

*Status: Point in time view as at 31/05/1991.*

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## SCHEDULES

### SCHEDULE 2

Section 32.

#### WASTE DISPOSAL AUTHORITIES AND COMPANIES

##### PART I

##### TRANSITION TO COMPANIES

##### *Preliminary*

- 1 In this Part of this Schedule—
- “authority” means an existing disposal authority as defined in section 32(1);
  - “company” means a waste disposal contractor formed under the <sup>M1</sup>Companies Act 1985 by a waste disposal authority as mentioned in section 30(5);
  - “direction” means a direction under section 32(2);
  - “joint company” means a company in which more than one authority holds securities;
  - “securities”, in relation to a company includes shares, debentures, bonds or other securities of the company, whether or not constituting a charge on the assets of the company; and
  - “the vesting date” means the date on which property, rights and liabilities vest in a company by virtue of a transfer scheme under paragraph 6 below.

##### **Marginal Citations**

**M1** 1985 c. 6.

##### *Notice of direction*

- 2 (1) The Secretary of State, before giving any directions to any authority or constituent authority, shall give notice of his intention to do so to that authority.
- (2) A notice under this paragraph shall give a general indication of the provisions to be included in the direction, indicating in particular whether the proposed direction will require the formation of one or more than one company and the authority or authorities who are to form or control the company or companies and whether any existing disposal authority will be abolished.

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- (3) A notice under this paragraph shall state that the authority to whom it is given is entitled, within a period specified in the notice, to make to the Secretary of State applications or representations with respect to the proposed direction under paragraph 3 below.

*Applications for exemption from and representations about directions*

- 3 (1) An authority which has been given notice under paragraph 2 above of a proposed direction may, within the period specified in the notice, make to the Secretary of State either an application under sub-paragraph (2) below or representations under sub-paragraph (3) below.
- (2) An authority may, under this sub-paragraph, apply to the Secretary of State requesting him not to make a direction in its case on the ground that the authority falls within any of paragraphs (a), (b), (c) or (d) of section 32(3).
- (3) An authority may, under this sub-paragraph, make representations to the Secretary of State requesting him to make, in the direction, other provision than that proposed in the notice.
- (4) It shall be the duty of the Secretary of State to consider any application duly made under sub-paragraph (2) above and to notify the authority of his decision.
- (5) It shall be the duty of the Secretary of State to consider any representations duly made under sub-paragraph (3) above before he gives a direction.

*Directions*

- 4 (1) A direction may require the authority or authorities to whom it is given to form or participate in forming one or more than one company or to form or participate in forming one or more than one joint company and it shall specify the date before which the company or companies is or are to be formed.
- (2) Where a direction is to require a joint company to be formed the direction may be given to such of the authorities as the Secretary of State considers appropriate (the “representative authority”).
- (3) Where a direction is given to an authority as the representative authority it shall be the duty of that representative authority to consult the other authorities concerned before forming a company in accordance with the direction.
- (4) The Secretary of State may exercise his powers to vary or revoke a direction and give a further direction at any time before the vesting date, whether before or after a company has been formed in accordance with the direction or previous direction, as the case may be.

*Formation and status of companies*

- 5 (1) An authority which has been directed to form a company shall do so by forming it under the <sup>M2</sup>Companies Act 1985 as a company which—

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- (a) is limited by shares, and
  - (b) is a wholly-owned subsidiary of the authority or authorities forming it;
- and it shall do so before such date as the Secretary of State specifies in the direction.
- (2) The authority shall so exercise its control of the company as to secure that, at some time before the vesting date, the conditions specified in section 68(6)(a) to (h) of the <sup>M3</sup>Local Government and Housing Act 1989 (conditions for “arm’s length companies”) apply in relation to the company and shall, at some time before the vesting date, resolve that the company shall be an arm’s length company for the purposes of Part V of that Act.
- (3) In this paragraph “wholly-owned subsidiary”, in relation to a company and an authority, is to be construed in accordance with section 736 of the Companies Act 1985.

