

*These notes refer to the Energy Act 2004 (c.20)  
which received Royal Assent on 22 July 2004*

# **ENERGY ACT 2004**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These explanatory notes relate to the Energy Act which received Royal Assent on 22 July 2004. They have been prepared by the Department of Trade and Industry in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.
2. These notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.

### **OVERVIEW**

3. The Act covers three main areas: the civil nuclear industry; sustainability and renewable energy sources; and energy markets and regulation. It implements commitments made in the Government's White Papers "*Our energy future: creating a low carbon economy*" (Cm. 5761, February 2003) and "*Managing the Nuclear Legacy – A Strategy for Action*" (Cm. 5552, July 2002). The latter set out the Government's plans for improving the management of public sector civil nuclear liabilities, in particular through the establishment of the Nuclear Decommissioning Authority ("NDA"). It also outlined plans for the restructuring of British Nuclear Fuels plc ("BNFL") as part of new arrangements for funding the decommissioning and clean up of the public sector civil nuclear legacy.
4. The Act will also create a single wholesale electricity market for Britain, the British Electricity Trading and Transmission Arrangements ("BETTA"). Provisions covering electricity and gas interconnectors implement a number of requirements in the EU's 2003 Gas and Electricity Directives and its Electricity Regulation.
5. The Act is in four parts with 23 Schedules. The main provisions of the Act:

#### **Part 1: The Civil Nuclear Industry**

- establish the NDA as a new public body with the primary role of ensuring the decommissioning and clean-up of Britain's civil public sector nuclear sites;
- create a new Civil Nuclear Police Authority to oversee a reconstituted nuclear constabulary (the present United Kingdom Atomic Energy Authority ("UKAEA") Constabulary), directly accountable to the Secretary of State;
- amend the Anti-terrorism, Crime and Security Act 2001 (c.24) to extend the regulation of the security of uranium enrichment technologies and sensitive nuclear information;
- provide statutory authority for the Secretary of State to spend money under his options to acquire British Energy's power stations and/or its stake in Nirex. Nirex is a company owned by the major nuclear industry waste producers and tasked with

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investigating feasibility of a deep intermediate and low level waste disposal facility. The Secretary of State's options arise as part of the restructuring agreements in respect of British Energy;

## **Part 2: Sustainability and Renewable Energy Sources**

- amend the Sustainable Energy Act 2003 (c.30) to require the Government to publish information about the development and bringing into use of new energy sources, actions taken to ensure that the requisite scientific and engineering expertise is available to develop new energy sources, and actions taken to achieve the statutory energy efficiency aim or aims designated under sections 2 and 3 of the Sustainable Energy Act. This information will be published as part of the annual report required under section 1 of the Sustainable Energy Act 2003;
- provide for publication and implementation of a microgeneration strategy;
- place a new duty on the Secretary of State and the Gas and Electricity Markets Authority to carry out their respective functions under Part 1 of both the Gas Act 1986 (c.44) and the Electricity Act 1989 (c.29), in a manner best calculated to contribute to the achievement of sustainable development;
- establish a comprehensive legal framework to support renewable energy developments beyond territorial waters and augment the regime for inshore waters;
- provide the Secretary of State with a power to specify shorter obligation periods under the Renewables Obligation, impose surcharges to be made on late payments to the Renewables buy-out fund and to require mutualisation payments from electricity suppliers to cover a shortfall in the buy-out fund;
- make provision regarding the mutual recognition of Northern Ireland and UK Renewables Obligation Certificates;
- make provision regarding the issue of Renewables Obligation Certificates in respect of electricity generated from renewable sources outside Northern Ireland and supplied to customers in Northern Ireland;
- enable the Secretary of State to introduce a renewable transport fuel obligation;

## **Part 3: Energy Regulation**

- create a single wholesale electricity market for Great Britain;
- introduce a new licensing regime for gas and electricity interconnectors to enable the Gas and Electricity Markets Authority ("GEMA") to regulate their operation;
- create a special administration regime for gas transportation and electricity transmission and distribution companies facing actual or threatened insolvency;
- place a duty on the Secretary of State to publish an annual report on the security of energy supplies and lay that report before Parliament;
- establish a mechanism allowing energy market participants to appeal GEMA's decisions on modifications to the Codes that govern activities in the gas and electricity markets;

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- place a duty on the Secretary of State and GEMA to have regard to the principles of best regulatory practice in carrying out their functions under the Gas Act 1986 and the Electricity Act 1989;
- amend the definition of electricity supply in the Electricity Act 1989 to include supply over a transmission line;
- define “high voltage line” in respect of offshore electric lines;
- create a power for GEMA (with the consent of the Secretary of State) to make regulations to extend the range of sums that can be collected from a prepayment meter;
- reform the planning system for large energy projects handled by the Department for Trade and Industry (“DTI”) to enable the appointment of additional inspectors to speed up public inquiries;
- amend the Electricity Act 1989 and the Gas Act 1986 to allow GEMA, when entering information on registers it is required to maintain under section 49 of the Electricity Act 1989 and section 36 of the Gas Act 1986, to exclude details in certain circumstances;
- create a power for the Secretary of State to adjust transmission charges for renewable generators within a single area that can be shown to be of high renewable energy potential and where evidence would suggest that unadjusted transmission charges might have a material impact on the development of generation of electricity from renewable sources;
- provide for the use of surpluses arising under the Fossil Fuel Levy in Scotland.

#### **Part 4: Miscellaneous and Supplemental**

- create a fee-raising power enabling the Secretary of State to charge for specific services in relation to the exploration, production and transmission of oil and gas; the generation, transmission and distribution or supply of electricity; renewable energy zones and renewable energy installations; and the protection of the environment from these activities;
- create a power to implement in domestic law certain international agreements relating to pipelines and offshore installations.

#### **TERRITORIAL EXTENT AND TERRITORIAL APPLICATION**

6. Most of the Act’s content relates to reserved matters. Except as set out in paragraph 10 below, the Act extends to the whole of the United Kingdom.

##### **Scotland**

7. On 4 February 2004, the Scottish Parliament agreed that a number of provisions should cover functions devolved in Scotland. These include:

- some functions of the NDA that relate to devolved functions;
- amendments to the Radioactive Substances Act 1993 (c.12);

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- the jurisdiction of the new Civil Nuclear Constabulary;
- in regard to offshore renewable developments (Chapters 2 (Offshore Production of Energy) and 3 (Decommissioning of Offshore Installations) of Part 2 (Sustainability and Renewable Energy Sources)), the application of civil and criminal law (including police powers) and the extinguishment of public rights of navigation;
- provisions covering shorter obligation periods under the Renewables Obligation, and surcharges on late payments to the Renewables buy-out fund;
- mutual recognition of Renewables Obligation Certificates issued in Northern Ireland and Great Britain;
- provision covering surpluses arising from the Fossil Fuel Levy in Scotland.

8. The NDA will have functions which relate to both reserved and devolved matters in Scotland and so will have the status of and be similar to a cross border authority. The Act sets out the responsibilities which Scottish Ministers will have in relation to the operation of the NDA, and arrangements to ensure the accountability, where appropriate, to the Scottish Parliament as well as to Westminster. In respect of safety zones, the DTI and Scottish Executive have agreed that the Secretary of State will exercise the powers in the Act after consultation with Scottish Ministers.

### **Wales**

9. The Act does not cover any areas where power has been devolved to the National Assembly for Wales except the provisions amending the Radioactive Substances Act 1993 (c.12) where functions of the Assembly are modified in the same way as functions of the Secretary of State and Scottish Ministers. Otherwise the Act does not confer functions on the Assembly.

### **Northern Ireland**

10. The Act extends to Northern Ireland except:

- the provisions relating to the Civil Nuclear Constabulary (Chapter 3 of Part 1), with some minor exceptions;
- all amendments to the Electricity Act 1989 in Part 2 (Sustainability and Renewable Energy Sources);
- section 82 (microgeneration strategy);
- sections 90 and 91 (modification of conditions and extension of licences for offshore transmission) and 100 (further provision relating to public rights of navigation);
- Part 3 (Energy Regulation), with the exception of section 151 (5).

## **THE ACT**

### **PART 1: THE CIVIL NUCLEAR INDUSTRY**

#### **SUMMARY AND BACKGROUND**

11. Proposals for most of this Part were published for pre-legislative scrutiny as the draft Nuclear Sites and Radioactive Substances Bill in June 2003. Principal exclusions were

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Chapter 3, covering the Civil Nuclear Constabulary and the provisions on nuclear security, devolution, tax and structure and finance of transferee companies. The House of Commons Select Committee on Trade and Industry published a report on these proposals in October 2003 which can be found at:

<http://www.parliament.the-stationery-office.co.uk/pa/cm/cmtrdind.htm> - reports

### **Chapters 1 and 2: Nuclear Decommissioning and Transfers Relating to Nuclear Undertakings**

12. Chapter 1 and its related Schedules deal with the establishment of the NDA, its functions (including its strategy, plans and reports in respect of its functions), powers and statutory duties and the funding of its activities.

13. The creation of the NDA and its functions will not affect the existing regulatory regime in respect of nuclear sites and storage and disposal of radioactive waste under the Nuclear Installations Act 1965 (c.57) and the Radioactive Substances Act 1993 (c.12) respectively. The powers of the Health and Safety Executive as the licensing authority and the Environment Agency and the Scottish Environment Protection Agency to enforce those requirements are also unaffected.

14. Chapter 2 gives the Secretary of State powers to make transfer schemes both to facilitate the restructuring of BNFL and to enable the NDA, where appropriate, to improve arrangements for the management of the nuclear sites for which it is given responsibility. It also consolidates the power of the Secretary of State to make transfer schemes under the Atomic Energy Authority Act 1995 (c.37).

15. The Government has also published other documents relating to the proposed NDA, so as to give stakeholders a better understanding of the overall framework within which the NDA would operate. Principal amongst these are a draft management statement outlining the intended relationship between Government and the NDA and a draft Memorandum of Understanding between the NDA and the nuclear regulators. These can be found at:

[www.dti.gov.uk/nuclearcleanup/pdfs/draftmou.pdf](http://www.dti.gov.uk/nuclearcleanup/pdfs/draftmou.pdf) and

[www.dti.gov.uk/nuclearcleanup/pdfs/ndastatement.pdf](http://www.dti.gov.uk/nuclearcleanup/pdfs/ndastatement.pdf)

### **Chapter 3: Civil Nuclear Constabulary**

16. Chapter 3 implements proposals in the White Paper, *“Managing the Nuclear Legacy – A Strategy for Action”* (Cm. 5552), to reform the governance arrangements for the UKAEA Constabulary, and to set it up on a statutory basis similar to that for other police forces.

17. The UKAEA Constabulary operates in England, Scotland and Wales but not in Northern Ireland. Accordingly the Constabulary provisions (with some minor exceptions) extend only to England, Wales and Scotland.

18. The Atomic Energy Authority Act 1954 (c.32) conferred power on UKAEA to nominate persons to be special constables for the purposes of section 3 of the Special Constables Act 1923 (c.11). The body of special constables so nominated by UKAEA and appointed under section 3 forms the existing UKAEA Constabulary. Members of the existing Constabulary have police powers to enable them to protect certain civil licensed nuclear sites and nuclear material in transit. The Constabulary is currently part of UKAEA, and is fully funded by the nuclear site licensees whose sites it polices (currently UKAEA, BNFL and

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URENCO). It is overseen by a non-statutory committee of UKAEA – the UKAEA Constabulary police authority - composed of representatives of the nuclear site licensees, the Director of the Office for Civil Nuclear Security (part of the DTI), an expert police adviser and another representative of DTI. The Chair rotates on an annual basis between UKAEA and BNFL.

19. sites and escorts sensitive nuclear material in the course of transport. It has a specialist anti-terrorist policing role focussed on the protection of proliferation-sensitive nuclear material. It is an integral part of the civil nuclear security framework and works within security parameters set by the Director of Civil Nuclear Security on behalf of the Secretary of State. The Constabulary has limited contact with the public or with general crime for which Home Office and Scottish Executive forces continue to have operational responsibility within the areas in which the Constabulary operates.

20. The Act provides for the separation of the UKAEA Constabulary from UKAEA, and its transfer to a statutory Police Authority (a Non-Departmental Public Body) created by the Act, to become the new Civil Nuclear Constabulary. The Police Authority will be accountable to the Secretary of State and have overall supervisory responsibility for the force and for ensuring that it carries out its role effectively.

21. The Anti-terrorism, Crime and Security Act 2001 (c.24) (the “ACTS Act”) modified and extended the UKAEA Constabulary’s jurisdiction to bring it into line with its core nuclear security role. This Act essentially restates those provisions (with the consequent repeal of the relevant ATCS Act provisions). It makes minor changes to the Constabulary’s current jurisdiction to focus this more firmly on its specialist nuclear security role, and gives the Constabulary police powers and privileges throughout Great Britain for any purpose connected with the core jurisdiction set out in section 56(1) to 56(4). It also enables a senior officer of the Civil Nuclear Constabulary to authorise, under section 44 of the Terrorism Act 2000 (c.11), stop and search for articles which could be used in connection with terrorism without grounds for suspicion, and extends the offences of assault on constables and impersonation of police to members of the Civil Nuclear Constabulary. The existing staff of the UKAEA Constabulary (both constables and civilian support staff) will be transferred to the new Police Authority under the provisions of the Act. The Transfer of Undertakings (Protection of Employment) Regulations 1981 (“TUPE”) will apply to the transfer, and employees will continue to be eligible for membership of the UKAEA pension scheme.

22. Members of the Constabulary will be prohibited from joining trade unions (subject to limited exceptions). In this and other respects the Act puts on a statutory footing the current informal arrangements, and brings those arrangements into line with the long established principles incorporated in other police legislation. For example, it will also be made an offence to induce a member of the Constabulary to withhold his services. The Act also makes provision for recognition of a Civil Nuclear Police Federation, and requires the Police Authority to align any provision it makes about conditions of service with the provision made on such matters by police regulations (unless differences are justified due to the circumstances and structure of the Constabulary). Civilian staff are not affected by these arrangements.

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#### **Chapter 4: Authorisations Relating to Radioactive Waste**

23. Chapter 4 makes amendments to the Radioactive Substances Act 1993 (c.12) which will allow the Environment Agency, the Scottish Environment Protection Agency and the chief inspector in Northern Ireland to use a streamlined and simplified process in dealing with applications for the transfer of radioactive discharge authorisations when there is a change of operator at a nuclear site. The changes will improve the effectiveness and efficiency of regulation whilst maintaining the robustness of the discharge authorisation process.

#### **Chapter 5: Miscellaneous Provisions Relating to Nuclear Industry**

##### ***Nuclear Liability***

24. Section 76 gives the Secretary of State a power to amend UK legislation by order in respect of the UK's international obligations governing third party liability in the event of nuclear accidents (Paris and Brussels Conventions).

##### ***Nuclear Security***

25. Section 77 extends the scope of the enabling power in section 77 of the Anti-terrorism, Crime and Security Act 2001 (c.24) to make regulations to ensure the security of the UK's civil nuclear industry. The territorial application of this provision is the same as section 77 of the ATCS Act i.e. to the United Kingdom. Nuclear security is a reserved matter in Scotland, an excepted matter in Northern Ireland and is not a transferred matter in Wales.

26. Section 77 of the ATCS Act does not currently permit regulations to be made to ensure the security of equipment capable of being used to enrich uranium or software containing information relating to uranium enrichment (including uranium enrichment carried out overseas) held outside nuclear premises, and the security of this equipment and software when they are being held, transported or transmitted. Uranium enrichment technology is used in the civil nuclear industry and has been sought by States seeking to develop nuclear weapons.

27. Section 77 of the ATCS Act does not currently permit regulations to be made to ensure the security of sensitive nuclear information being held, transported and transferred by carriers, where such carriers are not directly involved in activities on or in relation to nuclear sites or other nuclear premises.

28. Section 77 of the ATCS Act does not currently permit regulations to be made to ensure the security of holdings of sensitive nuclear information in the United Kingdom, where (a) such information is held in relation to uranium enrichment activities outside the United Kingdom, and the transport and transmission of such information; and (b) the person holding the information is not involved in activities on or in relation to nuclear sites or other nuclear premises in the United Kingdom.

##### ***Authorisation of Government expenditure***

29. As part of the restructuring of British Energy ("BE"), the Government has agreed to enter into a series of principal agreements with the company. The agreements detail the arrangements by which British Energy and HMG will contribute to the costs of discharging BE's nuclear liabilities going forward.

30. The Secretary of State intends to give effect to most of his obligations under the agreements using his powers under Schedule 12 to the Electricity Act 1989, as amended by

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the Electricity (Miscellaneous Provisions) Act 2003 (c.9) (“EMPA”), and as to be amended by section 34 of the Act. He will also have available additional, free-standing powers conferred by EMPA.

31. Section 79 gives the Secretary of State explicit statutory authority to incur expenditure as a result of options included in the documents. The provision is general, but goes further than the free-standing provisions in EMPA by authorising spending on two elements of the agreements not currently covered by legislation:

- in circumstances where British Energy has sold one of its nuclear power stations to a third party, the acquisition of the power station from that third party and subsequently operating it. This would follow the exercise of an option on the part of HMG to acquire the station for this purpose; and
- the acquisition of British Energy’s shareholding in Nirex, and to incur expenditure on any consequences of such an acquisition.

32. As a matter of law, the Appropriation Acts give the Secretary of State the authority to spend money on the exercise of his functions, but as a matter of practice, the agreement with Parliament known as the Baldwin agreement and the guidance set out by the Treasury in Government Accounting have the effect that new functions involving significant and continuing expenditure should normally be identified by an Act other than the Appropriation Act.

***Option to purchase BE’s nuclear stations from third party***

33. As part of the restructuring documentation, British Energy will grant the Secretary of State an option to acquire any of its power stations. The option may be exercised in relation to any of the nuclear power stations currently owned by British Energy. The option can be exercised at a time when British Energy, or a third party purchaser, chooses to shut them, and the reason for exercising the option would be either to prolong the operation of the station or stations where it is economically advantageous to do so, or to decommission them within the private sector.

34. The Electricity (Miscellaneous Provisions) Act 2003 (c.9) provides specific statutory authority for the Secretary of State to spend money on the acquisition of assets of British Energy and on carrying on an undertaking using such assets. However, it does not authorise expenditure on acquiring or running assets which at the time they are acquired no longer belong to a BE company. This section will provide such authority.

***Option for the Secretary of State to acquire BE’s shares in Nirex***

35. As part of the restructuring documentation British Energy will grant an option for the Secretary of State to acquire British Energy's shares in Nirex. Nirex is a company formed jointly by British Energy, BNFL and UKAEA to manage the UK’s intermediate level radioactive waste. If he exercises the option, the Secretary of State will acquire the company’s shares in Nirex, its rights and benefits under loans made by the company to Nirex and British Energy’s liabilities, as a Nirex shareholder, under its research and advisory contracts with Nirex.

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36. This section again gives the Secretary of State specific statutory authority to incur expenditure in connection with the acquisition of any securities in Nirex or in consequence of such an acquisition.

## **COMMENTARY ON SECTIONS**

### **CHAPTER 1: NUCLEAR DECOMMISSIONING**

#### **Section 1: The Nuclear Decommissioning Authority**

37. Section 1 provides for the establishment of the NDA as a body corporate and makes it clear that it is not to be treated as a body enjoying Crown status, privilege or immunity or (with one exception mentioned below) as exercising functions on behalf of the Crown.

#### **Section 2 and Schedule 1: Constitution of NDA**

38. Section 2 deals with the membership of the NDA and the basis on which members are to be appointed. It should be read in conjunction with Schedule 1 which contains more detailed provisions on terms of appointment and the basis on which the NDA is to conduct its business.

39. The section essentially provides for an NDA board of not less than seven and no more than thirteen members of which the majority must be non-executive members. This reflects the Government's view that the role of the board should be to challenge the executive management team to do better and to hold it to account for its performance. Subsections (8) and (9) are specifically designed to ensure, so far as practicable, that the non-executive majority is maintained at all times.

40. The non-executive members will consist of a Chairman and up to eleven other persons (depending upon how many executive members are appointed). The Government intends that all appointments will be made by open competition under the rules set out by the Office of the Commissioner for Public Appointments ("OCPA"). The Chairman will be appointed by the Secretary of State. Other non-executives will be appointed by the Secretary of State after consultation with the Chairman. The Secretary of State will consult Scottish Ministers before making these appointments.

41. The executive members will consist of a Chief Executive (appointed by the non-executive members subject to the approval of the Secretary of State) and where the Secretary of State so provides up to a maximum of three other persons appointed by the non-executives after consultation with the Chief Executive. Again, appointments will be made following open competition carried out on an open and transparent basis. The Secretary of State will consult Scottish Ministers before approving the appointment of the Chief Executive. Subsection (6) provides that the requirement to consult Scottish Ministers may be satisfied by consultation that took place wholly or partly before the commencement of section 2.

42. All these provisions are designed to ensure that final decisions on the NDA's strategy and annual work plans (see notes to sections 11 to 13 below), rules of procedure and delegation of functions are taken by the Board and are not effective unless a majority of members present are non-executives. The procedure during the initial period (as defined) is set out in Schedule 1, paragraph 4.

### **Section 3: Designated responsibilities**

43. Section 3 sets out the principal functions of the NDA and arrangements for the NDA to be given designated responsibility for particular installations, sites or facilities. In line with the White Paper (Cm. 5552), the prime function is the decommissioning and cleaning up of designated nuclear installations and designated nuclear sites. The definitions of ‘nuclear site’ and ‘person with control’ are to be found in section 36 and other key terms are defined in section 37. Decommissioning and cleaning up are defined broadly in section 37(1) to include dealing with anything that needs to be removed so that the site or installation is suitable to be used for other purposes and to include the construction of any new facilities which might be required for achieving it. “Installation” is defined in section 37 to include buildings, structures and “apparatus”, and a “nuclear installation” to mean an installation on a principal nuclear site plus any pipes, conduits and other apparatus connected to it that are not on the principal nuclear site, but not including an installation comprised in an NDA facility.

44. Section 3 is framed in general terms so that, in addition to the BNFL and UKAEA sites described in the White Paper, the Government could in future give the NDA responsibility for the decommissioning and cleaning up of Ministry of Defence sites and, with the consent of the company concerned, also give it responsibility for securing the decommissioning and cleaning up of sites operated by companies in the private sector. This last point reflects both recent experience with BE and responses to the White Paper which suggested that it would be in the public interest if the NDA’s responsibilities could go wider than public sector civil nuclear liabilities as proposed in the White Paper.

45. Paragraph (a) of subsection (1) covers the operation of Magnox nuclear power stations pending the commencement of their decommissioning. Paragraph (d) covers the operation of designated facilities for treating, storing, transporting and disposing of hazardous material. “Hazardous material” includes nuclear matter and radioactive waste. The note on section 37 contains more detail on the definition of ‘hazardous material’. Paragraph (d) will include the operation of BNFL’s Thermal Oxide Reprocessing Plant (“THORP”), the Sellafield MOX Plant (“SMP”) and other commercial plants and facilities at Sellafield, which, as the White Paper explained, for regulatory and operational reasons, has to be managed as a single, integrated site. “Treating” includes reprocessing and manufacturing fuel (see the definition of “treat” in section 37) to cover some of the operational installations which will fall under the responsibility of the NDA, such as THORP and SMP. Many facilities will include buildings, structures or apparatus and accordingly “facility” in paragraph (d) is defined in section 37 to include an installation (see note on section 37 below). This means that installations contained in facilities on principal nuclear sites can be designated for decommissioning under subsection (1)(b) or, if they are comprised in NDA facilities, under subsection (1)(f), see below. “Facility” also includes a business or undertaking so, for example, the NDA could be given responsibility for operating the BNFL subsidiary which transports nuclear fuel and spent fuel. No decision has yet been taken on that. Subsection (1)(d) also covers the low level waste disposal site at Drigg.

46. Paragraph (e) of subsection (1) is intended to cover situations where the NDA has responsibility for treating, storing and disposing of nuclear matter, radioactive waste or contaminated matter which is not necessarily on a nuclear site which is the responsibility of the NDA.

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47. Paragraph (f) of subsection (1) covers the decommissioning of installations which form part of facilities which the NDA has had responsibility for operating under subsection (1)(d). Such installations are not included in the definition of ‘nuclear installation’ and cannot therefore be designated under subsection (1)(b). Disposal facilities do not currently require a licence under the Nuclear Installations Act 1965 (c.57), and it is conceivable that certain kinds of treatment or storage facilities may not be licensable. The Act therefore provides for the cleaning-up of a category of principal nuclear site on which there is a treatment, storage or disposal facility that has been operated by the NDA but which is not on a licensed or Crown site. “Nuclear site” is defined in section 36.

48. Subsection (2) explains by way of a cross reference that the NDA can only discharge its responsibilities under section 3 by carrying out its duties under sections 15 and 16.

49. Subsection (3) provides that designation of an installation, site or facility or for the treatment, storage, transportation or disposal of matter or waste is achieved by means of a direction given by the Secretary of State to the NDA.

50. Subsection (4) provides that the NDA can only be given responsibility for installations, sites or facilities which are controlled by a Crown appointee, the UKAEA, a publicly owned nuclear company (for example, BNFL) (or the wholly owned subsidiary of such a company), the NDA itself, or otherwise where the person with control of that installation, site or facility has given his consent.

51. Subsection (5) requires directions to cite the specific provision in subsection (1) under which a designation is being made. Subsection (6) requires the NDA to decommission all installations on a principal nuclear site designated for cleaning-up, unless the designation specifically provides otherwise.

52. Subsection (7) requires the Secretary of State to lay a copy of every direction containing a designation before Parliament and to publish it subject, in both cases, to the exclusion of any material which, in his view, should – under subsection (9) – be withheld in the interests of national security.

#### **Section 4: Additional responsibilities under designating directions**

53. Section 4 enables the Secretary of State to give the NDA certain additional responsibilities when, or after, making a designation under section 3.

54. Subsection (1) is aimed at a situation in which the NDA is responsible for operating an installation or facility on a site which it does not have responsibility for cleaning-up and which it needs to be able to manage.

55. When the NDA has responsibility in relation to a principal nuclear site, subsection (2) enables the NDA to be given responsibility for operating or managing research facilities, general facilities on the site (e.g. car parks, etc), land which is occupied together with the site by a person with control (e.g. land owned by BNFL in the vicinity of its sites) and facilities on such land (e.g. the visitor centre at Sellafield, offices, research laboratories, etc). There are some research facilities on principal nuclear sites, for example the BNFL Technology Centre at Sellafield.

56. Subsection (3) limits the nature of these additional responsibilities the NDA can be given to ones that will assist it in carrying out functions it already has or ones which are incidental to that purpose.

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57. Where the NDA is given responsibility under section 3(1) or 4(2)(a), (b) or (d) for the operation of an installation or facility, it will by implication have power to do anything it needs to do in order to operate the installation or facility concerned, including building or replacing anything on which the operation depends. Because the designation under section 3(1)(e) is in respect of particular matter or waste, the NDA may need to be able to build and operate an installation or facility to be able to deal with it, and subsection (4) contains the necessary power.

### **Section 5: Supplemental provisions of designating directions**

58. Section 5 makes additional provisions in relation to the terms of directions which may be given under section 3.

59. Subsection (1) provides that a designation may be made to come into force at a later date. This means a designation could have effect for certain purposes under the Act before the NDA has to carry out the principal function concerned. For example, when the NDA is first established, designations of BNFL and UKAEA will be made so that the NDA can begin preparing its annual plan in readiness for its first year of operation, expected to begin on 1 April 2005. The designations will come into force on that date. Where the NDA is given responsibility for installations, sites or facilities owned by what is currently a private sector company, subsections (2) and (3) allow for the possibility that the company concerned may be required to pay for work carried out by, or on behalf of, the NDA. The expectation would be that, insofar as funds were available to pay for such work, either an upfront payment would be made to public funds or a direction would require appropriate ongoing charges to be imposed by the NDA.

60. Subsections (4) and (5) provide for the modification or revocation of directions by a further direction given by the Secretary of State. As in the case of section 3(4), any such direction may only be given where the installation, site or facility concerned belongs to the Crown, UKAEA or BNFL, a company which is currently publicly owned, the NDA, or with the consent of the person with control. A direction giving the NDA responsibility for the decommissioning of an installation or clean up of a principal nuclear site may, under subsections (6) and (7), only be revoked if the Secretary of State is satisfied that the NDA has fully discharged its responsibilities.

