

# ENTERPRISE AND REGULATORY REFORM ACT 2013

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 6: Miscellaneous and General**

#### **Copyright and rights in performances**

##### *Section 74: Exploitation of design derived from artistic work*

515. [Section 74](#) repeals section 52 of the Copyright, Designs and Patents Act 1988 (“CDPA 1988”). The repeal of section 52 means that articles to which the section applies will have full copyright protection for the period of the life of the author plus 70 years. Accordingly, the exception provided by section 52 cannot be relied upon, and the copy of a copyright work will in future be an infringing copy. The [Copyright \(Industrial Process and Excluded Articles\) \(No.2\) Order 1989 No. 1070](#) made under section 52 would therefore cease to have effect.
516. [Section 52](#) applies where an artistic work, following the authorisation of the copyright holder, has been copied by an industrial process and marketed anywhere in the world. Twenty-five years after copies of the artistic work were first marketed, the work may be copied by third parties without infringing copyright. The 1989 Order also defines when an article is to be regarded as being made by an industrial process. This is where the article is one of more than 50 copies of an artistic work or it consists of goods manufactured in lengths or pieces except where those are hand-made. An example of the application of section 52 is as follows, a jeweller makes a ring which qualifies for copyright protection as a work of artistic craftsmanship. The ring is then manufactured with more than 50 copies being made and it is marketed throughout the world. Twenty-five years after the end of the year in which the ring was first marketed, third parties can make their own copies without infringing copyright in the original ring.
517. [Section 52\(6\)\(a\)](#) excludes films from the scope of the section. The [Copyright \(Industrial Process and Excluded Articles\) \(No.2\) Order 1989 No. 1070](#) made under section 52(4) also excludes from the scope of the section sculptures (other than casts or models used or intended to be used as models or patterns to be multiplied by any industrial process), wall plaques, medals and medallions and printed material primarily of a literary or artistic character.

##### *Section 75: Penalties under provision amending exceptions: copyright and rights in performances*

518. The section ensures that where section 2(2) of the European Communities Act 1972 (“ECA 1972”) is used to narrow or remove exceptions to copyright and performance rights the restriction to criminal penalties as detailed in paragraph 1 of Schedule 2 to the ECA 1972 does not apply and the current level of criminal penalties can be maintained.

519. Current penalties for copyright infringement exceed the limits provided for implementation under the ECA 1972. For example the current maximum terms of imprisonment in the most serious cases of copyright infringement are set by section 107 of the CDPA 1988 (which was amended by the Copyright etc. Trade Marks (Offences and Enforcement) Act 2002) at ten years on indictment and six months for summary offences. According to paragraph 1 of Schedule 2 to the ECA 1972 the penalties which can be imposed by regulations which are made under that Act are restricted. The maximum term of imprisonment that can be applied is three months for summary offences and two years for those on indictment.

***Section 76: Power to reduce duration of copyright in transitional cases***

520. **Section 76** amends section 170 of the CDPA 1988 (transitional provisions and savings) and gives the Secretary of State a power to reduce the duration of copyright in certain unpublished works which are currently subject to the transitional provisions (set out in Schedule 1 of the CDPA 1988). The section allows for regulations to provide for different provisions for different types of work and of different ages. This would mean that recent works, for example, could be treated differently to centuries' old works.
521. Under this section, no works will receive a shorter term of copyright protection than set out in the EU Term Directive. For example, for literary works by a known author, the standard term is life of the author plus 70 years. Where an author is unknown, the standard term is 70 years from the year in which the work was created or first made available.
522. Currently, some works caught by the existing transitional provisions enjoy copyright protection until 2039 if this date falls after the standard terms set out in the EU Term Directive [2006/116/EC](#). This means that works such as centuries' old unpublished manuscripts in archives, libraries and museums are still in copyright. Also, recent unpublished works that were in existence when the CDPA came into force such as unpublished minutes of meetings from the 20th century, where the author died before 1st January 1969, remain in copyright until 2039. These unpublished works enjoy a period of copyright protection longer than the standard terms set out in the EU Term Directive.
523. Many of these unpublished works are orphan works because it is not possible to contact the rights holder, who may be a long lost historical figure or a beneficiary who cannot be located, to ask permission to use them. By reducing the term of copyright protection to the standard terms, many of these works will fall into the public domain and could be made accessible to the public by archiving institutions.
524. Unpublished films and unpublished photographs are excluded from the section because of the possibility of their being exploited commercially without having been published.

