



# Energy Act 2004

## 2004 CHAPTER 20

### PART 1

#### THE CIVIL NUCLEAR INDUSTRY

### CHAPTER 2

#### TRANSFERS RELATING TO NUCLEAR UNDERTAKINGS

##### *Transfer by scheme of property etc.*

#### **38 Nuclear transfer schemes**

- (1) The Secretary of State may make a scheme providing for one or more transfers authorised by this Chapter (a “nuclear transfer scheme”).
- (2) Nothing in this Chapter authorises the transfer in accordance with a nuclear transfer scheme of a nuclear site licence.
- (3) Before making—
  - (a) a nuclear transfer scheme which transfers property, rights or liabilities to or from the NDA or a subsidiary of the NDA, or
  - (b) a nuclear transfer scheme not falling within paragraph (a) which he is proposing to make for purposes connected with the carrying out of the NDA’s functions,the Secretary of State must consult the NDA.
- (4) Before making a nuclear transfer scheme which transfers property, rights or liabilities to any person—
  - (a) from BNFL, or
  - (b) from a wholly-owned subsidiary of BNFL,the Secretary of State must consult BNFL.

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- (5) Before making a nuclear transfer scheme that transfers property, rights or liabilities to any person—
  - (a) from the UKAEA, or
  - (b) from a wholly-owned subsidiary of the UKAEA,
 the Secretary of State must consult the UKAEA.
- (6) The consent of the Treasury is required for the making of a nuclear transfer scheme.
- (7) A nuclear transfer scheme shall come into force at such time as the Secretary of State may appoint, whether in the scheme or subsequently.
- (8) Schedule 5 (which makes further provision about nuclear transfer schemes) has effect.

### **39 Transfers of publicly owned assets**

- (1) A nuclear transfer scheme may provide for a transfer to—
  - (a) a publicly owned company,
  - (b) the NDA, or
  - (c) a consenting person,
 of property, rights and liabilities falling within subsection (2) that are set out in the scheme.
- (2) The property, rights and liabilities that may be transferred are—
  - (a) securities of BNFL;
  - (b) securities of a company falling within subsection (3);
  - (c) property, rights and liabilities of BNFL or the UKAEA;
  - (d) property, rights and liabilities of a company falling within subsection (3);
  - (e) property, rights and liabilities of a wholly-owned subsidiary of BNFL, of the UKAEA or of a company falling within that subsection.
- (3) A company falls within this subsection if—
  - (a) it is a nuclear company that is publicly owned; or
  - (b) it is a company designated for the purposes of this section by an order made by the Secretary of State.
- (4) The Secretary of State may designate a company for the purposes of this section only if it is a publicly owned company to which—
  - (a) securities of BNFL,
  - (b) property, rights or liabilities of BNFL, or
  - (c) property, rights or liabilities of a wholly-owned subsidiary of BNFL,
 were transferred (whether in accordance with a nuclear transfer scheme or otherwise) at a time when both the company and BNFL were publicly owned.
- (5) The Secretary of State must lay a copy of every order under subsection (3) before Parliament.
- (6) Nothing in this section authorises—
  - (a) a transfer of securities of BNFL, or
  - (b) a transfer of property, rights or liabilities of BNFL or of a wholly-owned subsidiary of BNFL,
 at a time when BNFL is no longer publicly owned.

- (7) Nothing in this section authorises—
- (a) a transfer of securities of a company designated for the purposes of this section, or
  - (b) a transfer of property, rights or liabilities of such a company or of a wholly-owned subsidiary of such a company,
- at a time when the company is no longer publicly owned.
- (8) Schedule 6 (which makes provision about the structure etc. of publicly owned companies to which transfers are made that are authorised by this section) has effect.
- (9) For the purposes of this section a person is a consenting person, in relation to a nuclear transfer scheme, if he has consented to the provisions of the scheme so far as they relate to him.

#### **40 Transfers with the consent of the transferor**

- (1) A nuclear transfer scheme may provide for a transfer to—
- (a) a publicly owned company, or
  - (b) the NDA,
- of property, rights and liabilities falling within subsection (3) that are set out in the scheme.
- (2) But property, rights and liabilities may be transferred by virtue of this section only if the person who is entitled or subject to them has consented to their transfer in accordance with a nuclear transfer scheme.
- (3) The property, rights and liabilities that may be transferred are—
- (a) securities of a nuclear company that is not publicly owned;
  - (b) property and rights of such a company in or in relation to a nuclear site or an installation in or on such a site; or
  - (c) property, rights and liabilities to which such a company is entitled or subject—
    - (i) in respect of such a site or installation;
    - (ii) in connection with or by reference to activities carried on in or on such a site or installation; or
    - (iii) for purposes connected with that site or installation or with any such activities.
- (4) In subsection (3) references to the property, rights and liabilities of a company, or to which a company is entitled or subject, include references to the property, rights and liabilities of any of its wholly-owned subsidiaries.

