem makes under section 25 of the Electricity Act 1989 (“Orders for securing compliance”) for the enforcement of the MPLC. Subsection (2) allows licence holders who are the subject of an order to appeal to the Competition Appeal Tribunal (“the CAT”) against the order. Under subsection (3), the CAT can decide whether it wishes to decide on all or part of the matter, or whether it wishes to remit all or part of the matter back to Ofgem (or, indeed, do both). Subsection (4) provides for what the CAT may do in the event it re-determines an appealed matter: permitting it to uphold, set aside or substitute its own final or provisional order.
108. Appeals to the CAT will be subject to the Tribunal’s rules, and subsection (6) provides that subsections (2) to (5) will be subject to those rules.
109. Subsection (7) prevents an order for securing compliance from being challenged by any form of legal proceedings other than an appeal to the CAT under this section. Subsection (8) provides that any decision by the CAT will have the same effect, and will be enforced in the same manner, as a decision of Ofgem.

Section 21: Penalties: appeals

110. This section allows generation licence holders to appeal to the CAT regarding a penalty imposed by Ofgem under section 27A of the Electricity Act 1989 in relation to the MPLC. Subsection (2) provides that an appeal can be made against the imposition of a penalty, the size of that penalty and the date on which they have been directed to pay the whole, or part, of that penalty. Subsection (3) enables the CAT to uphold the penalty, set aside the penalty, substitute another amount for the penalty or vary the date by which the penalty, or any part of it, is required to be paid.
111. This section has a number of provisions that are identical to those in section 20. Any decision by the CAT will have the same effect, and will be enforced in the same manner, as a decision by Ofgem (subsection (7)). Furthermore, appeals to the CAT will be subject to the Tribunal’s rules, and subsections (2) to (4) are subject to those rules (subsection (5)). Subsection (6) ensures that it will not be possible to challenge penalties imposed by Ofgem except by an appeal to the CAT under this section.

Section 22: Further appeals

112. This section provides for further appeals from specified decisions of the CAT to appropriate courts (the Court of Appeal or, in Scotland, Court of Session).

Section 23: Expiry of power

113. Subsection (1) ensures that there is a limited time period within which an MPLC can be in force. This period is initially 5 years, but subsection (2) allows the Secretary of State to make an order to extend this period by up to 2 years. Before making any such order, subsection (4) requires the Secretary of State to consult generation licence holders, Ofgem and any other appropriate person.
114. Subsection (5) provides that any licence modifications made under this Part will cease to have effect after the expiry date set by subsections (1) and (2). Under subsection (6), however, any actions (including the imposition of penalties or other enforcement actions) that have previously been taken by Ofgem, or any other party, would not be affected.
115. Subsection (7) allows the Secretary of State to modify a regulatory instrument (which includes a licence) as a consequence of the powers to make licence modifications expiring. Subsection (8) provides that the Secretary of State must consult the holder of any generation licence, Ofgem and any other such persons considered appropriate before making any such modification.

Time limit for the imposition of financial penalties by the Gas and Electricity Markets Authority

Summary and Background

116. Ofgem has powers under the Gas Act 1986 and the Electricity Act 1989 to grant licences for gas and electricity distribution and supply, and to set the conditions of those licences. Ofgem also has the power (s30A-30C of the Gas Act 1986 and s27A-27C of the Electricity Act 1989) to impose financial penalties for the breach of licence conditions. Any such financial penalty cannot be more than 10% of a licence holder's applicable turnover (in its business year preceding the issue of the penalty notice) and the penalty must be imposed within twelve months of the breach of the relevant licence condition occurring.
117. There are a number of circumstances where the twelve month time period can restrict Ofgem's use of its enforcement powers. For example, if a potential breach relates to a requirement to notify consumers of a price change, a consumer will not be aware of the change until they receive their bill. The consumer is then likely to take the issue up with their supplier before approaching Ofgem or the relevant consumer body (Consumer Focus). It may, therefore, take time to identify a pattern of consumer complaints. This lengthy process can mean that although Ofgem have been able to investigate and establish a breach of a licence condition, they may be unable to impose a financial penalty that reflects the full extent of any licence breach.
118. This section extends the time limit within which a financial penalty can be imposed to five years from the breach of the licence condition. The aim is to allow Ofgem to protect the consumer interest by ensuring there is sufficient time for them to make effective use of their existing powers.

Commentary on Sections

Section 24: Time limit for the imposition of financial penalties

119. Subsections (1) and (2) amend section 30C(1) of the Gas Act 1986 and section 27C(1) of the Electricity Act 1989, respectively. In both cases, the time limit for Ofgem to impose

a penalty for contravention of a licence condition/requirement or failure to achieve a performance standard is increased from twelve months to five years. Subsection (3) ensures that these amendments do not apply to breaches of licence conditions occurring before this section comes into force.