***Section 77: Licensing of copyright and performers' rights and Schedule 22:  
Licensing of copyright and performers' rights***

525. **Section 77** inserts new provisions into the CDPA 1988. This will allow (through regulations) for a system for the licensing of "orphan works" (works for which the copyright owner/s is not known or cannot be located), the authorisation of applications to operate voluntary extended collective licensing schemes, and a reserve power which could be used to require a collecting society to adopt a code of practice.
526. The section responds to recommendations to modernise copyright licensing made in the Hargreaves Review of Intellectual Property and Growth. These recommendations were broadly accepted by Government and the proposals contained in this section were subject to consultation in 2011-12.
527. **Subsection (2)** inserts provisions into section 116 of the CDPA 1988 which enable the Secretary of State to make regulations to require a licensing body (usually known

as a collecting society) to adopt a code of practice that must be consistent with criteria specified in the regulations. The power includes provision for enforcement and sanctions where a licensing body fails to comply with the provisions contained in their codes of practice. The details of the power are described in Schedule 22 of the Act which inserts a new schedule into the CDPA 1988. This provides a backstop power to put in place statutory codes in the event that self-regulation fails. Under self regulation collecting societies will adopt and adhere to codes of practice containing minimum standards set by Government.

528. *Subsection (3)* introduces a series of new sections to follow section 116 of the CDPA 1988, which makes provision regarding the licensing of copyright works. These are:

- section 116A, which gives the Secretary of State power to appoint a body or bodies to license the use of orphan works through secondary legislation. Orphan works are copyright works (such as books, photographs, films and music) for which one or more of the copyright owners is unknown or cannot be found. Public and private libraries, archives, museums and galleries may hold the original or a copy of such works but, without the permission of one or all of the rights holders, they are limited in what they can do to make such works available to the public without threat of legal challenge. These works could include published or broadcast works or unpublished works such as diaries and photographs.
- section 116A also sets out the areas which the regulations on orphan works will cover. Under the regulations the Secretary of State may appoint appropriate bodies - this can never be a body which wishes to use the work – to license orphan works. The regulations will also set out the requirements for the diligent search that must be conducted by potential licensees before a work qualifies as an orphan work. In addition, the section states that the regulations may apply where it is not clear whether an orphan work is in copyright or not as may be the case when the date of the author's death is not known. The regulations limit the licences to non-exclusive rights so that more than one person or organisation can obtain a licence to use the same work. Subsection (6) of section 116A includes provisions for dealing with the possible re-appearance of the copyright holder while the licence is extant and for orphan works registers.
- section 116B, which creates a power to enable the Secretary of State to make regulations for the authorisation of applications by licensing bodies to operate voluntary extended collective licensing schemes. Subsections (2) to (6) describe limitations that would apply to any such schemes, including the stipulation that a rights holder must have the ability to opt out of any extended collective licensing scheme. Currently, a collecting society can only license on the basis of express permissions to do so from its members, the copyright owners. A collecting society which applied and was authorised to operate an extended collective licensing scheme would be able to grant non-exclusive licences for specified uses of copyright works on behalf of all rightsholders, of works of the type covered by the scheme. Rights holders who chose to opt out would not be covered by the scheme.
- section 116C, which makes general provision about the powers in sections 116A and 116B. It states that the Secretary of State can impose conditions on any body authorised to license in accordance with 116A or 116B. It also makes provision regarding the treatment of fees, royalties and other sums paid in respect of a licence in relation to orphan works licensing and extended collective licensing. The section allows the Secretary of State to define what happens to end orphan work status and what happens if a rights holder wishes to opt out of an extended collective licensing scheme that is already operational.
- section 116D, which makes general provision about the regulations which could be made using the powers in this section. These include that regulations would be made by the affirmative procedure.

## **Part 1, Schedule 22: Regulation of licensing bodies**

### Codes of Practice

529. Paragraph 1 of Schedule 22 inserts a new Schedule A1 into the CDPA 1988. Paragraphs 1 and 2 of Part 1 of Schedule A1 enable the Secretary of State to establish procedures, through secondary legislation, to require a licensing body to adopt a code of practice that complies with criteria specified in the regulations. This is intended to be used where a licensing body fails to adhere to a self-regulatory code containing minimum standards set by Government.

### Licensing code ombudsman

530. [Paragraph 3](#) enables the Secretary of State to make provision for the appointment, remit and powers of an Ombudsman to investigate disputes.

### Code reviewer

531. [Paragraph 4](#) enables the Secretary of State to make provision for the appointment, remit and powers of a person to review and report on compliance with the codes of practice adopted by licensing bodies. It makes further provision for the provision of information to the code reviewer and for payments to him.

### Sanctions

532. [Paragraph 5](#) makes provision through the regulations for sanctions, including financial penalties (at a maximum £50,000), to apply to licensing bodies for failures to comply with requirements set out in the regulations. There are provisions for the imposition of sanctions on a director, and other responsible personnel, where that is deemed appropriate. The regulations must also include provisions for a licensing body to appeal against the imposition of a sanction or penalty.