#### Marginal Citations

**M2** 1985 c. 6.

**M3** 1989 c. 42.

#### *Transfer schemes*

- 6
- (1) Where an authority has formed a company or companies in pursuance of a direction, the authority shall, before such date as the Secretary of State may specify in a direction given to the authority under this sub-paragraph, submit to the Secretary of State a scheme providing for the transfer to the company or companies of any property, rights or liabilities of that or that and any other authority, or of any subsidiary of its or theirs, which appear to be appropriate to transfer as representing the relevant part of the undertaking of that authority or of that authority and the other authorities.
- (2) In preparing a scheme in pursuance of sub-paragraph (1) above the authority shall take into account any advice given by the Secretary of State as to the provisions he regards as appropriate for inclusion in the scheme (and in particular any advice as to the description of property, rights and liabilities which it is in his view appropriate to transfer to the company).
- (3) A scheme under this paragraph shall not come into force until it has been approved by the Secretary of State and the date on which it is to come into force shall be such date as the Secretary of State may, either in giving his approval or subsequently, specify in writing to the authority; and the Secretary of State may approve a scheme either without modifications or with such modifications as he thinks fit after consulting the authority who submitted the scheme.
- (4) If it appears to the Secretary of State that a scheme submitted under sub-paragraph (1) above does not accord with any advice given by him, he may do one or other of the following things, as he thinks fit, namely—
- (a) approve the scheme under sub-paragraph (3) above with modifications; or
  - (b) after consulting the authority who submitted the scheme, substitute for it a scheme of his own, to come into force on such date as may be specified in the scheme.

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- (5) In the case of a scheme for the transfer to a company or joint company of the relevant part of the undertaking of two or more authorities, the representative authority shall consult the other authority or authorities before submitting the scheme under sub-paragraph (1) above; and the Secretary of State shall not approve the scheme (whether with or without modifications), or substitute a scheme of his own unless—
- (a) he has given that other authority or (as the case may be) those other authorities an opportunity of making, within such time as he may allow for the purpose, written representations with respect to the scheme; and
  - (b) he has considered any such representations made to him within that time.
- (6) The Secretary of State shall not specify the date on which the scheme is to come into force without consulting the authority which submitted the scheme and, where the scheme was submitted by a representative authority, the other authorities concerned.
- (7) On the coming into force of a scheme under this paragraph the property, rights and liabilities affected by the scheme shall be transferred and vest in accordance with the scheme.
- (8) As a consequence of the vesting by virtue of the scheme of property, rights and liabilities of an authority in a company, that company shall issue to the authority such securities of the company as are specified in the transfer scheme.

*Transfer schemes: supplementary provisions*

- 7 A scheme under paragraph 6 above may define the property, rights and liabilities to be transferred by the scheme—
- (a) by specifying the property, rights and liabilities in question; or
  - (b) by referring to all the property, rights and liabilities comprised in any specified part of the undertaking or undertakings to be transferred; or
  - (c) partly in the one way and partly in the other;
- and may make such supplemental, incidental and consequential provision as the authority making the scheme considers appropriate.
- 8 (1) The provisions of this paragraph apply to the transfer to a company of the property, rights and liabilities representing the relevant part of an authority's undertaking.
- (2) Any property, rights or liabilities held or subsisting partly for the purpose of the relevant part of the authority's undertaking and partly for the purpose of another part shall, where the nature of the property, rights or liabilities permits, be divided or apportioned between the authority and the company in such proportions as may be appropriate; and where any estate or interest in land falls to be so divided, any rent payable under a lease in respect of that estate or interest, and any rent charged on that estate or interest, shall be correspondingly apportioned or divided so that the one part is payable in respect of, or charged on, only one part of the estate or interest and the other part is payable in respect of, or charged on, only the other part of the estate or interest.
- (3) Any property, rights or liabilities held or subsisting as mentioned in sub-paragraph (2) above the nature of which does not permit their division or apportionment as so mentioned shall be transferred to the company or retained by the authority according

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to which of them appear at the vesting date likely to make use of the property, or, as the case may be, to be affected by the right or liability, to the greater extent, subject to such arrangements for the protection of the other of them as may be agreed between them.

