

ENERGY ACT 2004

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Chapter 2: Transfers Relating to Nuclear Undertakings

Section 38 and Schedule 5: Nuclear transfer schemes

152. **Section 38** gives the Secretary of State powers to make transfer schemes under Chapter 2 of Part 1 of the Act subject to consulting the relevant party (the NDA, the UKAEA or BNFL) and the consent of the Treasury. Subsection (2) prohibits the transfer by scheme of a nuclear site licence.
153. Supplementary provisions relating to transfer schemes are set out in Schedule 5 of the Act. These are modelled on previous legislation, in particular, the equivalent provisions in the **Atomic Energy Authority Act 1995 (c.37)** relating to the transfer of the then commercial activities of the UKAEA. Most of the provisions relate to the proposed restructuring of BNFL but the powers may also be used to split new site licensee companies out of Magnox Electric plc and UKAEA and, as explained below, for other purposes.
154. In more detail, Schedule 5 defines the property, rights and liabilities which may be transferred; the basis on which transfers may be made, both in relation to property, rights and liabilities held in the UK and in other legal jurisdictions; and the effect of schemes made under the Act. It also provides for the modification of schemes by agreement within a period of three years of the date at which the scheme was first made, and for the payment of compensation where, as a result of a scheme being made, a third party is prevented from exercising an entitlement to an interest or right. Paragraph 10 of Schedule 5 makes express provision to the effect that the Transfer of Undertakings (Protection of Employment) Regulations 1981 shall apply to any transfer made via a scheme and, in that context, places a duty on the Secretary of State to give notice of any proposal to make or modify a scheme to such persons as he considers appropriate for enabling the provisions of the 1981 Regulations to be complied with. It is highly likely that these Regulations would apply anyway but express provision is made to achieve certainty.

Section 39 and Schedule 6: Transfers of publicly owned assets

155. **Section 39** provides for the transfer by scheme of any property, rights and liabilities as defined in subsection (2) to a publicly owned company, the NDA or a third party (a 'consenting person') who has consented to the provisions of any scheme relating to him. Subsection (6) prohibits the transfer of securities in BNFL, or of a wholly owned subsidiary of BNFL, or of any property, rights or liabilities of those companies, at a time when BNFL is no longer publicly owned. The section provides the basis for the planned restructuring of BNFL within the public sector and for subsequent transfers from BNFL, Magnox Electric and UKAEA to any new site licensee companies which the NDA may wish to establish in order to promote competition for site management contracts and otherwise achieve its objectives.

156. **Schedule 6** provides for the financial structure and control of publicly owned transferee companies following a transfer scheme. These provisions are modelled on the equivalent provisions in the **Atomic Energy Authority Act 1995 (c.37)**. Paragraph 2 of the Schedule permits the creation of the initial Government shareholding in a transferee company. Paragraph 3 empowers the Treasury, or a Minister of the Crown, to invest in securities of the transferee company. Paragraph 4 permits the use of nominees by the NDA, the UKAEA and a Minister of the Crown. Paragraph 5 requires dividends or other sums received by the Treasury, or a Minister of the Crown in right of, or on the disposal of, securities or rights acquired by virtue of Schedule 6 to be paid into the Consolidated Fund. Paragraph 6 sets out the provisions for establishing the excess of accumulated realised profits over accumulated realised losses of the transferee company and also the provisions for determining the amount of such an excess that shall be treated as undistributable reserves. Paragraph 7 sets out the accounting assumptions that will apply to a transferee company in respect of a period which includes a transfer date, for the purposes of determining whether a distribution may be made. Finally, paragraph 8 confirms that the Schedule does not prejudice the inherent power of a Minister of the Crown or the Treasury to acquire or dispose of securities of a company or to act through nominees for that purpose.

Section 40: Transfers with the consent of the transferor

157. **Section 40** provides for the transfer by scheme of shares in, or the property, rights and liabilities of, a nuclear company in the private sector to either a publicly owned company or the NDA. By virtue of subsection (2), such transfers may only be made where the person who is entitled or subject to the property, rights and liabilities in question has consented to the provisions of the scheme. This section is intended to deal with circumstances where, for reasons of public safety or in order to minimise costs to the taxpayer, the NDA is given responsibility for the decommissioning and cleaning up of sites or installations which are owned by a private sector company.