### Fees

533. [Paragraph 6](#) enables the Secretary of State to charge fees to a licensing body that becomes subject to statutory regulation. The amount charged in fees must not be more than the cost of administering the regulation.

### General

534. [Paragraph 7](#) sets out the ambit of any regulations made under this Schedule.
535. Regulations would be made by the affirmative procedure.

## **Part 2, Schedule 22: Performers' rights**

536. [Part 2](#), Schedule 22 makes a number of amendments to Schedule 2A to the CDPA 1988, which makes provision for the licensing of performers' rights. They will have the effect of making equivalent provision in relation to these rights which apply to the licensing of copyright as set out at section 77. That is they mirror the provisions made for copyright in works for copyright in performer's rights. New paragraph 1A covers the licensing of "orphan works", new paragraph 1B the voluntary extended collective licensing scheme and new paragraphs 1C and 1D covers both the "orphan works" and voluntary extended collective licensing schemes.

### ***Section 78: Penalties under provision implementing Directive on term of protection***

537. This section ensures that when section 2(2) of the ECA 1972 is used to implement EU Directive 2011/77/EU on the term of protection of copyright and certain related rights the restriction to criminal penalties as detailed in paragraph 1 of Schedule 2 to the ECA 1972 does not apply and the current level of criminal penalties can be maintained.
538. The primary function of the Directive is to extend the copyright term for sound recordings and performers' rights from 50 to 70 years. The impact of extending the duration of copyright term in the way proposed by the Directive will be to criminalise acts which under the current law would be lawful.

539. Current penalties for copyright infringement exceed the limits provided for implementation under the ECA 1972 . The current maximum terms of imprisonment for the most serious cases of copyright infringement are set by section 107 of the CDPA 1988 (as amended by the Copyright etc. Trade Marks (Offences and Enforcement) Act 2002) at ten years on indictment and six months for summary offences. According to paragraph 1 of Schedule 2 to the ECA 1972 the penalties which can be imposed by regulations which are made under that Act are restricted. The maximum term of imprisonment that can be applied is three months for summary offences and two years for those on indictment.

### **Payments to directors of quoted companies** Summary and Background

540. Under the CA 2006, quoted companies<sup>1</sup> are required to produce a directors' remuneration report (section 420) as part of the annual reports and accounts, and to put this directors' remuneration report to the company's members at the annual general meeting. At the meeting, shareholders are asked to approve the report by means of an ordinary resolution (section 439). This resolution is 'advisory' in nature and the company is not required by law to take any action in response to the vote. As such, no individual directors' pay is contingent on the outcome of the vote.

#### ***Section 79: Members' approval of directors' remuneration policy***

541. *Subsection (1)* inserts a new subsection (2A) into section 421 (Content of directors' remuneration report) of the CA 2006 and requires that, in making regulations on the required content of a directors' remuneration report, the Secretary of State must specify that the company's policy on remuneration of directors must be in a separate part of the report.
542. *Subsection (2)* inserts a new section 422A which makes it possible for a company to revise the directors' remuneration policy part of the directors' remuneration report. Section 422A(5) applies certain provisions in the CA 2006 to the revised report, as they apply to a directors' remuneration report.
543. *Subsection (4)* inserts a new section 439A of the CA 2006 alongside the existing requirement under section 439 (Quoted companies: members' approval of directors' remuneration report) to put the directors' remuneration report to a shareholder resolution at every accounts meeting. This new section provides for a separate shareholder resolution on the directors' remuneration policy part of the directors' remuneration report.
544. Section 439A(1) requires companies to put the directors' remuneration policy to a shareholder resolution at an accounts or other general meeting in the first financial year commencing on or after the day on which the company becomes a quoted company, and at least every three financial years thereafter.
545. Section 439A(2) has the effect of requiring companies to put the directors' remuneration policy to a shareholder resolution at the accounts meeting if, at the last accounts meeting, the shareholder resolution on the directors' remuneration report put forward under section 439 of the CA 2006 was not passed; and if, at that last accounts meeting or other general meeting held since, there was no shareholder resolution on the directors' remuneration policy under section 439A.
546. Section 439A(5) applies subsections (2) to (4) of existing section 439 of the CA 2006 to section 439A, therefore requiring: notice to be given in any manner permitted for the service on the member of notice of the meeting; for the business of the meeting to include the resolution; and for the existing directors to ensure the resolution is put to the vote of the meeting.

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<sup>1</sup> Quoted company, as defined in section 385 of the Companies Act 2006.