### **Section 6: Designations relating to Scotland**

61. Section 6 provides for Scottish Ministers to act with or be consulted by the Secretary of State when making, varying or removing directions which give the NDA responsibilities in Scotland.

62. Subsection (2) sets out the cases in which Scottish Ministers act jointly with the Secretary of State in respect of sites in Scotland. The subsection draws a distinction not made elsewhere between licensable sites and other principal nuclear sites. As well as sites which require a licence under the Nuclear Installations Act 1965 and sites which would require a licence if they did not belong to the Crown, this category includes a site on which there is a fusion reactor (there is only one site with a fusion reactor in the UK which is in England). Directions in respect of sites that are not licensable will be given jointly by the Secretary of State and Scottish Ministers.

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63. Subsection (3) requires Scottish Ministers to be consulted by the Secretary of State where directions relate to giving, removing or varying certain NDA responsibilities in respect of licensable sites in Scotland.

### **Section 7: Supplemental functions**

64. Section 7 gives the NDA other functions to the extent that it considers these appropriate. As foreshadowed in the White Paper, these include the carrying out and promotion of research into matters relating to its functions; raising the profile of nuclear decommissioning through the provision of information; educating and training persons about those matters. Subsection (1)(e) also provides for the encouragement and support of initiatives to promote socio-economic development or that produce other environmental benefits for communities living near its sites, recognising that in some areas the NDA will be a major contributor to local economic activity and, consistent with its principal functions, will have a role to play in local socio-economic and environmental development.

65. The function in subsection (2) is required as a consequence of the restructuring plan for British Energy (“BE”) under which the Government has given certain undertakings underwriting the cost of decommissioning and clean up of BE sites (subject to approval of the agreement by the European Commission). The intention is that, in order to safeguard the interests of the taxpayer, the NDA should have the capacity to act as the nominee of the Secretary of State under the terms of the agreements with BE and generally to ensure that BE’s decommissioning plans and the basis on which it operates its stations and subsequently carries out decommissioning and clean up of its sites are such as to minimise any call on public funds. Subsection (3) enables the Secretary of State to require NDA to meet the costs of such an agreement so that all Government’s responsibilities in respect of nuclear clean up can be managed within the same framework.

66. Subsection (4) additionally gives the NDA the functions where required to do so by the Secretary of State of providing advice (generally or in relation to a particular installation site or facility) either to the Secretary of State or to third parties where the NDA has particular expertise in respect of its functions (set out in subsection (5)). Scottish Ministers can also require such advice to be given to them as far as Scotland is concerned. The NDA can also provide general advice to the Secretary of State or Scottish Ministers on its own initiative where the NDA thinks it appropriate.

67. Subsection (6) ensures that the NDA’s principal functions, defined in section 3(1), are not to be adversely affected by the carrying out of any of the NDA’s supplemental functions under subsection (1) or by its giving general advice. This duty on the NDA does not apply where the Secretary of State is requiring the NDA to act on his behalf under subsection (2) or (3) or where the Secretary of State or Scottish Ministers require advice.

68. Where the NDA is required to provide advice to Scottish Ministers without the agreement of the Secretary of State the NDA can charge them for the advice given.

### **Section 8: Special functions in relation to pensions etc.**

69. Section 8 gives the NDA particular functions in respect of (a) establishing and maintaining a pension scheme covering employees of organisations involved in decommissioning and clean up activities, and other employees in the nuclear industry who are of such a description as may be designated by the Secretary of State; and (b)

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administering a compensation scheme covering those employees. At present BNFL administers a compensation scheme on behalf of the nuclear industry. The NDA will have power to participate in such a scheme under its general powers but the power to administer is necessary in case the members of the scheme decide at any time that the NDA is best placed to administer it.

70. Subsection (2) identifies those employees who can benefit from such schemes. In addition to UKAEA employees and those employed for the purposes of carrying out NDA functions, the Secretary of State can designate others employed in the nuclear industry who can so benefit, after consultation with the NDA (subsection (3)).

**Section 9: General duties when carrying out functions**

71. Section 9 places a duty on the NDA, in carrying out its functions, to do all the things specified in subsections (1), (2), (3), (4) and (6).

72. Subsection (1) requires the NDA to have particular regard both to relevant Government policy, including that of devolved administrations (defined in subsections (7) and (8) respectively), and to the regulatory framework in respect of the environment, health and safety, and nuclear security (as defined in subsections (9) and (10)). This underlines the importance of decommissioning and clean up being carried out safely, securely, cost effectively and in ways which protect the environment. The definition of “nuclear security” is adapted from and consistent with the provisions on security in section 77 of the Anti-Terrorism, Crime and Security Act 2001.

73. Subsection (2) also requires the NDA to promote the development of a competitive market for clean up and other contracts; to ensure the availability of a skilled workforce capable of sustaining its work programmes over the long term; and to secure the adoption of good practice across its sites.

74. By virtue of paragraph (d) of subsection (2) the NDA is required to secure best value for the taxpayer within this overall framework, but not at the expense of its other duties in subsections (1) and (2).

75. Subsection (3) places a duty on the NDA to consider and act in the overall public interest in decisions on operating its facilities and managing its sites. So, for example, the NDA should seek to obtain value for the taxpayer from any asset it owns but for which it no longer has a use.

76. Subsections (4) and (5) require the NDA, in carrying out its function under section 7(1)(e), to support and encourage activities benefiting the social and economic life of local communities, to have regard, in particular, to the extent to which the previous operator was supporting such activities before designation of a site to the NDA, and to consider the obligations that should be imposed on its site operators or management contractors in respect of such activities.

77. Subsection (6) places a duty on the NDA, before entering into any contract in relation to a site, installation or facility to require its proposed contractors to produce their procurement strategy for carrying out work under the contract, and to consider the likely effect on the economic life of the local community of implementing this strategy.

### **Section 10: Powers for carrying out functions**

78. Section 10 gives the NDA the general and specific powers it requires to carry out its functions. In addition to the general powers, in subsection (1), some particular powers are identified in subsection (2) which might not be thought to fall within its general powers in the absence of a specific mention. They are included because they are or may become a necessary part of the NDA's activities. The power to operate power stations is for the NDA to be able to operate, besides the Magnox stations that will be designated under section 3(1), the Combined Heat and Power station at Fellside which provides essential steam and electricity to the Sellafield site and the Maentwrog hydroelectric station which is located on the lake which supplies a Magnox decommissioning site. The power to hold a nuclear site licence is there as a fall back lest it is decided that the NDA must take more direct responsibility for the work on any site. The NDA would of course need to demonstrate it met all the requirements of a site licensee before it could secure a licence from the Nuclear Installations Inspectorate of the Health and Safety Executive.

79. Other powers covered by subsection (2) include those to make grants or loans for the benefit of socio-economic development or other activities that produce other environmental benefits or for research into decommissioning and clean-up; and to use facilities on its sites for carrying out research for third parties and in this respect or otherwise to generate funds which will ultimately contribute to the resources to be made available to the NDA. In order to carry out its functions, the NDA may exercise its statutory powers itself or contract with others to do things on its behalf. The section does not empower the NDA to do anything which is not required for the purpose of, or in connection with, the carrying out of its functions.

80. Subsection (3) gives the NDA power to charge for work done in relation to sites, installations or facilities for which it is not itself financially responsible (for the definition of financial responsibility see section 21) subject to the approval of Ministers either under the initial designation or otherwise.

### **Section 11 and Schedule 2: Strategy for carrying out functions**

81. Section 11 places a duty on the NDA, once established, to prepare a strategy for carrying out its functions and to keep that strategy under review. Whenever the NDA is given a new responsibility for securing the decommissioning or clean up of an installation or site, it must review the relevance of its strategy for that purpose and, if need be, revise its strategy accordingly (subsection (2)).

82. Under Schedule 2, the strategy must be approved by the Secretary of State and, in respect of responsibilities given to the NDA jointly under section 6, by Scottish Ministers. Schedule 2 sets out various procedural arrangements for preparing and revising the NDA's strategy including timing; consultation by the NDA as part of the process of preparing or revising its strategy; approval of the strategy by the Secretary of State, and publication of the strategy once approved. Further information can be found at the notes to Schedule 2.

### **Section 12: Contents of strategy**

83. Section 12 sets out various requirements regarding the matters the strategy is to address and the basis on which it must address them. The key requirements are that the strategy must:

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- cover both the decommissioning and clean up of the installations and sites for which the NDA is responsible and its strategy for operating installations and facilities whilst they remain operational (subsection (1));
- set out the NDA's objectives in relation to the decommissioning and clean up of the various installations and sites for which it is responsible, including the condition to which sites are to be restored, and how, and over what period and at what estimated cost, it intends to achieve those objectives (subsections (4) to (7));
- set out the NDA's priorities, and how it intends to promote a skilled workforce, competition, good practice, and encourage or support activities benefiting the socio-economic or environmental development of communities near its installations and sites, as well as the rationale for its strategy (subsection (2)). It must also set out how the NDA intends to publicise its strategy, engage in stakeholder dialogue, and listen to external views (subsection (3)).

84. Subsection (9) requires the strategy to take account of sites, installations and facilities which have been designated, but which have yet to become the responsibility of the NDA by that designation entering into force.

### **Section 13 and Schedule 3: Annual plans**

85. Section 13 requires the NDA, for each financial year, to prepare a plan showing how it intends to carry out its functions during the year in question and to submit it to the Secretary of State and Scottish Ministers for approval. Scottish Ministers' approval is needed in respect of responsibilities given to the NDA jointly with the Secretary of State under section 6. The plan will relate directly to the NDA's strategy – i.e. the plan will set out the basis on which the NDA proposes to implement its strategy in the twelve months concerned.

86. Subsection (2) requires the plan to be submitted for approval not less than three months before the start of the financial year in question. Subsections (3) and (4) specify certain matters which the plan must cover in relation respectively to decommissioning and clean up and the operation of installations and facilities. Subsection (5) requires that the plan must also set out all the activities of significance that the NDA proposes to carry on during the year in question in relation to its other functions. Subsection (6) gives the Secretary of State power to direct the NDA to deal with other matters in its plan for any financial year. Subsection (7) ensures that in preparing its annual plan the NDA can anticipate it taking on responsibility for other sites, installations or facilities for which a designation is due to come into force in that year.

87. Schedule 3 deals with various matters relating to the preparation and revision of annual work plans, in particular as regards consultation with stakeholders, approval of plans by the Secretary of State, the publication of plans once approved, and their laying before Parliament and the Scottish Parliament by the Secretary of State and Scottish Ministers. The provisions are very similar to those in Schedule 2, including the requirement that the Secretary of State must consult Scottish Ministers on any proposals for sites in England and Wales relating to the non-processing treatment, storage or disposal of hazardous material that would have an effect on the management of hazardous material or availability of a site in England and Wales for the treatment, storage or disposal of hazardous material located in Scotland. The main difference between Schedule 3 and Schedule 2 is that, given that work plans will implement an approved strategy, paragraph 2(2) of the Schedule leaves open the possibility, in cases

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where a plan is revised in year, of the NDA only consulting those stakeholders directly affected by the changes proposed before submitting the revised plan for approval. As with Schedule 2, the method of consultation is left for the NDA to decide with its stakeholders.

#### **Section 14: Annual reports**

88. Section 14 deals with the preparation and publication of the NDA's annual report.
89. Subsection (1) requires the NDA to produce an annual report on the discharge of its responsibilities and the carrying out of its other functions as soon as reasonably practicable after the end of the year in question and to send it to the Secretary of State and Scottish Ministers.
90. The report must cover all the matters specified in subsection (3) and any others which the NDA may be directed to cover by the Secretary of State after consulting the Scottish Ministers. Subsection (5) requires that the report must also deal separately with activities in respect of decommissioning and clean up and operational installations and facilities such as the Magnox stations, THORP and SMP. This reflects the commitment in the White Paper to provide specific information on the performance of Magnox, THORP and SMP and the rationale for keeping them open.
91. Subsections (6) and (7) require the Secretary of State to lay the NDA's report before Parliament and to publish it in the manner which, in his opinion, is most appropriate for bringing it to the attention of stakeholders. Subsection (8) requires the report to be laid before the Scottish Parliament. Under subsection (9), the Secretary of State may exclude anything before laying and publishing the report which he considers to be against the interests of national security, or which relates to the private affairs of an individual or the commercial interests of a particular body of persons where publication of such information would seriously and prejudicially affect the interests of that individual or body.

#### **Section 15: Duty to decommission and clean up installations and sites**

92. Section 15 sets out what the NDA has to do in order to discharge a responsibility it is given under section 3 for decommissioning or cleaning-up. It puts a specific duty on the NDA to take all such steps as it considers appropriate for securing the implementation of its approved strategy and annual work plan in respect of each of the installations and sites which it has designated responsibility for decommissioning and cleaning up. This includes achieving the objectives set out in the strategy under section 12(4) and (5), for each installation or site. Where a site is a contaminated site rather than a principal nuclear site (for definitions see section 37), the duty is subject to such directions as the Secretary of State may make in respect of the discharge of the NDA's responsibilities for such sites (subsection (3)). Such directions are to be given jointly with Scottish Ministers in respect of sites in Scotland. Thus the Secretary of State cannot give the NDA directions as to how the NDA is to carry out its main decommissioning and cleaning up task on principal nuclear sites. This is to be up to the NDA, subject to the need for the Secretary of State to approve the strategy and annual plan under sections 11 and 13 respectively.

#### **Section 16: Duties to operate installations and provide treatment, etc**

93. Section 16 places duties on the NDA in respect of its responsibilities for the operation of installations and facilities, including any under section 4(2), the treatment, storage, transportation or disposal of hazardous material under section 3(1)(e) and the management of

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any land under section 4(1) or (2). The NDA is to carry out these tasks in accordance with such general and specific directions as may be given to it by the Secretary of State and, where there was a joint designation, Scottish Ministers. The NDA must also act in accordance with its approved strategy and annual plan.

### **Section 17: Duty to use installations etc for purposes of NDA**

94. Section 17 puts a duty on the person with control (see section 36) of a designated principal nuclear site, a designated nuclear installation, a designated facility situated in or on a principal nuclear site, or a designated installation comprised in an NDA facility, not to use or dispose of that site, installation or facility except in order to discharge the NDA's responsibilities in relation to it or to enable the person with control to comply with relevant statutory and regulatory requirements. For the purposes of this section, disposal covers granting a lease or licence of the site or contracting to do so (subsection (9)). This section does not mean that a site, installation or facility cannot be used or disposed of where the NDA has given its consent (subsection (3)). In a case where the site, installation or facility has been transferred to the NDA, the person with control has a right under subsection (4) to use them for those two purposes, without the need for any further permission from the NDA.

95. Except where the NDA otherwise directs or where the NDA is charging for the work it is doing, subsection (5) further requires the person with control to pay to the NDA any sums and other benefits received as a consequence of operating the site, installation or facility or the disposal of an interest or right in relation to the site, installation or facility. The main purpose of this provision is to ensure that where the NDA is funding the operation of installations such as THORP, SMP and Magnox stations, it also receives the income provided. It could also include sums received by way of rents and disposal of surplus assets. Section 22(3) requires the NDA in turn to pay the money received to the Secretary of State. This section does not impose any obligations on the persons in control of contaminated sites.

96. Subsections (6) and (7) provide that where a management contract or other agreement is in force between the NDA and a person with control or its owner, fulfilling the terms of the agreement by definition facilitates the discharge of the NDA's responsibilities.

97. Both the duty under subsection (2) and the right under subsection (4) apply to interests or rights in the installation, site or facility and subsection (8) extends those to anything located on the site, e.g. vehicles, a business or undertaking operated from the site and intellectual property.

### **Section 18: Directions by NDA to the person with control**

98. Section 18 places a duty on the person with control of a designated principal nuclear site, a nuclear installation, a facility situated in or on a principal nuclear site, or an installation comprised in an NDA facility to prepare such plans for the discharge of the NDA's responsibilities in relation to that site, installation or facility as the NDA may direct; submit them to the NDA for approval; and comply with any further directions the NDA may give in accordance with the provisions of subsection (3).

99. These directions may cover any related site which is designated under section 19 in relation to the principal nuclear site or installation or facility concerned. Where the person with control of an installation, site of facility is a company subsection (4) ensures that the person holding the majority of the voting rights in that company (for example the parent

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company of a site management company) is required to comply with NDA directions aimed at securing the compliance of the person/company with control of the site. Subsection (5) provides that directions may only be given by the NDA for the purpose of giving effect to its strategy and annual work plans. Under subsection (6), the NDA may also issue directions regarding consultation by the person with control on the preparation of plans for the site, installation or facility concerned. The expectation is that consultation will be carried out on a similar basis to that required in the preparation of the NDA's strategy and annual work plans and involve the same parties.

100. Subsection (7) makes express provision to the effect that no direction given by the NDA may authorise a contravention by the person with control of the statutory requirements which apply to the operation of an installation or site. Consequently, any purported direction by the NDA that would, if the person with control were to give effect to it, place him in breach of any regulatory requirements would be unlawful.

### **Section 19: Designation as a related site for the purpose of section 18**

101. Section 19 enables the Secretary of State to designate a contaminated site (see section 36 for the definition) as being related to a principal nuclear site or an installation or facility on such a site – a 'related site' (paragraph (a) of subsection (1)). Such a site is then brought within the scope of section 18 and the person with control of the principal nuclear site (or the installation or facility on such a site which caused the contamination) can be subject to directions for the related site as well. By virtue of subsection (2), this can only happen in situations where the contamination, whether radioactive or chemical, has been caused, directly or indirectly, by activities in, or connected to the particular principal nuclear site or the installation or facility on such a site (subsection (4)), which must also be the responsibility of the NDA under a direction. The activity could have taken place before the principal nuclear site was used for nuclear purposes. A number of such sites had previous military or other uses that may be responsible for contamination. As with designations in respect of the NDA's principal functions (section 3(4)), a direction making a site a related site can only be made where the person with control is a Crown appointee, the UKAEA, a publicly owned company or the NDA, or where the person with control has given consent (paragraph (d) of subsection (2)).

### **Section 20: Duty to comply with directions under section 18**

102. Section 20 sets out the basis on which the duty to comply with directions given under section 18 applies and that it is enforceable by civil proceedings primarily for an injunction or, in Scotland, an interdict. Subsection (3) makes it clear that the duty is subject to the NDA discharging its financial responsibilities for the installation or site concerned. Subsection (4) provides for the disapplication of the duty to the extent that there is a contract in place between the NDA and the operator. This provides for flexibility as the parties to the contract can decide which aspects of their relationship contract should govern and which directions should govern.

### **Section 21: Financial responsibilities of NDA**

103. Section 21 gives the NDA financial responsibility for the decommissioning, operation or cleaning up of installations, facilities, sites or related sites which, at the time the relevant designation is made under section 3, are controlled by one of the persons listed in subsection (2). From that point, the NDA is responsible for the future costs of carrying out its

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responsibilities. It is primarily intended to ensure that the fact that the NDA will be assuming responsibility for the cost of decommissioning and cleaning-up will mean that the costs will not have to be shown on the balance sheet of BNFL or any successor companies holding a site licence.

104. Where the NDA has financial responsibility but is not itself the person with control of an installation, site or facility, subsection (3) provides that the person with control is not to be or become liable for the costs of doing anything the NDA has to do to discharge its responsibilities for decommissioning, cleaning-up or operation. Subsection (5) makes it clear that this does not mean that the person with control will not be liable to make payments under, for example, contracts it enters into with third parties. Subsection (4) prohibits the NDA from charging the person with control when the NDA has financial responsibility and provides that the person with control does not have to make any financial provision for meeting costs for which the NDA has financial responsibility. This would include making provision for any future costs in the accounts of the person with control. The effect of subsection (4) with subsection (6) is to require the NDA to put the person with control in funds to meet the costs it incurs in meeting regulatory obligations (as authorised or required by section 17), as well as the costs of complying with directions given by the NDA under section 18. Subsection (9) makes the provisions of section 21 subject to a contract in place between the NDA and the person with control of the installation, site or facility or a body corporate of which that person is a subsidiary.

105. Where the NDA is given responsibility for an installation, facility or site without it including financial responsibility under subsections (1) and (2), a payment could be required by the Secretary of State under section 5(2) on making the designation or the NDA could charge for the work under section 5(3) or section 10(3). However, if no charge is made under either of those provisions, the NDA will carry the cost of the work itself. Subsection (10) makes it clear that the NDA can also carry the financial burden in cases where it does not have financial responsibility under this section.

## **Section 22: Expenditure and receipts of NDA**

106. Section 22 sets out how the NDA is to be put in funds and arrangements for handling any income it generates.

107. Subsection (2) enables the Secretary of State to fit the payment of grants to the requirements of the NDA so that it has the funds it needs as and when required.

108. Subsection (3) requires all sums received by the NDA other than by grant from the Secretary of State to be paid to the Secretary of State who, under subsection (4), is required to pay them into the Consolidated Fund. Section 31 provides the mechanism by which these sums are credited to contribute to future decommissioning and clean up costs. This covers income from operating nuclear installations such as THORP, SMP and Magnox, and charges to third parties, whether for decommissioning work carried out on their behalf or for the use of other facilities or land which are the responsibility of the NDA.

109. Subsection (5) requires the Secretary of State to have regard, in particular, to the extent to which he considers that the NDA should exercise its power to make grants or loans to benefit the social or economic life of communities or that produce other environmental benefits in order to mitigate the effects of the cessation of the operation of a designated installation.

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110. While it will be important that the NDA operates any income generating facilities in the most beneficial way, this must not distract the NDA from its principal task of decommissioning and clean up. In the interest of transparency therefore any income the NDA generates itself will be clearly separated from the grant it receives from Government. It follows that the resources available to the NDA to carry out its functions will derive principally from grants provided by the Secretary of State in line with its agreed strategy and annual plans.

### **Section 23: Borrowing by the NDA**

111. Section 23 sets out the framework for the NDA to borrow from the Secretary of State. This is principally to enable the NDA to support the carrying on of normal business practices which optimise the contractual arrangements which are necessary to support the decommissioning, clean up and operational activity of the persons with control of designated sites, installations and facilities which it funds.

112. Subsections (4) and (5) allow the NDA to borrow from other sources so that it could consider entering into PFI arrangements for particular projects, subject to the approval of the Secretary of State and the Treasury.

### **Sections 24 and 25: Limit on NDA borrowing and Government guarantees for NDA borrowing**

113. Section 24 limits the capacity of the NDA to borrow to £2 billion, the limit which applies to BNFL in the Atomic Energy Act 1971 (c.11). In view of the long timescales involved in nuclear clean up, the Secretary of State can amend that limit by order. Section 25 provides that the Secretary of State may guarantee borrowing by the NDA with the approval of the Treasury.

### **Section 26: Accounts of NDA**

114. Section 26 establishes the framework for NDA financial reporting in accordance with the usual rules governing non-departmental public bodies (“NDPBs”). It requires the NDA to keep proper accounts and accounting records and prepare an annual statement of accounts in accordance with requirements laid down by the Secretary of State with the approval of the Treasury. The accounts must be audited by the Comptroller and Auditor General (“C&AG”) and, together with the C&AG’s report, laid before Parliament.

115. The NDA’s accounts will show income from and expenditure on operational plant such as THORP, SMP and Magnox separately from income and expenditure on decommissioning and clean up. The DTI will be seeking views from stakeholders before final decisions are taken on requirements to be made as to accounting treatments and the presentation of the NDA’s accounts.

### **Section 27 and Schedule 4: Tax exemption for NDA activities**

116. Section 27 allows for the exemption from corporation tax, with appropriate safeguards, of certain activities carried on by or on behalf of the NDA. The main activities to be considered for exemption from corporation tax are those which count as a trade for tax purposes but are undertaken by or on behalf of the NDA where such activities are closely intertwined with decommissioning and clean up work and are likely to be loss-making for tax. For the NDA, under normal tax rules, the work of decommissioning and clean up will not in itself count as a trade for tax purposes. (Although subject to section 30, provisions for

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such work arising from current income generating activities may be taken into account in calculating the profit or loss from those activities for tax purposes.)

117. Under subsection (1), trading income from exempt activities of the NDA or an NDA company is not taxed, nor can the exempt activities give rise to tax losses. To be exempt the activities need to be specified in regulations. Subsection (2) gives effect to Schedule 4, which makes further, detailed provisions for the exemption. Further information can be found in the notes to that Schedule.

118. The exempt activities are defined in subsection (3) and are activities covered by section 3(1) and which are also specified in Treasury regulations. Activities that could be covered by the exemption include THORP and SMP at Sellafield, which are likely to be loss-making for tax and where any activity that could in theory be taxable is intimately bound up with the wider decommissioning and clean up activities on the Sellafield site. Other trading activities, such as electricity generation, are more clearly separable from decommissioning and clean up, and more likely to be profitable for tax, so the intention is that such activities will not be specified in Treasury regulations and so will remain taxable.

119. An NDA company is defined in subsection (4) as either a wholly owned subsidiary of the NDA, or alternatively as a relevant site licensee. This is so that any tax exemption is given only to NDA subsidiaries or site licensee companies linked to the NDA carrying out trades that include and are intimately bound up with nuclear legacy decommissioning and clean up activities. In such cases the cost and effort of ascertaining the tax position (where losses would be likely) would be disproportionate. It is Government's intention that private companies will not be able to realise tax-free profits through the tax exemption. The intention is that regulations to allow exemption will only apply where the detail of the arrangements with the site licensee companies carrying on the activity is such that any losses or profits would in economic terms be the NDA's.

120. Subsection (5) lists the conditions to be met if a company is to qualify as a relevant site licensee company. These include holding a nuclear site licence and where a management contract is in force with the NDA, the contract is with the company in question or with its parent. Conditions to be specified in Treasury regulations will also have to be met for a company to qualify as a relevant site licensee company. The specified conditions will be drafted so as to ensure that where shares of site licensee companies are held by management contractors, the contractor cannot extract any profits or utilise any losses in respect of the exempt activities of the site licensee company.

121. Subsection (6) requires the agreement of the Secretary of State for any Treasury regulations made under subsection (3)(b) specifying activities exempt from corporation tax or subsection (5)(d) setting out conditions that need to be met for a company to qualify as a relevant site licensee. Subsection (7) explains that the regulations are to be made under the negative resolution procedure in the House of Commons.

122. Various definitions are given in subsection (8), including those for "management contract", "trading income" and "trading losses".

123. Subsection (9) specifically concerns the tax treatment of trade credits under the loan relationships and derivative contracts legislation. Where, but for particular tax rules, they would be regarded as trading receipts, and the trade in question is exempted, the credits themselves are exempted.

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124. Subsection (10) ties this section to the corporation tax legislation.

### **Section 28: Taxation of NDA activities chargeable under Case VI of Schedule D**

125. Section 28 confirms that the income generating activities of the NDA will be taxed under Case I of Schedule D, rather than Case VI of Schedule D, under section 18 of the Income and Corporation Taxes Act 1988 (c.1). This is being introduced in case the contractual relationships between the NDA and site licensee companies are such that the income generating activities of the NDA would be taxable under Case VI under the general tax rules. Taxing the income from significant activities, such as electricity generation, under Case VI would cause difficulties. This is because the tax sections in this Act have been drafted on the assumption that the NDA would be carrying on a trade for tax purposes, and Case VI does not have the comprehensive computational rules in the same way that Case I does.

126. Subsections (1) and (2) confirm that taxable activities carried out by the NDA when fulfilling its functions under section 3(1)(a), (d) or (e) are taxed under Case I, unless there is specific tax legislation (other than section 18 of the Income and Corporation Taxes Act 1988) to tax them under Case VI.

127. Subsections (3) and (4) provide for any activities to be treated together as part of the same trade or of another “real” trade being carried on by the NDA, unless specific tax legislation requires the activity to be treated as carried on as part of a separate trade.

128. Subsection (5) ties this section to the corporation tax legislation.

### **Section 29: Disregard for tax purposes of cancellation etc of provisions**

129. This section provides that the accounting entries made by a publicly-owned BNFL site licensee company arising from the initial recognition of the NDA taking responsibility for nuclear clean-up and decommissioning liabilities are not included in the tax computation (“a disregard”). This disregard would only apply to the initial accounting entries made on the undertaking of responsibility.

130. Without this provision the accounting credit arising in these circumstances would increase the taxable profits (or reduce the tax-allowable losses) of the BNFL company in which the credit was made. Where the NDA has taken responsibility by virtue of a direction under section 3 (thereby causing the site licensee to recognise an asset to match its liabilities) the site licensee may recognise in its accounts subsequent change in the estimated value of the NDA’s undertaking to pay for nuclear clean-up and decommissioning. The disregard will not apply to these accounting changes nor to the actual expenditure to which they relate. These subsequent changes would lead to accounting entries for the decommissioning liability and the right to recover sums from the NDA, which would match one another. This matching treatment would be followed for tax without the need for a special rule.