Notice of unilateral changes to domestic supply contracts

Summary and Background

120. Responses to Ofgem's 2008 probe¹⁶ into the energy supply markets highlighted a number of problems arising from the length of time given to notify price increases:
- consumers are denied the opportunity to budget for the extra costs or to decide to decrease their usage in light of the increased costs;
 - if a consumer is already in debt to a supplier, switching to an alternative provider to avoid the increase is unlikely to be an option – delayed notification of the price increase is therefore even more detrimental as they have no choice but to accept the change; and
 - a delay in notification of a price increase or change in tariff structure denies the consumer the opportunity to take and provide meter readings around the date when the rise becomes effective and thus satisfy themselves that any change has been correctly applied by the supplier.
121. Ofgem published an open letter¹⁷ in 2009 soliciting views on this issue. Subsequently their consultation on proposed retail market remedies¹⁸ made it clear that best practice is for energy suppliers to inform their customers about price rises as soon as possible and preferably in advance, and that 65 working days should be regarded as a backstop.
122. Ofgem is currently considering whether to change this notification period through its powers under section 11A of the Electricity Act 1989 and section 23 of the Gas Act 1986 to propose modifications to the standard conditions of electricity and gas licences.
123. This section introduces a power to allow the Secretary of State to address the situation should Ofgem not be able to take action within an appropriate timeframe. This power will expire three years after coming into force which is considered sufficiently long to permit the issue to be addressed.

Commentary on Sections

Section 25: Modifications of supply licences: notice of unilateral changes to domestic supply contracts

124. This section provides that the Secretary of State may modify the conditions of supply licences issued under the Gas Act 1986 or the Electricity Act 1989 (subsection (1)). Subsection (2) requires that such modifications may only be made for the purpose of ensuring that domestic consumers are notified within a period determined by the modifications about unilateral changes, by their gas or electricity supplier, of the terms of their contracts or the price charged for their gas or electricity.
125. Subsection (3) will allow modifications to licences to include provisions relating to whether notification of contract or price changes is to be before or after the changes are made, the means of communicating the changes and what happens if a company fails to give the required notice. They may also require the notice to be accompanied by additional information.

¹⁶ "Energy Supply Probe – Initial Findings Report", Ofgem 140/08, 6 October 2008

¹⁷ "65 day notice period for unilateral contract variations open letter", Ofgem, 20 February 2009

¹⁸ "Energy Supply Probe - Proposed Retail Market Remedies", Ofgem 99/09, 7 August 2009

126. Subsection (4) provides that this power expires three years after coming into force. Subsection (5) requires the Secretary of State to consult with the holder of any licence being modified, Ofgem and any other persons the Secretary of State considers appropriate. Subsections (6), (7) and (8) contain definitions for the purposes of this section.

Adjustment of energy charges

Summary and Background

127. In 2008, a market probe by Ofgem¹⁹ into the energy supply markets for domestic and small business customers found that, in general, the ‘big six’ suppliers²⁰ were acting competitively. The probe did identify, amongst other concerns, that energy suppliers have consistently earned significantly higher margins for electricity supply than for gas supply in the period 2005-07 and that this difference in margins was not justified by cost differentials. Ofgem noted that in effect this represents a large difference in prices offered to ‘dual fuel’ customers (those who buy electricity and gas from the same supplier) compared to those who source their electricity and gas from separate suppliers, or do not have access to the gas grid.
128. Ofgem has introduced (with effect from 1 September 2009) a modification to the standard conditions of the gas and electricity supply licences held by suppliers with over 50,000 household customers to deal with these concerns by prohibiting undue discrimination in terms and conditions offered to customers^{21,22,23}. This licence condition will expire on 31 July 2012 – a reflection of Ofgem’s expectation that the full package of measures proposed²⁴ to deal with concerns raised by the probe will have improved competition in the energy market to the extent that the licence condition is no longer necessary. Ofgem will, however, keep the situation under review.
129. Sections 41A and 41B of the Gas Act 1986 and sections 43A and 43B of the Electricity Act 1989 contain powers (not used to date) to allow the Secretary of State to adjust charges for gas or charges for electricity to help customers who are treated less favourably than others by their supplier. These powers do not currently allow the Secretary of State to intervene in cases where suppliers appear to be cross-subsidising their gas businesses from their electricity businesses and where, consequently, electricity-only customers are being treated less favourably, facing excessive prices not justified by cost differentials. This means that if Ofgem had not taken the action described above, the Secretary of State would have been unable to step in and the situation would not have been addressed.
130. These sections replace the powers in sections 41A and 41B of the Gas Act 1986 and sections 43A and 43B of the Electricity Act 1989. These new powers are derived from the pre-existing powers, but are amended to enable the Secretary of State to deal with situations where energy suppliers treat customers less favourably according to the type of energy supplied.