***Section 80: Restrictions on payments to directors***

547. **Section 80** makes provision about the effect of the shareholder resolution on the directors' remuneration policy provided for by section 79. It inserts a new Chapter 4A into the part of the CA 2006 which deals with payments to directors.
548. Section 226A defines the type of remuneration payments to people who are directors, are to be directors, or have been directors, and payments for directors' loss of office, to which the rest of the Chapter applies.
549. Sections 226B and 226C place restrictions on the remuneration payments and payments for loss of office that can be made to directors of quoted companies. All such payments to directors will need to be consistent with the directors' remuneration policy of the company of which the person is a director. Alternatively, payments will need to be approved by a separate shareholder resolution.
550. Section 226D specifies the process by which a company must approve a remuneration payment or payment for loss of office as part of a separate shareholder resolution under section 226B(1)(b) or 226C(1)(b). The details of any proposed payment, including an explanation of how it is inconsistent with the approved directors' remuneration policy, will need to be set out in a memorandum made available to shareholders. Subsection (6) of section 226D will mean that the restrictions on payments to directors contained in the new Chapter 4A will not apply to a payment made by a company until the earlier of the end of the financial year which begins on or after the day on which it becomes a quoted company or the date on which the company decides the first directors' remuneration policy approved under section 439A is to take effect for the purpose of Chapter 4A.
551. Section 226E clarifies the consequences of making payments which are not either consistent with the last directors' remuneration policy to have been approved by shareholders, or approved by a specific shareholder resolution. In doing so, it makes provision comparable to existing section 222 of the CA 2006 (Payments made without approval: civil consequences) relating to the consequences of making unapproved payments to directors.
552. Section 226E, subsection (1), will mean that any legal obligation, such as a contract with a director, which gives rise to a payment to a director which would be deemed unauthorised under section 226B or 226C, is unenforceable.
553. Section 226E, subsection (5), provides a court the discretion to decide, having regard to all the circumstances of the case, to relieve a director from liability in proceedings brought under section 226E if that director can prove that he or she acted honestly and reasonably.
554. Certain transactions such as substantial property transactions, loans and certain credit transactions require approval by a resolution of members under Chapter 4 of Part 10 of the CA 2006. Section 226F has been included because of the possibility that a transaction dealt with in Chapter 4 might also be regarded as a remuneration payment or loss of office payment for the purposes of Chapter 4A. In a case where approval under Chapter 4 and approval under section 226B(1)(b) or 226C(1)(b) would otherwise be required, section 226F(2) ensures that approval under Chapter 4 is sufficient for both purposes. The company will not be required to seek approval through two separate resolutions.

***Section 81: Payments to directors: minor and consequential amendments***

555. *Subsection (3)* amends section 190 of the CA 2006 to preserve the existing position that transactions relating to payments for loss of office to directors of quoted companies are not subject to the requirements of Chapter 4 of the CA 2006 relating to substantial property transactions.

556. *Subsection (4)* disapplies existing provisions on payments for loss of office in sections 216 to 222 (inclusive) of the CA 2006 for those companies (i.e. quoted companies falling within section 385) that will in future be required to comply with the new sections on the directors' remuneration policy and payments to directors, from the point at which Chapter 4A applies to those companies. Sections 216 to 222 (inclusive) of the CA 2006 will continue to apply to all other types of companies.
557. *Subsection (6)* inserts two new subsections into the existing section 430 of the CA 2006 (Quoted companies: annual accounts and reports to be made available on website). Subsection (2A) requires that any revised directors' remuneration policy (as revised under new section 422A) is to be made available on the company's website in the same manner as other reports and accounts. Subsection (2B) requires that companies publish, in a similar manner, details of payments for loss of office and remuneration payments made or to be made to a departing director as soon as reasonably practicable after a person ceases to be a director. *Subsections (7) to (9)* make further minor amendments to section 430 to clarify the process by which information under sections 430(2A) and 430(2B) must be made available.
558. *Subsection (10)* amends existing section 440 of the CA 2006 (Quoted companies: offences in connection with procedure for approval) so as to preserve the criminal offences that are committed where there is a failure to comply with the requirements about giving notices, and putting resolutions to the vote, in relation to directors' remuneration reports (including the part of the report containing the directors' remuneration policy).

### ***Section 82: Payments to directors: transitional provision***

559. *Subsection (1)* specifies that companies that are quoted companies on the day immediately before section 79 comes into force will be required to give notice of the intention to move, as an ordinary resolution, a resolution approving the relevant directors' remuneration policy at the accounts meeting in the first financial year which begins on or after the day section 79 comes into force, or at an earlier general meeting.
560. *Subsection (2)* specifies that where a company is a quoted company on the day immediately before section 79 comes into force, a remuneration or loss of office payment made to a director in the first financial year to begin on or after the day section 79 comes into force will not be subject to the restrictions set out in section 226B or 226C (unless the company has decided that the first directors' remuneration policy approved under section 439A should take effect on a date before the end of that year).
561. *Subsection (3)* excludes from Chapter 4A payments required to be made to directors under agreements entered into, or under other obligations arising, before 27 June 2012.
562. *Subsection (4)* has the effect of treating agreements entered into, or other obligations arising, before 27 June 2012 but which are modified or renewed on or after that date, as having been made on the date of the modification or renewal. The effect of this is that, if an agreement is changed or renewed after that date, a requirement to make payment under that agreement will be subject to the restrictions in Chapter 4A.
563. *Subsection (5)* will mean that sections 216 to 222 of the CA 2006 will continue to apply to payments for loss of office which are, for the reasons set out in subsection (3), not covered by the proposed new Chapter 4A.