131. Subsections (1) and (2) define the circumstances in which the “disregard” applies. Subsection (3) sets out the disregard itself.

132. Subsection (4) ensures that it is only the accounting entries caused by the NDA acquiring responsibility for decommissioning and cleaning-up, or by the transfer of property etc to the NDA or a subsidiary of the NDA under a nuclear transfer scheme under section 39, that are to be disregarded.

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133. Subsection (5) contains definitions and subsection (6) ties this section to the corporation tax legislation.

### **Section 30: Disregard for tax purposes of provisions recognised by NDA**

134. Section 30 introduces a new section for the NDA that mirrors the effect of the new section introduced by section 29 for BNFL. The disregard in section 30 applies to the NDA so that the entries recognised in its accounts immediately on taking responsibility for BNFL's nuclear liabilities would not be brought into account for tax purposes. As for section 29, the disregard would not apply to any subsequent change in estimated value of the expenditure to which it relates.

135. Subsections (1) and (2) set out the circumstances in which the "disregard" applies. Subsection (3) sets out the disregard itself. The disregard applies only to entries relating to nuclear sites where the nuclear site licence is held by BNFL or a wholly owned subsidiary.

136. Subsection (4) restricts the disregard to accounting entries for the first recognition of the provision in the accounts of the NDA.

137. Subsection (5) contains definitions and subsection (6) ties this section to the corporation tax legislation.

### **Section 31: Establishment and maintenance of the Account**

138. Section 31 establishes a statutory account – the Nuclear Decommissioning Funding Account – as the basis for funding all of the NDA's activities. The aim is to enable the NDA to plan ahead effectively and put long term contracts in place by demonstrating the availability of funding on a rolling basis over a period of ten years or more.

139. The provision is intended to give confidence to the market that resources will be available to support substantial programmes of work over a period of years, and thereby should encourage competition for clean up contracts and help to build confidence in the NDA and in its programmes.

140. Subsection (2) provides for the opening balance of the Account to be determined by the Secretary of State with the consent of the Treasury. The intention is to ensure it is sufficient to support the NDA's programme over the first 10 year period. The opening balance will be the sum total of:

- the value of BNFL's Nuclear Liabilities Investment Portfolio (which, under section 42 of the Act will be transferred to the Secretary of State and paid into the Consolidated Fund – see paragraphs 160 and 161 below);
- the value of the Magnox Undertaking of 1998 at the time it is extinguished by section 43 of the Act (see paragraphs 162 and 163 below);
- an additional sum from Government to drive forward the decommissioning and clean up programme as effectively and efficiently as possible.

141. Thereafter, the Account will be held by the Secretary of State who, under section 22, will receive all income passed to the NDA for payment into the Consolidated Fund and provide grants to the NDA. The Account will record all such receipts and grants as credits or debits respectively. Any money generated by the NDA in operating installations such as THORP, SMP or Magnox will therefore be identified as a contribution to the funding of the

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decommissioning and clean up programme. Subsection (4) also provides for the Account to be credited by any amounts received by the Secretary of State on the NDA's behalf and by interest on the balance in the account.

142. The annual contribution will be the largest and most important of the credits to the Account. The intention is that it should be set at a level which ensures that the balance of the Account is kept at a sufficient level to support a rolling ten year programme for the NDA. Subsections (6) and (7) require the Secretary of State to publish a policy statement explaining how the annual contribution is to be determined so as to prevent the balance of the Account falling below a minimum defined level determined by the Secretary of State with the consent of the Treasury. The Secretary of State will be accountable to Parliament for the implementation of this policy and the operation of the Account as a whole.

### **Section 32: Examination of the Account**

143. Section 32 makes provision for the Comptroller and Auditor General ("C&AG") to examine the operation of the Account and the application of the policy for determinations of the Government's annual contribution. The aim is to ensure that the operation of the Account is subject to independent scrutiny. The C&AG's report is to be based on a statement by the Secretary of State setting out the credits and debits made to the account for the period of the statement. The C&AG must lay copies of the statement and of his report before Parliament.

### **Section 33: Validity of transactions**

144. Section 33 provides that a contract which is entered into by the NDA is not invalidated by conduct of the NDA which is outside its powers or contravenes the duties imposed on the NDA by section 7(6) or 9 or a direction given by the Secretary of State under the Act. The section also stipulates that contractors are not required to enquire or see whether the transaction being entered into constitutes or involves such conduct or contraventions. Potential contractors will not therefore have to concern themselves with checking whether the Act has been complied with by the NDA before entering into a contract.

### **Section 34: Amendment of Schedule 12 to Electricity Act 1989**

145. Section 34 makes two detailed amendments to Schedule 12 of the Electricity Act 1989, which allows the Secretary of State to give financial assistance in connection with cleaning-up after nuclear activities. The first brings the scope of Schedule 12 (which already covers the decommissioning of an installation licensable under the Nuclear Installations Act 1965) into line with the concepts of decommissioning and cleaning up of nuclear installations and principal nuclear sites under this Act. The second provides that the Secretary of State's power to give financial assistance under Schedule 12 does not apply where the NDA has financial responsibility under section 21 of this Act.

### **Section 35: Power to modify Chapter 1 of Part 1**

146. Section 35 gives the Secretary of State a power, by order subject to affirmative resolution of both Houses, to modify the provisions of sections 2, 11, 12 and 13 and their related Schedules on the constitution of the NDA and the process for approving the NDA's strategy and annual plans. It provides the flexibility to make any amendments to those provisions which might be necessary or desirable without having to secure the Parliamentary time needed for primary legislation. The Secretary of State must consult Scottish Ministers

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before making an order and cannot modify the functions of Scottish Ministers without their consent.

### **Section 36: Meaning of “nuclear site” etc and “person with control”**

147. Section 36 defines key concepts for the designation and control of sites, installations and facilities. Subsection (2) defines the two types of nuclear site which are the basis in section 3(1)(c) for the NDA’s responsibilities for clean up: principal nuclear sites and contaminated sites. The powers of the NDA and the duties on the persons with control of sites depend on their categorisation. The principal differences are in the application of sections 17 and 18 which only apply in relation to principal nuclear sites or facilities thereon. Subsection (3) defines the person with control of an installation, site or facility in a range of specific cases.

148. A “principal nuclear site” includes sites licensed under the Nuclear Installations Act 1965 (c.57); sites which would require a licence were the licensing requirements to apply to the Crown; non-licensed sites on which there is situated a facility for which the NDA has responsibility; sites where there are nuclear fusion research installations (the only existing one is the UKAEA site at Culham); and sites which are still contaminated as a result of nuclear activities (defined in subsection (5)) carried out on the site during or before the time when it fell within one of the preceding classes of site which could include for example, old military ordnance.

149. Contaminated sites can either have been contaminated as a result of a range of activities in, on, or related to a nuclear installation, principal nuclear site or NDA facilities (subsection (5)) or are the location of hazardous material. The contamination can be either radioactive or chemical in nature. This means that the NDA can potentially take responsibility for sites which are not principal nuclear sites but which have been contaminated from a range of sources connected with the nuclear industry. An example would be where pipe-lines discharging radioactive waste have leaked onto adjoining land.

150. There is a third category of site, a “related site”, which is a particular type of contaminated site. This is dealt with separately in section 19.

### **Section 37: General interpretation of Chapter 1 of Part 1**

151. Subsection (1) defines terms used in this Part of the Act. The definitions of “cleaning up” and “decommissioning” are drawn very broadly to include removing any substance or material (i.e. not just hazardous material) that needs to be removed in order to make the site or installation suitable for other purposes. What the other purpose should be for a particular site will be determined by the objectives for it set out in the strategy. Hazardous material is defined to include “nuclear matter” within the meaning of the Nuclear Installations Act 1965, “radioactive waste” within the meaning of the Radioactive Substances Act 1993 (see subsection (7)) and things that have been contaminated as a result of nuclear activities, as defined in section 36. It should be noted that the definition of “treat” in relation to hazardous material includes both the manufacture of nuclear fuel and the reprocessing of spent fuel. It is also worth noting that for the purposes of the Act a “facility” includes any, or all, of an installation, an undertaking or a business, and any vehicles or other property used for the purposes of an undertaking or business. Subsections (3) and (4) define a publicly owned company.

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- “Nuclear material” is defined in section 26 of the Nuclear Installations Act 1965 (c.57) to mean—
  - (a) “(a) any fissile material in the form of uranium metal, alloy or chemical compound (including natural uranium), or of plutonium metal, alloy or chemical compound, and any other fissile material which may be prescribed [by regulations made by the Secretary of State]; and
  - (b) any radioactive material produced in, or made radioactive by exposure to the radiation incidental to, the process of producing or utilising any such fissile material as [mentioned in paragraph (a)];”.
  - (c) The power to except types of matter from the definition in the Nuclear Installations Act 1965 is disregarded by section 37(7).
- “Radioactive waste” is defined in section 2 of the Radioactive Substances Act 1993 (c.12) to mean “waste which consists wholly or partly of—
  - (a) a substance or article which, if it were not waste, would be radioactive material; or
  - (b) a substance or article which has been contaminated in the course of the production, keeping or use of radioactive material, or by contact with or proximity to other waste falling within paragraph (a) or this paragraph.”.
- “Radioactive material” is defined in section 1 of the Radioactive Substances Act 1993 to mean (broadly) anything which is not waste but which is a substance possessing a degree of radioactivity as set out in Schedule 1 to that Act, or a substance which is radioactive—
  - (a) due to a process of nuclear fission (or other process of subjecting a substance to bombardment by neutrons or to ionising radiations);
  - (b) in consequence of the disposal of radioactive waste; or
  - (c) by way of contamination in the course of the application of a process to some other substance.

## **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

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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

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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

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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

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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

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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.

### **CHAPTER 3: CIVIL NUCLEAR CONSTABULARY**

#### **Section 51 and Schedule 10: The Civil Nuclear Police Authority**

180. Section 51 should be read in conjunction with Schedule 10. It establishes the Civil Nuclear Police Authority as a body corporate, and gives the Authority the power to employ persons and to determine their pay and conditions. The Secretary of State will be responsible for appointing the members of the Authority, including the Chairman. The Act does not prescribe the detailed composition of the Authority, but the intention is that membership will consist of independent members and representatives of the civil nuclear industry. The intention is to achieve a balanced membership containing a clear independent element, including members with specialised policing knowledge, whilst retaining representatives of the industry in the majority. The Government intends that the rules on appointment set out by the Office of the Commissioner for Public Appointments (“OCPA”) will be followed in making appointments to the Police Authority.

181. The Police Authority will be able to determine the pay and conditions of its employees. The intention is that employees of the Police Authority will be eligible for membership of the UKAEA pension scheme, but there is also power for the Authority, with the Secretary of State's consent, to set up a new pension scheme for its employees.

182. Part 4 of Schedule 10 sets out the financial arrangements and responsibilities of the Police Authority. It sets a borrowing limit and allows the Secretary of State to guarantee loans, to make grants and determine the financial duties of the Police Authority. In the normal course the Government's expectation is that the Police Authority will, as now, recover its costs from those to whom it provides services. Provision for grants and borrowing is being made so that large capital items can be provided for in this way if necessary. The Police Authority's accounts will be audited by the Comptroller and Auditor General, and laid before Parliament.

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183. Part 5 of the Schedule makes it clear that the Police Authority is not part of the Crown, and designates it as a public authority for the purposes of the Freedom of Information Act 2000.

### **Section 52: The Civil Nuclear Constabulary**

184. Section 52 places an obligation on the Police Authority to secure the maintenance of the Civil Nuclear Constabulary, in similar terms to the obligation on police authorities for Home Office police forces under section 6 of the Police Act 1996 (c.16). It also defines the primary function of the Constabulary as the protection of civil licensed nuclear sites and the safeguarding of nuclear material.

### **Section 53 and Schedule 11: Chief Constable and other senior officers**

185. Section 53 should be read in conjunction with Schedule 11. It requires the Police Authority, with the approval of the Secretary of State, to appoint a Chief Constable and a Deputy Chief Constable. (The Police Authority must consult the Chief Constable before appointing the Deputy.)

186. Schedule 11 sets out the circumstances in which the Police Authority may suspend a senior officer in order to maintain public confidence, and enables the Police Authority to require such an officer to retire or resign in the interests of efficiency or effectiveness. It also gives the Secretary of State a power to require the Police Authority to exercise these powers in relation to the Chief Constable. These provisions mirror those for Home Office Forces.

### **Section 54: Functions of senior officers**

187. Section 54 sets out the circumstances in which other senior officers (Deputy Chief Constable or Assistant Chief Constables) may stand in for the Chief Constable. These mirror provisions in other police legislation.

### **Section 55: Members of the Constabulary**

188. Section 55 makes it clear that members of the Constabulary will be under the direction and control of the Chief Constable. Unlike area forces all members of the Constabulary will be employees of the Police Authority, as well as office holders. A member of the Civil Nuclear Constabulary who makes the appropriate declaration under this section in either England & Wales or Scotland will have police powers and privileges throughout Great Britain within the jurisdiction set out in section 56.

### **Section 56: Jurisdiction of Constabulary**

189. Section 56 sets out the jurisdiction of members of the Constabulary in terms similar to that set out in section 76 of the Anti-Terrorism, Crime and Security Act 2001 (c.24). Whilst the jurisdiction will remain broadly the same as at present, three adjustments are being made. The first of these will remove the Constabulary's jurisdiction on premises which are not nuclear sites but are in the possession or under the control of UKAEA (by virtue of Schedule 3 to the Atomic Energy Act 1954 (c.11)) or of certain nuclear operators (by virtue of paragraph 4 of Schedule 1 to the Nuclear Installations Act 1965 (c.11) or section 19 of the Atomic Energy Act 1971 (c.11)). There is no longer any need for the Constabulary to protect premises which do not hold nuclear material. The second will remove the Constabulary's jurisdiction to exercise police powers in respect of the property of UKAEA or certain nuclear operators within a 15 mile radius of their premises (which the Constabulary has by virtue of

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section 2 of the Metropolitan Police Act 1860 (c.135), as adapted by the provisions mentioned above). The third extends police powers and privileges to members of the Civil Nuclear Constabulary beyond their 'core jurisdiction' (as set out in section 56(1) to 56(4)) to anywhere else in Great Britain, essentially so long as they are exercising powers and privileges there in connection with their core jurisdiction. The purpose is to ensure that, for example, members of the Constabulary can escort someone who has committed an offence within their core jurisdiction to a police station outside their core jurisdiction, or they can pursue someone outside their core jurisdiction who has committed an offence within their core jurisdiction whether or not that crime relates to the security of nuclear material the Constabulary is safeguarding.

190. Members of the Constabulary have general policing powers within their jurisdiction. Operational arrangements are set out in a national policing protocol and in individual memoranda of understanding between the Constabulary and the Home Office and Scottish forces.

#### **Section 57: Stop and search under Terrorism Act 2000**

191. Section 57 enables members of the Civil Nuclear Constabulary to be authorised by a senior officer of the Constabulary, under section 44 of the Terrorism Act 2000 (c.11), to stop and search for articles which could be used in connection with terrorism without grounds for suspicion. In practice such powers are likely to be used mainly in connection with securing trans-shipment sites as part of a joint operation with local police forces, and subject to agreed arrangements between the respective chief constables. The authorisation will lapse during any period in which the Constabulary ceases to have jurisdiction in the place or area specified in the authorisation.

#### **Section 58: Government, administration and conditions of service**

192. The Home Secretary has powers under section 50 of the Police Act 1996 (c.16) to make regulations regarding the government, administration and conditions of service of Home Office police forces. These regulations will not apply to the Civil Nuclear Constabulary although the relevant provisions are currently adopted for the UKAEA Constabulary as a matter of practice. Section 58 places a statutory obligation on the Police Authority to ensure that, where it makes provision about conditions of service of the Constabulary, these only differ from Police Act regulations which contain provision about such matters in so far as is necessary to reflect the circumstances and structure of the Constabulary. This will ensure close alignment of common conditions and standards with other police forces, whilst enabling recognition of the distinct circumstances of the Constabulary. Before making provision about such matters, the Police Authority will have to consult the Chief Constable, the Police Federation and any approved rank-related associations.

193. Paragraph 3 of Schedule 13 provides the Secretary of State with a power to give directions to the Police Authority on matters covered by section 50 of the Police Act 1996 (c.16). This is a fallback power, intended for use in circumstances where the Secretary of State believes the Police Authority has failed to implement any relevant regulations correctly.

#### **Section 59: Members of the Constabulary serving with other forces**

194. Section 59 ensures that, where members of the Constabulary are seconded to other police forces with the agreement of the respective chief officers, they shall have the same

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powers and privileges as members of the force to which they are seconded. This mirrors arrangements that already exist between other forces, but from which the Constabulary has thus far been excluded.

### **Section 60: Charges**

195. The Government's intention is that the Police Authority will, as now, recover its costs from those to whom it provides services. Section 60 essentially requires those organisations to whom the Constabulary provides services to meet the costs incurred by the Police Authority in or in connection with the provision of those services. In other words, the intention is that the Police Authority should set its charges at the level that will enable it to recover fully the costs of providing such services. As is standard practice for Non Departmental Public Bodies, the detailed financial arrangements of the Authority will be set out in its Financial Memorandum.

### **Section 61 and Schedule 12: Planning and reports**

196. Section 61 should be read in conjunction with Schedule 12. The Schedule is based on provisions of the Police Act 1996 (c.16), differing only where necessary to meet the specific needs of the Civil Nuclear Police Authority. The intention is to ensure that, as far as possible within the NDPB framework and the interests of national security, the Authority operates under the same framework of governance and openness as Home Office and other forces. The Police Authority is required to produce annual policing objectives for the Constabulary, which must be consistent with directions issued by the Secretary of State, and to have regard to the National Policing Plan and general policing objectives set by the Home Office. The Government also intends that the Police Authority should have regard to any similar document describing national policing priorities in Scotland.

197. The Schedule also requires the Police Authority to produce an annual policing plan setting out the means by which the objectives are to be met and the financial resources available. The Police Authority will also have to issue a three-year strategy plan. These plans are to be published.

198. Part 2 of Schedule 12 sets out the reports that the Police Authority and the Chief Constable are obliged to provide. Again the intention is to replicate the requirements on other police forces as far as is practicable within the constraints of national security. The Police Authority will be required to issue an annual report, which the Secretary of State will publish and lay before both Houses of Parliament.

199. The Police Authority will also be able to require the Chief Constable to report to it on any policing matter. The Secretary of State will have a similar power to require the Police Authority and the Chief Constable to report to him on any policing matter. These provisions mirror those for other police forces.

### **Section 62: Inspection**

200. Section 62 puts on a mandatory, statutory footing the current arrangements whereby the UKAEA Constabulary is subject to voluntary inspection by Her Majesty's Inspectors of Constabulary ("HMIC"). It also allows the Secretary of State to initiate an inspection, and places a duty on the Secretary of State to make the report of an inspection public, subject to national security considerations. Where an inspection covers the Constabulary's activities in

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Scotland then HMIC must consult the Scottish inspectors about the Scottish aspects of the inspection.

### **Section 63 and Schedule 13: Supervision by Secretary of State**

201. Section 63 should be read in conjunction with Schedule 13. Schedule 13 gives the Secretary of State the power (amongst other things) to issue to the Police Authority directions setting out objectives for it, directions relating to the activities of the Constabulary, and directions relating to the Constabulary's conditions of service. The main purposes of these powers are:

- to allow the Secretary of State to set strategic and policing objectives for the Police Authority. This is broadly equivalent to the power to set such objectives for Home Office forces in section 37 of the Police Act 1996 (c.16);
- to ensure that the Police Authority and the Constabulary implement the security standards, guidelines and procedures set by the Secretary of State, including:
  - (a) the tasks which the Constabulary is to perform;
  - (b) the nuclear sites which the Constabulary is to protect, and the minimum number of constables which should be deployed there;
  - (c) detailed requirements on protection of information and security vetting;
  - (d) certain qualitative criteria such as training, intelligence matters, special operations and exercises;

This preserves the current arrangements whereby the Secretary of State, through the Office for Civil Nuclear Security, sets the security framework and agrees and monitors the security arrangements for all civil nuclear sites;

- to allow the Secretary of State to ensure that the Police Authority's employment practices retain parity with other police forces. Where directions deal with matters which are dealt with by regulations under section 50 of the Police Act 1996 (c.16) (police force regulations), the direction may differ from those regulations only in so far as is necessary to reflect the circumstances and structure of the Constabulary;
- to allow the Secretary of State to require specific remedial action where he believes the Police Authority is failing to meet objectives he has set or has failed to comply with a direction he has given or where a HMIC report is critical of the Authority's efficiency or effectiveness.

### **Section 64: Civil Nuclear Police Federation**

202. Section 64 gives statutory recognition to the Civil Nuclear Police Federation to represent members of the Constabulary in matters affecting their welfare and efficiency. The arrangements will mirror those for other police forces and put on a statutory footing the current arrangements whereby members of the UKAEA Constabulary are represented by a non-statutory police federation.

### **Section 65: Rank - related associations**

203. Section 65 allows the Secretary of State to approve further associations to represent certain ranks of the Constabulary who are not members of the Civil Nuclear Police

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Federation in welfare and efficiency matters. This is to allow flexibility in the event that, for example, some ranks of the Constabulary wish to establish an alternative approved body (such as a superintendents' association).

#### **Section 66: Representation at certain disciplinary proceedings**

204. Section 66 mirrors the arrangements for area police forces and the British Transport Police. Currently the UKAEA Constabulary implements on a voluntary basis disciplinary procedures closely based on those set out in regulations under section 50 of the Police Act 1996 (c.16). These (or similar) arrangements will continue.

#### **Section 67: Trade union membership**

205. Section 67 prevents members of the Constabulary from being a member of a trade union (subject to certain limited exceptions). This puts on a statutory footing the current informal arrangements, and brings those arrangements into line with the long established principles incorporated in other police legislation.

#### **Section 68: Application of offences etc applying to constables**

206. Section 68 extends the offences of assault on constables and impersonation of police to members of the Civil Nuclear Constabulary. It also makes it an offence to cause disaffection within the Constabulary. Again the policy intention is to ensure that the same offences that apply in relation to other police forces apply in relation to the Constabulary.

#### **Section 69 and Schedule 14: Minor amendments relating to the Constabulary**

207. Section 69 should be read in conjunction with Schedule 14. It substitutes in a number of Acts the Civil Nuclear Constabulary for the UKAEA Constabulary. This is largely to maintain the existing position. Paragraph 6 of Schedule 14 extends the definition of "Crown servant" in the Official Secrets Act 1989 to ensure that that Act applies in relation to the Civil Nuclear Constabulary in the same way that it applies in relation to Home Office and Scottish police forces.

#### **Section 70: Nuclear transfer scheme for UKAEA Constabulary**

208. Section 70 requires the transfer of constables in the current UKAEA Constabulary, and of certain civilian employees of UKAEA, to the Police Authority. Constables transferred under these arrangements will not need to make another declaration following transfer.

### **CHAPTER 4: AUTHORISATIONS RELATING TO RADIOACTIVE WASTE**

#### **Section 72: Transfer of authorisations**

209. Section 72 inserts a new section 16A in the Radioactive Substances Act 1993 (c.12) ("RSA 93"). Section 16A will provide a process whereby an authorisation to dispose of radioactive waste from a nuclear site can be transferred from one operator to another. At present, RSA 93 requires the new operator to apply for a new authorisation and the authorising authority will then go through its full determination process for that application which, on nuclear sites, tends to be protracted and resource intensive. Section 16A allows for the transfer of an authorisation either wholly or in part. The process provided for in section 16A would apply when there is a new operator at a nuclear site but there is otherwise no need for the existing limitations and conditions of the authorisation to change.

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210. Subsections (1) to (4) of section 16A define the circumstances in which the new section will apply; the charges that must accompany any application that is made under this section; and require appropriate local authorities to be informed of applications. Subsection (5) imposes a duty on the authorising authority to consult every body it would have been required to consult had the application been for a new authorisation, although subsection (6) allows certain authorities or bodies not to be consulted if it appears to the authorising authority that the transfer is unlikely to result in changes to the arrangements for the disposal of radioactive waste that would be of interest to that authority or body. Subsections (7) and (8) set down the conditions which must be met for a transfer of authorisation to be granted and lay down certain procedures which must be followed if the application is granted. Subsection (9) sets a minimum time for a transfer to take effect, although subsection (10) allows this minimum time to be set aside if the authorising authority believes the coming into effect of the transfer needs to be expedited. Subsection (11) defines “authorising authority” for the purposes of this section.

### **Section 73: Applications for variation of authorisations**

211. Section 73, by means of new provisions to be inserted in section 17 of RSA 93, provides a mechanism for an authorised person to apply for a variation to the authorisation, while sustaining the existing position that, in relation to the revocation or variation of authorisations, the authorising authority can exercise its powers without such an application. The new provisions also set out the charges that must accompany any application that is made. They apply to all authorisations granted under sections 13 and 14 of the RSA 93, whether for nuclear sites or for other premises.

### **Section 74: Periodic reviews of authorisations**

212. Section 74 inserts a new section 17A in RSA 93. Subsection (1) provides that periodic reviews of the limitations and conditions of authorisations granted under sections 13 or 14 of RSA 93, whether for nuclear sites or for other premises, must be carried out and that additional reviews may be carried out at the discretion of the authorising authority. Subsection (2) defines “the authorising authority” and defines “periodic reviews”.

### **Section 75 and Schedule 15: Consequential amendments of the 1993 Act**

213. Section 75 brings Schedule 15, which makes a number of consequential amendments to RSA 93, into effect.

## **CHAPTER 5: MISCELLANEOUS PROVISIONS RELATING TO NUCLEAR INDUSTRY**

### **Section 76: Amendment for giving effect to international obligations**

214. Section 76 gives the Secretary of State the power to amend primary legislation in order to implement certain international obligations contained in the Paris and Brussels Conventions on third party nuclear liability.

215. The Conventions establish an international legal framework within Western Europe for compensating victims of a radiation leak. The Paris Convention establishes minimum levels of liability for operators of nuclear installations and the principle that their liability is strict and is to be covered by compulsory financial security. The Brussels Convention provides supplementary compensation to be paid from public funds.

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216. The Conventions have been revised to provide higher and broader levels of compensation in the event of civil nuclear accidents. In particular, the liability of individual operators has been increased from £140m to €700m (£430m) per incident and the provision for supplementary compensation has been increased from £220m to €1.5bn (£930m). The definition of “nuclear damage” is also being widened to include not only loss of life or personal injury and loss of or damage to property, but also environmental damage, loss of income deriving from such damage and the cost of measures to prevent an accident occurring again.

217. Section 76 also makes provision for ratification of the “Joint Protocol” which allows parties to the two international Conventions (Paris and Vienna) governing liability for civil nuclear accidents to extend reciprocal benefits to each other. The ratification of the Joint Protocol will enable UK participation for the first time in a global compensation regime between the largely Western European parties to the Paris Convention and the parties to the Vienna Convention, which include Former Soviet Union and Eastern European countries and South American States.

#### **Section 77: Regulation of equipment, software and information**

218. This section fills gaps in the regulation making powers of section 77 of the ATCS Act. To the extent not already covered by section 77 of ACTS, the amendments will permit the regulation of persons holding, transmitting or transporting the following items outside nuclear premises, namely (a) uranium enrichment equipment and software, and (b) sensitive nuclear information. The regulation making power will apply regardless of whether uranium enrichment itself is carried out inside or outside the UK.

219. Additional regulations will be made in these areas as soon as the enabling power has been modified.

#### **Section 78: Application of the 1965 Act to Northern Ireland**

220. Section 78 makes a number of consequential amendments to the 1965 Act as a result of the Northern Ireland Act 1998, which provides that nuclear energy and installations are excepted matters.

#### **Section 79: Expenditure on nuclear related matters**

221. Section 79 gives the Secretary of State statutory authority to incur expenditure as a result of options included in the documents relating to the restructuring of British Energy. The provision is general, but goes further than the free-standing provisions in EMPA by authorising spending on two elements of the agreements not currently covered by legislation:

- In circumstances where British Energy has sold one of its nuclear power stations to a third party, the acquisition of the power station from that third party and subsequently operating it. This would follow the exercise of an option on the part of HMG to acquire the station for this purpose; and
- The acquisition of British Energy’s shareholding in Nirex, and to incur expenditure on any consequences of such an acquisition.