#### **41 Recovery of property from private ownership**

- (1) This section applies in the case of a nuclear company (“the transferred company”) all the shares in which were transferred for the purposes of a management contract to the contractor or to a subsidiary of the contractor where—
- (a) the contractor is in breach of that contract; or
  - (b) that contract has come to an end, whether by the expiry of the period for which it was in force or otherwise.
- (2) A nuclear transfer scheme may provide for the transfer to—

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- (a) a publicly owned company,
- (b) the NDA, or
- (c) a consenting contractor,

of the property, rights and liabilities falling within subsection (3) that are set out in the scheme.

- (3) The property, rights and liabilities that may be transferred are—
- (a) securities of the transferred company (whether transferred as mentioned in subsection (1) or issued afterwards);
  - (b) property, rights and liabilities to which the transferred company was entitled or subject immediately before the transfer so mentioned;
  - (c) property, rights and liabilities transferred for the purposes of the management contract, to the contractor, to a subsidiary of the contractor or to the transferred company or a wholly-owned subsidiary of the transferred company;
  - (d) property, rights and liabilities to which the transferred company or a wholly-owned subsidiary of the transferred company first became entitled or subject while that contract was in force.
- (4) Subsection (3) does not apply to property, rights or liabilities to the extent that they have been excluded from that subsection by—
- (a) provision contained in an agreement between the NDA and the person entitled to or subject to them; or
  - (b) provision contained in a nuclear transfer scheme by virtue of which the property, rights and liabilities or the shares mentioned in subsection (1) were vested in any person.
- (5) A transfer is authorised by this section notwithstanding that what is transferred has ceased, before the transfer, to be the property or a right or liability—
- (a) of a person to whom anything was transferred for the purposes of the management contract mentioned in subsection (1);
  - (b) of the transferred company or of a wholly-owned subsidiary of that company; or
  - (c) in the case of securities issued after the transfer mentioned in that subsection, of the person to whom they were issued.
- (6) Nothing in this section authorises the transfer of property, rights or liabilities from a company at a time when it is publicly owned.
- (7) For the purposes of this section a person is a consenting contractor, in relation to a nuclear transfer scheme, if—
- (a) he is a contractor under a management contract other than the one that has been broken or come to an end; and
  - (b) he has consented to the provisions of the scheme so far as they relate to him.
- (8) In this section—
- “contractor”, in relation to a management contract, means a party to the contract who is not the NDA;
  - “management contract” means a contract between the NDA and another person under which the other person is required to do or secure anything that the NDA is required to secure for the purpose of discharging its responsibilities; and

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“transferred”, in relation to shares, property, rights or liabilities, means transferred in accordance with a nuclear transfer scheme.

#### **42 Transfer of Nuclear Liabilities Investment Portfolio**

- (1) A nuclear transfer scheme may provide for the transfer from BNFL to the Secretary of State of—
  - (a) the Nuclear Liabilities Investment Portfolio; or
  - (b) so much of that Portfolio as may be specified in the scheme.
- (2) Nothing in this section authorises a transfer at a time when BNFL is no longer publicly owned.
- (3) Where cash is transferred to the Secretary of State by a transfer authorised by this section, he must pay it into the Consolidated Fund.
- (4) Where the Secretary of State receives—
  - (a) sums by way of income on property or rights transferred to him by a transfer authorised by this section, or
  - (b) sums in respect of the disposal of any such property or rights,he must pay those sums into the Consolidated Fund.
- (5) The Secretary of State must comply with every direction given to him by the Treasury with respect to—
  - (a) the disposal of property or rights transferred to him by a transfer authorised by this section; or
  - (b) the exercise of any other right attached to, or arising in respect of, such property;and (in a case where there is no applicable direction) the Secretary of State must not dispose of or exercise any property or rights with respect to which he may be given a direction except with the consent of the Treasury.
- (6) In this section “the Nuclear Liabilities Investment Portfolio” means property and rights to which BNFL is entitled and which appear to the Secretary of State, from BNFL’s published accounts, to represent assets held by BNFL for the purpose of being able to meet costs or liabilities for which the NDA has a financial responsibility under Chapter 1 of this Part.

#### *Extinguishment of undertakings and tax losses*

#### **43 Undertakings given by the Secretary of State**

- (1) This section applies where—
  - (a) the Secretary of State has given an undertaking to a publicly owned company to make payments to that company or a subsidiary of that company; and
  - (b) it appears to him that (apart from section 21(8)) the financial responsibilities of the NDA under Chapter 1 of this Part would make it unnecessary for those amounts to be paid.
- (2) The Secretary of State may extinguish the undertaking, and every liability of his that has arisen under the undertaking, with effect from such date as he may notify to the other parties to it.