### **Redress schemes for lettings agency work and property management work Summary and Background**

564. **Sections 83 to 88** introduce powers for the Secretary of State to require persons who engage in lettings agency work and property management work in respect of dwelling-houses in England to belong to an approved redress scheme or government administered redress scheme. The intended effect is that complaints against all (or a specified class

of) such persons conducting such activities could be investigated and determined by an independent person.

***Section 83: Redress schemes: lettings agency work***

565. This section introduces powers for the Secretary of State to require persons who engage in lettings agency work to be members of a redress scheme for dealing with complaints in connection with that work.
566. *Subsection (1)* provides that a redress scheme for these purposes may either be a scheme that is approved by the Secretary of State or a scheme that is administered by or on behalf of the Secretary of State and designated for such purposes. Whilst, the expectation is that third parties would come forward with schemes for approval, the power to create a government administered redress scheme could be invoked if, for example, schemes capable of being approved were not available or in case it were considered necessary to introduce a government administered scheme as a response to existing approved schemes being discontinued.
567. *Subsection (6)* requires the Secretary of State to be satisfied that all persons who are to be subject to the duty will be eligible to join a redress scheme before the duty applies to them. This is to provide a safeguard against letting agents being in breach of a duty that they do not have the ability to satisfy.
568. *Subsection (7)* defines lettings agency work as work undertaken on behalf of prospective landlords or prospective tenants and covers the process both of finding a tenant for the landlord or a property for the tenant and the work done to put the tenancy in place. It applies only to privately rented homes in England (see the commentary on subsection (10) below).
569. *Subsections (8) and (9)* exclude certain organisations from the requirement to belong to a redress scheme. Subsection (8) mirrors the amendment made to the Estate Agents Act 1979 by section 70 by excluding from that requirement those businesses that simply allow landlords and tenants to find and communicate with one another, provided they do not otherwise participate in the transaction.
570. *Subsection (9)* provides that local authorities are not included and thereby ensures that, for example, any local letting agency business established by local authorities is not caught by section 83. The Local Government Ombudsman already provides a mechanism for people to complain against local authorities. However, there is nothing to stop a local authority which undertakes any work that would (in the absence of subsection (9)) fall within section 83 from choosing to join a redress scheme approved under this section (see section 88 (Redress schemes: supplemental) (5)). Subsection (9) also gives powers to the Secretary of State to exclude other activities by order.
571. This section applies only to properties that are to be let under a domestic tenancy. *Subsection (10)* defines a domestic tenancy as an assured tenancy under the Housing Act 1988, other than a long lease or a tenancy granted by a private registered provider of social housing. Assured tenancies are the most common type of tenancy in the private rented sector. Subsection (10)(b) gives the Secretary of State power to add other types of tenancy to the definition of a domestic tenancy; however, *subsection (11)* ensures that such an order cannot include a long lease or any property let by a local authority or private registered provider of social housing.
572. Long leases are excluded under subsection (10), on the basis that agents handling the sale of long leases are already covered by the Estate Agents Act 1979. Private registered providers of social housing are excluded as the intention is that the section should apply to the private rented sector, not to social housing.



**Section 84: Redress schemes: property management work**

573. This section introduces powers for the Secretary of State to require persons who engage in property management work to be members of a redress scheme for dealing with complaints in connection with that work.
574. *Subsection (6)* defines property management work. The premises managed must be located in England and consist of or include a dwelling-house let under a relevant tenancy (as defined in *subsection (8)*). *Subsection (7)* excludes property management work undertaken by local authorities and private registered providers of social housing and enables the Secretary of State to exclude other activities from the scope of property management work. Local authorities and private registered providers of social housing are excluded by *subsection (6)* as Schedule 2 to the Housing Act 1996 already requires those landlords to belong to an approved Scheme. The approved scheme under that Act is the Housing Ombudsman Service.
575. *Subsection (8)* defines a relevant tenancy as an assured tenancy (which is the most common type of tenancy in the private rented sector); a regulated tenancy under the Rent Act 1977 (which applies to tenancies in the private rented sector granted before 15 January 1989); or a long lease of residential property. *Subsection (8)* also enables the Secretary of State to designate further types of tenancy as a ‘relevant tenancy’; however *subsection (9)* ensures that a business lease cannot be a ‘relevant tenancy’.