#### **Section 80: Additional functions of UKAEA**

222. Section 80 ensures that UKAEA will have sufficient statutory powers to operate in the new UK nuclear clean up market. It provides that UKAEA:

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- can set up site licensee companies, site management companies, joint ventures or subsidiaries in order to bid for NDA site management contracts, including for non-UKAEA sites.
- has powers to run nuclear pensions schemes and, subject to approval by the Secretary of State, public service pension schemes other than the UKAEA pensions scheme.
- has powers to manage and commercially exploit the property it owns, where it no longer requires that property for its other functions.

## **PART 2: SUSTAINABILITY AND RENEWABLE ENERGY SOURCES**

### **SUMMARY AND BACKGROUND**

#### **Chapter 1: Sustainable Energy**

223. Section 81 requires the Government to publish information about the development and bringing into use of new energy sources, actions taken to ensure the requisite scientific and engineering expertise is available to develop new energy sources and actions taken to achieve the statutory energy efficiency aim of saving 3.5MtC through energy efficiency in the household sector. This information will be published as part of the annual report required under section 1 of the Sustainable Energy Act 2003.

224. Section 82 provides for publication and implementation of a microgeneration strategy.

225. Section 83 places a duty on the Secretary of State and GEMA to carry out their respective functions under Part 1 of both the Gas Act 1986 and the Electricity Act 1989, in a manner best calculated to contribute to the achievement of sustainable development.

#### **Chapter 2: Offshore production of energy and Chapter 3: Decommissioning of offshore installations**

226. International law has long recognised that each coastal State has jurisdiction and sovereignty over its territorial waters. At the time the Act was passed the UK Government and Scottish Ministers had given consent to 12 offshore wind farms at various locations around the UK coast, in internal tidal and territorial waters. Whilst some statutes such as the Food and Environment Protection Act 1985 (c.48) apply beyond territorial waters there is no comprehensive legal framework in place for offshore renewable energy developments beyond territorial waters. In this part of the Act, Chapter 2, relating to offshore production of energy, and Chapter 3, relating to decommissioning of offshore installations, create such a framework, based on the rights available to the UK as a contracting party to the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”). The text of UNCLOS can be found at <http://www.un.org/Depts/los/index.htm> and was published as Command Paper 8941.

227. Part V of UNCLOS enables coastal States to establish an exclusive economic zone within which they have sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation of the zone such as the production of energy from the water, currents and winds. UNCLOS also gives coastal States the exclusive right to construct and authorize and regulate the construction, operation and use of artificial islands, installations and structures for the purposes outlined above and other economic purposes.

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228. The Government published proposals to establish a Renewable Energy Zone under UNCLOS in its consultation paper “Future Offshore, A Strategic Framework for the Offshore Wind Industry” (DTI/Pub/2k/11/02/NP. URN 02/1327, November 2002). Chapter 2 implements those proposals.

229. UNCLOS places an obligation on contracting parties to ensure that renewable energy installations in a Renewable Energy Zone are decommissioned. Chapter 3 sets out a regime for the decommissioning of such installations.

230. Chapters 2 and 3 also augment the existing framework of law which applies to offshore renewable energy developments in territorial and internal waters. The effect is to create as far as possible a common legal regime for all offshore renewable energy developments whether they are located in internal waters, territorial waters or a Renewable Energy Zone.

#### **Chapter 4: Renewables Obligations relating to Electricity**

231. Under the Electricity Act 1989 (c.29) and the Renewables Obligation Order 2002 (S.I. 2002/914), electricity suppliers in England & Wales have a “renewables obligation” to produce to the Gas and Electricity Markets Authority (“GEMA”), before a specified day, certain evidence regarding the supply to customers in Great Britain of electricity generated by using renewable sources. The evidence required is Renewables Obligation Certificates (“ROCs”) issued by GEMA. Scottish electricity suppliers have a similar renewables obligation under the Renewables Obligation (Scotland) Order 2002 (S.S.I. 2002/163).

232. As an alternative to providing ROCs, electricity suppliers may discharge their renewables obligations (either fully or partially) by making buy-out payments to GEMA. This Chapter makes it clear that the Secretary of State may provide for more than one specified day in a year. This Chapter also provides for suppliers who do not comply with the renewables obligation by the specified day, to be treated as having subsequently discharged the renewables obligation if they make late buy-out payments, together with an escalating surcharge into a late payments fund. It also makes provision for requiring suppliers to make payments to GEMA to cover some or all of an unrecovered shortfall in the buy-out fund. This process is known as mutualisation. The Order taking these powers is expected to come into force on 1 April 2005.

233. Whilst Northern Ireland has not yet made a renewables obligation Order, it has recently enacted legislation (Articles 52 to 55 of the Energy (Northern Ireland) Order 2003) (S.I. 2003/419)(N.I.6)) which is analogous to the provisions of the Electricity Act creating the renewables obligation. That legislation requires Northern Ireland suppliers to produce, as evidence, Northern Ireland Renewables Obligation Certificates (“NIROCs”) issued by the Northern Ireland equivalent of GEMA, the Northern Ireland Authority for Energy Regulation (“Ofreg”).

234. This Chapter provides for the recognition in Great Britain of Renewables Obligation Certificates issued in Northern Ireland. Taking these powers now paves the way for the reciprocal arrangements to come into force from the outset of the renewables obligation for Northern Ireland. In due course, Northern Ireland is expected to make an analogous Order which will allow electricity suppliers in Northern Ireland to satisfy all or part of their renewables obligation by producing ROCs to Ofreg instead of NIROCs. The Northern Ireland Order is expected to come into force on 1 April 2005.

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## **Chapter 5: Renewable transport fuel obligations**

**235.** This Chapter provides a power for the Secretary of State to introduce a renewable transport fuel obligation. The nine sections making provision for this set out details to define the obligation; make arrangements for appointing a body to administer it; determine amounts of fuel for the purposes of discharging the obligation; provide for the issue of certificates to suppliers and for the alternative discharge of the obligation through payment; and finally for the civil penalties associated with contravention of the obligation.

## **COMMENTARY ON SECTIONS**

### **PART 2: SUSTAINABILITY AND RENEWABLE ENERGY SOURCES**

#### **CHAPTER 1: SUSTAINABLE ENERGY**

##### **Section 81: Reports under section 1 of the Sustainable Energy Act 2003**

236. Section 81 amends section 1 (annual reports on progress towards sustainable energy aims) of the Sustainable Energy Act 2003. The annual report required under the Sustainable Energy Act must now include information about the development and bringing into use of new energy sources and actions taken to maintain the levels of scientific and engineering expertise necessary for the development of new energy sources. The report will need to cover work carried out in relation to clean coal technology, coal mine methane, biomass, biofuels, fuel cells, photovoltaics, wave and tidal generation, hydrogeneration, microgeneration, geothermal sources and any other carbon-reducing technologies. The section also imposes a requirement for this annual report to look at actions taken to achieve the Government's energy efficiency aims designated under the Sustainable Energy Act.

##### **Section 82: Microgeneration**

237. Section 82 requires the Secretary of State to prepare, publish, and take reasonable steps to implement, a strategy for the promotion of microgeneration in Great Britain. For the purposes of this strategy, microgeneration is defined as the generation of under 50kW electricity or, in relation to heat, the production of under 45kW thermal. The strategy will look at electricity and/or heat generated from biomass, biofuels, fuel cells, photovoltaics, water (including waves and tides), wind, solar power, geothermal sources, combined heat and power, and any other source of energy that will, in the opinion of the Secretary of State, help reduce greenhouse gas emissions. The section stipulates that the strategy must be published within 18 months of commencement of the relevant section of the Energy Act.

##### **Section 83: Sustainable development**

238. Section 83 inserts a new duty into section 3A of the Electricity Act 1989 (c.29) and section 4AA of the Gas Act 1986 (c.44) which requires the Secretary of State and GEMA to carry out their respective functions under Part 1 of both Acts in a manner he or it considers is best calculated to contribute to the achievement of sustainable development.

#### **CHAPTER 2: OFFSHORE PRODUCTION OF ENERGY**

##### **Section 84: Exploitation of areas outside the territorial sea for energy production**

239. This section vests in Her Majesty the rights of the UK in Part V of UNCLOS only as regards the production of energy from water or winds. Section 104(2) makes it clear that the

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reference to energy from water includes the production of energy from both currents and tides. The rights vested encompass exploration activities and exploitation of these renewable energy resources and related purposes. The most important such purpose is the transmission and distribution of the electricity generated using water and wind power to markets onshore. Part V of UNCLOS includes rules about establishing the breadth of the exclusive economic zone. The section contains a power to designate by an Order in Council the extent of a Renewable Energy Zone around the UK to be established in accordance with the rules laid down in UNCLOS. The Renewable Energy Zone is the area within which the UK is able to exercise its rights to produce energy from water or winds.

### **Section 85: Application of criminal law to renewable energy installations**

240. This section provides a power to establish, by Order in Council, criminal jurisdiction over any “renewable energy installation” in a Renewable Energy Zone and over the waters within a safety zone declared pursuant to section 95. A “renewable energy installation” is defined in section 104, subsections (3) to (5). This section also provides for an Order in Council to extend the jurisdiction of the police in relation to offences which might have been committed on, under or above a renewable energy installation or in waters within a safety zone.

241. An Order in Council may extend not only to renewable energy installations in a Renewable Energy Zone but also to those in tidal waters and parts of the sea in or adjacent to Great Britain up to the limits of the territorial sea. The intention is that an Order in Council will ensure uniformity of criminal jurisdiction for all renewable energy installations in the waters covered.

### **Section 86: Prosecutions**

242. This section makes provision for the prosecution of criminal offences which might have been committed on, under or above a renewable energy installation in tidal waters, the territorial sea or the Renewable Energy Zone or on, under or above such of these waters that at the time of the alleged offence were within a safety zone. It excludes offences created by or under a number of statutes which have their own prosecuting regimes. The section provides that the consent of the Director of Public Prosecutions or the Director of Public Prosecutions for Northern Ireland is required before proceedings for an offence are brought in England and Wales, and Northern Ireland respectively. No provision is necessary in respect of Scotland as the consent of the Lord Advocate is needed for all prosecutions.

### **Section 87: Application of civil law to renewable energy installations**

243. This section enables civil law to be applied by Order in Council to renewable energy installations and to cables which are, will be or were used for carrying electricity to or from such an installation. The Order in Council can specify which part of the law in force in the United Kingdom is to apply and can also make provision for which courts (defined to include tribunals and regulatory bodies) are to have jurisdiction.

### **Section 88: Orders in Council under sections 85 and 87**

244. Sections 85 and 87 apply to renewable energy installations wholly or partly in Scottish offshore waters including the Scottish part of the Renewable Energy Zone designated under section 84(5). An Order in Council could potentially cover civil or criminal law matters which are wholly reserved under the Scotland Act 1998, wholly devolved or a mix of both.

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Section 88 sets out the parliamentary procedure to be followed, depending on the subject matter of the Order in Council. In the case of wholly reserved matters the Order in Council would be subject to the negative resolution procedure in the Westminster Parliament. Where the Order in Council deals with wholly devolved matters then it would be subject to an annulment in pursuance of a resolution of the Scottish Parliament. Where the Order in Council includes both reserved and devolved matters it would need to be subject to the procedures of both the Westminster and Scottish Parliaments.

### **Section 89: Activities offshore requiring 1989 Act licences**

245. Section 4 of the Electricity Act 1989 prohibits the generation, transmission, distribution and supply of electricity to any premises without a licence (section 135 of this Act amends section 4 in respect of transmission activities requiring a licence while section 145(2) also amends section 4 to include the participation in the operation of an electricity interconnector as a licensable activity). Section 5 of that Act gives a power to the Secretary of State to grant exemptions from this licensing requirement and section 6 provides for the issue of licences. This section amends section 4 of the Electricity Act so that the prohibitions (and licensing and exemption regime) also apply in a Renewable Energy Zone and confirms that the regime applies in the territorial sea adjacent to Great Britain.

### **Section 90: Modification of licence conditions for offshore transmission and distribution**

246. This section empowers the Secretary of State to modify the standard conditions of transmission and distribution licences (and make incidental, consequential or transitional changes to particular transmission or distribution licences) and associated codes. This power will enable the Secretary of State to reflect in standard licence conditions the different environment offshore, for example the differences in engineering involved in putting cables in the sea rather than on land. The power is only exercisable within 18 months of the commencement of the section.

### **Section 91: Extension of transmission licences offshore**

247. Section 135 amends section 4 of the Electricity Act by replacing the prohibition on transmission of electricity with a prohibition on participation in the transmission of electricity. Section 135(3) provides that coordinating and directing the flow of electricity onto and over a transmission system constitutes participation. This section enables the Secretary of State to modify a transmission licence in force at the commencement of the section which authorises a person to co-ordinate and direct the flow of electricity so it applies offshore to the extent set out in section 91(2). Section 91(4) also gives the Secretary of State power to modify standard conditions of any electricity licence or a particular electricity licence for incidental, consequential or transitional purposes. The power is only exercisable within 18 months of the commencement of the section.

### **Section 92: Competitive tenders for offshore transmission licences**

248. This section inserts a new section 6C into the Electricity Act 1989 to enable GEMA to make regulations setting out the process to be followed by it in awarding offshore transmission licences by competitive tender. There were no offshore transmission licences in force at the time of the passing of this Act.

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### **Section 93: Consents for generating stations offshore**

249. The effect of subsection (1) is to extend the requirement for consent to the construction, extension or operation of a generating station as set out at section 36 of the Electricity Act 1989 to a generating station in a Renewable Energy Zone and to confirm that the regime applies in territorial waters adjacent to Great Britain.

250. Schedule 8 to the Electricity Act 1989 sets out detailed provisions about the operation of the section 36 licensing regime. Subsection (2) introduces new provisions to cater for situations where the generating station for which a consent is required is not within the area of a relevant planning authority. Schedule 8 to the Electricity Act provides at the moment that where a relevant planning authority maintains an objection to an application for a section 36 consent, the Secretary of State must arrange for a public inquiry to be held. This Schedule was drawn up before marine generating stations were a reality and its effect in regard to such generating stations is not wholly clear. The new provisions make it clear that the requirement for a public inquiry following an objection by a local planning authority does not apply where none of the places to which the application for section 36 consent relates is within the area of a relevant planning authority. The subsection goes on to provide for situations where the section 36 application relates to places which are partially within the jurisdiction of one or more relevant planning authorities.

### **Section 94: Application of regulations under 1989 Act offshore**

251. Section 29 of the Electricity Act 1989 provides for regulations to be made relating to the supply and safety of electricity. Section 30 of that Act provides for electrical inspectors to be appointed and describes their role. This section extends these provisions to a Renewable Energy Zone and confirms their application to the territorial sea adjacent to Great Britain.

### **Sections 95 to 98: Safety zones for installations**

252. These sections give a discretionary power to the Secretary of State to issue a notice declaring one or more safety zones around a renewable energy installation. The Secretary of State has the flexibility to declare a safety zone as appropriate for the main stages of the life of renewable energy installation - the construction, extension and decommissioning phases, which are relatively short, as well as the longer operational phase. A notice can be issued where the renewable energy installation is at the proposal stage in regard to its construction, extension, operation or decommissioning or equally when these activities are in progress.

253. They also give the Secretary of State the flexibility to state in the notice which activities are prohibited within a safety zone or how such matters are to be determined, and which vessels may enter or remain in the safety zone or carry on prohibited activities. Determinations under a safety zone notice may be made by the Secretary of State or delegated to some other person.

254. Section 96 prohibits vessels from entering or remaining in a safety zone and carrying out activities except where permitted to do so by a notice declaring a safety zone. The Secretary of State also has the power to make regulations setting out general permissions allowing vessels to enter any safety zone and carry out activities. This is in addition to any individual permissions granted in the notice declaring that safety zone.

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255. Section 97 makes it an offence for a vessel to enter or remain in a safety zone and for activities to be carried on there unless permission has been given in an individual safety notice or regulations made by the Secretary of State. The section sets out certain defences. Section 98 extends criminal responsibility to certain persons other than the master or owner of the vessel who were responsible for the commission of the offence.

**Sections 99 and 100: Navigation and public rights of navigation**

256. These sections introduce a new section, section 36A, into the Electricity Act 1989 whereby the Secretary of State or Scottish Ministers (within their respective competence) have the power to make a declaration extinguishing public rights of navigation. The power applies only where the generating station is to be located in territorial waters adjacent to Great Britain and other tidal waters up to the low water mark. Section 100 applies in cases where a section 36 consent has been granted before the commencement of section 99.

257. The declaration relates only to public rights of navigation which apply to the site of the renewable energy installation. There is various provision in respect of the effect of the declaration on rights of navigation, when it takes effect and the information which the declaration has to give. It is important that the declaration becomes known to those with an interest and subsection (6) of new section 36A of the Electricity Act 1989, as inserted by section 99, places an obligation on the Secretary of State to ensure that this happens.

258. Subsection (2) of section 99 integrates the process for applying for a declaration with the process for a section 36 consent, as set out in Schedule 8 of the Electricity Act 1989. Subsection (3) of section 99 excludes the functions in the new sections 36A and 36B of the Electricity Act from the principal objectives and general duties of the Secretary of State set out in sections 3A to 3C of that Act.

259. Section 99 also introduces a second new section, section 36B, into the Electricity Act 1989 which places certain duties on the Secretary of State or Scottish Ministers in relation to navigation when exercising their section 36 powers. Subsection (1) of section 36B requires the Secretary of State and Scottish Ministers to refuse to grant a section 36 consent where a generating station is likely to cause interference with the use of recognised sea lanes essential to international navigation. The term “use of recognised sea lanes essential to international navigation” is defined at section 36B(7).

260. Where in the judgment of the Secretary of State or Scottish Ministers there would be no interference with the use of recognised sea lanes essential to international navigation, subsection (2) requires them then to have regard to the nature of any obstruction or danger to navigation in deciding whether to grant a section 36 consent and, if a consent is granted, what conditions may be included in the consent. Under subsections (3) and (4)(a) the Secretary of State and Scottish Ministers must take into account the cumulative impact of generating stations in the area which have already been consented to and those which are likely to be consented to in making their assessment of the effect on the safety of navigation, as well as how they have or will exercise their powers in regard to the extinguishment of public rights of navigation. The Secretary of State must also take account of how he has or will exercise his powers under the Act in respect of safety zones and decommissioning (subsection (4)(b)).

261. As subsection (2) of section 36B provides the same safeguards as a consent under section 34 of the Coast Protection Act 1949, generating stations which are granted a section 36 consent after the commencement of these provisions do not require a Coast Protection Act

*These notes refer to the Energy Act 2004 (c.20)  
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consent. This disapplication of the requirement for a section 34 Coast Protection Act consent applies in Scotland only if Scottish Ministers so provide by order made by a statutory instrument and approved by the Scottish Parliament.

### **Section 101: Application of civil aviation regulations to renewable energy installations**

262. By virtue of section 60(3) of the Civil Aviation Act 1982 (c.16) the Civil Aviation Authority may regulate, by means of an Air Navigation Order, aircraft on or in the neighbourhood of offshore oil and gas installations and the lighting of such installations for safety purposes. Section 106 of the 1982 Act states that an Order made under section 60 extends to territorial waters. Section 101 enables the Civil Aviation Authority to regulate (a) aircraft on or in the neighbourhood of a renewable energy installation in a Renewable Energy Zone and (b) the lighting of such an installation.

### **Section 103: Other amendments consequential on Chapter 2 of Part 2**

263. The Submarine Telegraph Act 1886 (c.49) brought into effect the 1884 Submarine Telegraphs Convention for the protection of submarine telegraph cables. Section 8 of the Continental Shelf Act 1964 (c.29) extended the provisions of the Act to cover other submarine cables and pipelines. Additionally the 1964 Act extended the Submarine Telegraph Act to cover pipelines only in the territorial sea. Subsection (1) extends the Submarine Telegraph Act to all submarine cables under the territorial sea and to waters in an area designated under section 1(7) of the Continental Shelf Act.

264. It may be the case that there is an overlap between sites which are most suitable for the exploration and exploitation of renewable energy sources on the one hand and petroleum resources on the other. Subsection (4) enables the Secretary of State to take the generation of electricity and related activities into account in exercising or performing the powers and duties conferred or imposed on him by or under the Petroleum Act 1998. Conversely the Secretary of State will take into account the exploration for or exploitation of petroleum resources in the exercise of the powers available to him in regard to the generation of electricity from renewable resources, although no legislative changes are necessary in this case.

## **CHAPTER 3: DECOMMISSIONING OF OFFSHORE INSTALLATIONS**

### **Section 105: Requirement to prepare decommissioning programmes**

265. This section gives a discretionary power to the Secretary of State to impose an obligation on a person to submit a costed decommissioning programme before a renewable energy installation (or part of it) or a related electric line has been installed. The Secretary of State may impose this obligation on a person at any time after at least one of the relevant statutory consents has been granted (or has been applied for and is likely to be granted) so that arrangements for decommissioning are in place at an early stage. Equally the Secretary of State can also issue a notice requiring a decommissioning programme to be submitted at subsequent stages in the life cycle of these assets. This section works in conjunction with section 112 which makes it an offence for a person not to inform the Secretary of State when he becomes responsible for these assets.

266. The decommissioning programme may be accompanied by details of the security arrangements, whether financial or otherwise, which the recipient of the notice proposes to put in place to ensure that funds are available to carry out the decommissioning programme.

*These notes refer to the Energy Act 2004 (c.20)  
which received Royal Assent on 22 July 2004*

A non-exhaustive list of things that will constitute security for this purpose is given at section 114(2).

### **Sections 106 and 107: Approval of decommissioning programmes and failure to submit or rejection of decommissioning programmes**

267. These sections set out a process for the approval of decommissioning programmes by the Secretary of State and provide for situations where either the person responsible for submitting the programme fails to do so or the programme which is submitted is considered by the Secretary of State to be inadequate and is rejected. In these latter two cases the Secretary of State has the power to prepare himself a suitable decommissioning programme and recover costs from the responsible person.

### **Section 108: Reviews and revisions of decommissioning programmes**

268. Subsection (1) sets out the Secretary of State's duty to review approved decommissioning programmes from time to time. Subsections (2) to (9) set out the process for dealing with modification of decommissioning programmes and the transfer of ownership of renewable energy installations or related electric lines. The process can be initiated either by the Secretary of State or the person who has the duty to carry out the decommissioning programme. Again the powers in the section are supplemented by the requirement at section 112 to inform the Secretary of State where a person becomes responsible for a renewable energy installation or related electrical lines.

### **Section 109: Carrying out of decommissioning programmes and section 110: Default in carrying out decommissioning programmes**

269. In the normal course of events these sections come into play when the renewable energy installation or related electric line is ready to be decommissioned. In most cases decommissioning will take place many years after the initial decommissioning programme was drawn up. Section 110 sets out a process to cover such situations where either the decommissioning does not take place or is not in accordance with the approved programme. These sections also provide sanctions if a condition relating to decommissioning, such as the obligation to maintain the required security, is breached before the decommissioning stage actually commences.

## **CHAPTER 4: RENEWABLES OBLIGATIONS RELATING TO ELECTRICITY**

### **Section 115: Discharge of renewables obligation in Great Britain by payment**

270. Section 32(3) of the Electricity Act 1989 provides that electricity suppliers must before one or more specified days provide to GEMA evidence regarding their supply of electricity generated from renewable sources to discharge their renewables obligation. The effect of section 115(1) is to make it clear that the Secretary of State may provide for more than one specified day in a year. This would mean suppliers would be required to produce evidence of their compliance with the renewables obligation before each of the days. The timing of each specified day and the associated obligation periods would be set out in an order.

271. Section 32C of the Electricity Act 1989 provides that an order made under section 32 may allow electricity suppliers to discharge their renewables obligation by making buy-out payments to GEMA, instead of producing evidence regarding their supply of electricity generated from renewable sources. Section 115(2) – (5) amends section 32C and provides

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which received Royal Assent on 22 July 2004*

for suppliers who have not discharged their renewables obligation by the specified day, to be treated as having discharged it by making a late buy-out payment. The Secretary of State is also empowered to introduce surcharges which will be added to any late buy-out payments made by a supplier. This power also allows for the surcharge to increase at a daily rate from the date on which the supplier should have complied with the renewables obligation. The Secretary of State may also specify steps under 27A of the Electricity Act 1989 which cannot be taken during a specified period following the date on which the supplier should have complied with the renewables obligation. The period during which late payments can be made, the amount of the surcharge and the manner of its calculation would be set out in an order.

272. Section 115 also provides that an order under section 32 of the Electricity Act may require suppliers to make payments to GEMA to make good some or all of any previous unrecovered shortfall in the buy-out fund. This process is known as mutualisation. Mutualisation payments can be required from either suppliers with a renewables obligation at the time the shortfall occurred, or suppliers with a renewables obligation in a subsequent specified period, and can be adjusted or repaid as provided in the order. To allow for the operation of the late payment regime described above, mutualisation will not take place until after the end of the late payment period. Section 115 also provides that an order under section 32 of the Electricity Act 1989 may provide that sections 25 to 28 of the 1989 Act apply, in relation to mutualisation, to a person who is not the holder of a relevant licence as though they were a holder of such a licence. This provision would enable GEMA to take enforcement action for breach of the mutualisation provisions against a company who had been a licensed supplier at the time of a shortfall, but who had subsequently disposed of its licence. The Secretary of State is also empowered to provide for mutualisation payments to be made where there is a shortfall in the Northern Ireland buy out fund.

#### **Section 116: Issue of green certificates in Great Britain**

273. Section 116 provides that an order under section 32 of the Electricity Act 1989 may, by virtue of section 32B, empower GEMA to issue renewables obligations certificates (“ROCs”) to Northern Ireland suppliers as well as to GB suppliers and the operators of generating stations. It also provides that such an order may provide for the issue of ROCs in respect of renewables electricity which is generated by certain generating stations and supplied to customers in Northern Ireland, and that a GB supplier may discharge its renewable obligation in GB by presentation of these certificates.

#### **Section 117: Use of green certificates issued in Northern Ireland**

274. Section 117 provides that an order made under section 32 of the Electricity Act 1989 may provide for a GB electricity supplier to discharge its renewables obligation in GB by producing a renewables obligation certificate issued under the Northern Ireland equivalent of the section 32 order (a “NIROC”).

#### **Section 118: Distributions to Northern Ireland suppliers**

275. Section 32C of the Electricity Act 1989 provides that an order made under section 32 may allow electricity suppliers, instead of producing evidence regarding the supply of electricity generated from renewable sources, to discharge their renewables obligation by making payments to GEMA. Section 32C(3) requires GEMA to distribute the amounts so received (which are known as the “buy-out fund”) to electricity suppliers in Great Britain in

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accordance with an order made under section 32. Section 118 amends section 32C by providing that Northern Ireland electricity suppliers shall also be potentially eligible for distribution by GEMA by virtue of section 32C(3).

### **Section 120: Issue of green certificates in Northern Ireland**

276. Section 120 relates to the issue of NIROCs under the Energy (Northern Ireland) Order 2003 and amends that Order accordingly. The section defines Northern Ireland for the purpose of the issue of NIROCs as excluding the territorial sea adjacent to Northern Ireland. This avoids overlap between GEMA's role and that of the Northern Ireland Authority for Energy Regulation ("NIAER") in respect of electricity supplied to customers in Northern Ireland, by providing that NIAER will issue NIROCs for generating stations located in Northern Ireland (including its inland waters but not UK territorial waters adjacent to Northern Ireland). GEMA will issue ROCs under the Electricity Act in respect of electricity produced by all other generating stations (including electricity supplied to customers in Northern Ireland).

277. The section also inserts a new provision providing for arrangements to be made for the sale of NIROCs, relating to electricity supplied under the non fossil fuel regime as applicable to Northern Ireland, separately from that electricity. Without this provision, Great Britain suppliers are unlikely to participate in auctions of NIROCs with the underlying electricity since they would have no use for the electricity which currently cannot in practice be exported from Northern Ireland to Great Britain because of interconnector limitations. This provision therefore puts all UK electricity suppliers on an equal footing in respect of such NIROCs, and at the same time improves the liquidity of the market in any competitive auction or other sale process for those NIROCs.

278. The section also allows the Department of Enterprise, Trade and Investment in Northern Ireland ("DETI") to direct the application of the proceeds of such sale.

### **Section 121: GEMA's power to act on behalf of Northern Ireland regulator**

279. This section permits GEMA and NIAER to enter into, and give effect to, arrangements for GEMA to carry out NIAER's functions under articles 52 to 55 of the Energy (Northern Ireland) Order 2003 (S.I. 2003/419)(N.I.6) (that is, NIAER's functions in administering the Northern Ireland renewables obligation). These arrangements are expected to be negotiated subsequently between GEMA and NIAER.

