

FLOOD AND WATER MANAGEMENT ACT 2010

EXPLANATORY NOTES

COMMENTARY

Part 2: Miscellaneous

Schedule 5: Special Administration

Transfer schemes

345. [Paragraph 1](#) amends Schedule 2 to the Water Industry Act 1991, which in certain circumstances allow a water or sewerage undertaker or qualified licensed water supplier to transfer its business (or part of its business) to a new appointee by way of a transfer scheme. A transfer scheme may be used to facilitate the smooth transfer of the business of a water company in special administration to the new appointee. Paragraph 1 removes the provisions requiring the consent of third party undertakers with an interest in the transfer before the transfer scheme is prepared, approved or modified.
346. [Paragraph 2](#) makes a further amendment to provide that a transfer scheme may not impose new liabilities on third party undertakers.

Objectives

347. [Paragraph 3](#) amends section 23 of the Water Industry Act 1991 to change the purposes of a special administration order where the water company is placed in special administration on the grounds that it is, or is likely to be, unable to pay its debts. The effect of new section 23(2B) is to require the special administrator to seek to rescue the water company as a going concern (the “rescue purpose”), rather than to transfer its business in accordance with the transfer purpose set out in section 23(2)(a) or (2A) (a). However, the special administrator must pursue the transfer purpose instead of the rescue purpose where the special administrator thinks that a rescue is unlikely to be possible or that the objectives of a special administration order would be better achieved through a transfer.
348. New section 23(2C), as read with the existing subsections (2)(b) and (2A)(b), places a duty on the special administrator to ensure that the water company properly carries out its statutory functions or licensed activities until the transfer purpose or the rescue purpose has been met.
349. New section 23(2D) allows the special administrator to propose a company voluntary arrangement under Part 1 of the Insolvency Act 1986 or a compromise, or arrangement in accordance with Part 26 of the Companies Act 2006 as part of a rescue package to be agreed with creditors.
350. New section 23(2E) to (2G) provides the Secretary of State with a regulation making power to modify the provisions in the Insolvency Act 1986 and the Companies Act 2006, in relation to these types of arrangements and compromises, and to make other additional provision about these types of arrangements and compromises in order to adapt them to water companies in special administration and meet the objectives of the

special administration regime. The regulations may in particular confer functions on the Secretary of State, the Welsh Ministers or the Water Services Regulation Authority. The Secretary of State can only make regulations with the consent of the Welsh Ministers and they are subject to the affirmative resolution procedure.

Financial assistance

351. [Paragraph 4](#) amends sections 153 and 154 of the Water Industry Act 1991, which contain provisions relating to the granting of financial assistance by the Secretary of State or the Welsh Ministers where a special administration order has been made.
352. Sub-paragraphs (2), (3) and (4) expand the power which enables the Secretary of State and the Welsh Ministers to offer indemnities to a special administrator, the employees and other members of the firm or body corporate in respect of liabilities or loss incurred or sustained under the order.
353. Sub-paragraph (5) provides that arrangements for grants, loans or indemnities made by the Secretary of State or the Welsh Ministers may continue after a special administration order ceases to have effect.
354. Sub-paragraphs (6) and (7) amend the provisions which require the Secretary of State and the Welsh Ministers to respectively inform Parliament and the National Assembly for Wales where a guarantee is given under section 154. Subsection (6) replaces a requirement on the Secretary of State and the Welsh Ministers to “immediately” lay details of any guarantees made in connection with a special administration order before Parliament or the National Assembly for Wales, as appropriate, with a requirement to lay the details “as soon as reasonably practicable”. Subsection (7) makes a similar change to the requirement to lay a statement of any sums paid by the Secretary of State or the Welsh Ministers, under a guarantee in connection with a special administration order. This means that in practice the laying of documents might be delayed until both Houses of Parliament or the National Assembly for Wales are sitting rather than during recess or some other time when they are not sitting.

Hive down

355. [Paragraph 5](#) inserts a new subsection into section 23 of the Water Industry Act 1991 to provide that where the transfer purpose is pursued, the special administrator may “hive down” or transfer the whole or part of the company’s business to a wholly-owned subsidiary of the company in advance of a transfer of the securities in that subsidiary to one or more new owners.
356. Sub-paragraphs (2) and (3) provide for the Secretary of State, with the consent of the Welsh Ministers, to make an order amending Schedule 2 to the Water Industry Act 1991 to allow the use of transfer schemes to transfer the whole or part of the business of a company in special administration by way of hive down. The order is subject to the affirmative resolution procedure.
357. Sub-paragraph (4) allows the hive down provisions to be applied to companies which went into special administration before commencement of these new provisions.

Application of general administration law

358. [Paragraph 6](#) replaces section 23(3) of, and Schedule 3 to, the Water Industry Act 1991. It applies Schedule B1 to the Insolvency Act 1986 (as inserted by the Enterprise Act 2002) to the special administration regime in place of older insolvency legislation that was generally replaced by Schedule B1, but preserved by the Enterprise Act 2002 for the purposes of the special administration regime. It also provides that the Secretary of State, with the consent of the Welsh Ministers, may make regulations to apply, disapply or modify Schedule B1, other Insolvency Act 1986 provisions and other relevant insolvency legislation for the purposes of the special administration regime.

Strategic supplies

359. [Paragraph 7](#) amends sections 66G(10) and 66H(10) of the Water Industry Act 1991. These sections allow the Water Services Regulatory Authority (Ofwat) to designate an introduction of water by a licensed water supplier as a strategic supply where, without the introduction or introductions, there would be a substantial risk that the undertaker would not be able to maintain supplies to all customers. The current definition of “customer” does not currently include licensed water suppliers who receive wholesale water supplies from the undertaker in order to supply their customers. The amendment in paragraph 7 ensures that the Authority can take wholesale supplies by the water undertaker to licensed water suppliers (and thereby their customers) into account when determining whether to designate one or more introductions of water by another licensed water supplier as a strategic supply.