Commentary on Sections

Section 26: Adjustment of charges to help disadvantaged groups of customers

131. Subsection (1) gives the Secretary of State the power to make a scheme that will adjust charges for gas and/or electricity if the Secretary of State considers one set of

¹⁹ “Energy Supply Probe – Initial Findings Report”, Ofgem 140/08, 6 October 2008

²⁰ Centrica, EDF, EON, RWE Npower, Scottish Power and Scottish & Southern Energy

²¹ “Addressing undue discrimination – decision document”, Ofgem 72/09, 26 June 2009

²² “Notice of modification of the Standard Conditions of the Electricity Supply Licence requiring cost reflectivity between payment methods and prohibiting undue discrimination in domestic supply”, Ofgem 100/09, 7 August 2009

²³ “Notice of modification of the Standard Conditions of the Gas Supply Licence requiring cost reflectivity between payment methods and prohibiting undue discrimination in domestic supply”, Ofgem 101/09, 7 August 2009

²⁴ “Energy Supply Probe - Proposed Retail Market Remedies”, Ofgem 99/09, 7 August 2009

customers of a particular energy supplier are treated less favourably than another set of customers. Subsections (3) to (5) provide that these sets of customers can consist of any combination of the following: the electricity customers of that supplier, the gas customers of that supplier, customers that are supplied with both gas and electricity, or any sub-division of these groups. For example, electricity customers could be sub-divided into those who have access to the gas network and those who do not.

132. Subsection (6) specifies which energy charges (gas and/or electricity) the Secretary of State may consider. Subsection (7) allows the Secretary of State to make any appropriate calculations or assumptions to establish whether a particular set of customers is being treated less favourably when comparing different charges for the same type of energy, or charges for different types of energy.

Section 27: Schemes: supplementary

133. This section makes provision about energy charge adjustment schemes made under the powers in section 26. Subsection (1)(b) allows for the scheme to adjust the charges of the customers that the Secretary of State considers have been treated more favourably as well as those that have been treated less favourably. Subsections (2) and (3) require the scheme to describe the less favourably treated customers, specify the energy companies whose charges will be adjusted by the scheme and the geographical area to which the scheme applies (unless it covers Great Britain). Subsection (2) also requires the scheme to set out the basis for the adjustment of charges.
134. Subsection (4) enables the scheme to require energy companies to provide information to each other and provides for any necessary modification of licence conditions. This section closely follows subsections (2) to (5) of section 41A of the Gas Act 1986 and section 43A of the Electricity Act 1989.

Section 28: Regulations adjusting energy charges: supplementary

135. Subsection (2) requires the Secretary of State to give notice that it is proposed to make regulations to establish a scheme. Any such notice must be given before the regulations are made, and must set out the effect of the scheme and the reasons for making the scheme. The Secretary of State must give not less than 28 days for representations to be made in relation to the scheme. Subsection (3) provides that a copy of this notice must be given to the company whose energy charges will be covered by the proposed order and provides that the notice must be publicised sufficiently widely so that it will be seen by all those likely to be affected by it.
136. Subsection (4) provides that regulations will remain in force for the period specified in the regulations, and that the maximum period is three years, although further regulations may be made at the end of that period. Subsection (5) allows the Secretary of State to make regulations to require energy companies to provide information to each other for the purpose of enabling the making of regulations to establish a scheme.
137. Subsection (6) provides for Ofgem to monitor the effect of all regulations made under section 26 and report its findings to the Secretary of State. It also enables Ofgem to require energy suppliers to provide any information necessary for this purpose. Subsections (2) to (6) of this section closely follow subsections (1) to (5) of section 41B of the Gas Act 1986 and section 43B of the Electricity Act 1989.

Section 29: Adjustment of energy charges: interpretation

138. Subsection (2) allows regulations made by the Secretary of State to exclude certain sets of customers from being considered in relation to an energy charge adjustment scheme. Subsection (5) provides that the definition of 'energy supplier' includes electricity suppliers, gas suppliers, and suppliers of both gas and electricity.