**Section 85: Orders under section 83 or 84: enforcement**

576. *Subsection (1)* enables the Secretary of State to prescribe the sanctions that may apply for the breach of an order made under sections 83 and 84 and to make provision for investigation of suspected breaches. *Subsection (2)* sets out the sanctions which the Secretary of State may impose.
577. *Subsections (3) to (5)* set out further matters relating to enforcement, including the requirement that provision must be made for appeals to a court or tribunal and the ability to confer responsibilities for enforcement on (and pay money to) persons that exercise functions of a public nature.

**Section 87: Approval of redress schemes for the purposes of section 83 or 84**

578. *Subsection (1)* introduces powers for the Secretary of State to prescribe the procedure for the approval of redress schemes, including such matters as the making of applications, the conditions to be satisfied before approval is given, the conditions which must be complied with by administrators of schemes and the withdrawal of approval.
579. *Subsection (2)* makes provision for the Secretary of State to set out the conditions which must be satisfied in order for a government-administered redress scheme to be designated.

**Section 88: Redress schemes: supplemental**

580. *Subsections (1) to (4)* make provision in relation to the order making powers of the Secretary of State under sections 83 (Redress schemes: lettings agency work); 84 (redress schemes: property management work) and 87 (Approval of redress schemes for the purposes of section 83 or 84).
581. *Subsection (5)* clarifies that nothing in sections 83 to 87 prevents a redress scheme from: providing for membership by persons who are not subject to the duty to belong to a scheme; investigating and determining complaints not covered by the duty, where members have voluntarily chosen to accept the jurisdiction of the scheme; or excluding complaints from the scheme in specified cases or circumstances.

## **Supply of customer data**

### **Summary and Background**

582. These sections reflect the Government's desire for customers to have electronic access to details of transactions they enter into when buying goods and services, which they can then use to inform future purchasing and consumption behaviours.
583. The Government's view is that a consumer who can make informed decisions about the goods and services they buy is more likely to seek better quality and value for their money, which in turn can help stimulate competition.
584. Existing legislation, notably the Data Protection Act 1998, gives customers access to their data but in a format to be determined by the provider, which may therefore be hard copy only. This does not allow them easily to use that information to compare prices or interrogate their consumption behaviour.
585. The Government has been working with suppliers in certain sectors to develop a voluntary programme for the release of electronic data to customers. These sections provide a backstop power for the Secretary of State to make regulations (a) requiring regulated persons to supply their customers, on request, with transaction data held in electronic form, and (b) providing an enforcement regime in the case of non-compliance.

### ***Section 89: Supply of customer data***

586. *Subsection (1)* contains the substantive power of the Secretary of State to make regulations. It enables provisions to be made compelling a "regulated person" (as defined in subsections (2) and (10)) to provide "customer data" (as defined in subsection (3)) to a customer at their request or to a person authorised by the customer to receive it ("the customer data regulations").
587. *Subsection (2)* identifies four types of supplier who may be required to supply data (energy suppliers, mobile phone network providers, and financial services providers offering current accounts or credit cards). Subsection (2)(d) provides the power to designate other regulated persons although before doing so the Secretary of State has to have regard to a number of factors set out in *subsection (7)*.
588. *Subsection (3)* defines "customer data" as information held electronically by or on behalf of the regulated person and that relates to transactions between the regulated person and the customer. For example this could be a customer's purchasing history represented by a quarterly energy statement. It does not extend to data not already held in electronic form.
589. *Subsection (9)* describes what is meant by a customer for the purpose of this section. It covers persons who have at any time purchased goods or services from the regulated person or received them free of charge from them. The intention is that this should generally apply to consumers (subsection (9)(b)(i)) but subparagraph (ii) allows this to be extended to specified forms of business. This is most likely to be used to treat micro businesses (who, like consumers, may suffer difficulties in identifying their consumption behaviour) as customers for these purposes.
590. *Subsections (4) and (5)* make further provision about the scope of the power, including allowing the regulations to specify the format and timeframe in which the data is to be delivered and to permit the regulated person to charge for the supply of data (though any such charge could not exceed the cost borne by the supplier in providing the data).
591. *Subsection (8)* is included to give the Secretary of State the flexibility to apply the regulations in different ways depending on the types of regulated person, customer or customer data, but also depending on where in the UK those persons are located. It also enables regulations to provide for exceptions from any requirement imposed by them, including if the cost of compliance proves to be prohibitive (subsection (8)(d)).