### **Section 122: Consultation in relation to Northern Ireland renewables orders**

280. This section enables DETI to consult on a renewables obligation order in Northern Ireland as soon as possible, and if necessary before it has made the amending order that it needs to make to the Energy (Northern Ireland) Order 2003 to reflect the changes introduced to the Electricity Act by this Act.

### **Section 123: Modification of conditions of Northern Ireland electricity licenses**

281. This section inserts a new provision into the Energy (Northern Ireland) Order 2003 that provides DETI and NIAER with a power to modify electricity licence conditions in Northern Ireland where they consider it necessary or expedient to do so in connection with amendments made to that Order either directly by section 120 of this Act or by an amending order made to take account of amendments to the Electricity Act made by this Chapter of the Energy Act.

## **CHAPTER 5: RENEWABLE TRANSPORT FUEL OBLIGATIONS**

### **Section 124: Imposition of renewable transport fuel obligations**

282. This section enables the Secretary of State to make an order imposing a “renewable transport fuel obligation” (“RTFO”) on specified parts of the UK transport fuel supply sector. Sections 125 to 132 elaborate on this order-making power. The powers in these sections apply to the whole of the United Kingdom.

283. Subsection (2) defines the obligation. An RTFO would require designated transport fuel suppliers to produce to the appointed Administrator evidence of a specified kind and in a specified form, showing that, within the relevant period, a specified amount of “renewable transport fuel” was supplied within the UK. The section would allow the requisite amount of fuel to be supplied either by the obligated supplier directly, or (wholly or partly) by other suppliers. The obligation periods, and the amount of “renewable transport fuel” (“RTF”) to be supplied in each period, would be specified. For these purposes “specified” means specified in, or determined in accordance with, the order (see section 132(1)).

284. Subsection (4) requires the Secretary of State to consult with relevant stakeholders before making any order under this section.

285. Subsection (5) states that the power to make an order introducing an RTFO is subject to the affirmative resolution procedure.

### **Section 125: The Administrator**

286. This section enables the Secretary of State to appoint a body to administer an RTFO, and to determine the functions and funding of that body.

287. Subsection (2) allows an order to confer or impose powers, duties and discretions upon the Administrator in connection with an RTFO and to impose duties on suppliers in relation to the Administrator.

288. Under subsection (3), these may include powers for the Administrator to require suppliers to provide certain information it needs to carry out its functions, and to impose charges on suppliers. The level of charges (or 'specified amounts') would be specified in the order.

289. Subsection (4) states that sums received through any charges imposed must be used solely towards meeting costs incurred by the Administrator in carrying out his functions. This would allow the Administrator potentially to be funded entirely through the operation of the RTFO itself.

290. Where an order imposes duties on suppliers, subsection (5) allows such duties to be framed by reference to determinations made by the Administrator. For example, such a duty may be framed in such a way so that it only arises on the making of a particular determination by the Administrator.

291. Subsection (6) enables the Secretary of State to appoint either an existing statutory body or person as the Administrator, or to establish a new body specifically for the purpose in accordance with subsection (8). Where an existing statutory body is appointed, subsection (7) allows the order to amend any relevant legislation as appropriate to enable that body to carry out the functions of the Administrator.

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292. Subsection (8) allows an order to establish a body corporate to be appointed as the Administrator, and to provide for matters related to the functioning of the body, including membership, staffing, expenditure and procedures. Subsection (9) allows an order to confer related discretions on the Secretary of State, the body itself, or members or staff of the body.

293. Subsection (10) enables the Secretary of State to make grants to the Administrator, which might be used, for example, to meet costs in establishing the body or to contribute towards the ongoing operational costs of the Administrator.

### **Section 126: Determinations of amounts of transport fuel**

294. This section allows a renewable transport fuel order to make provision about how amounts of transport fuel are to be counted or determined for the purposes of provision made by or under this Chapter, for example, in relation to the discharging of an RTFO. For these purposes, regard may be had to the life-cycle effects of different fuels based on carbon emissions, sustainable development, agriculture and other economic activities, and the environment generally. The purpose is to allow a wide degree of flexibility in the operation of an RTFO, in particular, as regards what fuels 'count' towards the discharge of an RTFO, and to what extent.

295. For example, an order may:

- Stipulate that only RTFs of a specified description will count towards discharge of an RTFO.
- Set maximum amounts for RTFs of specified descriptions that will count towards discharge of an RTFO.
- Set minimum amounts for RTFs of specified descriptions that will count towards discharge of an RTFO.
- Make provision that only a certain proportion of a particular type of RTF is to count for the purposes of an RTFO. For example, in the case of blended biofuel, it may be provided that only the proportion of the blended biofuel that is attributable to biofuel will count towards discharge of an RTFO. Blended biofuel is a fuel that consists of a blend of biofuel and fossil fuel (see section 132(1)).
- Make provision for how such proportions are to be determined. For example, in the case of blended biofuel, there needs to be a way of determining the extent to which the blend is attributable to biofuel, as opposed to fossil fuel. This could be done by reference to the volumes of each of those fuels used to produce the blend.
- Make provision for a supply of RTFs to be counted towards discharge of an RTFO only where it meets specified conditions relating to the fuel's supply (e.g. might relate to the purposes of the supply), the person by or to whom it was supplied (e.g. might limit to supply by the obligated supplier itself), or the place it was supplied to (e.g. might limit to certain geographical boundaries).
- Make provision preventing evidence of the supply of the same RTF to be counted towards discharge of an RTFO for more than one supplier (i.e. 'double-counting').
- Make provision for the supply of any fuel that is subsequently exported outside the UK not to count towards discharge of an RTFO.

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- Make provision for how units of various transport fuels are to be measured for the purposes of an obligation (for example, by energy, volume, etc).
- Make provision for specified RTFs to be allocated more or less “credit” per unit of fuel supplied than other RTFs.
- Make provision for aggregating different units of measurement applying to different transport fuels.
- Make provision allowing certain presumptions to be made. For example, it may be appropriate for certain presumptions to be made for the purpose of determining the effect of evidence provided to the Administrator by a supplier in support of the discharge of his RTFO.

**Section 127: Renewable transport fuel certificates**

296. This section enables the Secretary of State to make provision in an order for the Administrator to issue renewable transport fuel certificates (“RTF certificates”) to suppliers. An RTF certificates scheme would enable the trading of certificates between suppliers, and ‘banking’ of certificates for use in future obligation periods. The section allows an order to make provision for both these options.

297. Subsection (2) provides that an RTF certificate would certify that the stated amount of RTF has been supplied by the stated supplier, to the stated place and in the stated period. It would count as sufficient evidence of the facts certified for the purposes of an RTFO.

298. Subsection (3) provides that an order may specify conditions or requirements relating to the issue of certificates, including, as to the making of applications for certificates (including information to be provided).

299. Subsection (4) provides that an order may allow for transfers of certificates between specified persons, which would facilitate the trading of such certificates. Subsection (5) provides that an order may provide certain conditions in relation to such transfers, such as informing the Administrator.

300. Subsection (7) provides that an order may allow for certificates to be accepted after the deadline for producing evidence of discharge of an obligation. For example, an order might provide for a ‘reconciliation’ period during which suppliers are given a period of time to acquire additional certificates where necessary for the purpose of discharging their RTFOs.

301. Subsection (8) provides that an order may allow for certificates to be accepted in later periods than the period for which they were issued. This would allow companies, for example, to ‘bank’ certificates for future use or sale where they had more in one period than was required to fulfil their RTFO.

**Section 128: Discharge of obligation by payment**

302. This section enables the Secretary of State to make provision in an order requiring obligated suppliers who do not discharge their RTFOs through the production of evidence, to pay a specified amount (commonly described as a “buy-out price” - ‘BOP’) to the Administrator. This might relate to the amount of RTF by which a supplier has fallen short of its obligation in the relevant period (e.g by requiring payment of a specified sum per unit of RTF for the shortfall). A purpose of the power is to allow for a degree of flexibility for

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suppliers in meeting their obligations, and a safety net to limit the costs to the consumer should the price of renewables be higher than expected.

303. The section also allows for a two-stage enforcement approach to be adopted, whereby a supplier is given a period of time to pay the BOP, then a further period to pay at a penalty rate, before civil penalties may be invoked (see subsection (2)(a) and (d)).

304. Subsection (2) enables amounts to be increased in line with inflation (paragraph (b)). An order may provide for the BOP (and any penalty sums) to be repaid to a company in certain circumstances (e.g. where RTFO certificates produced by the company after the obligation period are accepted by the Administrator by virtue of section 127(7) (paragraph (c)). An order may prohibit the Administrator from seeking to recover BOP sums owing where specified conditions are satisfied (e.g. where a decision is taken to pursue civil penalties instead) (paragraph (d)).

305. Subsection (4) would allow an order to require specified suppliers to make payments into the “buy-out” fund, to cover any shortfall in payments due caused, for example, by an obligated supplier becoming insolvent without paying amounts owing for the relevant period. Under subsection (5), an order may provide for subsequent adjustment or repayment of such sums. For example, it may be appropriate for repayments to be made where the administrator or liquidator of a supplier who has become insolvent is subsequently able to raise funds to make a payment into the “buy-out” fund.

306. Subsections (6) and (7) provide that an order may require the Administrator to use a specified portion of BOP revenues to cover its operational costs; otherwise, the money must be recycled to specified transport fuel suppliers (e.g. only those who met their obligation in the relevant period) in accordance with a specified allocation system.

### **Section 129: Imposition of civil penalties**

307. This section allows an order to provide for persons who contravene designated provisions made by or under Chapter 5 of Part 2 of the Act to be liable to a civil penalty of such amount considered appropriate by the Administrator. This might cover, for example, failure to discharge an obligation, or infringement of requirements relating to the provision of information or payment of administrative charges. The Administrator may issue “civil penalty notices” to persons who breach the relevant provisions.

308. Subsection (3) allows an order to set a maximum penalty. But no penalty may be imposed on a defaulter which exceeds 10 per cent of the turnover of the defaulter’s business.

309. Subsections (4) to (6) set out the procedure for the issuing and payment of penalties under the section.

310. Subsection (7) requires the Administrator to pay any penalty sums received to the Secretary of State, who in turn must pay them into the Consolidated Fund.

### **Section 130: Objections to civil penalties**

311. This section allows persons issued with a civil penalty notice to give a notice of objection to the Administrator. Subsection (1) sets out the possible grounds for objection. Subsection (2)(b) requires any notice of objection to be given in the manner and timeframe specified in the order.

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312. Subsection (3) requires the Administrator to consider any notice of objection. The Administrator must then notify the objector of its decision in the manner and timeframe specified in the order (subsection (5)). In the meantime, the Administrator cannot enforce the penalty (subsection (4)). The original civil penalty notice will be amended or reissued as appropriate (subsection (6)).

### **Section 131: Appeals against civil penalties**

313. This section provides for persons issued with a civil penalty notice to appeal to the courts, on the grounds stated in subsection (1). The merits of the Administrator's decision would be considered in a rehearing of the matter.

314. Subsection (6) allows an appeal to the courts to be brought even where a notice of objection has been given to the Administrator in respect of the same matter, and regardless of the outcome of that objection process.

### **Section 132: Interpretation**

315. This section defines words and phrases used in sections 124 to 131. The definition of "renewable transport fuel" in subsection (1) covers biofuel, blended biofuel, and any other fuel produced from renewable energy sources (e.g. some forms of hydrogen). In addition, the section allows an order to designate any other description of fuel as being a RTF for the purposes of an RTFO, for example, a fuel produced (wholly or partly) from renewable sources that might be developed or become available in the future or which might be identified as part of the consultation process.

316. The definition of "transport fuel supplier" in subsection (1) essentially allows an RTFO to be placed on persons who supply fossil fuels, renewable transport fuels or any other transport fuel with a view to it being used for transport purposes (see the definition of "supply" in subsection (1) as well as subsection (3) in relation to transport purposes). This may include persons who are refiners, producers, blenders, distributors or retailers of fuel.

317. The definition of "biomass" in subsection (4) refers to the biodegradable portion of a specified product, waste or residue. There is a wide spectrum of waste streams capable of use for producing biofuel. The subsection allows for an Order to determine which would qualify under the definition for the purposes of an RTFO.

## **PART 3: ENERGY REGULATION**

### **SUMMARY AND BACKGROUND**

#### **Chapter 1: Electricity Trading and Transmission**

318. This Chapter provides a legal framework for a single competitive wholesale electricity market for the whole of England, Scotland and Wales. Specifically it allows for the implementation of the British Electricity Trading and Transmission Arrangements ("BETTA").

319. Proposals for this Chapter were published for pre-legislative scrutiny in January 2003 as the Draft Electricity (Trading and Transmission) Bill. The House of Commons Select Committee on Trade and Industry published a report on the proposals in April 2003 and the Government's response to its report on the BETTA proposals in July 2003. These publications can be found at:

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<http://www.parliament.the-stationery-office.co.uk/pa/cm/cmtrdind.htm> - reports

320. In order to deliver BETTA, arrangements are being proposed that are designed to promote the creation of a GB-wide wholesale electricity market, to create a single set of arrangements for access to and use of the transmission system and to create a single GB-wide transmission system operator. BETTA will also bring about the introduction of a GB-wide Balancing and Settlement Code (“BSC”), a GB Connections and Use of System Code (“CUSC”) and a GB Grid Code, which will mean a fully integrated and consistent set of rules in relation to connection to and use of the transmission system, and balancing and settlement, for the whole of GB. BETTA will also result in the introduction of a new code governing the interface between the system operator and transmission owners (an ‘SO-TO’ Code).

321. The main statute regulating the electricity industry is the Electricity Act 1989 (c.29) (the “Electricity Act”). Section 4 of the Electricity Act prohibits anyone from carrying out certain activities unless licensed or exempted from the requirement to be licensed. There are four types of electricity activity that are prohibited by the Electricity Act, and therefore licensable – generation, transmission, distribution and supply. In relation to electricity transmission there are currently three licences in GB, held by the National Grid Company, covering England and Wales, Scottish Power Transmission Limited and Scottish Hydro Electric Transmission Limited.

322. The Gas and Electricity Markets Authority (“GEMA”), supported by Ofgem (the Office of Gas and Electricity Markets), regulates the gas and electricity industries in Great Britain. Its powers are provided for under the Gas Act 1986 (c.44) (the “Gas Act”), the Electricity Act and, most recently, the Utilities Act 2000 (c.27) (the “Utilities Act”). The Electricity Act (section 6) provides for GEMA to grant licences for each of the four prohibited activities. Each licence has an accompanying set of Standard Conditions that set out the obligations and duties that each licensee must adhere to. In addition each licence may include specific or special conditions applicable to a particular licensee. It is also GEMA’s role to enforce any breach of these obligations.

### ***England and Wales***

323. England and Wales currently operates as a single wholesale electricity market. The New Electricity Trading Arrangements (“NETA”) came into effect in March 2001, replacing the Electricity Pool. The Pool was a relatively centralised market that determined the wholesale price of electricity. The trading arrangements under NETA, in contrast, are based on the bilateral trading of electricity contracts between generators, suppliers, traders and customers. They operate as far as possible like other commodity markets with a forward and futures market that allows contracts for electricity to be struck well in advance and for short-term power exchanges which give participants the opportunity to ‘fine tune’ their contract positions. The Government, and Ofgem in particular, have continued to work closely with industry, through consultations and other means, to improve the mechanisms in place under NETA to ensure it works as effectively and competitively as possible. A brief overview of NETA is also available on the Ofgem web site.

### ***Scotland***

324. The arrangements put in place under NETA did not encompass Scotland. At the time of privatisation, the wholesale trading arrangements that were put in place in Scotland were

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significantly different to those in England and Wales. As a result the Scottish market has only two main players. The key features of this structure are:

- Two vertically integrated groups, ScottishPower and Scottish & Southern Energy, who retain interests in generation, transmission, distribution and supply;
- The allocation of virtually all Scottish generating capacity, through ownership or contracts, between ScottishPower and Scottish and Southern Energy;
- Duopoly control over the bulk of interconnector capacity with England & Wales.

325. The result of this structure is:

- In Scotland GEMA administers prices because competition is underdeveloped and the market offers much less choice for both industrial and domestic consumers;
- Current market arrangements make it difficult for independent Scottish generators to connect to the grid and sell to the wider GB market. This hinders competition and is a barrier to achieving the Government's renewables target of 10% by 2010.

### ***Europe***

326. The Lisbon European Council in March 2000 agreed to accelerate energy liberalisation with the ultimate objective of a fully open internal electricity and gas market. This was followed in March 2001 by proposals from the European Commission for new Electricity and Gas Directives and a Regulation on cross-border trade in electricity. Political agreement on these proposals was reached at the Energy Council on 25 November 2002.

327. The new Directives require, among other things, independent regulation, transparent, non-discriminatory access to infrastructure, the unbundling of vertically integrated monopolies and for all consumers to choose their electricity and gas suppliers by July 2007. The Regulation establishes a mechanism for developing cross-border trading arrangements.

328. The Government strongly endorses these measures, which it believes are essential prerequisites for a properly functioning internal energy market. BETTA will allow us to apply even greater pressure on our European partners to implement the changes agreed in the Directive in terms of opening their markets and increasing competition.

### ***Main provisions***

329. In summary, this Chapter provides for:

- a power for the Secretary of State to amend electricity licences; to enable the implementation of a single British transmission system and a single system operator; and to allow for a single set of trading arrangements and a single set of arrangements for access to and use of the transmission system, modelled on those currently operating in England and Wales, to be extended to the whole of Britain;
- changes to the prohibition on transmitting electricity. In simple terms this will re-define what the prohibition covers. Section 4 of the Electricity Act defined what was meant by transmitting electricity and made it illegal to undertake such activity without an appropriate licence. As a result of the proposal to introduce a single system operator for Great Britain, the Act will amend section 4 in order to ensure that the licensable transmission activity covers separate components:

*These notes refer to the Energy Act 2004 (c.20)  
which received Royal Assent on 22 July 2004*

- the co-ordination and direction of the flow of electricity across the whole transmission system i.e. an activity of the transmission system operator, and
- the making available for use for the purposes of such a transmission system of anything which forms part of it.

This reflects the fact that both the system operator and the transmission asset owners will have an important role to play in the process of transmission under the new arrangements;

- A power for the Secretary of State to instruct GEMA to award a transmission licence;
- Changes to the licensing powers contained in the Electricity Act to reflect the two transmission functions as outlined above;
- Other changes to the Electricity Act consequent upon a single trading market and revised transmission arrangements;
- A licensing scheme so that existing transmission licences will become transmission licences under the amended prohibition on transmission;
- A scheme to enable the transfer of certain assets to the transmission system operator in order to enable it to carry out its activities effectively in the event that the transmission licence holders concerned cannot agree the need for, or aspects of, the transfer amongst themselves.

## **Chapter 2: Interconnectors for Electricity and Gas**

330. Chapter 2 extends the licensing regimes under the Electricity Act and the Gas Act 1986 to electricity and gas interconnectors respectively. An interconnector is a connection between the electricity or gas system in Great Britain and such a system in another country.

331. These provisions partially implement the following European Community Legislation:

- Articles 20 and 23 of Directive 2003/54/EC of the European Parliament and the Council, concerning common rules for the internal market in electricity;
- Articles 18, 22 and 25 of Directive 2003/55/EC of the European Parliament and the Council, concerning common rules for the internal market in natural gas.

332. A Transposition Note setting out how the Government will transpose into GB law the main elements of these Directives applicable to interconnectors is available from the Energy Markets Unit, Department of Trade and Industry, 1 Victoria Street, London SW1.

## **Chapter 3: Special Administration Regime for Energy licensees**

333. Chapter 3 provides for a special administration regime for the holders of electricity transmission or distribution licences or gas transportation licences. These provisions are designed to ensure the uninterrupted operation of gas and electricity networks essential to security of supply in the event of actual or threatened insolvency of such a licence holder. There are similar provisions in the water and rail sectors.

*These notes refer to the Energy Act 2004 (c.20)  
which received Royal Assent on 22 July 2004*

#### **Chapter 4: Further Provisions about Regulation**

##### ***Annual report on security of energy supplies***

334. Section 172 requires the Secretary of State to publish an annual report on the security of energy supplies, and to lay the report before Parliament.

##### ***Appeals from GEMA decisions***

335. Sections 173 to 176 provide for an appeals mechanism to the Competition Commission against GEMA decisions on modifications to the Gas and Electricity Network Codes. The measure is designed to improve the accountability of the process by which the detailed rules that govern activities in the gas and electricity markets as set out in various industry codes are amended. The codes are designed to allow ongoing amendment. Modifications can currently be proposed by a party to the code. Such proposals are then considered in accordance with the modification procedure set out in the code which results in a recommendation to GEMA. GEMA makes the final decision whether the proposed modification should be accepted or rejected. The regulator is not bound to accept the recommendation, although it must issue a decision letter explaining its choice. In the absence of an appeals mechanism, market participants' only means of redress at present is to initiate a judicial review of GEMA's decision.

##### ***Meaning of electricity supply***

336. Section 179 provides for electricity conveyed by a transmission system to a substation, and then supplied from there to premises, to be brought within the definition of supply in the Electricity Act 1989.

##### ***Meaning of "high voltage line"***

337. Section 180 defines "high voltage line" in respect of offshore electric lines as such lines which are of a nominal voltage of 132 kilovolts or more.

##### ***Prepayment meters***

338. Section 181 provides GEMA with the power, with the consent of the Secretary of State, to make regulations to extend the range of sums that could be collected from a prepayment meter.

##### ***Inquiries under sections 36 and 37 of the 1989 Act***

339. Section 182 fulfils the Government's commitment set out in paragraph 4.33 of the Energy White Paper, "*Our energy future – creating a low carbon economy*" (Cm 5761), to apply proposals by Government for major infrastructure projects handled in the planning process in England to major energy projects in England and Wales where consents are awarded by the Secretary of State.

##### ***Exclusion of confidential information from the Register***

340. Section 183 inserts new subsections into the Electricity Act 1989 and the Gas Act 1986 which allow GEMA, when entering information on the registers it is required to maintain under section 49 of the Electricity Act 1989 and section 36 of the Gas Act 1986, to exclude details in certain circumstances.

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### ***Assistance for areas with high distribution costs***

341. Section 184 gives the Secretary of State the power to make an order to establish a scheme requiring authorised transmitters (in practice the Great Britain System Operator) to make a payment to a distributor when that distributor faces costs that are significantly higher than in other areas of Britain.

### ***Payments into the Scottish Consolidated Fund***

342. Section 187 provides a power for Scottish Ministers to direct GEMA to pay into the Scottish Consolidated Fund monies from funds paid to GEMA and arising from the auctioning of electricity generated under Scottish Renewables Obligation contracts. There is also a corresponding duty on Scottish Ministers to include provision in budget proposals to the Scottish Parliament that monies thus raised shall be used to promote the use of energy from renewable sources.

## **COMMENTARY ON SECTIONS**

### **CHAPTER 1: ELECTRICITY TRADING AND TRANSMISSION**

#### **Section 133: “New trading and transmission arrangements”**

343. Section 133 sets out what is meant by “new trading and transmission arrangements”. This phrase is used principally in sections 134, 137 and 139 of the Act in order to limit the powers given to the Secretary of State.

#### **Section 134: Power to modify licence conditions**

344. Section 134 gives the Secretary of State the ability to modify the conditions of electricity licences in GB in order to implement the new trading and transmission arrangements. The new arrangements will have most impact on transmission licensees but there will also be necessary changes to other types of electricity licences.

#### **Section 135: Alteration of transmission activities requiring licence**

345. Section 135 amends section 4 of the Electricity Act by replacing the prohibition on unlicensed transmission with a prohibition on unlicensed participation in transmission. Participation in transmission is described as either of two separate transmission activities. These activities are: (1) co-ordinating and directing the flow of electricity onto the transmission system e.g. balancing the demand and supply of electricity close to real time (done under the new arrangements by a system operator); or (2) making available for use for the purposes of such a transmission system anything that forms part of it. This is to reflect the separation of roles between the transmission system operator and the transmission asset owners under BETTA.

#### **Section 136: Transmission licences**

346. Section 136 makes changes to sections 6 and 7 of the Electricity Act in the following ways:

- it amends the power of GEMA to grant a transmission licence to that of granting a licence to participate in transmission, reflecting the change to the prohibition explained above;

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- it removes the restriction stopping GEMA from granting more than one transmission licence in any given geographical area;
- it allows GEMA to alter, with the consent of the licence holder, the geographical scope of a licence;
- it allows for licence conditions that can restrict the activities of a transmission licence holder and/or restrict the area within which authorised activities can be undertaken.

347. In particular subsection (3) amends section 7 of the Electricity Act and thereby extends the scope of conditions that may be included in a transmission licence. It allows a licence condition to restrict the holder from carrying on an activity otherwise authorised by the grant of the licence or restrict the carrying on of that activity to a specific geographic area. This change is necessary because each licence will simply be a licence to participate in transmission. It is the conditions imposed in the licence that will determine which transmission activities can be undertaken by the licensee.

### **Section 137: New standard conditions for transmission licences**

348. Subsection (1) of section 137 gives the Secretary of State power to determine a whole new set of standard conditions for transmission licences, whilst subsection (2) requires the publication of such conditions. This power is required because it is expected that a new set of standard conditions for transmission licence holders will be required for BETTA and the power in section 134 only allows for the modification of individual conditions, not the wholesale replacement of a set of standard conditions. Subsection (4), following the approach in section 33(2) of the Utilities Act, permits the inclusion of conditions which make provision in respect of the operation of other standard conditions, in particular for other conditions not to be brought into operation, or to be re-activated or suspended in the circumstances specified in the condition, i.e. for conditions to be switched on and off as appropriate during the implementation of BETTA. Subsections (5) and (6) ensure that section 8A of the Electricity Act operates, in the case of transmission licences, by reference to the standard conditions determined under subsection (1). Subsection (7) restricts the time during which the Secretary of State may use this power to eighteen months after subsection (1) comes into force (or if earlier, once subsections (5) and (6) come into force, by which time the power should have been exercised).

### **Section 138 and Schedule 17: Conversion of existing transmission licences**

349. This section gives Schedule 17 effect. Schedule 17 provides for a licensing scheme or schemes to be made by the Secretary of State. The scheme or schemes will be used to transform each existing transmission licence into a licence to participate in transmission. This is necessary to ensure that the existing licence holders will not be in breach of the prohibition in section 4 of the Electricity Act when the amendments made under section 135 of this Act come into force. It also allows for the new set of standard transmission licence conditions to be incorporated into each transmission licence. The Secretary of State is also given the power to make incidental, supplemental and consequential modifications to the licences and make appropriate transitional provision. The Schedule places an obligation on the Secretary of State to publish the text of each amended licence as soon as possible after the making of a new scheme. It also allows the Secretary of State, by statutory instrument subject to annulment, to make appropriate modifications to the licensing scheme after implementation.

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which received Royal Assent on 22 July 2004*

### **Section 139: Grant of transmission licences**

350. Section 139 gives the Secretary of State power to direct GEMA to grant or refuse a new licence to participate in transmission. Subsection (2) requires the Secretary of State to consult GEMA before issuing such directions, whilst subsections (3) to (6) draw the boundaries for when and how the Secretary of State may make such directions.

### **Section 141 and Schedule 18: Property arrangements scheme**

351. Section 141 gives Schedule 18 effect. Schedule 18 provides the mechanism for GEMA to make a scheme or schemes for the transfer of property, rights or liabilities from a transmission licence holder to the system operator (who will also be a transmission licence holder) or for the creation of rights in favour of the system operator over property, rights or liabilities of a transmission licence holder. This facility is required to ensure that the new trading and transmission arrangements are implemented in a timely and efficient manner and that the system operator has access to and use of all the property and equipment required to do its job effectively before the new trading and transmission arrangements can commence operation. In particular, GEMA has the power to determine disputes between the transmission licence holders. Only transmission licence holders may apply for the Authority to make a scheme under this Schedule. GEMA will then determine any point of dispute using the criteria set out in the Schedule and will also be able to override a third party's consent where it would otherwise be required.

352. Schedule 18 also allows for an appeal against GEMA's decision. Aggrieved parties can appeal to the Competition Appeal Tribunal within seven days of the decision being made. The Tribunal has, among other things, the power to overturn, or amend GEMA's determination of any disputed point. Schedule 18 also provides for the Tribunal to have the power to make interim arrangements whilst the Tribunal is assessing the case.