- (4) It shall be the duty of the authority and the company, before or after the vesting date, so far as practicable to enter into such written agreements, and to execute such other instruments, as are necessary or expedient to identify or define the property, rights and liabilities transferred to the company or retained by the authority and as will—
- (a) afford to the authority and the company as against one another such rights and safeguards as they may require for the proper discharge of the authority's functions and the proper carrying on of the company's undertaking; and
  - (b) make, as from such date (not being earlier than the vesting date) as may be specified in that agreement or instrument, such clarifications and modifications of the division of the authority's undertaking as will best serve the proper discharge of the authority's functions and the proper carrying on of the company's undertaking.
- (5) Any such agreement shall provide so far as it is expedient—
- (a) for the granting of leases and for the creation of other liabilities and rights over land whether amounting in law to interests in land or not, and whether involving the surrender of any existing interest or the creation of a new interest or not;
  - (b) for the granting of indemnities in connection with the severance of leases and other matters;
  - (c) for responsibility for complying with any statutory requirements as respects matters to be registered and any licences, authorisations or permissions which need to be obtained.
- (6) If the authority or the company represents to the Secretary of State, or if it appears to him without such a representation, that it is unlikely in the case of any matter on which agreement is required under sub-paragraph (4) above that such agreement will be reached, the Secretary of State may, whether before or after the vesting date, give a direction determining the manner in which the property, rights or liabilities in question are to be divided between the authority and the company, and may include in the direction any provision which might have been included in an agreement under that sub-paragraph; and any property, rights or liabilities required by the direction to be transferred to the company shall be regarded as having been transferred to, and by virtue of the transfer scheme vested in, the company accordingly.

#### *Tax and company provisions*

- 9 (1) Any shares in a company which are issued as a consequence of the vesting by a transfer scheme of property, rights and liabilities in the company shall—
- (a) be issued as fully paid; and
  - (b) treated for the purposes of the application of the <sup>M4</sup>Companies Act 1985 in relation to that company as if they had been paid up by virtue of the payment to the company of their nominal value in cash.

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- (2) For the purposes of Chapter I of Part II of the <sup>M5</sup>Capital Allowances Act 1990 (capital allowance in respect of machinery and plant) property which is vested in a company by virtue of a transfer scheme shall be treated as if—
- (a) it had been acquired by the company on the transfer date for the purposes for which it is used by the company on and after that date; and
  - (b) capital expenditure of an amount equal to the price which the property would have fetched if sold in the open market had been incurred on that date by the company on the acquisition of the property for the purposes mentioned in paragraph (a) above.

**Marginal Citations**

**M4** 1985 c. 6.

**M5** 1990 c. 1.

*Benefit of certain planning permission*

- 10 (1) This paragraph applies in relation to planning permission deemed to have been granted to the authority under regulation 4 of the <sup>M6</sup>Town and Country Planning General Regulations 1976 (deemed planning permission for development by local authorities) which subsists at the vesting date.
- (2) Any planning permission to which this paragraph applies which authorises the use of land by the authority for the treatment, keeping or disposal of waste shall, on the transfer of the land to the company by the scheme, enure for the benefit of the land.

**Marginal Citations**

**M6** S.I.1976/1419.

*Right to production of documents of title*

- 11 Where on any transfer by virtue of a transfer scheme the authority is entitled to retain possession of any documents relating to the title to, or to the management of, any land or other property transferred to the company, the authority shall be deemed to have given to the company an acknowledgement in writing of the right of the company to production of that document and to delivery of copies thereof; and, in England and Wales, section 64 of the <sup>M7</sup>Law of Property Act 1925 shall have effect accordingly, and on the basis that the acknowledgement did not contain any such expression of contrary intention as is mentioned in that section.

**Marginal Citations**

**M7** 1925 c. 20.

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### *Proof of title by certificate*

- 12 (1) A joint certificate by or on behalf of the authority and the company that any property specified in the certificate, or any such interest in or right over any such property as may be specified in the certificate, is by virtue of the transfer scheme for the time being vested in the authority or in the company shall be conclusive evidence for all purposes of that fact.
- (2) If on the expiration of one month after a request from the authority or the company for the preparation of such a joint certificate the authority and the company have failed to agree on the terms of the certificate, they shall refer the matter to the Secretary of State and issue the certificate in such terms as the Secretary of State may direct.