Section 41: Recovery of property from private ownership

158. **Section 41** provides for the recovery by transfer scheme of shares in, and the property, rights and liabilities of, a site licensee company which, for the duration of its contract, is legally owned by a managing contractor appointed by the NDA. It reflects the fact that site licensee companies will be, de facto, assets of the NDA and the primary means by which it discharges its responsibilities. It is therefore essential that the NDA should be able to recover ownership of a company (and any associated assets etc., including new shares issued and new property acquired by the site licensee company) when a managing contractor is in breach of contract or a management contract comes to an end or is terminated.
159. Subsections (2) to (8) provide for the making of a scheme to transfer the ownership of the site licensee company and associated property, rights and liabilities, either to the NDA itself, a publicly owned company, or to a consenting contractor. When a contract comes to an end, the expectation is that these assets will be transferred on to a new managing contractor and held by it for the duration of its contract with the NDA. However, where a contract is terminated at short notice, either because of the failure of the managing contractor or because it is in breach of contract terms, it may be necessary for the NDA to manage the site licensee company itself or via a new public sector company until a new contractor is appointed. Section 41 permits the recovery of securities, property, rights and liabilities from persons other than the original management contractor and its subsidiaries. However, where there is recovery of securities, property, rights and liabilities from such a person, paragraph 12 of Schedule 5 provides for compensation. Paragraph 12 does not provide for compensation to management contractors, because such persons will have contracts with the NDA. Those contracts will be negotiated against the backdrop of section 41, and the rights of the management contractors (including any rights to compensation) may be provided for in the contracts.

Section 42: Transfer of Nuclear Liabilities Investment Portfolio

160. **Section 42** provides for the transfer of BNFL's Nuclear Liabilities Investment Portfolio to the Secretary of State and the subsequent payment of the sums involved - whether cash transferred or money received as a consequence of realising assets forming part of the NLIP – into the Consolidated Fund.
161. At 31 March 2003, the NLIP had a total value of £3.84 billion made up of around £2.34 billion in cash and Government gilts and £1.5 billion in short term fund-managed investments.

Section 43: Undertakings given by the Secretary of State

162. **Section 43** provides for the extinguishment of financial undertakings given by the Secretary of State in respect of matters for which the NDA will assume financial responsibility once section 21 comes into force. It is aimed primarily at the Magnox Undertaking under which the Secretary of State agreed in 1998 to make a series of payments based on the profile of expected expenditure on Magnox liabilities. The discounted value of the Undertaking at 31 March 2002 was £4.8 billion. Should the Secretary of State give other undertakings in the future, this section would also apply to those other undertakings. When the NDA assumes financial responsibility for the decommissioning and clean up of Magnox sites the Undertaking will no longer be required.
163. Subsection (3) prohibits the extinguishment of undertakings where the recipient of the sums involved is not publicly owned. In the case of the Magnox Undertaking, however, the intention would be to extinguish it as part of the financial restructuring of BNFL.

Section 44: Extinguishment of BNFL losses for tax purposes

164. The accumulated losses in BNFL companies that have built up over time largely arise, one way or another, from provisions made in BNFL's accounts for decommissioning and clean-up. These losses will be extinguished when the NDA takes responsibility for decommissioning and clean-up under section 21. Under section 29 the credits BNFL will recognise in its accounts when the NDA takes responsibility are exempted from tax. As a quid pro quo section 44 extinguishes the tax losses of BNFL and its subsidiaries.
165. Subsection (1) extinguishes losses in BNFL companies for accounting periods beginning on or after the trigger date, which is defined in subsection (4).
166. Subsection (2) lists the various sorts of tax losses which are extinguished by this section.
167. Subsection (3) restricts the application of this section to publicly owned BNFL companies. This is because the extinguishment, like the tax disregard in section 29, is focussed on and to facilitate the reorganisation of the responsibility for nuclear decommissioning and clean-up within the public sector.
168. Subsection (4) sets out definitions, including that of "trigger date", which is the earlier of the date when the NDA takes financial responsibility under section 21 of a BNFL site and the date when property etc of a BNFL company is transferred to the NDA or a subsidiary of the NDA in accordance with a nuclear transfer scheme authorised by section 39.
169. Subsection (5) ties this section to the corporation tax legislation.

Section 45 and Schedule 7: Further provisions applying to transferee companies

170. **Section 45** gives effect to Schedule 7, and provides that directors of publicly controlled companies to which transfers have been made in accordance with nuclear transfer schemes are disqualified from membership of the House of Commons. An equivalent provision is made in relation to the Northern Ireland Assembly.