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- (3) Nothing in this section authorises the extinguishment of an undertaking at a time when the company to whom payments would fall to be made under the undertaking is not publicly owned.
- (4) The extinguishment of an undertaking under this section shall neither require nor enable any sum to be brought into account in any person's case for the purposes of corporation tax.
- (5) In this section "undertaking" includes any agreement in which an undertaking to make payments is contained.

#### **44 Extinguishment of BNFL losses for tax purposes**

- (1) In relation to accounting periods beginning on or after the trigger date, all the relevant losses of every BNFL company arising before that date shall be treated for the purposes of corporation tax as extinguished.
- (2) The following are relevant losses of a BNFL company for the purposes of this section—
  - (a) losses incurred by the company in a trade;
  - (b) losses incurred by the company in a transaction a profit or gain from which would have been chargeable to tax under Case VI of Schedule D;
  - (c) excesses to be carried forward in the company's case under section 75(3) of the Income and Corporation Taxes Act 1988 (c. 1);
  - (d) Schedule A losses (within the meaning of section 392A of that Act) incurred by the company;
  - (e) losses to be carried forward in the company's case under section 392B(1) of that Act;
  - (f) any tax loss of the company falling within section 400(2)(d) of that Act;
  - (g) allowable losses (within the meaning of section 8 of the Taxation of Chargeable Gains Act 1992 (c. 12)) that have accrued to the company;
  - (h) deficits of the kind mentioned in subsection (1) of section 83 of the Finance Act 1996 (c. 8) to the extent that they are to be carried forward in the company's case under subsection (3A) of that section;
  - (i) excesses of the kind mentioned in section 260 of the Capital Allowances Act 2001 (c. 2) in relation to the company;
  - (j) losses of the kind mentioned in paragraph 35(1) of Schedule 29 to the Finance Act 2002 (c. 23) incurred by the company;
  - (k) unrelieved surplus advance corporation tax of the company (within the meaning of section 32 of the Finance Act 1998 (c. 36)).
- (3) This section applies to the relevant losses of a BNFL company only if it is publicly owned on the day before the trigger date.
- (4) In this section—
  - "BNFL company" means—
    - (a) BNFL;
    - (b) a company that is a 75 per cent subsidiary of BNFL at a time during the qualifying period; or
    - (c) a company (other than BNFL) that is a 75 per cent subsidiary of a BNFL parent company at a time during the qualifying period;

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“BNFL parent company” means a company of which BNFL is a 75 per cent subsidiary;

“qualifying period” means the period beginning with 16th March 2004 and ending with the trigger date;

“trigger date” means whichever is the earlier of the following—

- (a) the date of the first occasion on which section 21 operates so as to confer financial responsibilities on the NDA in relation to an installation, site or facility the person with control of which is a BNFL company that is publicly owned; and
- (b) the date of the first occasion on which a transfer takes effect which is a transfer to the NDA or a subsidiary of the NDA in accordance with a nuclear transfer scheme authorised by section 39 of property, rights or liabilities of a BNFL company.

(5) This section is to be construed as one with the Corporation Tax Acts.

#### *Provisions relating to transfers*

### **45 Further provision applying to transferee companies**

- (1) Schedule 7 (which makes provision about the finances and accounts of publicly controlled companies to which property, rights and liabilities are transferred) has effect.
- (2) In Part 3 of Schedule 1 to the House of Commons Disqualification Act 1975 (c. 24) (other disqualifying offices), insert (at the appropriate place)—

“Director of a publicly controlled company (within the meaning of Chapter 2 of Part 1 of the Energy Act 2004) to which transfers have been made in accordance with provisions of nuclear transfer schemes authorised by that Chapter.”;

and the corresponding amendment shall also be made in Part 3 of Schedule 1 to the Northern Ireland Assembly Disqualification Act 1975 (c. 25).

### **46 Pensions**

Schedule 8 (which makes provision about pensions in connection with transfers affecting nuclear undertakings) has effect.

### **47 Taxation**

Schedule 9 (which makes taxation provision in relation to nuclear transfer schemes) has effect.

### **48 Supplementary powers of the Secretary of State, the NDA and the UKAEA**

- (1) The Secretary of State shall have power to enter into agreements for the purpose of accepting or imposing such contractual obligations as he thinks fit with respect to—
  - (a) nuclear transfer schemes and proposals for such schemes;
  - (b) anything connected with such a scheme or proposal; or
  - (c) the exercise of powers conferred on the Secretary of State or any other person by or under this Chapter.