### *Construction of agreements*

- 13 Where any of the rights or liabilities transferred by a transfer scheme are rights or liabilities under an agreement to which the authority was a party immediately before the vesting date, whether in writing or not, and whether or not of such a nature that rights and liabilities thereunder could be assigned by the authority, that agreement shall have effect on and after the vesting date as if—
- (a) the company had been a party to the agreement; and
  - (b) for any reference (however worded and whether express or implied) to the authority there were substituted a reference, as respects anything falling to be done on or after the vesting date, to the company; and
  - (c) any reference (however worded and whether express or implied) to any officer or servant of the authority were, as respects anything falling to be done on or after the vesting date, a reference to such person as the company may appoint or, in default of appointment, to the officer or servant of the company who corresponds as nearly as may be to that officer or servant of the authority; and
  - (d) where the agreement refers to property, rights or liabilities which fall to be apportioned or divided between the authority and the company, as if the agreement constituted two separate agreements separately enforceable by and against the authority and the company respectively as regards the part of the property, rights and liabilities retained by the authority or, as the case may be, the part of the property, rights and liabilities vesting in the company and not as regards the other part;
- and sub-paragraph (d) above shall apply in particular to the covenants, stipulations and conditions of any lease by or to the authority.

- 14 Without prejudice to the generality of the provisions of paragraph 13 above, the company and any other person shall, as from the vesting date, have the same rights, powers and remedies (and in particular the same rights and powers as to the taking or resisting of legal proceedings or the making or resisting of applications to any authority) for ascertaining, perfecting or enforcing any right or liability transferred to and vested in the company by a transfer scheme as he would have had if that right or liability had at all times been a right or liability of the company, and any legal proceedings or applications to any authority pending on the vesting date by or against the authority, in so far as they relate to any property, right or liability

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transferred to the company by the scheme, or to any agreement to any such property, right or liability, shall be continued by or against the company to the exclusion of the authority.

*Third parties affected by vesting provisions*

- 15 (1) Without prejudice to the provisions of paragraphs 13 and 14 above, any transaction effected between the authority and the company in pursuance of paragraph 8(4) above or of a direction under paragraph 8(6) above shall be binding on all other persons, and notwithstanding that it would, apart from this sub-paragraph, have required the consent or concurrence of any other person.
- (2) It shall be the duty of the authority and the company, if they effect any transaction in pursuance of paragraph 8(4) above or of a direction under paragraph 8(6) above, to notify any person who has rights or liabilities which thereby become enforceable as to part by or against the authority and as to part by or against the company; and if such a person applies to the Secretary of State and satisfies him that the transaction operated unfairly against him the Secretary of State may give such directions to the authority and the company as appear to him to be appropriate for varying the transaction.
- (3) If in consequence of a transfer by a transfer scheme or of anything done in pursuance of paragraphs 8 to 14 above the rights or liabilities of any person other than the authority which were enforceable against or by the authority become enforceable as to part against or by the authority and as to part against or by the company, and the value of any property or interest of that person is thereby diminished, such compensation as may be just shall be paid to that person by the authority, the company or both, and any dispute as to whether and if so how much compensation is payable, or as to the person by whom it shall be paid, shall be referred to, and determined by, the Lands Tribunal.

*Transfer of staff*

- 16 (1) The <sup>M8</sup>Transfer of Undertakings (Protection of Employment) Regulations 1981 shall apply in relation to the relevant employees of an authority in accordance with sub-paragraph (2) below.
- (2) For the purposes of the application of those Regulations in relation to any of the relevant employees of an authority, the relevant part of the undertaking of the authority shall (whether or not it would otherwise be so regarded) be regarded—
- (a) as a part of an undertaking within the meaning of those Regulations which is transferred from the authority to the company on the vesting date, and
  - (b) as being so transferred by a transfer to which those Regulations apply and which is completed on that date.
- (3) Where a person is, in pursuance of section 32, to cease to be employed by an authority and to become employed by a company, none of the agreed redundancy procedures applicable to persons employed by waste disposal authorities shall apply to him.
- (4) For the purposes of this paragraph persons are “relevant employees” of an authority if they are to become, in pursuance of section 32, employees of a company to which the relevant part of the undertaking of the authority is to be transferred.

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M8 S.I.1981/1794

#### *Information for purposes of transfer scheme*

- 17 (1) The Secretary of State may, by directions, prescribe descriptions of information which are to be furnished for purposes connected with the transfer by authorities to companies of the relevant part of the undertakings of authorities.
- (2) It shall be the duty of a waste regulation authority or a waste disposal authority, on being requested to do so by a written notice served on it by the Secretary of State, to furnish to the Secretary of State such information of a description prescribed under sub-paragraph (1) above as may be specified in the notice.