171. **Schedule 7** makes provision about the finances and accounts of transferee companies. These provisions are required primarily for the restructuring of BNFL via the proposed transfer of its commercial businesses. The Schedule makes it clear that UKAEA subsidiaries (e.g. site licensee companies created from UKAEA) do not fall within the scope of its provisions, and remain subject to the borrowing and guarantee provisions of the Atomic Energy Act 1986. The Schedule sets out borrowing limits on transferee companies; and the basis on which the Secretary of State may issue loans or guarantee to such companies. The borrowing limits may be increased by order, which order is subject to affirmative resolution procedure in the House of Commons. Existing legislation concerning loans and guarantees to BNFL is extended to cover a “designated BNFL company”: ie. a company designated for the purposes of the Schedule by the Secretary of State. Paragraph 7 makes provision for the exercise by a Minister of the Crown of any powers given to him by the articles of association of a transferee company to restrict the sums of money which may be borrowed or raised by the group to which the company belongs, in the public interest. Finally, Schedule 7 also sets out the basis for preparing statutory accounts of transferee and transferor companies, and the requirement on companies wholly owned by the Crown to lay annual accounts before Parliament.

Section 46 and Schedule 8: Pensions

172. **Section 46** gives effect to Schedule 8 which relates to pensions.
173. The Schedule has two main purposes:
- to enable BNFL and UKAEA employees who are currently members of the UKAEA pension scheme to retain their membership of the scheme in the event that they are transferred for NDA purposes to a relevant public sector employer; and
 - to ensure that in the event of employees being transferred for NDA purposes to the private sector, or within the private sector, and, as a consequence, having to leave their current pension scheme, they have the option of joining a new scheme which (taken as a whole) confers benefits which are no less favourable than those offered by their original pension scheme.
174. It thus gives effect to the assurances set out in the White Paper that the Government would protect the pensions position of BNFL and UKAEA staff who might be affected by the restructuring of BNFL and any changes which the NDA might make to current arrangements for the management of BNFL and UKAEA sites. Further information can be found in the explanatory note for Schedule 8.

Section 47 and Schedule 9: Taxation

175. **Section 47** gives effect to Schedule 9, which establishes the tax provisions that will apply to transfers by way of a nuclear transfer scheme. These provisions supplement existing tax legislation. The Act provides flexibility for transfer schemes to take a variety of possible forms and Schedule 9 has been drawn up to cater for this flexibility. The main intention of Schedule 9 is to ensure that tax charges and reliefs on either party are not triggered as a result of a nuclear transfer scheme and that such schemes should, as far as possible, be tax neutral for both parties.
176. **Schedule 9** mainly deals with transfers made under nuclear transfer schemes to the NDA, an NDA company and from BNFL to publicly owned companies that are not subsidiaries of the NDA. However, there are other tax provisions dealing with transfers from UKAEA, the transfer of the Nuclear Liabilities Investment Portfolio, stamp duty and miscellaneous supplemental provisions. Further information can be found at the notes to Schedule 9.

Section 48: Supplementary powers of the Secretary of State, the NDA and UKAEA

177. **Section 48** provides powers for the Secretary of State, the NDA, and the UKAEA in relation to the making of nuclear transfer schemes, and other functions under the Act. Those powers include powers to enter into agreements in connection with nuclear transfer schemes. The consent of the Treasury is required before the Secretary of State and UKAEA enter into such agreements, and the consent of the Secretary of State is required before UKAEA enters into such agreements. Subsection (8) removes certain statutory restrictions on the powers of UKAEA to dispose of shares. Subsection (7) requires the UKAEA to consult the Secretary of State before disposing of securities, where (a) such disposal is in connection with the carrying out by the NDA of the NDA's functions (b) in the opinion of UKAEA, such disposal would be inconsistent with the UKAEA's statutory functions; and (c) the Secretary of State's consent has not already been obtained.

Section 49: Duty to assist the Secretary of State

178. **Section 49** is a provision designed to ensure that the Secretary of State can secure all the information required to make a transfer scheme. It puts an obligation on the transferor – i.e. the company or person from whom the transfer is to be made – to provide the Secretary of State with, and so far as practicable, to secure that its subsidiaries similarly provide, all such information and other assistance as the Secretary of State may require for the making or modification of a scheme. The obligation applies to all transfer schemes made under Chapter 2 of Part 1 of the Act including those made under section 40 where transfers are made with the consent of the transferor.

Section 50: Interpretation of Chapter 2 of Part 1

179. **Section 50** defines the terms “nuclear company” and “publicly controlled” which were not previously defined in Chapter 1.