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- (2) The NDA and the UKAEA shall each have power to enter into agreements for the purpose of accepting or imposing such contractual obligations as it or they think fit with respect to—
- (a) nuclear transfer schemes and proposals for such schemes;
  - (b) anything connected with such a scheme or proposal; or
  - (c) the exercise of powers conferred on it or them, or any other person, by or under this Chapter.
- (3) The NDA and the UKAEA shall also each have power to do anything else which, in its or their opinion, is appropriate for facilitating—
- (a) a transfer which is or is proposed to be effected in accordance with a nuclear transfer scheme; or
  - (b) any other transfer of property, rights or liabilities of the NDA or (as the case may be) the UKAEA which is or is proposed to be effected for purposes connected with the carrying out by any person of any functions conferred on that person by or under this Part.
- (4) Agreements entered into in exercise of the powers conferred by subsection (1) or (2) may, in particular, include provision for the making of payments (whether by way of consideration or otherwise)—
- (a) to the Secretary of State, or
  - (b) to the NDA or the UKAEA,
- in respect of anything transferred or created in accordance with a nuclear transfer scheme.
- (5) The consent of the Treasury is required for the Secretary of State or the UKAEA to enter into an agreement in exercise of those powers.
- (6) The consent of the Secretary of State is also required for the UKAEA to enter into an agreement in exercise of those powers.
- (7) Before making any disposal of securities of a company in a case in which—
- (a) the disposal is made in accordance with arrangements entered into by the UKAEA for purposes connected with the carrying out of its functions by the NDA,
  - (b) those arrangements are not arrangements to which the Secretary of State has consented under subsection (6), and
  - (c) in the opinion of the UKAEA, the disposal is one which they would not have power to make but for section 1(2) of the Atomic Energy (Miscellaneous Provisions) Act 1981 (c. 48) (disposal otherwise inconsistent with UKAEA functions),
- the UKAEA must consult the Secretary of State.
- (8) Subsection (4) of section 1 of the Atomic Energy (Miscellaneous Provisions) Act 1981 (which limits the cases in which the UKAEA may make share disposals that are inconsistent with its functions) shall not apply—
- (a) to anything done by the UKAEA in exercise of powers conferred on them by or under this Chapter; or
  - (b) to any disposal of securities in accordance with arrangements entered into by the UKAEA for purposes connected with the carrying out of its functions by the NDA.



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- (9) Sums received by the Secretary of State in pursuance of an agreement under this section must be paid into the Consolidated Fund.
- (10) The powers conferred on the Secretary of State, the NDA and the UKAEA by this section—
  - (a) are in addition to their powers apart from this section; and
  - (b) are to be disregarded in determining the extent of those powers.

### *Supplementary provisions of Chapter 2 of Part 1*

#### **49 Duty to assist the Secretary of State**

- (1) This section applies where the Secretary of State proposes to make a nuclear transfer scheme.
- (2) The transferor shall have the duty, within such period as the Secretary of State may allow—
  - (a) to provide the Secretary of State, and
  - (b) to secure, so far as practicable, that its subsidiaries provide the Secretary of State,with all such information and other assistance as the Secretary of State may require for the purposes of, or in connection with, the making of the scheme.
- (3) The duties of the transferor under this section are duties owed to the Secretary of State.
- (4) Those duties are to be enforceable by the Secretary of State in civil proceedings—
  - (a) for an injunction;
  - (b) for specific performance of a statutory duty under section 45 of the Court of Session Act 1988 (c. 36); or
  - (c) for any other appropriate remedy or relief.
- (5) In this section “the transferor”, in relation to a nuclear transfer scheme, means a person from whom it is proposed that property, rights or liabilities are transferred by the scheme.

#### **50 Interpretation of Chapter 2 of Part 1**

- (1) In this Chapter —
  - “nuclear company” means a body corporate with control of a designated installation, designated site or designated facility;
  - “publicly controlled” is to be construed in accordance with subsection (3).
- (2) Expressions used in this Chapter and in Chapter 1 of this Part have the same meanings in this Chapter as in that Chapter.
- (3) For the purposes of this Chapter a body corporate is a publicly controlled company if it is a company limited by shares that is either publicly owned or is otherwise a company in which—
  - (a) a person specified in subsection (4) holds a majority of the voting rights; or
  - (b) two or more persons so specified, taken together, hold a majority of the voting rights.

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- (4) The persons mentioned in subsection (3) are—
- (a) the Treasury;
  - (b) a Minister of the Crown;
  - (c) the NDA;
  - (d) the UKAEA;
  - (e) a publicly owned company; or
  - (f) a nominee of a person falling within paragraphs (a) to (e).
- (5) In this section “company” has the same meaning as in the Companies Act 1985 (c. 6).