## PART II

### PROVISIONS REGULATING WASTE DISPOSAL AUTHORITIES AND COMPANIES

#### *Terms of waste disposal contracts*

- 18 A waste disposal authority shall, in determining the terms and conditions of any contract which the authority proposes to enter into for the keeping, treatment or disposal of waste, so frame the terms and conditions as to avoid undue discrimination in favour of one description of waste disposal contractor as against other descriptions of waste disposal contractors.
- 19 (1) A waste disposal authority shall have regard to the desirability of including in any contract which the authority proposes to enter into for the keeping, treatment or disposal of waste terms or conditions designed to—
- (a) minimize pollution of the environment or harm to human health due to the disposal or treatment of the waste under the contract; and
  - (b) maximize the recycling of waste under the contract.
- (2) A waste disposal authority shall be entitled—
- (a) to invite tenders for any such contract, and
  - (b) to accept or refuse to accept any tender for such a contract and accordingly to enter or not to enter into a contract,
- by reference to acceptance or refusal of acceptance by persons tendering for the contract of any terms or conditions included in the draft contract in pursuance of sub-paragraph (1) above.

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*Procedure for putting waste disposal contracts out to tender*

- 20 (1) A waste disposal authority which proposes to enter into a contract for the keeping, treatment or disposal of controlled waste shall comply with the following requirements before making the contract and if it does not any contract which is made shall be void.
- (2) The authority shall publish, in at least two publications circulating among waste disposal contractors, a notice containing—
- (a) a brief description of the contract work;
  - (b) a statement that during a specified period any person may inspect a detailed specification of the contract work free of charge at a specified place and time;
  - (c) a statement that during that period any person will be supplied with a copy of the detailed specification on request and on payment of the specified charge;
  - (d) a statement that any person who wishes to submit a tender for the contract must notify the authority of his wish within a specified period; and
  - (e) a statement that the authority intend to invite tenders for the contract, in accordance with sub-paragraph (4) below.
- (3) The authority shall—
- (a) ensure that the periods, place and time and the charge specified in the notice are such as are reasonable;
  - (b) make the detailed specification available for inspection in accordance with the notice; and
  - (c) make copies of the detailed specification available for supply in accordance with the notice.
- (4) If any persons notified the authority, in accordance with the notice, of their wish to submit tenders for the contract, the authority shall—
- (a) if more than four persons did so, invite at least four of them to tender for the contract;
  - (b) if less than four persons did so, invite each of them to tender for the contract.
- (5) In this paragraph—
- “the contract work”, in relation to a contract for the keeping, treatment or disposal of waste, means the work comprising the services involved in the keeping, treatment or disposal of the waste under the contract; and
- “specified” means specified in the notice under sub-paragraph (2) above.
- 21 A waste disposal authority, in taking any of the following decisions, namely—
- (a) who to invite to tender for the contract under paragraph 20(4)(a) above, and
  - (b) who to enter into the contract with,
- shall disregard the fact that any waste disposal contractor tendering for the contract is, or is not, controlled by the authority.

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### *Variation of waste disposal contracts*

- 22 Where a waste disposal authority has entered into a contract with a waste disposal contractor under the authority's control, paragraph 18 above shall, with the necessary modifications, apply on any proposed variation of the contract during the subsistence of that control, in relation to the terms and conditions that would result from the variation as it applies to the original contract.

### *Avoidance of restrictions on transfer of securities of companies*

- 23 (1) Subject to sub-paragraph (3) below, any provision to which this paragraph applies shall be void in so far as it operates—
- (a) to preclude the holder of any securities of a waste disposal contractor from disposing of those securities; or
  - (b) to require the holder of any such securities to dispose, or offer to dispose, of those securities to particular persons or to particular classes of persons; or
  - (c) to preclude the holder of any securities from disposing of those securities except—
    - (i) at a particular time or at particular times; or
    - (ii) on the fulfilment of particular conditions or in other particular circumstances.
- (2) This paragraph applies to any provision relating to any securities of a waste disposal contractor which is controlled by a waste disposal authority or to which the authority has transferred the relevant part of its undertaking and contained in—
- (a) the memorandum or articles of association of the company or any other instrument purporting to regulate to any extent the respective rights and liabilities of the members of the company;
  - (b) any resolution of the company; or
  - (c) any instrument issued by the company and embodying terms and conditions on which any such securities are to be held by persons for the time being holding them.
- (3) No provision shall be void by reason of its operating as mentioned in sub-paragraph (1) above if the Secretary of State has given his approval in writing to that provision.

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