PART 4: FINAL PROVISIONS

COMMENTARY ON SECTIONS

Section 30: General duties of the Authority and the Secretary of State

139. This section provides that in exercising any functions conferred by or under Part 2 or 3 of the Act, the Secretary of State and Ofgem are bound by the principal objective and general duties set out in Part 1 of the Electricity Act 1989 and Gas Act 1986 (as amended by sections 16 and 17).

Section 31: Orders and regulations

140. This section sets out the procedure for the Secretary of State to make orders and regulations under this Act. Regulations made under Part 1 (carbon capture and storage provisions), section 9 (schemes for reducing fuel poverty), section 15 (schemes for reducing fuel poverty: interpretation) or section 26 (adjustment of charges to help disadvantaged groups of customers) must be approved by both Houses of Parliament (subsection (2)).
141. Regulations made solely under section 6 (carbon capture and storage provisions: the administrator) and which do not contain provisions to amend an Act, regulations made under section 11 (reconciliation mechanism: regulations) and orders made under section 23 (expiry of power), section 28(5) (regulations adjusting energy charges: supplementary) or section 29(2) (adjustment of energy charges: interpretation) may be annulled by a resolution of either House of Parliament (subsections (3) and (4)).
142. Orders or regulations made under the provisions in this Act may include incidental, supplementary, consequential, transitory or transitional provision or savings (subsection (5)).
143. Regulations made under Part 1 (carbon capture and storage) or 2 (schemes for reducing fuel poverty) may impose obligations or confer functions on a person including the Secretary of State (subsection (6)). Regulations under Part 1 may amend Acts and Acts of the Scottish Parliament (subsection (7)).
144. The Secretary of State must obtain the consent of Scottish Ministers before making regulations under Part 1 which contain provisions that would be within the legislative competence of the Scottish Parliament if contained within an Act of that Parliament (subsection (8)).

Section 32: Modifications of licences etc: Parliamentary procedure

145. This section sets out the procedure that the Secretary of State must comply with in order to exercise the licence modification powers conferred by sections 18(1) or 25(1). Subsections (1) and (2) provide that before making modifications, the Secretary of State must lay a draft before Parliament and allow a period of 40 days for either House of Parliament to reject the draft. Subsections (5) and (6) specify how the 40-day period is to be calculated.
146. Subsection (2) means that if either House of Parliament resolves not to approve the draft then the Secretary of State cannot introduce the licence modification as drafted. In this situation, subsection (4) allows the Secretary of State to lay a new draft of the licence modifications before Parliament. Subsection (3) means that unless Parliament resolves not to approve the draft the Secretary of State will be free to make the modifications as drafted.

Section 33: Licence modifications etc

147. This section contains additional provision about the modification of licences under the powers in the Energy Act. In relation to the power to make modifications conferred by

section 12(1), section 18(1) or section 25(1), subsections (3) and (4) allow flexibility for the Secretary of State to exercise the power either generally, in relation solely to specified cases or subject to exceptions. Where the Secretary of State modifies a standard licence condition, Ofgem must incorporate the same modification in the standard conditions of licences subsequently granted and publish the modification (subsection (7)). Subsection (6) provides that the modification of part of a standard licence condition does prevent any other part of condition being regarded as a standard condition for the purposes of Part 1 of the Gas Act 1986 and Electricity Act 1989.

148. The Secretary of State must publish the details of any modifications made as soon as reasonably practicable (subsection (5)). This requirement also applies in relation to modifications under section 23(7) (subsection (2)).

Section 35: Consequential amendments

149. This section introduces the Schedule which contains consequential amendments to the Gas Act 1986, the Electricity Act 1989 and the Utilities Act 2000.

Section 38: Commencement

150. This section sets out the commencement dates for the provisions in the Act. Under subsection (3) all provisions will come into force two months after the Act receives Royal Assent, with the exception of provisions relating to the exploitation of electricity trading and transmission arrangements which will be commenced by order (subsection (2)) and Part 4 (Final provisions), (other than section 35 and the Schedule so far as they relate to the provisions about exploitation of electricity trading and transmission arrangements), which will come into force on the day the Act receives Royal Assent (subsection (1)).

