

WATER SERVICES ETC. (SCOTLAND) ACT 2005

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Provision of Water and Sewerage Services

Scottish Water: water and sewerage services undertaking

Section 13: Water and sewerage services undertaking

51. Section 13 enables the Scottish Ministers to require Scottish Water to separate its retail functions from its wholesale functions, by creating a separate business undertaking. In this way it will be possible for this retail arm to be treated in the same way as any other service provider, under the licensing regime and by Scottish Water.
52. Subsection (1) provides that Scottish Water must comply with a requirement made on it to secure the establishment of a business undertaking. Subsection (2) provides that the Scottish Ministers may require Scottish Water to take such steps as Ministers specify for the purposes of, or in connection with, the establishment and development of, or Scottish Water's interest in, the undertaking; and to take these steps, or any particular steps, by such date as Ministers specify. Subsection (3) provides that it is for Scottish Water to determine, subject to Scottish Ministers' approval, whether the undertaking will be a subsidiary, company, or partnership, or be established through such other arrangements as it considers appropriate.
53. Subsection (4) provides that the functions of the undertaking established under subsection (1) are to become a water services provider and a sewerage services provider, and thereafter to carry out the functions authorised by those licences. Subsection (5) requires the undertaking to apply to become a water services and sewerage services provider as soon as reasonably practicable after it is established.
54. Subsection (6) confers an order-making power on the Scottish Ministers to prescribe that paragraphs 1 and 2 of schedule 2 to the Act, which make provision for licence applications and licence conditions, have effect subject to such modifications as are specified in the order, in relation to the first application for a licence made by the undertaking established under section 13. Section 34 of the Act provides that an order under this subsection is subject to negative procedure in the Parliament.
55. Subsection (7) allows the new undertaking to engage in any activity which it considers is not inconsistent with its activities as a water and sewerage services provider. The intention here is to ensure that the undertaking has the same freedom as any other licensed provider to offer its customers services in addition to those provided pursuant to its licence.
56. Subsection (8) requires Scottish Water to treat the new undertaking in the same way as it treats any other licensed water or sewerage services provider.
57. Subsection (9) confirms that references to Scottish Water in any enactment will henceforth be understood not to include the new undertaking established by this section,

to ensure that responsibility for all Scottish Water's statutory functions apply to Scottish Water as the public (wholesale) water supplier and sewerage provider in exercise of its core functions.

Section 14: Financing, borrowing and guarantees

58. Section 14 makes provision in relation to the funding of the undertaking established under section 13, and confers order-making powers on the Scottish Ministers to prescribe circumstances in which grants may be made to the undertaking, sums may be lent to it, financial obligations may be guaranteed in respect of it and in which equity may be provided to it. Section 34 of the Act provides that the order-making powers in subsections (1), (2), (6) and (9) of section 14 are subject to negative procedure in the Parliament.
59. Subsections (1) and (2) make provision for the Scottish Ministers to make grants to the undertaking, and for the undertaking to borrow from the Scottish Ministers and not (subject to the exception in subsection (4)(b)) from any other person, except Scottish Water. In each case, the circumstances in which this may occur and the amounts of any grant or loan will be specified in an order, and will be subject to the consent of Scottish Water.
60. Subsection (3) provides that in any financial year, the net amount (as defined in subsection (4)) of sums borrowed from the Scottish Ministers by the undertaking must not exceed the amount specified for that year in a Budget Act.
61. Subsection (5) provides that any loans made by the Scottish Ministers under subsection (2)(a) to the undertaking are to be repaid at such times and by such methods, as Ministers may from time to time specify; and Ministers can also specify the times and rates at which interest on such loans is to be paid.
62. Subsection (6) provides for an order-making power for Scottish Ministers to specify the circumstances in which they may guarantee a financial obligation entered into by the undertaking under subsection (4)(b), such as an overdraft or similar temporary borrowing arrangement. Subsection (7) provides that, immediately after a guarantee is given under subsection (6), the Scottish Ministers must lay a statement of the guarantee before Parliament. Subsection (8) provides that where any sums are paid out in fulfilment of a guarantee, the undertaking must repay to Ministers such amounts (with interest), as Ministers may specify.
63. Subsection (9) provides another order-making power for Scottish Ministers to specify circumstances in which they may, with the consent of Scottish Water, subscribe for share or loan capital of the undertaking.
64. Subsection (10) provides that any grants or loans made, or guarantees or subscriptions for share or loan capital given to the undertaking under section 14 are to be subject to such conditions as Scottish Ministers consider it appropriate to impose.

Section 15: Transfer of staff etc. to the undertaking

65. Section 15 provides for the transfer of staff, property and liabilities from Scottish Water to the new undertaking established under section 13 for the purposes that the undertaking is established to perform. It makes provision for the protection of the terms and conditions of employment of staff who are transferred to the undertaking.
66. Subsection (1) requires Scottish Water to comply with a requirement by the Scottish Ministers to transfer staff to the new undertaking for the purposes of it applying for water services and sewerage services licences and enabling the undertaking to carry out its activities as a licensed provider (these purposes are specified in subsection (8)).

*These notes relate to the Water Services etc. (Scotland) Act
2005 (asp 3) which received Royal Assent on 17 March 2005*

67. Subsection (2) provides that the contract of employment of any staff transferred under subsection (1) will not be terminated by the transfer, but will continue as if originally made between the person and the undertaking.
68. Subsection (3) provides that when staff are transferred to the undertaking, the undertaking will take on all rights, powers, duties and liabilities in relation to the contracts of employment of these staff and that anything done in relation to employees or their contracts before the transfer will continue to have effect after the transfer.
69. Subsection (4) states that the transfer under these provisions does not affect any person's right to terminate their contract of employment if their terms and conditions can be shown to have been changed substantially to their detriment. However, the fact that the identity of the person's employer has changed does not in itself constitute such a change.
70. Subsection (5) requires Scottish Water to comply with a requirement by the Scottish Ministers to transfer such property (including rights) and liabilities to the undertaking as necessary for the purposes specified in subsection (8). Subsection (6) provides that such a transfer may be to such extent and subject to such conditions as Scottish Water, with the consent of Scottish Ministers, may determine. Subsection (7) provides for the transfer of property and liabilities to have effect despite any provision which might otherwise prevent the transfer, and that the property and liabilities which are transferred are vested in the undertaking.