### **Section 143 and Schedule 19: Amendments consequential on Chapter 1 of Part 3**

353. Subsection (1) brings Schedule 19 into effect, whilst subsection (2) provides that a transmission licence holder retains his powers under Schedule 4 of the Electricity Act in relation to any geographic area that is no longer part of the area covered by his licence as a result of modifications under section 134 or the making of a licensing scheme under Schedule 17.

## **CHAPTER 2: INTERCONNECTORS FOR ELECTRICITY AND GAS**

### **Sections 145 to 148: licensing of electricity interconnectors**

354. Section 4 of the Electricity Act provides that it is an offence to generate, transmit, distribute or supply electricity unless authorised by virtue of a licence and section 5 provides that in certain instances the Secretary of State may grant an exemption from this prohibition. Participation in the operation of an electricity interconnector is not addressed in the Act and is currently unregulated. There is no requirement for those participating in this activity to hold a licence or exemption.

355. Section 145 amends section 4 of the Electricity Act to make unauthorised participation in the operation of an electricity interconnector a prohibited activity. As a result, the unauthorised participation in the operation of an electricity interconnector becomes an offence in the same way as the other activities referred to in section 4 of the Electricity Act.

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which received Royal Assent on 22 July 2004*

It also defines the activity, what is meant by an electricity interconnector and, by amending sections 5 and 6, enables the Secretary of State, or where relevant GEMA, to authorise the activity by either a licence or exemption.

356. Section 145 also prevents an electricity interconnector licence being issued to the holder of any other type of licence under the Act and the latter from holding a licence to participate in the operation of an electricity interconnector. This is to prevent possible conflicts of interest in the allocation of capacity on interconnectors.

357. The procedures for determining standard licence conditions for electricity interconnectors are set out in section 146. These procedures are in line with those for existing licences. The concept of standard licence conditions is designed to ensure that all licences of a particular type contain the same licence conditions as far as appropriate and to facilitate the procedure in section 11A of the Electricity Act whereby licence conditions may be modified collectively. Section 146 gives the Secretary of State the power to draw up and publish the standard conditions of the electricity interconnector licence before the commencement of subsection (6). After that time the Secretary of State will have no further role in relation to the standard licence conditions although he may veto proposals made by GEMA to modify the standard licence conditions either on the grant of a licence or subsequently. Subsection (2) permits the standard conditions to make provision for a standard condition not to be brought into operation, to be suspended or be reactivated in circumstances specified in the condition. This is intended to allow more flexible licensing arrangements.

358. Subsection (6) of section 146 amends section 8A of the Electricity Act so that the standard licence conditions determined under the power in subsection (1) will be incorporated into all licences granted after subsection (6) comes into force. Section 8A also gives GEMA the power to modify the standard conditions determined by the Secretary of State, when granting a licence and sets out the process to achieve this.

359. Section 147 sets out the consequential amendments which the introduction of interconnector licensing will necessitate.

360. Section 148 gives the Secretary of State the power to grant electricity interconnector licences under section 6 of the Electricity Act to persons participating in the operation of an electricity interconnector when the prohibition enters into force. The normal licence application procedure will not apply but the Secretary of State must consult a prospective licence holder, GEMA and such other persons as he considers appropriate before issuing a licence.

### **Sections 149 to 153: Gas interconnectors**

361. Section 5(1)(a) of the Gas Act provides that it is an offence to convey gas through pipes to any premises or to a pipe-line system operated by a gas transporter unless authorised by a licence, exemption, or exception under the Act. Conveying gas through a gas interconnector currently only falls within the prohibition to the extent that the gas is being conveyed to a pipe-line system operated by a gas transporter.

362. Section 149 amends section 5 of the Gas Act to exclude conveyance of gas through a gas interconnector from subsection (1)(a) of that Act and to define and make participation in the operation of a gas interconnector a prohibited activity. As a result, the unauthorised

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participation in the operation of a gas interconnector becomes an offence in the same way as the other activities referred to in section 5 of the Act. Participation in the operation of a gas interconnector will either be authorised by a licence granted under section 7ZA of the Gas Act (as inserted by this Act) or by an exemption order granted by the Secretary of State under section 6A of the Gas Act.

363. Section 149 also prevents a gas interconnector licence being issued to the holder of any other type of licence under the Gas Act and the latter from holding a licence issued under new section 7ZA. This is to prevent possible conflicts of interest in the allocation of capacity on gas interconnectors.

364. The procedures for determining standard licence conditions for gas interconnectors are set out in section 150. These procedures are in line with those for existing licences. The concept of standard licence conditions is designed to ensure that all licences of a particular type contain the same licence conditions as far as appropriate and to facilitate the procedure in section 23 of the Gas Act whereby licence conditions may be modified collectively. Section 150 gives the Secretary of State the power to draw up and publish the standard conditions of the gas interconnector licence before the commencement of subsection (6). After that time the Secretary of State will have no further role in relation to the standard licence conditions although he may veto proposals made by GEMA to modify the standard licence conditions either on the grant of a licence or subsequently.

365. Subsection (2) of section 150 permits the standard conditions to make provision for a standard condition not to be brought into operation, to be suspended or be reactivated in circumstances specified in the condition. This is intended to allow more flexible licensing arrangements.

366. Subsection (6) of section 150 amends section 8 of the Gas Act so that the standard licence conditions determined under the power in section 150(1) will be incorporated into all licences granted after subsection (6) of section 150 comes into force. Section 8 of the Gas Act also gives GEMA the power to modify the standard conditions determined by the Secretary of State, when granting a licence and sets out the process to achieve this.

367. Section 151 modifies the Pipe-lines Act 1962 (c.58) and the Petroleum Act 1998 (c.17) so that the dispute settlement procedures set out therein no longer apply in relation to access by third parties to gas interconnectors. These will now be covered in the gas interconnector licence conditions.

368. Section 152 gives the Secretary of State the power to grant gas interconnector licences under section 7ZA of the Gas Act to persons participating in the operation of a gas interconnector when GEMA's power to grant such licences enters into force. The normal licence application procedure will not apply but the Secretary of State must consult a prospective licence holder, GEMA and such other persons as he considers appropriate before issuing a licence.

369. Section 153 amends the Gas Act so that where an act or omission taking place outside GB constitutes an offence under the Act it may be prosecuted in GB. Provisions made by or under the Act in relation to places outside GB apply to individuals and companies whether or not they are British citizens or incorporated under the law of a part of the UK.

## **CHAPTER 3: SPECIAL ADMINISTRATION REGIME FOR ENERGY LICENSEES**

### **Section 154: Energy administration orders**

370. This section provides that a court may make an energy administration order appointing an energy administrator in relation to a protected energy company i.e. a company which holds a gas transportation licence or an electricity transmission or distribution licence.

371. Subsections (1), (2) and (3) explain the terms “energy administration order” and “energy administrator” and how the energy administrator is to perform his duty.

372. Subsection (4) establishes that an energy administration order can only apply to the affairs and business of a non-GB company (i.e. a company incorporated outside Great Britain and including a Northern Ireland company) which are carried out in Great Britain and to its property in Great Britain.

373. Subsection (5) sets out which licence holders may be subject to an energy administration order. These are all regulated natural monopolies.

### **Section 155: Objective of an energy administration**

374. Subsection (1) establishes that the objective of the energy administrator in performing his duty is (i) to secure that the company’s system (as defined in subsection (6)) is maintained and developed efficiently and economically, and (ii) to render the continuation of the energy administration unnecessary for this purpose by one of the means in subsection (2).

375. Subsection (2) defines the means by which energy administration may be rendered unnecessary. These are either the rescue of the company as a going concern or transfers which satisfy subsection (3).

376. Subsection (4) provides examples of the types of transfer which may satisfy subsection (3).

377. Subsection (5) provides that rescue is to be preferred to transfer in achieving the objective of energy administration. Transfers are only to be effected when rescue is not reasonably practicable without transfers, where the objective of the energy administration cannot be achieved through rescue without transfers or where such transfers would produce a better result for the creditors or members of the company.

### **Section 156: Applications for energy administration orders**

378. This section sets out that an application for an energy administration order can only be made by the Secretary of State or by GEMA with the consent of the Secretary of State. It also requires the applicant to give notice to relevant persons, listed in subsection (2), as soon as reasonably practicable after the making of the application.

### **Section 157: Powers of court**

379. This section sets out the powers of the court in relation to an energy administration order.

380. Subsection (1) sets out the court’s powers on hearing an application for energy administration.

381. Subsection (2) provides that the court can only make an energy administration order if it is satisfied that the company is insolvent, facing insolvency or that on a petition from the

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Secretary of State under section 124A of the Insolvency Act 1986 (c.45) it would be just and equitable (aside from the objective of energy administration) to wind up the company in the public interest.

382. Subsections (3) and (4) provide that in certain circumstances the court cannot make an energy administration order.

383. Subsection (6) provides that an interim order made under subsection 1(d) may, amongst other things, restrict the exercise of a power of the company or its directors or confer a discretion on a qualified insolvency practitioner in relation to the protected energy company.

384. Subsection (8) provides that the company will be deemed to be insolvent in accordance with sections 123 or 222 to 224 of the Insolvency Act 1986 (c.45).

### **Section 158: Energy administrators**

385. This section defines the status of the energy administrator. It further provides that he must exercise his management functions for the purpose of achieving the objective of the energy administration as quickly and efficiently as is reasonably practicable and that he must exercise and perform his powers and duties in the manner which, insofar as it is consistent with the objective of the energy administration, best protects the interests of the creditors of the company as a whole and, subject to those interests, the interests of the members of the company as a whole.

### **Section 159 and Schedules 20 and 21: Conduct of energy administration, transfer schemes etc**

386. This section gives effect to Schedules 20 and 21 and applies the rule making power in section 411 of the Insolvency Act 1986 (c.45) for the purpose of giving effect to this Chapter.

387. Schedule 20 provides for certain provisions of Schedule B1 of the 1986 Insolvency Act (introduced by section 248 and Schedule 16 of the Enterprise Act 2002 (c.40)) to have effect in relation to energy administration. A version of Schedule B1 to the 1986 Act as amended to apply to energy administration is available on the DTI website<sup>1</sup>. The Schedule also grants the Secretary of State a power to make modifications to the provisions of insolvency law having effect in the case of unregistered companies in relation to energy administration (paragraph 33). This power is subject to the negative resolution procedure. It also grants the Secretary of State the power to make such modifications to primary legislation relating to insolvency including the Energy Act as he considers appropriate in relation to energy administration (paragraph 46). This power is subject to the affirmative resolution procedure.

388. Schedule 21 covers the content and effect of transfer schemes which can be made as described in section 155(3) i.e. transfers to another company or companies as a going concern of so much of the protected energy company's assets as are necessary to ensure that the objective of the energy administration is met. The transfer may include assets other than the network system (vehicles, for example) but must include enough assets to constitute a going concern as a transportation, transmission or distribution company. It may be the case that all of the protected energy company's assets will be transferred to one company but the

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<sup>1</sup> [www.dti.gov.uk/energy/leg\\_and\\_reg/acts/index.shtml](http://www.dti.gov.uk/energy/leg_and_reg/acts/index.shtml)

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protected energy company may also be separated into several going concerns; for example in the case of an electricity distribution company it might be possible to separate the assets on geographical lines creating several smaller regional distribution networks. All transfers are subject to veto or amendment by the Secretary of State.

389. Paragraphs 1 to 4 of Schedule 21 enable a protected energy company (through its energy administrator) to make a scheme or schemes for the transfer of property, rights and liabilities to a new company subject to the approval of the Secretary of State, who in turn must consult GEMA. Paragraph 5 provides that all or part of a licence can be included in a transfer scheme, whilst paragraph 6 provides that powers and duties which fall to the old energy company (i.e. the protected energy company in respect of which the energy administration order was made) under statutory provisions can be transferred to the extent that they are exercisable or required by the new energy company given the extent of the transfer of the business to it. The Secretary of State is given the power to modify the scheme before giving approval although he will require the consent of the old energy company and the new energy company to the modifications (paragraph 3). Similarly he may modify it subsequently with the consent of those parties and after consulting GEMA (paragraph 9).

390. Paragraph 7 of Schedule 21 deals with a number of matters which provide for the smooth transition of property, rights etc from the protected energy company to the new energy company.

391. Paragraphs 10 to 11 of Schedule 21 provide for cases where the energy company is a foreign company or foreign property, rights and liabilities are being transferred.

**Section 160 to 164: Restrictions**

392. These sections prevent energy administration being frustrated by prior orders of various types being granted before the Secretary of State or GEMA have been given an opportunity to apply for an energy administration order or by other steps being taken when an energy administration order has been made or an application is outstanding.

**Section 160: Restrictions on winding-up orders**

393. This section provides that a winding up order sought by a person other than the Secretary of State in respect of a protected energy company cannot be made unless notice has been served on the Secretary of State and GEMA and at least fourteen days have passed since the last of those notices was served. It also provides that if an application for an energy administration order is received before the winding up order is made the court can consider that application instead of making the winding up order.

**Section 161: Restrictions on voluntary winding-up**

394. This section prevents a protected energy company voluntarily winding itself up without the permission of the court and prevents the court from granting permission unless notice has been served on the Secretary of State and GEMA and at least fourteen days have elapsed since the service of the last of those notices. It also provides that if an application for an energy administration order is received before such permission is given the court can consider that application instead of granting the permission.

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### **Section 162: Restrictions on making of ordinary administration orders**

395. Subsection (2) prevents a protected energy company entering ordinary administration if it is already in energy administration, or an energy administration order has been made but is not yet in force.

396. Subsection (3) provides that an ordinary administration order must not be granted by the court and the court must not exercise its powers under paragraph 13 of Schedule B1 to the 1986 Act (including its powers to make interim orders) unless notice has been served on the Secretary of State and GEMA, fourteen days have elapsed since the service of the last of those notices, and no energy administration order is outstanding.

### **Section 163: Restrictions on administrator appointments by creditors etc.**

397. This section provides that an administrator cannot be appointed for a company by its secured creditors, directors or the company itself, if an energy administration order in relation to the company is in force, has been made but is not yet in force, or has been applied for. An administrator cannot be appointed to a protected energy company unless none of the above conditions apply and, additionally, the Secretary of State and GEMA have been served with copies of all relevant documents filed or lodged with the court and at least 14 days have elapsed since the service of the last of these copies.

### **Section 164: Restrictions on enforcement of security**

398. This section provides that security over the property of a protected energy company cannot be enforced unless the Secretary of State and GEMA have been notified of the intention to enforce the security and at least 14 days have elapsed since the service of the last of those notices.

### **Section 165: Grants and loans**

399. This section enables the Secretary of State, with the consent of the Treasury, to give a grant or loan to a company in energy administration where this appears to the Secretary of State to be appropriate to achieve the objective of energy administration.

400. Subsections (2), (3), (4) and (5) enable the Secretary of State to set the terms of a grant or loan including: requiring whole or part of a grant to be repaid if other terms on which the grant is made are breached and setting terms for the grant of any loan – i.e. terms for repayment of a loan, the rates of interest due on it and changing these loan terms by direction.

401. Subsection (6) requires the Secretary of State to secure Treasury consent before giving grants or loans and giving any directions in respect of the terms on which any loan is granted under subsection (5) of this section.

### **Section 166: Indemnities**

402. This section enables the Secretary of State, with the consent of the Treasury, to indemnify persons in respect of liabilities incurred or loss or damage sustained in connection with the exercise of the energy administrator's powers and duties.

403. Subsections (2), (3), (4) and (5) enable the Secretary of State to set the terms of an indemnity including requiring that where any sums are paid out by him in respect of the indemnity to the energy administrator, to direct that the protected energy company pay such amounts as are directed towards the repayment of those sums and interest on them.

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404. Subsection (6) provides that subsection (4) does not apply if the sums paid out by the Secretary of State are paid to the company in energy administration.

405. Subsection (7) requires the Secretary of State to secure Treasury consent before setting any of the terms of an indemnity under subsections (2), (4) and (5).

406. Paragraph (b) of subsection (8) enables the Secretary of State to agree to indemnify persons who become relevant to the energy administration subsequent to the initial agreement e.g. persons who become employees of the energy administrator in the course of the energy administration.

407. Subsection (9) specifies the categories of person who may be indemnified under the terms of this section.

**Section 167: Guarantees where energy administration order is made**

408. This section enables the Secretary of State, with consent of the Treasury, to provide guarantees in relation to a protected energy company in energy administration.

409. Subsections (2) and (3) set out that the Secretary of State may guarantee sums borrowed by the protected energy company, the payment of interest on those sums and the discharge of any other related financial obligation, and that the Secretary of State may set the terms of the guarantee as he sees fit.

410. Subsection (4) requires the Secretary of State to lay a statement before Parliament as soon as practicable after any guarantee is made.

411. Subsections (5) and (6) enable the Secretary of State, where any sums are paid out by him in respect of the guarantee to direct that the protected energy company pay such amounts as are directed towards the repayments and interest on those amounts whilst they are outstanding.

412. Subsections (7) and (8) require the Secretary of State to lay a statement before Parliament about any sum paid out under such a guarantee as soon as practicable after the end of the first financial year in which a payment is made and at the end of every subsequent year until the company has discharged the liability.

413. Subsection (9) requires the Secretary of State to obtain Treasury consent before giving any guarantee or direction under subsection (5) or (6) of this section.

**Sections 168 to 169: Licence modifications relating to energy administration**

414. These sections enable the Secretary of State to modify the conditions of gas and electricity licences. It outlines that such modifications can provide for circumstances where there is a shortfall in the property of a protected energy company, which is or has been in energy administration, for meeting the costs of energy administration. In particular, the Secretary of State can require that in such circumstances the protected energy company or its successor raises a levy on other protected energy companies and uses the sums raised to discharge debts incurred during energy administration. These will include sums paid by the Secretary of State under sections 165, 166 and 167.

*These notes refer to the Energy Act 2004 (c.20)  
which received Royal Assent on 22 July 2004*

**Section 168: Modifications of particular or standard conditions**

415. Subsection (1) enables the Secretary of State to modify the conditions of any one particular licence and the standard conditions of gas and electricity licences in relation to the new regime for energy administration.

416. Subsection (2) extends the power under subsection (1) to include the making of incidental, consequential or transitional modifications.

417. Subsection (3) and (4) require the Secretary of State to consult the holder of any licence being modified and anyone else he thinks appropriate before making a modification.

418. Subsections (5) and (6) require the Secretary of State to publish modifications made under this section.

419. Subsection (8) requires GEMA to incorporate any modification of standard conditions made by the Secretary of State into new licences it grants and to publish these modifications.

420. Subsection (9) limits the exercise of the powers under this section to the eighteen months after commencement of this section.

**Section 169: Licence conditions to secure funding of energy administration**

421. This section outlines how the Secretary of State can amend the conditions of gas and electricity licences to secure the funding of energy administration.

422. Subsection (1) specifies that the modifications that the Secretary of State can make to gas and electricity licences include requiring the holder of the licence to raise the charges imposed by him so as to raise such amounts as may be determined and to pay the amounts raised to specified persons for the purpose of making good a “shortfall” (as defined in subsection (3)) in the property of a protected energy company available to meet the expenses of energy administration, or for contributing to the making good of such a shortfall.

423. Subsection (2) provides that the modifications may require a licence holder to which the sums raised under subsection (1) are paid to apply those sums towards discharging the “shortfall”.

424. Subsection (3) defines a “shortfall” in meeting the expenses of energy administration as the property of the company being insufficient to meet the costs of energy administration. It also defines making payment to make good the shortfall as discharging “relevant debts” which cannot otherwise be met out of the available property.

425. Subsection (4) defines “relevant debts”. These include obligations to repay the grants, loans, sums paid out under an indemnity and sums paid out under guarantees under sections 165, 166 and 167.

**Section 170: Modification of Chapter 3 of Part 3 under Enterprise Act 2002**

426. This section provides that the power to modify or apply enactments which is conferred on the Secretary of State by sections 248, 277 and 254 of the Enterprise Act (c.40) includes a power to make consequential modifications to this Chapter of the Act (i.e. these energy administration provisions) where the Secretary of State considers this appropriate in connection with other provisions made under the powers conferred by those sections.

*These notes refer to the Energy Act 2004 (c.20)  
which received Royal Assent on 22 July 2004*

### **Section 171: Interpretation of Chapter 3 of Part 3**

427. This section defines the terms used in sections 154 to 170.

## **CHAPTER 4: FURTHER PROVISIONS ABOUT REGULATION**

### **Section 172: Annual report on security of energy supplies**

428. This section requires the Secretary of State to publish an annual report on the availability of electricity and gas for meeting the reasonable demands of consumers in Great Britain, and to lay that report before Parliament. The report must deal with both the short and long term, and must cover in particular:

- electricity generating capacity;
- the availability of capacity in electricity transmission and distribution systems;
- the availability of capacity in gas infrastructure; and
- the availability of capacity in licensed gas pipe-line systems.

The report must be prepared jointly by the Secretary of State and GEMA.

### **Section 173: Appeals to the Competition Commission**

429. This section sets out on what grounds a permission for an appeal may be granted, and by whom, and gives the Secretary of State powers to designate by order what codes come within the scope of the appeals procedure and what sort of decisions are excluded.

430. Subsection (2) restricts appeals to decisions on modifications to those codes designated by the Secretary of State, which do not match the description of decisions that are excluded by the Secretary of State under subsection (2)(d). It enables the Secretary of State to make an order by negative resolution designating the codes where modification decisions are to be appealable. The Government will consult on the codes to be designated, but its initial view is that the appeals mechanism is to be applicable to modifications to the Transco Network Code for gas, and the Balancing and Settlement Code (“BSC”) and the Connection and Use of System Code (“CUSC”) for electricity.

431. Subsection (3) restricts the right of appeal to people “materially affected” by the decision or bodies representing people so “materially affected”. Those “materially affected” are likely to include but may not be restricted to: parties to the framework agreement applicable to the code which is the subject of the appeal; persons holding licences granted under section 6 of the Electricity Act 1989 (c.29) and sections 7 and 7A of the Gas Act 1986 (c.44) who are obliged by licence condition to comply with the relevant code; Energywatch and other interested groups representing consumer, licensee or other trading party interests. All applicants for appeal will have to meet the “materially affected” test in the circumstances of the particular appeal.

432. Subsections (4) and (5) provide that the Competition Commission may refuse permission to appeal if the appeal is trivial or vexatious or has no reasonable prospect of success.

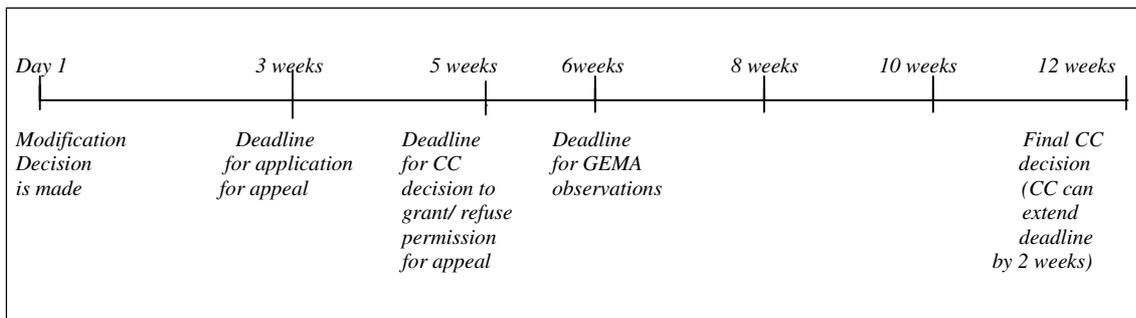
433. Subsection (6) requires the Secretary of State, when making an order under subsection (2) which designates a code or excludes certain types of decision from the appeals process, to consult with GEMA and other appropriate persons. Subsection (8) provides that such an order

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is to be subject to the negative resolution procedure. The Government will consult on the terms of the order, but its initial view is that decisions should be excluded which are urgent or where the delay occasioned by an appeal could impact on security of supply or where GEMA's decision agrees with the recommendation of the panel in the case of the BSC, or with a certain proportion of code participants in the case of the CUSC and the Transco Network Code.

**Section 174 and Schedule 22: Procedure on appeals**

434. The effect of section 174 and Schedule 22 is to set out an appeals procedure whereby applicants have 15 working days (counting from the day after the day on which GEMA's decision is published) to submit an appeal against a GEMA decision on a code modification to the Competition Commission. An application for permission to appeal must be accompanied by all such information as the Competition Commission may require under its appeal rules. The Competition Commission has 10 working days from the submission of the application to decide whether to grant or refuse the application for permission to appeal. GEMA has 15 working days after the submission of the application for permission to appeal to submit its representations or observations, should it choose to do so. The Competition Commission will then carry out a review to a tight timetable of whether GEMA discharged its duties correctly; this may include a hearing at which the parties can make representations and answer questions, and a further hearing to determine the appeal. It must normally reach its decision within 30 working days following the last day for the making of representations or observations by GEMA but it can extend this period by a maximum of 10 working days if necessary. The Competition Commission will be able to confirm or quash the original decision, or remit it to GEMA with directions to reconsider taking into account certain factors. This time line is presented below:



435. Further information can be found in the notes to Schedule 22.

**Section 175: Determination of appeals**

436. This section sets out how the Competition Commission is to reach its decisions on appeals and what it must do on reaching a decision.

437. Subsection (2) provides that in determining the appeal the Competition Commission must have regard, to the same extent as GEMA, to the statutory duties which are placed on GEMA. Subsection (3) provides that the Competition Commission must not have regard to any matter which GEMA was not entitled to have regard to when making its decision, though it may consider fresh evidence if GEMA would have been entitled to have regard to it had it

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had the opportunity to do so. Subsection (4) provides that the Competition Commission may allow the appeal only if it is satisfied: that GEMA failed to have proper regard to the applicable code objectives, or to the regulator's statutory obligations, or failed to give the proper weight to one or more of the above; that the decision was based on an error of fact and/or that the decision was wrong in law.

438. Subsection (6) provides that if the appeal is successful then the Competition Commission must do one or more of the following: (i) quash the decision, (ii) remit it to GEMA with directions for reconsideration and determination or, (iii) if it is quashing a refusal of consent, give appropriate directions for securing that the relevant condition has effect as if the consent had been given.

439. Subsection (9) sets out the way in which the Competition Commission is required to publish its decision, including the reasons for the decision.

440. Subsection (10) allows the Commission to exclude certain information from the reasons for its decision on the grounds of confidentiality when publishing its decision for the attention of persons beyond the parties under subsection (9).

#### **Section 176: Specialist members of Competition Commission**

441. This section provides that the Competition Commission's functions with respect to appeals are to be treated as functions of the Competition Commission under section 104 of the Utilities Act 2000 (c.27).

#### **Section 177: Modifications of standard conditions for funding appeals and references**

442. This section gives the Secretary of State power, after consulting licence holders, to make an order amending gas and electricity licences to change the licence charges in order to fund the appeals mechanism provided for in sections 173 to 176, and the existing arrangements for licence modification references. It is intended to use this power in respect of appeals to allow GEMA to raise the funds it needs to pay the costs of an appeal as ordered by the Commission. Where an appeal is upheld this will consist of its own costs, possibly the costs of the appellant and the costs of the Competition Commission. It is intended to use this power in respect of licence condition references to give the Competition Commission, rather than GEMA, the discretion to allocate the Competition Commission's costs in licence modification references. These costs will then be recovered by GEMA, after the Competition Commission has indicated the proportions that individual licensees should pay of the Competition Commission's costs.

#### **Section 178: Duty to have regard to best regulatory practice**

443. Section 178 inserts a subsection into section 4AA of the Gas Act 1986 and section 3A of the Electricity Act 1989 which provides that the Secretary of State and GEMA are to have regard to the principles of best regulatory practice when performing their functions in accordance with the principal objective and general duties. The key principles of best regulatory practice are: transparency, accountability, proportionality, consistency and targeting.

#### **Section 179: Meaning of electricity supply**

444. Section 179 provides for electricity conveyed by a transmission system to a substation, and then supplied from there to premises, to be brought within the definition of supply in

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section 4 of the Electricity Act 1989, as amended by the Utilities Act. This will close an anomaly in the definition of supply which defines electricity supply as supply by means of a distribution system and therefore excludes the conveyance of electricity to customers whose supply of electricity does not pass through a distribution network.

### **Section 180: Meaning of “high voltage line”**

445. This section defines “high voltage line” in respect of offshore electric lines as such lines which are of a nominal voltage of 132 kilovolts or more. This is the same as the definition of high voltage lines in Scotland. The section does not change the definition of “high voltage line” in respect of onshore electric lines in Great Britain.