***Section 90: Supply of customer data: enforcement***

592. This section empowers the Secretary of State to make provision for the enforcement of the customer data regulations. It provides for a model of civil enforcement as opposed to criminal penalties (subsection (2)) and enables regulations to be made allowing customers to bring their own actions for breach of the regulations before a court or tribunal (subsection (5)). By virtue of *subsections (6) and (8)* some of the provisions of section 89 apply to this section also.
593. *Subsection (1)* identifies the Information Commissioner as a potential enforcer but empowers the Secretary of State to designate other persons to act as enforcers. The regulations may also designate more than one enforcer and provide for their functions to be exercisable concurrently or jointly (see further the explanation of subsection (4) below).
594. *Subsection (2)(a) and (b)* set out the enforcement options referred to above. The regulations will be able to provide for enforcers to apply to a court (or tribunal) for an order that a regulated person comply with the regulations. Alternatively an enforcer may be allowed to serve an enforcement notice on a regulated person without a court order. In both cases breach of the order/notice could amount to a contempt of court.
595. *Subsection (3)* provides that regulations may confer on enforcers investigatory powers to enable them to fulfil their functions. The regulations may also set out sanctions for non-compliance with requirements made by an enforcer when exercising its investigatory powers (for example if a regulated person fails to provide information on request). The words in parenthesis in subsection (3)(b) make clear that the enforcement provisions should be comparable to those for breach of the customer data regulations (namely civil enforcement not criminal penalties).
596. As explained above, under *subsection (4)(b)* provision can be made for functions to be exercisable by more than one enforcer, whether concurrently or jointly. Where functions are exercised concurrently, *subsection (4)(c)* allows the regulations to make provision for a lead enforcer to take on a co-ordination role, namely to direct which enforcer can act in a particular case. To assist with that role, that subsection also allows the regulations to require the other enforcers to consult with the lead enforcer before exercising enforcement functions.
597. Finally, *subsection (4)(a)* enables regulations to be made requiring an enforcer (if not the Information Commissioner) to inform the Commissioner if they intend to exercise functions under the regulations. The intention is to make the Commissioner aware of potential breaches of the customer data regulations in case they raise wider subject access issues.

***Section 91: Supply of customer data: supplemental***

598. This section provides for supplemental matters including the power to make consequential amendments to legislation and to enable a person to exercise a discretion in a matter such as the exercise of the powers conferred by these sections (*subsection (1)*). It also describes the Parliamentary procedure for the regulations; those made under section 89 are subject to the negative resolution procedure, except where regulations are applied to persons by virtue of section 89(2)(d) in which case the affirmative resolution procedure is to be used. Regulations made under section 90 are also subject to the affirmative resolution procedure as are any instruments that make regulations under section 89(2)(d) or 90 together with any other provision under section 89.

## **Insolvency: protection of essential supplies**

### ***Section 92: Power to add to supplies protected under the Insolvency Act 1986***

599. This section gives the Secretary of State a power to make an order amending sections 233 and 372 of the Insolvency Act 1986 (“IA 1986”). These sections currently allow for certain providers of gas, electricity, water and communications services (“utility supplies”) to seek a personal guarantee from an insolvency practitioner before continuing to supply an insolvent business and prevent such suppliers from demanding that pre-insolvency arrears are cleared as a condition of continuing supply.
600. *Subsections (1) and (2)* provide a power to enable IT suppliers to be added to the present list of utility supplies to which sections 233 and 372 apply. This reflects the increasing importance of IT supplies to the functioning of modern businesses since these two sections were enacted.
601. *Subsections (1) and (2)* also enable the Secretary of State to widen the application of these provisions to providers of utility services who are not presently covered by sections 233 and 372. The Government considers this is necessary in order to be able to reflect the way the utility and telecoms markets have evolved and deregulated since these statutory provisions were enacted.

### ***Section 93: Corporate insolvency: power to give further protection to essential supplies***

602. This section gives the Secretary of State a power to make an order that renders void certain contractual terms in contracts for the supply of essential goods or services where a company goes into administration or a voluntary arrangement takes effect if certain conditions are met. The supplies that may be protected are those to which section 233 applies, i.e. supplies of gas, electricity, water, communications and IT supplies if added through exercise of the power in section 92.
603. *Subsection (2)* requires the provision of express safeguards that must be included in an order made under this power. Those safeguards include granting the right to a supplier to terminate a contract of supply where any charges for post-insolvency supply remain unpaid after 28 days beginning with the day on which payment is due regardless of the terms of the contract. A supplier may also terminate the contract if given permission by the insolvency office-holder or by the court.
604. *Subsection (3)* requires a further safeguard to be provided for affected suppliers by giving such suppliers a right to request a personal guarantee for payment from the insolvency office-holder as a condition of continuing the supply. *Subsection (4)* provides scope for the Secretary of State to provide exceptions to this right.
605. *Subsection (5)* gives the Secretary of State the power to add any other safeguards that might be felt necessary, in order to protect suppliers who may be affected.
606. *Subsection (7)* defines which contractual terms may be rendered void by the order for the purposes of this power. These are those contractual terms that would allow providers of essential IT or utility supplies to alter the terms of a contract or withdraw the supply from an insolvent company on account of the insolvency. It also includes those that allow a supplier to terminate the contract on account of a termination event that occurred before the insolvency but which had not been exercised by the time of insolvency.