SCHEDULE: CONSEQUENTIAL AMENDMENTS

151. This Schedule contains consequential amendments to the Gas Act 1986, the Electricity Act 1989 and the Utilities Act 2000. Paragraphs 2 and 6 make regulations under sections 9 and 11 and 26 to 29 of the Act a ‘relevant requirement’ for the purposes of the relevant provisions of the Gas Act 1986 and the Electricity Act 1989. This means that Ofgem may use their existing enforcement powers under those Acts if suppliers fail to comply with any regulations made under these sections.
152. Paragraphs 3, 4, 9, 10, 13 and 15 repeal sections 41A and 41B of the Gas Act 1986, sections 43A and 43B of the Electricity Act 1989 and sections 69 and 98 of the Utilities Act 2000 as these are replaced by sections 26 to 29.
153. Paragraphs 7 and 8 make appropriate changes to sections 27 (validity and effect of orders) and 27E (appeals) of the Electricity Act 1989 to remove the possibility, when the power in section 18(1) is exercised, of using the court-based appeals process that is available in respect of orders enforcing other licence conditions. This appeal process is not required in this context because of the provisions made in sections 20 and 21 for appeals to the CAT.
154. Paragraphs 12 and 14 amend sections 33(1) and 81(2) of the Utilities Act 2000 to ensure that the standard gas and electricity licence conditions incorporate modifications to the standard licence conditions made under the powers of the Act.
155. In amending section 105 of the Utilities Act 2000, paragraph 16 ensures that information about individuals that is obtained under Part 2 or sections 27 or 28 of the Act is protected generally from onward disclosure, but also ensures suppliers can share information about their activities under these sections of the Act for the purpose of facilitating the performance of Ofgem’s functions to monitor compliance with the schemes.

COMMENCEMENT DATES

156. [Parts 1, 2 and 3](#) of the Act, and (for certain purposes – see commentary on section 38 above) section 35 and the Schedule will commence 2 months after Royal Assent with the exception of the Market Power Licence Condition provisions which will be commenced by order. Part 4 (Final Provisions), apart from (for certain purposes) section 35 and the Schedule, will commence on the day of Royal Assent.

HANSARD REFERENCES

157. The following table sets out the dates and Hansard references for each stage of this Act's passage through Parliament.

<i>Stage</i>	<i>Date</i>	<i>Hansard reference</i>
House of Commons		
Introduction	19 November 2009	Vol. 501 Cols. 142 - 143
Second Reading	7 December 2009	Vol. 502 Cols. 41 - 123
Committee (Public evidence session)	5 January 2010 (am)	1 st sitting Cols. 1 - 36
	5 January 2010 (pm)	2 nd sitting Cols. 37 - 82
	7 January 2010 (am)	3 rd sitting Cols. 83 - 100
	7 January 2010 (pm)	4 th sitting Cols. 101 - 126
Committee	12 January 2010 (am)	5 th sitting Cols. 129 - 166
	12 January 2010 (pm)	6 th sitting Cols. 169 - 200
	14 January 2010 (am)	7 th sitting Cols. 203 - 226
	14 January 2010 (pm)	8 th sitting Cols. 229 - 276
	19 January 2010 (am)	9 th sitting Cols. 279 - 318
	19 January 2010 (pm)	10 th sitting Cols. 321 - 364
	21 January 2010 (am)	11 th sitting Cols. 367 - 388
	21 January 2010 (pm)	12 th sitting Cols. 391 - 442
Report and Third Reading	24 February 2010	Vol. 506 Cols. 329 - 413

House of Lords		
Introduction	25 February 2010	Vol. 717 Col. 1094
Second Reading	23 March 2010	Vol. 718 Cols. 901-946
Committee	7 April 2010	Vol. 718 Cols. 1571-1574
Report	7 April 2010	Vol. 718 Col. 1574
Third reading	7 April 2010	Vol. 718 Col. 1574

These notes refer to the Energy Act 2010 (c.27) which received Royal Assent on 8 April 2010

House of Commons		
Ping Pong	8 April 2010	Vol. 508 Cols. 1236-1241
Royal Assent – 8 April	House of Lords Hansard Vol 718, Col 1738	
	House of Commons Hansard Vol 508, Col 1256	

ANNEX A: GLOSSARY:

CAT – Competition Appeal Tribunal. The CAT hears appeals against competition law decisions of the Office of Fair Trading, sector regulators and the Competition Commission.

CCS – Carbon Capture and Storage is the process of capturing carbon dioxide produced during the burning of fossil fuels and its transportation and permanent storage in underground geological formations such as old oil and gas fields or saline aquifers.

ECHR – European Convention on Human Rights.

EU ETS – European Union Emissions Trading Scheme. EU ETS is a Europe-wide ‘cap and trade’ scheme which places a cap on the total emissions of participants, divides that cap into rights to emit or ‘allowances’, and allows participants to trade those allowances. Since 2005, it has set a declining cap on emissions from the large industrial sectors, including power.

IEA – International Energy Agency

MPLC – Market Power Licence Condition

Ofgem – Office of Gas and Electricity Markets. The independent regulator of the downstream gas and electricity markets.