### **Section 181: Prepayment meters**

446. Section 181 provides GEMA with the power, with the consent of the Secretary of State, to make regulations to extend the range of sums that could be collected from a prepayment meter. GEMA is required to consult interested parties, including the Gas and Electricity Consumers Council, before making regulations.

447. At present, sums recovered through a prepayment meter may only be in respect of an individual fuel and may only be in respect of supply to the premises at which the meter is sited or the provision of the meter. The section makes clear that the extended range of sums that could be collected includes debts owed to a person other than the current gas or electricity supplier, debts accrued in respect of other premises, or debts accrued in respect of the supply of other fuels. Any sums covered by the new regulations may only be recovered with the agreement of the consumer, the circumstances in which such an agreement may be made being set out in the regulations.

### **Section 182: Additional inspectors**

448. Section 182 fulfils the Government’s commitment set out in paragraph 4.33 of the Energy White Paper, “*Our energy future – creating a low carbon economy*” (Cm 5761), to apply proposals by Government for major infrastructure projects handled in the planning process in England to major energy projects in England and Wales where consents are awarded by the Secretary of State. The proposals are to streamline the public inquiry process by allowing lead inspectors to be assisted by further inspectors to share the work and allow issues to be considered concurrently rather than sequentially as at present. These proposals for major infrastructure projects are contained in section 44 of the Planning and Compulsory Purchase Act 2004 (c.5). This section seeks to allow that approach to be adopted for power stations and overhead line developments considered by the Secretary of State under section 36 and section 37 respectively of the Electricity Act.

449. The Energy White Paper noted that such an approach should help streamline planning processes for large renewable energy developments and other large generation plant and for major upgrades of the transmission network. It was not anticipated that it would be used for all public inquiries into power stations and overhead line developments since some inquiries could be adequately handled by a single inspector. But it would be an option available if a particular development warranted it.

450. The section provides for the Secretary of State to direct an inspector appointed for a public inquiry into a particular development to expressly consider the handling of that inquiry and for that inspector to then make recommendations on that to the Secretary of State. It is

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anticipated that one of the handling issues would be whether the inquiry could be effectively, and more efficiently, handled by having some issues handled concurrently. In the light of the inspector's recommendations the Secretary of State would then appoint an appropriate number of additional inspectors for the public inquiry. These additional inspectors would then work to the inspector initially appointed (the lead inspector) handling particular issues. The lead inspector would then report to the Secretary of State taking account of the reports of the additional inspectors on particular issues.

451. This alternative approach to the handling of a public inquiry it is anticipated will require some adjustment to the current public inquiry rules governing procedural matters which are based on a single inspector considering matters, the Electricity Generating Stations and Overhead Lines (Inquiries Procedure) Rules 1990 (SI 1990/528). Revised rules would therefore need to be drawn up in consultation with the Department for Constitutional Affairs and placed before Parliament for scrutiny in due course.

452. The section covers the exercise of the Secretary of State's powers and as such would extend to proposals in England and Wales, the territorial sea adjacent to England and Wales, and to proposals in Renewable Energy Zones established under Part 2 of this Act. Decisions on section 36 and 37 developments in Scotland and in the territorial sea adjacent to Scotland are handled by Scottish Ministers.

### **Section 183: Exclusion of confidential information from registers**

453. Section 183 inserts new subsections into the Electricity Act 1989 and the Gas Act 1986 which allow GEMA, when entering information on the registers it is required to maintain under section 49 of the Electricity Act 1989 and section 36 of the Gas Act 1986, to exclude details in certain circumstances. GEMA can exclude such details as it considers appropriate to maintain the confidentiality of matters, relating either to an individual or a body of persons, where publication of those details might, in GEMA's opinion, seriously and prejudicially affect the individual or body of persons.

### **Section 184: Assistance for areas with high distribution costs**

454. This section gives the Secretary of State the power to make an order to establish a scheme requiring authorised transmitters (in practice the Great Britain System Operator) to make a payment to a distributor when that distributor faces costs that are significantly higher than in other areas of Britain. The power will be exercisable in respect of a single area to be specified in the order. In order to qualify for a payment, the distributor must be one which distributes electricity by means of a distribution network when at least 100,000 premises are connected to that same network. The payment must be passed from the distributor to suppliers within the relevant area. The scheme will be funded by charges on suppliers across Britain.

455. The Secretary of State must consult before establishing a scheme, and must carry out a review of the scheme every three years.

456. This section is intended to replace a licence condition formerly imposed on SSE Generation Limited known as "Hydrobenefit" which was removed in January 2004. It is intended that this section will benefit customers in the north of Scotland, where there are the highest distribution costs in Britain by a significant margin.

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which received Royal Assent on 22 July 2004*

### **Section 185: Adjustment of transmission charges**

457. Section 185 provides the Secretary of State with the power to adjust electricity transmission charges for renewable generators within a single area that can be shown to be of high renewable energy potential, and where evidence would indicate that unadjusted transmission charges might have a material impact on development of the generation of electricity from renewable sources. Subsection (2)(b) requires any costs arising from the scheme to be spread across all GB supply companies. The area to which the scheme is to be applied must be specified (subsection (3)) and there can only be one scheme in operation at any one time (subsection (10)). Subsections (11) and (12) specify that any one scheme can be applied for a maximum of 5 years. There is a power to renew a scheme at any time by a further order, but no scheme may be applied in relation to a time more than ten years from the commencement of the section. Subsection (15) provides for an order establishing any scheme to be subject to the affirmative resolution procedure.

### **Section 186: Restrictions on disclosure of information**

458. This section provides for the protection of information provided under the Hydrobenefit replacement scheme (Section 184 – assistance for areas with high distribution costs) and the adjustment of transmission charges for renewable generators scheme (Section 185) through the application of section 105 of the Utilities Act 2000. It will be an offence to disclose information provided under these schemes, except in those circumstances specified under section 105.

### **Section 187: Payments of sums raised by fossil fuel levy**

459. Section 187 provides a power for Scottish Ministers to direct GEMA to pay into the Scottish Consolidated Fund monies from funds paid to GEMA and arising from the auctioning of electricity generated under Scottish Renewables Obligation (“SRO”) contracts. There is also a corresponding duty on Scottish Ministers to include provision in budget proposals to the Scottish Parliament that monies thus raised shall be used to promote the use of energy from renewable sources. This will enable the Scottish Executive to provide the additional support necessary to meet its commitment to increasing the amount of renewable energy produced in Scotland. Similar powers as regards monies arising from the auctioning of electricity generated under NFFO (Non Fossil Fuel Obligation) contracts in England and Wales are contained in section 7 of the Sustainable Energy Act 2003 (c.30).

460. The SRO was the support scheme for electricity generated from renewable sources that was introduced under the original sections 32 and 33 of the Electricity Act 1989, which were executively devolved to Scottish Ministers. Under the SRO scheme, Orders were made which required Scottish public electricity suppliers (the successors to the old nationalised electricity boards) to buy electricity generated from renewable sources under "SRO contracts". The price paid for the electricity under those contracts was above the market price for electricity and the public electricity suppliers were compensated for this by payments out of the money collected through the Fossil Fuel Levy that was provided for in section 33 of the Electricity Act. The levy was charged on the electricity supplies of all licensed electricity suppliers and was paid out to the smaller number of electricity suppliers which were subject to the SRO Orders.

461. Sections 62 to 65 of the Utilities Act inserted into the Electricity Act new sections 32 to 32C, which contain provisions allowing the introduction of the GB Renewables Obligations,

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the successor to the SRO scheme and its English / Welsh equivalent. This scheme has been implemented in Scotland by the Renewables Obligation (Scotland) Order 2002 (S.S.I. 2002/163). The scheme requires each licensed electricity supplier to produce evidence that it has supplied a specified proportion of its electricity from renewable sources or that other electricity suppliers have done so. The evidence that it has to produce is Renewable Obligation Certificates (“ROCs”) issued by GEMA. If the supplier does not produce the necessary number of Certificates, it has to make a payment (the buy-out price) to GEMA. It is this that gives the Certificates a value.

462. The SRO contracts are long-term, and the last of them will not expire until 2018. The price paid by the suppliers for the electricity under those contracts is above the market price, and they are compensated by payments out of the Fossil Fuel Levy. SRO output is also eligible for ROCs under the Renewables Obligation (Scotland) Order, and the proceeds of the sale by auction of such ROCs is now used to reduce Fossil Fuel Levy costs. As a result, there is no need at present to raise Levy funds via electricity bills, and the Levy rate (set by GEMA) is currently set at zero.

463. The income currently being realised through the auction of SRO ROCs exceeds its expenditure, owing to the value of the Renewable Obligation Certificates associated with the NFFO electricity. The Scottish supply successor companies are required, under subsection (5A) of section 33 of the Electricity Act (as that section is now amended and preserved in Scotland by Orders under section 67 of the Utilities Act), to pay to GEMA (the person prescribed under section 33(1)(b) of the Electricity Act) the surplus that arises from the auctioning of ROCs for electricity generated under SRO contracts, thereby avoiding a double subsidy to electricity generators with SRO contracts. Section 33 does not, however, make provision for the disposal of this surplus by GEMA, but this is now addressed by this section.

464. In order to give Scottish Ministers the required power over the surpluses in the Scottish Levy fund, a separate section, covering section 33 of the Electricity Act as it applies in Scotland, required to be inserted in the Act at Westminster. Although the existing powers under section 33 were executively devolved to Scottish Ministers, and have subsequently been amended, the legislation on using the surplus in Scotland had to be obtained through the Westminster procedures because it amends the Electricity Act in a way that is not consistent with the Executive’s limited devolved power to amend section 33 of that Act.

## **PART 4: MISCELLANEOUS AND SUPPLEMENTAL**

### **Section 188: Imposition of charges**

465. Section 188 enables a consistent and transparent charging regime to be put in place that covers a range of energy services that the Secretary of State currently provides. These relate to the exploration, production and transmission of oil and gas; the generation, transmission and distribution or supply of electricity; renewable energy zones and renewable energy installations; and the protection of the environment from these activities. Existing legislation already provides a power for charges to be levied on certain services, such as the approval of decommissioning plans. Regulations which arise from these new powers will allow charges to be levied for individual services where full recovery of the direct costs of providing that specific service will be applied.

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which received Royal Assent on 22 July 2004*

### **Section 189: International agreements relating to pipelines and offshore installations**

466. Section 189 provides the power for Her Majesty to modify the Petroleum Act 1998 (c.17) by Order in Council to give effect to international agreements relating in whole or in part to the construction, operation, use, decommissioning or abandonment of a pipeline or offshore installation.

467. The power includes the power to provide for provision made by or under the Petroleum Act 1998 to have effect in relation to areas outside the UK and its waters and to apply to individuals and to bodies corporate whether or not they are British citizens or incorporated under the law of a part of the UK.

468. A modification could reflect the fact that an international agreement might provide that disputes over access to a pipeline on the UK Continental Shelf and the Continental Shelf of another State could either be the subject of co-determination by the UK and the other State in accordance with English law or the law of the other State or fall for sole determination by the UK or the other State. Section 17F of the Petroleum Act 1998 (c.17) currently gives the Secretary of State the power to make such a determination in relation to a pipeline in UK waters.

### **Sections 190 and 191: Application of general duties to Part 3 functions etc and Supplementary provision about licence condition powers**

469. Section 190 provides that, where appropriate in relation to Part 3 (as well as in relation to certain provisions in Part 2) of the Act, the principal objectives and general duties laid down in sections 4AA to 4B of the Gas Act 1986 and sections 3A to 3D of the Electricity Act 1989 shall apply to the exercise of functions conferred by Part 3 (and as mentioned above, Part 2) of the Act on the Secretary of State or GEMA. In particular, the principal objectives and general duties will apply in the case of any provisions in Part 3 which provide for the granting of licences and the determination or modification of licence conditions and to functions which relate to companies which hold electricity or gas licences (which includes, for example, the energy administration provisions in Chapter 3 of Part 3). Section 191 ensures that, where any powers granted under Part 3 (and certain powers granted under Part 2) relating to the determination or modification of licence conditions are exercised, certain general provisions of the Gas and Electricity Acts which are relevant to these powers are applicable.

### **Section 192: Service of notifications and other documents in electronic form**

470. Section 192 sets out the basis on which those provisions of the Bill requiring the giving of a notification or the sending of a document to a person may be satisfied. It has effect subject to section 194 which makes provision for electronic delivery of notifications and documents. Section 195 makes provision for the Secretary of State to specify the timing and location of things done electronically in order to comply with any of the provisions of the Act. These powers are required in order to enable the NDA to meet the Government's targets for electronic delivery of services and in order to remove any scope for uncertainty about the form in which notifications and documents may be supplied electronically.

### **Section 197: Repeals**

471. Section 197 and Schedule 23 provide for a number of repeals, including repeal of the following provisions:

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- Repeal of the bulk of the provisions of the Atomic Energy Authority Act 1995 (c.37), with a saving in respect of the provisions relating to transfer schemes already made under that Act. The repealed provisions are no longer necessary in light of the extensive transfer scheme powers in the Act.
- Repeal of sections 11(1) and (2) of the Atomic Energy Authority Act 1971 (c.11) (“the 1971 Act”). These powers are no longer needed, in light of the transfer scheme powers in the Act.
- Disapplication of loan and guarantee powers in section 11(4) and section 12(1) of the 1971 Act, and section 1(1) and (2) of the Nuclear Industry (Finance) Act 1977, in relation to Amersham plc (formerly the publicly owned Radiochemical company). These amendments remove the Government’s power to take ownership of Amersham shares currently held by UKAEA, subscribe for shares in Amersham, and make and guarantee loans to Amersham. Now that Amersham plc is privately owned these powers are no longer necessary or appropriate.
- Repeal of section 11(3) of the 1971 Act. Repeal of section 11(3) will remove the requirement on the Secretary of State to hold more than 50% of the shares in BNFL and is a necessary first step for the proposed restructuring of BNFL. There is also a consequential repeal of section 1(6) of the Atomic Energy (Miscellaneous Provisions) Act 1981 (c.48).
- Repeal of section 20(4) of the 1971 Act. This provision is spent.
- Repeal of the provisions setting out the current status and jurisdiction of the UKAEA Constabulary, including the identified paragraphs in Schedule 3 of the Atomic Energy Authority Act 1954 (c.32); the identified paragraphs in Schedule 1 of the Nuclear Installations Act 1965 (c.57); section 6(3) and (4) of the Police and Criminal Evidence Act 1984 (c.60); and the identified provisions in the Ministry of Defence Police Act 1987 (c.4), the Criminal Justice and Police Act 2001 (c.16), the Anti-Terrorism Crime and Security Act 2001 (c.24) and the Police Reform Act 2002 (c.30). These provisions are otiose given the creation of the Civil Nuclear Police Authority and the specific provision made in the Act for the role and jurisdiction of the Civil Nuclear Constabulary.

## **SCHEDULES**

### **Schedule 1: The Nuclear Decommissioning Authority**

472. This Schedule contains detailed provisions relating to section 2.

473. Part 1 of Schedule 1 contains detailed provisions dealing with

- the terms of appointment, remuneration and pensions of the Chairman and other non-executive members and the circumstances in which the Secretary of State may remove them from office;
- the terms and conditions of the Chief Executive and other executive members; and
- the staffing of the NDA.

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474. Although paragraph 1(3) provides that a non-executive member may be reappointed on any number of occasions, this is to allow for exceptional cases. The Government intends to follow OCPA rules which provide that, save in exceptional cases, a person may only be reappointed on one occasion for a total period of service of ten years.

475. Paragraph 4 sets out the constitution of the NDA during the “initial period” which is defined in paragraph 4(6). Paragraph 4(1) provides that, for the initial period, the NDA is to consist of just those members who have been appointed. Paragraph 4(2) requires the chairman to appoint a chief executive first. Paragraph 4(3) provides that after the appointment of the chief executive subsequent members may be appointed. Paragraph 4(4) provides that the quorum rules in paragraph 9(1) do not apply in respect of decisions for as long as the chairman is the only non-executive member. Paragraph 4(5) requires the chairman to keep proper records of everything that he does while he is the only non-executive member. Paragraph 4(6) provides that the initial period begins from the time the NDA is established until either seven members have been appointed or at the time specified by the Secretary of State to the NDA, whichever occurs first. The provisions on the NDA’s constitution during the initial period are designed to facilitate the start up of the NDA as soon as is practicable in order for the NDA to be ready for its first year of operation, expected to be on 1 April 2005.

476. Part 2 of the Schedule deals with the proceedings of the NDA. Paragraph 7 gives it the power to establish committees for the carrying out of its functions and for advisory purposes - subject, in every case, to a committee including at least one person who is a member of the NDA. Advisory committees may include persons who are neither members of the NDA nor members of its staff provided they are not authorised to do anything on the NDA’s behalf. All other committees must be made up of members and staff of the NDA. Paragraphs 8 to 13 set out detailed requirements regarding the delegation of functions; quorums for Board meetings; rules of procedure; the recording of proceedings; and the authentication of NDA decisions.

477. Part 3 of the Schedule provides for the extension to the NDA of relevant provisions of the Public Records Act 1958, the Parliamentary Commissioner Act 1967, the House of Commons Disqualification Act 1975, the Northern Ireland Assembly Disqualification Act 1975 and the Freedom of Information Act 2000.

**Schedule 2: Procedural requirements applicable to NDA’s Strategy**

478. Schedule 2 sets out various procedural arrangements for preparing and revising the NDA’s strategy, required under section 11.

479. As regards timing, paragraph 2 requires the NDA to prepare its first strategy within twelve months of section 11 coming into force and, under paragraph 3, thereafter to review its strategy at least every five years. Paragraph 3(5), however, leaves it open to the NDA to revise its strategy at any time and, in the NDA’s early years at least, the expectation is that it will amend and adjust it on a more frequent basis.

480. The initial strategy, and any subsequent revision of it which significantly alters the NDA’s priorities as between different installations or sites, changes its objectives for an installation or site or significantly increases the cost of giving effect to its strategy, are subject to approval by the Secretary of State (paragraph 5). As a minimum, the strategy must also be submitted for re-approval every five years (paragraph 3). This reflects the fact that, whilst

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the NDA is intended to have substantial management freedom and to operate at arms length from Government, Ministers must exercise strategic control over its activities and be accountable for its actions. Approval of the strategy and the annual work plan (section 13) is the means by which this strategic control is to be exercised.

481. Paragraph 4 of the Schedule expressly requires the NDA, in preparing, revising or reviewing its strategy to consult the nuclear regulators; relevant local authorities; those persons with control of installations or sites for which the NDA is responsible, their employees and their Trade Union representatives; and any bodies such as site liaison committees which have been, or may be, established for the purpose of consulting local stakeholders about activities carried on at, or in connection with, a relevant installation or site. Whilst each of these must be consulted, there is no constraint on the NDA consulting other stakeholder groups or the public at large. Equally, the Schedule does not prescribe the basis on which consultation should take place – the Government's view is that it should be left open to the NDA and stakeholder groups to develop and, as necessary subsequently change arrangements which best serve their purposes. The NDA is required to have regard to all representations made to it (paragraph 4(3)). Paragraph 4(5) provides that consultation can take place in relation to a designated installation, site or facility that has been designated by a direction which has not yet come into force (see the notes for section 5(1) for more on the timing of designation directions). This takes account of the fact that when it is first established the NDA will need to start work on preparing its annual plan in readiness for its first year of operation, expected to be 1 April 2005. The designations will come into force on that date.

482. Paragraph 5(2) of the Schedule, read in conjunction with section 12(2)(f), requires the NDA, when submitting its strategy for approval or re-approval, to provide a report on the representations made to it by stakeholders and to explain the reasons for the recommendations contained in the strategy. Paragraph 5(3) requires the Secretary of State to consult the Scottish Ministers before approving anything relating to responsibilities in section 6(3). In addition, paragraph 5(4) requires that before approving the strategy, the Secretary of State must consult Scottish Ministers on any proposals for sites in England and Wales relating to the non-processing treatment, storage or disposal of hazardous material that would have an effect on the management of hazardous material in Scotland, or the availability of a site in England and Wales for the treatment, storage or disposal of hazardous material located in Scotland. Paragraphs 5(6) to 5(8) deal with the situation where, for whatever reason, the Secretary of State decides not to approve the strategy as recommended and, in particular, give him the power to make directions requiring the NDA to modify the strategy in respect of any of the matters specified in paragraph 5(7). The rationale for this is that those matters are so important that they must be subject to strategic control by Ministers and that, in the event of a fundamental disagreement, their views should prevail. However, as paragraph 5(10) makes clear, in respect of other matters there will still be an onus on the NDA to produce a strategy that Ministers will approve. The NDA and the regulators must be consulted before any direction is given (paragraph 5(9)).

483. Paragraph 6 of the Schedule requires the NDA to publish its strategy, as approved, in the manner which, in its opinion, is most appropriate for bringing it to the attention of stakeholders and, on the same basis, to publish a report on the representations made to it by stakeholders on what the strategy should contain. In both cases, however, publication is subject to exclusion of anything which the Secretary of State considers to be against the

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interests of national security or which the NDA considers would seriously and prejudicially affect the interest of an individual or particular body of persons. In determining whether to exclude any information from publication the NDA must have regard to whether the harm caused by publication is likely to outweigh the benefits.

### **Schedule 3: Procedural requirements applicable to NDA's annual plans**

484. This Schedule is described in the notes to section 13.

### **Schedule 4: Supplemental taxation provisions for exempt activities**

485. Under section 27, trading income from exempt activities of the NDA or a relevant site licensee is not taxed, nor can the exempt activities give rise to tax losses. Subsection (2) of that section gives effect to this Schedule, which makes further, detailed provisions for the exemption.

486. Schedule 4 comprises supplemental provisions concerning the exempt activities which provide machinery to enable the exemption to work more easily in practice and safeguards to ensure that no unintended tax advantage arises from the tax exemption.

487. The aim of paragraphs 1 and 2 is to ensure that income and expenditure associated with exempt activities is kept separate for tax purposes from taxable income and expenditure and to clarify the treatment of accounting periods when companies begin or cease to carry on exempt activities. Paragraph 1 ensures that exempt activities are treated as a separate trade from non-exempt activities. Paragraph 2 ensures that accounting periods end for tax purposes when any entity becomes an NDA company, is no longer an NDA company or begins or ceases to carry on exempt activities.

488. Paragraphs 3 and 4 are also concerned with ensuring expenditure and allowances associated with exempt activities do not qualify to be tax deductible. Paragraph 4 prevents capital allowances being claimed by the NDA or an NDA company in respect of assets used in exempt activities through finance leasing the assets to the NDA or an NDA company.

489. Paragraph 5 ensures that where an industrial building has an identifiable part that is used by the NDA or an NDA company for exempt activities and part for a taxable trade, then no industrial buildings allowances may be claimed in computing the profits of the taxable trade in respect of the part of the building used for exempt activities.

490. Paragraph 6 ensures that the purchaser does not obtain a tax benefit from the fact that the NDA or NDA company has not been able to claim industrial buildings allowances by reason of the fact it has been engaged in exempt activities. Accordingly, where an industrial building is disposed of by the NDA or an NDA company to a company which is neither the NDA nor an NDA company, the amount of qualifying expenditure in respect of which industrial allowances may be claimed by the purchaser is calculated as if the activities that the NDA or the NDA company had been engaged in were not exempt activities and all writing down allowances had been claimed by the NDA or the NDA company on the basis that the activities were not exempt activities.

### **Schedule 5: Supplementary provisions about nuclear transfer schemes**

491. This Schedule is described in the notes to section 38.

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### **Schedule 6: Structure etc of the transferee companies**

492. This Schedule is described in the notes to section 39.

### **Schedule 7: Finance and accounts of transferee companies**

493. This Schedule is described in the notes to section 45.

### **Schedule 8: Pensions**

494. This Schedule is given effect by section 46 and is divided into five parts:

- Part 1 sets out definitions including the pension schemes to which it applies.
- Part 2 enables the NDA to modify, by direction, a relevant pension scheme (for example the BNFL group scheme) firstly to extend the groups of persons who can participate in the scheme to include employees and directors or other officers of an employer which has received employees by nuclear transfer scheme; and secondly to give NDA a role in administering the scheme. Modifications can only be made following consultation with the scheme trustees and employees' representatives. The NDA is not permitted to modify the schemes in such a way as to deprive members of their accrued rights. It is not the intention to use these statutory powers to alter the pensions of existing members of the BNFL Group scheme from a final salary scheme to a defined contribution scheme.
- Part 3 deals with the application of the UKAEA scheme to the employees who are transferred to a 'relevant public sector employer'. 'Relevant public sector employer' is defined in paragraph 1 of the Schedule to include UKAEA, NDA, or a 'publicly controlled company'. 'Publicly controlled company' is in turn defined in section 50, and in general terms covers companies in which the majority of the voting rights are held by a public sector body. The effect of Part 3 is that where employees of BNFL and UKAEA are transferred to a relevant public sector employer, for NDA purposes, they will be entitled to retain their membership of the scheme or their eligibility or potential eligibility to become members. In relation to a relevant public sector employer that is a publicly controlled company, its employees cease to be entitled to membership of the UKAEA scheme when such a company ceases to be publicly controlled. Paragraphs 5 to 7 give the Secretary of State powers to direct the UKAEA to amend the rules of the scheme. Paragraph 8 provides for payments to the UKAEA by relevant public sector employers in order to meet their obligations as participating employers under the rules of the scheme. In the event of the parties not being able to reach agreement, the Secretary of State may determine the payments involved.
- Part 4 deals with the position where employees are transferred for NDA purposes, whether by nuclear transfer scheme or otherwise, and they are required to leave their current pension scheme by reason of that transfer. Part 4 applies both to transfers from the public to private sector, and to transfers within the private sector, for example from one management contractor to another.

495. Paragraph 9 sets out in detail the circumstances in which employees are protected upon transfers for NDA purposes. It includes transitional provision to ensure that employees are protected during the initial stages of restructuring. It does this by disapplying the employment condition for the first transfer of employees (as many will not have had the

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chance to work on NDA related matters for six months), and by ensuring that employees are protected if they are transferred for a second or third time within a period of six months from their first transfer. Paragraph 9(3)(b) also makes it clear that employees' pensions are protected under Schedule 8 when their employment is not transferred but ownership of their employer is transferred (for example when a new site management contractor takes ownership of a site licensee company).

496. Paragraph 10 relates to situations arising from the making of transfer schemes. Paragraph 11 relates to transfers made by other arrangements. In each case the effect is that the employees concerned are entitled to membership of an alternative scheme offering benefits which, taking into account other benefits offered by the new employer, are no less favourable than the provisions of the scheme of which the employees were originally members. In other words, if an employee is transferred on a number of occasions, and becomes a member of a number of different pension schemes as a result of those transfers, the test to be applied upon each transfer is whether the new pension scheme being offered is no less favourable (overall) than the original pension scheme of which he was a member. Where employees are transferred by virtue of a transfer scheme the Schedule places a duty on the Secretary of State, to satisfy himself (before the transfer scheme comes into force) that the new pension scheme (taken as a whole) meets this requirement. In other cases, the same duty applies to the NDA. In all cases prior consultation is required. In practice, we anticipate that the alternative pension scheme will be that established by the NDA under its powers in section 8(1)(a) ('NDA pension scheme').

497. Paragraph 12 enables the NDA and Secretary of State to modify the NDA pension scheme in order to meet the requirements set out in previous paragraphs of Part 4. Before the Secretary of State makes a modification he must consult the NDA and employees' representatives. Before the NDA makes a modification it must consult employees' representatives and obtain the consent of the Secretary of State.

498. Part 5 enables the UKAEA pension scheme to apply to employees of designated BNFL companies, while such companies are publicly controlled.

### **Schedule 9: Taxation provisions relating to nuclear transfer schemes**

499. Schedule 9, given effect by section 47, 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.

500. Schedule 9 mainly deals with transfers made under nuclear transfer schemes to the NDA, an NDA company and from BNFL or from the UK Atomic Energy Authority to publicly owned companies that are not subsidiaries of the NDA. However, there are other tax provisions dealing with the transfer of the Nuclear Liabilities Investment Portfolio, stamp duty and miscellaneous supplemental provisions.

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**Part 1 – Transfers to the NDA or a subsidiary of the NDA**

501. Part 1 sets out the tax effects of transfers to the NDA or subsidiaries of the NDA under nuclear transfer schemes, under section 39. Such nuclear transfer schemes may be effected to bring companies involved in or assets used for decommissioning and other activities under the NDA's control, or to transfer a site licensee company to the NDA at the end of a management contract.