### ***Section 94: Individual insolvency: power to give further protection to essential supplies***

607. This section makes comparable provision to section 93 for cases where an individual becomes subject to an individual voluntary arrangement. *Subsection (2)* provides that this power is restricted to supplies made to individuals subject to an individual voluntary arrangement for the purpose of carrying on a business.

***Section 95: Sections 93 and 94: supplemental***

608. This section gives the Secretary of State the power in an order under sections 93 and 94 to make different provision for different cases, to provide for persons to exercise discretion and to make incidental, supplementary, consequential and transitional or saving provision in relation to the exercise of the powers. It also restricts the powers so that they may not be exercised retrospectively in a way which would affect contracts of supply which pre-date the introduction of any order made and ensures that any order made is subject to the affirmative resolution procedure.

**Royal Charters**

***Section 96: Royal Charters: requirements for Parliamentary approval***

609. On 29th November 2012 the Report of An Inquiry into the Culture, Practices and Ethics of the Press was presented to Parliament (HC 780) (“the Leveson Report”). In the report, the Rt. Hon. Lord Justice Leveson makes a range of recommendations to reform the regulatory framework for the press, creating a new system for press regulation, with the principle of industry self-regulation at its heart. One of the recommendations of the Leveson Report was that a body should be given responsibility for recognising whether any independent self-regulator established by the press met certain criteria (principally set out in recommendations 1 to 24 of the Leveson Report). On 18<sup>th</sup> March 2013, the Government published and laid before Parliament its proposals for a royal charter for the establishment of such a body, with the agreement of the Official Opposition.
610. **Section 96** will apply to a body established by a Royal Charter after 1<sup>st</sup> March 2013 where the Charter contains a requirement that Parliament must approve amendments to the Charter or the dissolution of the body the Charter establishes. It will provide that such a requirement contained in the Charter on the date it is granted must be satisfied before steps can be taken to recommend, via the Privy Council, dissolution or amendment to Her Majesty in Council.

**Caste as an aspect of race**

***Section 97: Equality Act 2010: caste as an aspect of race***

611. This section amends section 9(5) of the Equality Act 2010 so as to place a duty on a Minister of the Crown to make an order which includes “caste” within the definition of “race” in section 9 of that Act.
612. Under section 9(5)(b), a Minister of the Crown may also by order amend that Act to include exceptions for caste, or make particular provisions of that Act apply in relation to caste in some but not other circumstances.
613. This section also provides a power to enable a Minister to review section 9(5) of the Equality Act 2010 and any orders made under it. The Minister must publish a report on the outcome of any such review.
614. The power to review cannot be exercised earlier than five years after the day on which the Act was passed, which was 25 April 2013. Once the five year period has passed, this power may be exercised more than once.
615. If it is considered appropriate, in the light of the outcome of a review, the Minister may by order repeal or otherwise amend section 9(5) of the Equality Act 2010.

**Equal Pay Audit**

***Section 98: Power to provide for equal pay audits***

616. This section amends the Equality Act 2010 to enable a Minister of the Crown to make regulations to require employment tribunals to order employers to carry out equal

pay audits where they have been found to have breached equal pay law or to have discriminated because of sex in non-contractual pay such as discretionary bonuses.

617. Regulations made under this power will be subject to the affirmative resolution procedure, requiring approval in both Houses of Parliament and may only be made following consultation with the Minister responsible for employment tribunals. The section spells out the circumstances to be set out in regulations in which a pay audit cannot be ordered by an employment tribunal and that the regulations may set out the content of pay audits. Regulations made under this section may provide that an employment tribunal may order an employer to pay a penalty not exceeding £5000 for failure to comply with an equal pay audit order and that such a penalty may be repeated. The first regulations made under this power must include an exemption for certain types of new or small businesses.

## **General**

### ***Section 99: Consequential amendments, repeals and revocations***

618. This section provides a power for Secretary of State to make changes to other legislation in consequence of the provisions of the Act. Where those changes include the transfer of functions from the OFT and CC to the CMA (such as the transfer of the OFT's consumer enforcement powers), the functions may be modified to reflect the remit of the CMA. Any changes are to be made in an order subject to the affirmative or negative procedure. Where the changes are to an Act, an Act of the Scottish Parliament, a Measure of the National Assembly for Wales or Northern Ireland legislation, the order must follow the affirmative procedure.

### ***Section 102: Extent***

619. [Section 102](#) provides for the extent of the Act.