502. Paragraph 1 extinguishes certain trading losses brought forward when companies become NDA companies in consequence of a section 39 scheme. This paragraph only extinguishes losses if they have arisen from trading activities that would have been exempt if carried on by the NDA. This ensures that no brought forward trading losses relating to exempt activities may subsequently be used by private companies. The purpose of this section is similar to that of section 27(1) which prevents current tax trading losses from arising from exempt activities.

503. Paragraph 1(2) extinguishes such losses at the time a company becomes an NDA company in accordance with such a nuclear transfer scheme. Paragraph 1(3) allows any reasonable apportionment method to be used to allocate income and expenditure and hence to allocate tax trading losses to exempt and non-exempt activities.

504. Paragraph 2 has the same intention as paragraph 1 but applies where a trade is transferred to the NDA or an NDA company, as a consequence of a section 39 scheme, to extinguish brought forward trading losses associated with the activities transferred, if such activities would have been exempt if they had been carried on by the NDA.

505. Paragraph 2(2) extinguishes the losses at the time when a trade or part of a trade is transferred to the NDA or an NDA company in accordance with such a nuclear transfer scheme.

506. Paragraph 2(3) allows the NDA or an NDA company which begins to carry on a trade under such a nuclear transfer scheme access to brought forward trading losses arising from non-exempt trading activities which are transferred.

507. Paragraph 3 explains that transfers of chargeable assets to the NDA or an NDA subsidiary under a nuclear transfer scheme under section 39 are to be tax neutral by treating the disposal such that neither a gain nor a loss arises for tax purposes. For the transferee, chargeable assets are deemed to be acquired at values that give neither a gain nor a loss to the transferor.

508. Paragraph 4 excludes acquisition and enhancement costs from the calculation of the chargeable gain or capital loss arising on the disposal of certain chargeable assets by the NDA or an NDA subsidiary, such that the asset has a nil base cost for disposal purposes. This computational provision is to reduce the disproportionate effort and cost that the NDA would otherwise incur. Without this provision it would be necessary to maintain registers and associated base costs of publicly owned assets through potentially numerous nuclear transfer schemes and over lengthy periods of time.

509. Paragraph 4(1) limits the assets to which this restriction applies to those acquired under nuclear transfer schemes in accordance with section 39 or 40, which were not part of the Nuclear Liabilities Investment Portfolio. Paragraph 4(2) specifically denies relief for these acquisition and enhancement costs.

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510. Paragraph 4(3) deals with subsequent transfers where neither a gain nor loss accrues to the NDA or its subsidiary. Paragraph 4(4) provides that paragraph 29 takes precedence so that in relation to the transfer of shares in relevant site licensee companies, the shares are treated as having been disposed of at a value that gives neither gain nor loss to the transferor.

511. The aim of paragraph 5 is to prevent tax liabilities arising in companies as a result of historic fixed asset transfers, where such liabilities arise only as a result of the implementation of nuclear transfer schemes under section 39.

512. Paragraph 5 prevents a degrouping charge (as defined by the Taxation of Chargeable Gains Act 1992 (c.12) (the “1992 Act”)) from arising in a company transferred to the NDA or an NDA company under such a nuclear transfer scheme. Paragraph 5(2) prevents the 1992 Act from deeming the transferred company to have made a chargeable disposal of certain assets on leaving the old group. Paragraph 5(3) ensures that the deemed disposal and reacquisition is reinstated when the transferred company leaves the new group, as defined in the subparagraph.

513. Paragraph 6 provides that a transfer of debts to the NDA or a subsidiary of the NDA under a section 39 nuclear transfer scheme will not give rise to a tax charge in the transferor, to the extent that the debts transferred are treated as chargeable assets. This is consistent with the general aim of ensuring tax neutrality for transfer schemes.

514. Paragraph 6(2) deems the NDA to have always been the creditor in respect of the debt and therefore the effect is that no disposal takes place for the purposes of the 1992 Act.

515. Paragraph 7 sets out the capital allowances position of both transferor and transferee where, in consequence of a section 39 scheme, assets are transferred to the NDA or subsidiary of the NDA with a whole trade. The aim of the paragraph is to ensure continuity of treatment such that no allowances or charges arise in the transferor and the transferee is treated as having always owned the relevant assets.

516. Paragraph 7(1) restricts the application of paragraph 7 to transfers of trades from companies which are not subsidiaries of the NDA to the NDA or its subsidiaries, such transfers taking place under such a nuclear transfer scheme.

517. Paragraph 7(2) ensures that allowances are available to the NDA or its subsidiary as if the transferor company had continued to carry on that trade. Paragraph 7(3) confirms that no balancing adjustments or recognition of disposal proceeds arise to a company that transfers its trade to the NDA. Paragraph 7(4) calculates the amount of allowances available to the NDA or its subsidiary on the basis that the NDA or its subsidiary had been carrying on the trade for the same time and on the same basis as the transferor. The transferor is deemed to have transferred its assets associated with the trade at the value which ensures no balancing allowance or charge arises in that company.

518. The intention behind paragraph 8 is similar to that behind paragraph 7 in that it provides clarity as to the capital allowances position of both transferor and transferee where assets are transferred with a trade by a company which is not a subsidiary of the NDA to the NDA or one of its subsidiaries. The difference between paragraphs 7 and 8 is that paragraph 8 applies where either the transferee already carries on a trade (paragraph 8(1)) or only part of a trade is transferred (paragraph 8(2)) or both.

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519. Each of paragraphs 8(1) and 8(2) provide that the provisions of paragraph 7 should apply to the trade transferred and that the trade transferred should be treated as a separate trade from that previously engaged in by the transferee and transferor respectively.

520. Paragraph 8(3) allows a reasonable apportionment of income, expenditure, assets and liabilities to the separate trades as necessary for the purposes of calculating the capital allowances position of the assets associated with the trade transferred.

521. Paragraph 9 details the capital allowances position where assets are transferred other than as part of a trade.

522. Where plant and machinery is transferred in accordance with a nuclear transfer scheme but the transfer does not form part of a trade, such that paragraph 7 does not apply, the assets are transferred to the NDA or a subsidiary of the NDA at their book value for accounts purposes.

523. Paragraph 10 provides that the legislation detailing the capital allowances position in respect of transfers between connected persons is not to apply to transfers made in accordance with nuclear transfer schemes within section 39 to the NDA or a subsidiary of the NDA.

524. Paragraph 11 explains how transfers of loan relationships should be treated in the event that the NDA or a subsidiary of the NDA replaces a person as party to a loan relationship in accordance with a nuclear transfer scheme under section 39. The aim is that such transfers should be treated as tax neutral such that no tax benefit is obtained by either the transferor or the transferee as a result of the transfer.

525. Accordingly, paragraph 11(2) applies the loan relationship rules of Finance Act 1996 to the loan relationship, and treats the transferee as if it had been a party to the loan relationship since the time the transferor had been party to it.

526. Paragraph 12 explains how transfers of derivative contracts should be treated in the event that the NDA or a subsidiary of the NDA replaces a person as party to a derivative contract in accordance with a nuclear transfer scheme under section 39. As with paragraph 11, the aim is that such transfers should be treated as tax neutral such that no undue tax benefit is obtained by either the transferor or the transferee as a result of the transfer.

527. Accordingly, paragraph 12(2) applies the derivative contract rules of Schedule 26 to the Finance Act 2002 to the derivative contract, and treats the transferee as if it had been a party to the derivative contract since the time the transferor had been party to it.

528. Paragraph 13 explains how the transfers of intangible assets are to be treated where transfers are made to the NDA or a subsidiary of the NDA under a section 39 nuclear transfer scheme. As with paragraphs 11 and 12 the aim is that such transfers should be treated as tax neutral with no undue tax benefit being obtained by the transferor or transferee.

529. Paragraph 13(1) explains that the transfer of a 'chargeable intangible asset' should be treated as a tax neutral transfer for the purposes of Schedule 29 to the Finance Act 2002. Paragraph 13(2) explains that where an intangible asset is transferred that was not a chargeable intangible asset in the hands of the transferor but falls to be treated as such by the NDA or its subsidiary after the transfer, then the acquisition value for tax purposes for the NDA is the same amount as the disposal consideration of the transferor under paragraph 3(2) of the Schedule, that is an amount causing neither a gain nor a loss to arise on the transferor.

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530. Paragraph 14 defers a degrouping charge that would otherwise arise as a result of the implementation of a transfer to the NDA or a subsidiary of the NDA under a section 39 nuclear transfer scheme causing a company to leave its group. The degrouping charge deferred is one which would have arisen in respect of intangible fixed assets that have previously been transferred between group companies. The aim of this paragraph is to prevent tax liabilities arising in companies due to historic transactions where such liabilities arise only as a result of the implementation of transfer schemes.

531. Paragraph 14(1) describes which degrouping charges are covered by the paragraph. Paragraph 14(2) defers the application of the degrouping legislation of paragraph 58 of Schedule 29 to the Finance Act 2002 and paragraph 14(3) applies this degrouping legislation on the first subsequent occasion that the degrouped company ceased to be a member of its new group of companies, 'new group' being defined in the subparagraph.

532. Paragraph 15 ensures that where a trade or part of a trade is transferred from a BNFL company (or subsidiary of BNFL) to the NDA (or a subsidiary of the NDA) under section 39 there is tax neutrality and the transferee effectively stands in the shoes of the transferor for tax purposes. This will ensure that there will be no tax consequences where the transferor writes off sums in its books as part of the detailed transfer arrangements. The rule will apply to trading items, such as trade debtors or sums received in advance for the supply of goods or services by the transferor, or trade creditors and sums paid in advance for the provision of services to the company.

***Part 2 – Other Transfers relating to BNFL or the UKAEA etc***

533. Part 2 of Schedule 9 applies to transfers of shares, property, rights and liabilities of BNFL, UKAEA and their wholly owned subsidiaries. However, unlike Part 1, Part 2 only applies to transfers made in accordance with a nuclear transfer scheme, which must always fall within section 39, where the transferee is a publicly owned company which is not a subsidiary of the NDA, or the UKAEA. The provisions in Part 2 are in many cases in very similar terms to those in Part 1.

534. Paragraph 16 identifies the transfers which may fall within Part 2, as described above.

535. Paragraph 17 deals with the application of section 343 of the Income and Corporation Taxes Act 1988 (the "Taxes Act") to transfers where the conditions in section 343(1) surrounding ownership of the transferor and transferee are satisfied in respect of such a transfer.

536. The paragraph states that section 343(4) shall not apply in respect of such transfers. This means that the general restriction of the trading losses which may be transferred by reference to the excess of relevant liabilities over relevant assets is specifically not applied to such transfers.

537. The application of section 343(4) of the Taxes Act has been removed as it is not yet determined what transfers will be made under nuclear transfer schemes. It is therefore possible that nuclear provisions relating to a different trade could remain in the transferor company when a nuclear transfer scheme is enacted. This may ordinarily cause a loss restriction under section 343(4) of the Taxes Act. It is the intention of Government that the possible restriction of tax losses should not be considered in determining the methods

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available to effect the transfer and that tax losses correctly attaching to a trade should not be lost solely because of the arrangements of a transfer scheme.

538. Paragraph 18 explains that transfers of chargeable assets within Part 2 of Schedule 9 are to be tax neutral for the transferor by treating the disposal as one where neither a gain nor a loss arises for tax purposes. This tax neutral disposal value is the base cost for acquisition purposes for the transferee.

539. The aim of this paragraph is to prevent tax liabilities arising in companies as a result of historic fixed asset transfers, where such liabilities arise only as a result of the implementation of nuclear transfer schemes.

540. Paragraph 19 prevents a degrouping charge as defined by the 1992 Act from arising in a company under a nuclear transfer scheme to which Part 2 of this Schedule applies. Paragraph 19(2) prevents the 1992 Act from deeming the transferred company to have made a chargeable disposal of certain assets on leaving the old group. Paragraph 19(3) ensures that the deemed disposal and reacquisition is reinstated when the transferred company leaves the new group, 'new group' being defined in the subparagraph.

541. Paragraph 20 provides that a transfer of debts under a nuclear transfer scheme to which Part 2 of this Schedule applies will not give rise to a tax charge in the transferor, to the extent that the debts transferred are treated as chargeable assets. This is consistent with the general aim of ensuring tax neutrality for transfer schemes.

542. Paragraph 20(2) deems the transferee to have always been the creditor in respect of the debt and therefore the effect is that no disposal takes place for the purposes of the 1992 Act.

543. Paragraph 21 details the capital allowances position where assets are transferred other than as part of a trade.

544. Where plant and machinery is transferred in accordance with a nuclear transfer scheme but the transfer does not form part of a trade, assets will be transferred at their book value. This treatment mirrors the treatment of assets transferred to the NDA, as set out in paragraph 9.

545. Paragraph 22 provides that the legislation detailing the capital allowances position in respect of transfers between connected persons is not to apply to transfers made in accordance with nuclear transfer schemes within Part 2.

546. Paragraph 23 explains how transfers of loan relationships should be treated in the event that a transferee replaces a person as party to a loan relationship in accordance with a transfer scheme, where Part 2 of this Schedule applies. The aim of the paragraph is that such transfers should be treated as tax neutral so that no tax benefit is obtained by either the transferor or the transferee as a result of the transfer.

547. Accordingly, paragraph 23(2) applies the loan relationship rules of Finance Act 1996 to the loan relationship, and treats the transferee as if it had been a party to the loan relationship since the time the transferor had been party to it.

548. Paragraph 24 explains how transfers of derivative contracts should be treated in the event that a transferee replaces a person as party to a derivative contract in accordance with a nuclear transfer scheme to which Part 2 of this Schedule applies. As with paragraph 23, the

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aim is that such transfers should be treated as tax neutral such that no undue tax benefit is obtained by either the transferor or the transferee as a result of the transfer.

549. Accordingly, paragraph 24(2) applies the derivative contract rules of Schedule 26 to the Finance Act 2002 to the derivative contract, and treats the transferee as if it had been a party to the derivative contract since the time the transferor had been party to it.

550. Paragraph 25 explains how the transfers of intangible assets are to be treated where a transfer is made under a nuclear transfer scheme to which Part 2 of this Schedule applies. As with paragraphs 23 and 24 the aim is that such transfers should be treated as tax neutral with no undue tax benefit being obtained by the transferor or transferee.

551. Paragraph 25(1) explains that the transfer of a 'chargeable intangible asset' should be treated as a tax neutral transfer for the purposes of Schedule 29 to the Finance Act 2002. Paragraph 25(2) explains that where an intangible asset is transferred that was not a chargeable intangible asset in the hands of the transferor but falls to be treated as such by the transferee, then the acquisition value for tax purposes for the NDA is the same amount as the disposal consideration of the transferor under paragraph 3(2) of the Schedule, that is an amount causing neither a gain nor a loss to arise on the transferor.

552. Paragraph 26 defers a degrouping charge that would otherwise arise as a result of the implementation of a nuclear transfer scheme, where the charge would arise in respect of intangible fixed assets that have previously been transferred between group companies. The aim of this paragraph is to prevent tax liabilities arising in companies due to historic transactions where such liabilities arise only as a result of the implementation of transfer schemes.

553. Paragraph 26(1) identifies the circumstances in which the paragraph applies. Paragraph 26(2) defers the application of the degrouping legislation of paragraph 58 of Schedule 29 to the Finance Act 2002 and paragraph 26(3) applies this degrouping legislation on the first subsequent occasion that the degrouped company ceased to be a member of its new group of companies, 'new group' being defined in the subparagraph.

554. Paragraph 27 ensures that where a trade or part of a trade is transferred under a section 39 scheme from a BNFL company to another publicly owned company that is not an NDA subsidiary, there is tax neutrality and the transferee effectively stands in the shoes of the transferor for tax purposes. This will potentially apply to trading items such as trade debtors or sums received in advance for the supply of goods or services by the transferor, or trade creditors and sums paid in advance for the provision of services to the company. The provision is similar to that in paragraph 15 which applies in respect of transfers to the NDA or a subsidiary within Part 1 of this Schedule.

***Part 3 – Transfers relating to relevant site licensees***

555. Part 3 ensures that certain tax provisions concerned with chargeable gains and intangible assets apply in a tax neutral way, on that occasion and subsequently, where a company becomes a relevant site licensee company, as defined in section 27 of the Act. The provisions in question relate to 'degrouping' adjustments (where a company leaves a group) and to the computation of the gain or loss on the transferor or transferee where shares in the 'relevant site licensee' are transferred.

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556. Paragraph 28(1) sets out the scope of the paragraph. It is concerned with the case where a subsidiary of the NDA becomes a “relevant site licensee” company.

557. Paragraph 28(2) and (3) provide that the relevant site licensee is to be treated as continuing to be in its original (NDA) group for chargeable gains purposes (1992 Act), intangible assets gains and losses purposes (Schedule 29 to the Finance Act 2002) and the exemptions from degrouping charges provided in this Schedule. This means in particular that no degrouping computation would be needed either when the NDA subsidiary leaves the NDA group on becoming a relevant site licensee company or when that company resumes its membership of the NDA group on ceasing to be such a company.

558. Paragraph 28(4) provides that the definitions of groups for chargeable gains purposes (1992 Act), and intangible assets gains and losses purposes (Schedule 29 to the Finance Act 2002) are to apply for the respective purposes of the paragraph.

559. Paragraph 29 allows for the transfers of relevant site licensee companies to or from the NDA, or between one contracting group and another, to be at such a price that neither a gain nor a loss arises for the purposes of capital gains. The overall effect of paragraph 29 is that the transfer of site license companies between different owners (for instance at the beginning and end of a managing contract) is tax neutral.

560. Paragraph 30 adopts the definition of relevant site licensee in section 27.

***Part 4 – Transfer of Nuclear Liabilities Investment Portfolio***

561. The aim of paragraphs 31 to 33 inclusive is to ensure that should the Nuclear Liabilities Investment Portfolio be transferred to the Secretary of State then such a transfer would be tax neutral for BNFL (the current owner of the Nuclear Liabilities Investment Portfolio).

562. Paragraph 31 applies Part 4 to transfers to the Secretary of State made in accordance with a transfer scheme which is authorised under section 42 of this Act (Transfer of Nuclear Liabilities Investment Portfolio).

563. Paragraph 32 explains that for chargeable gains purposes a disposal falling within Part 4 should be treated as one for which neither a gain nor capital loss accrues to BNFL.

564. Paragraph 33 ensures that where a transfer is made in respect of this Part, BNFL is not allowed to bring debits or credits into account under either the loan relationship provisions of Chapter 2 of Part 4 of the Finance Act 1996 or the derivative contract provisions of Schedule 26 to the Finance Act 2002. The aim of this paragraph is to ensure tax neutrality in respect of this Part.

***Part 5 – Stamp duty etc***

565. Paragraph 34 deals with stamp duty and stamp duty reserve tax. The aim of the paragraph is to ensure that no stamp duty liability arises on transfers under nuclear transfer schemes where such transfers are made to publicly owned bodies.

566. Paragraph 34(1) explains that stamp duty is not chargeable on nuclear transfer schemes or on instruments certified by the Secretary of State to the Commissioners of the Inland Revenue that are associated with such schemes. The exemption to stamp duty only applies to the extent the scheme or transfer is not in relation to a private transfer.

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567. Paragraph 34(2) explains the conditions that must be met for a scheme or instrument to be treated as being where stamp duty is not chargeable as a result of the stamped application of paragraph 34(1).

568. Paragraph 34(3) provides that, in a similar vein to paragraph 34(1), no stamp duty reserve tax should arise in respect of transfers made under schemes except to the extent the scheme is in relation to a private transfer.

569. Paragraph 34(4) provides a definition of 'instrument' and 'private transfer'.

### ***Part 6 – Supplemental provisions of Schedule 9***

570. Paragraph 35 enables the NDA to be treated as a company for the purposes of the capital gains tax rules applying to groups of companies. Similarly it enables the NDA to be a company for the purposes of the intangible fixed assets rules. This confirms that the NDA is to be taxed as if it were an ordinary company – subject to the special rules that are in this Act.

571. Paragraph 36 has the effect of removing the possibility of re-basing elections being made for assets held by an entity as at 31 March 1982 to the extent a disposal is made in accordance with paragraph 3, 18, 29 or 32 of this Schedule.

572. Paragraph 37 provides a list of definitions of terms used in this Schedule.

573. The paragraph also clarifies that Schedule 9 should be construed as one with the Corporation Tax Acts and the 2001 Act in respect of capital allowances.

574. The paragraph provides that the Board of Inland Revenue is to determine whether an asset is part of BNFL's 'Nuclear Liabilities Investment Portfolio' after consulting the Secretary of State. This is for the purpose of paragraph 4(1) of the Schedule (the exclusion of Portfolio assets from the nil acquisition cost rule for capital gains). It does not apply for the purposes of section 42 of the Act. Whether an asset is part of the Portfolio for those purposes is determined under subsection (6) of section 42.

### **Schedule 10: The Civil Nuclear Police Authority**

575. This Schedule is described in the notes to section 51.

### **Schedule 11: Removal and suspension of senior officers of Constabulary**

576. This Schedule is described in the notes to section 53.

### **Schedule 12: Planning and reports about Constabulary**

577. This Schedule is described in the notes to section 61.

### **Schedule 13: Directions by Secretary of State about Constabulary**

578. This Schedule is described in the notes to section 63.

### **Schedule 14: Minor amendments relating to Constabulary**

579. This Schedule is described in the notes to section 69.

### **Schedule 15: Amendments of 1993 Act**

580. This Schedule is brought into effect by section 75.

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**Schedule 16: Applications and proposals for notices under section 95**

581. Schedule 16 sets out the process for applying for a notice in regard to a safety zone under section 95. The process is essentially the same as that set out in Schedule 8 of the Electricity Act 1989 (c.29) in regard to an application for a consent under section 36 of that Act to construct, extend or operate a generating station.

**Schedule 17: Conversion of existing transmission licences: licensing scheme**

582. This Schedule is described in the notes to section 138.

**Schedule 18: Property arrangements schemes**

583. This Schedule is described in the notes to section 141.

**Schedule 19: Consequential amendments relating to Chapter 1 of Part 3**

584. This Schedule is brought into effect by section 143.

**Schedule 20: Conduct of energy administration**

585. This Schedule is described in the notes to section 159.

**Schedule 21: Energy transfer schemes**

586. This Schedule is described in the notes to section 159.

**Schedule 22: Procedure for appeals under section 173**

***Application for permission to bring an appeal***

587. Paragraph 1 sets out the procedure for making an application for permission to appeal to the Competition Commission within 15 working days of GEMA's decision being published and gives the Commission power to grant permission subject to conditions.

***Addition of persons to application***

588. Paragraph 2 allows an additional person to become party to an appeal (an "intervener"), for the purpose of supporting the appeal or opposing it, if they apply to do so within 20 working days of the initial application for permission to appeal or within a longer period if the Competition Commission allow, and are materially affected by the decision or represent persons who are so materially affected. An intervener may not rely on grounds of appeal which are not contained in the appellant's application for permission to bring an appeal. The Competition Commission cannot give a direction that the person become party to the appeal if it will prevent determination of the appeal within the prescribed time limits. The Competition Commission, in giving its direction that a person is to be a party to an appeal, may impose conditions on its direction. These conditions could include conditions which limit the matters to be considered on an appeal, and conditions for the purpose of expediting the determination of the appeal.

***Suspension of decision***

589. Paragraph 3 allows the Commission to "stop the clock" on the implementation of a decision once permission to appeal has been granted. This will only be an option where an application has been made for this to happen, the applicant will incur significant costs by the decision taking effect before determination of the appeal and the balance of convenience has been considered. An application may be made by the appellant or another person with

interests or functions that entitles him, or would have entitled him, to appeal against GEMA's decision.

***Time limit for representations and observations by GEMA***

590. In paragraph 4 GEMA is given a period of fifteen working days from the original application or last joined application for an appeal within which to make its representations to the Competition Commission on an appeal.

***Consideration and determination of appeal by group***

591. Paragraph 5 provides for a group of three Commission members, with one appointed as chairman, to consider and determine an appeal with decisions effective only if all three are present and two members of the group are in favour of the decision.

***Timetable for determination of appeal***

592. Paragraph 6 requires the Commission to reach its decision within 30 working days following the last day on which GEMA could have made its representations on an appeal though it is enabled to extend this period by a maximum of 10 working days if it is satisfied there are good reasons for doing so. Where the Commission extends the deadline it must notify every party to the appeal.

***Matters to be considered on appeal***

593. Paragraph 7 gives the group discretion to disregard matters raised by parties which were not included in their initial application for appeal or, in the case of GEMA, its representations.

***Production of documents***

594. Paragraph 8 gives the Commission power to require the production of documents or types of documents and take copies of those documents.

***Oral hearings***

595. Paragraph 9 gives the Commission power to hold an oral hearing and to require oral evidence under oath, in respect of (i) an application for permission to appeal, (ii) a person seeking to intervene in an appeal, (iii) a direction to suspend GEMA's decision and (iv) for the purpose of determining the appeal. The Commission may also require a person to attend an oral hearing for the purpose of giving evidence. A person who attends an oral hearing may be cross-examined by or on behalf of any party to the appeal.

***Written Statements***

596. Paragraph 10 gives the Commission power to require a person to produce a written statement at a specified time and place to the person considering suspending GEMA's decision or a group determining an appeal, and for that statement to be verified by a statement of truth.

***Defaults in relation to evidence***

597. Paragraph 11 provides an enforcement power for paragraphs 8, 9 and 10. A person can be held in contempt of court by the High Court or Court of Session for failing to comply with a notice requiring production of documents, failing to comply with a notice requiring attendance at an oral hearing or failing to comply with a notice requiring production of a

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written statement. A person may also be held in contempt of court if he makes a statement which is false in any material sense in a written statement, or if he provides information which is materially false in the course of providing information which is otherwise verified by a statement of truth. It also provides for altering, suppressing or destroying a document requested by the Commission to be a criminal offence.

***Procedural Rules***

598. Paragraph 12 allows the Competition Commission to make and publish rules for the conduct and disposal of appeals.

***Costs***

599. Paragraph 13 gives the group power to make an order in respect of costs incurred in connection with the appeal. Sub-paragraphs (2) and (3) of paragraph 13 require that the costs incurred by the Competition Commission in connection with the appeal shall be paid by the losing party to an appeal, allocated as the group see fit where an appeal brought by two or more appellants is dismissed. Sub-paragraph (5) of paragraph 13 allows the group to require one party to an appeal to make a payment to another in respect of the costs borne by the other party. Sub-paragraphs (6) and (7) of paragraph 13 provide that sums required to be paid by an order must be paid within 5 days and sums which are outstanding after this period shall bear interest at a rate determined in the order.

***The Secretary of State's power to modify time limits***

600. Paragraph 14 gives the Secretary of State power to amend the time limits set in Schedule 22 by order. It is envisaged this may be necessary if on review it is judged that the current time limits have proved inappropriate.

**Schedule 23: Repeals**

601. This Schedule is described in the notes to section 197.

**COMMENCEMENT**

602. All sections come into force on such day as the Secretary of State may by order appoint. Different days may be appointed for different purposes.

***HANSARD REFERENCES***

The following table sets out the dates and Hansard references for each stage of this Act's passage through Parliament.

<b>Stage</b>	<b>Date</b>	<b>Hansard reference</b>
<b>House of Lords</b>		
Introduction	27 November 2003	Vol. 655 Col 23
Second Reading	11 December 2003	Vol. 655 Cols. 829-924
Grand Committee	15 January 2004 to 2 March 2004	Vol. 656 GC 135-190; GC 253-310; GC 373-430; Vol. 657 GC 67-134; GC 283-340; GC 341-408; GC

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		483-532; GC 533-590; Vol. 658 GC 55-114; GC 149-202; GC 203 –248
Report	18, 22, 23, 29, 30 March and 1 April 2004	Vol. 659 Cols. 355-456; 472-584; 598-662; 1025- 1161; 1191-1208; 1497- 1517
Third Reading	20 April 2004	Vol. 660 Cols 182-279
<b>House of Commons</b>		
Introduction	22 April 2004	Votes and Proceedings No 72 page 429
Second Reading	10 May 2004	Vol. 421 Cols 42-128
Committee	20 May 2004 to 22 June 2004	Hansard Standing Committee B
Report and Third Reading	13 July 2004	Vol. 423 Cols 1283-1379
Lords Consideration of Commons Amendments	15 July 2004	Vol. 663 Cols 1361-1414
Commons Consideration of Lords Message	20 July 2004	Vol. 424 Cols 294-298

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House of Lords Hansard Vol. 664 Col 333

House of Commons Hansard Vol. 424 Col 514

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