

*These notes refer to the Climate Change Act 2008 (c.27)  
which received Royal Assent on 26th November 2008*

# CLIMATE CHANGE ACT 2008

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 3: Trading Schemes**

##### **Trading schemes**

##### *Section 44: Trading schemes*

203. This section provides the relevant national authority (defined in section 47 as the Secretary of State, the Scottish Ministers, the Welsh Ministers or the relevant Northern Ireland department) with the power to set up trading schemes relating to greenhouse gas emissions using secondary legislation.
204. *Subsection (2)(a)* provides for trading schemes which limit activities that consist of the emission of greenhouse gases, or that directly or indirectly lead to such emissions (for example, “cap and trade schemes” which cap emissions from a particular set of activities and allow trading of emissions within the cap). *Subsection (2)(b)* provides for trading schemes which encourage activities that directly or indirectly lead to a reduction in greenhouse gas emissions or the removal of greenhouse gases from the atmosphere.

##### *Section 45: Activities to which trading schemes may apply*

205. This section sets out what activities are regarded as indirectly causing or contributing to greenhouse gas emissions or reductions in greenhouse gas emissions. It also makes provision in relation to the location of activities and emissions covered by this Part.
206. *Subsection (1)* sets out the types of activity which are considered to be indirect causes of, or contributors to, greenhouse gas emissions, such as activities which involve the use of energy or those involving the supply of something the use of which would lead to greenhouse gas emissions. For example, the supply of a heating fuel would be regarded as indirectly causing emissions because it leads to emissions at the point of use by the consumer. *Subsection (2)* provides that reductions in the level of those activities are to be regarded as indirectly causing or contributing to reductions in greenhouse gas emissions.
207. *Subsection (3)* provides that Part 3 of the Act applies to activities carried out in the United Kingdom, regardless of where emissions, or reductions in emissions, actually occur.

##### *Section 46 and Schedule 2: Matters that may or must be provided for in trading schemes*

208. *Subsections (1) and (2)* introduce Schedule 2 to the Act, which gives further details about regulations establishing trading schemes. *Subsection (3)* provides that regulations may also contain provision about their application to the Crown.

**Schedule 2: Trading schemes**

209. *Schedule 2* makes specific provision on what may or must be included in regulations establishing trading schemes. Parts 1 and 2 make provision, respectively, in relation to trading schemes operating to achieve different results; but it is possible to make trading schemes that operate to achieve both types of results by combining different elements of those Parts.
210. *Part 1 of Schedule 2* contains details of what can or must be included in a trading scheme which operates by limiting, or encouraging the limitation of, activities that consist of or lead to emissions of greenhouse gases. For example, the Carbon Reduction Commitment, a proposed scheme to reduce energy use, would be a scheme under Part 1 of Schedule 2.
211. A trading scheme under Part 1 must operate by having trading periods (*paragraph 2*), by defining the activities covered by the scheme (*paragraph 3(1)*) and by specifying scheme “units” (which may be specified by reference to the activities themselves, things consumed or used for their purposes, things produced by the activities or other consequences of the activities) (*paragraph 3(3) and (4)*). The scheme must define the participants covered by it; participants may be defined by reference to criteria (*paragraph 4*).
212. A scheme under Part 1 may provide for allowances to be allocated to participants; allowances represent the right to carry out a specified amount of the activity covered by the scheme. But the regulations cannot provide for allowances to be allocated in return for payment (*paragraph 5*). Any provisions for auctioning allowances would be contained in different legislation (for example, a Finance Act).
213. The scheme rules may require a participant to have or acquire a certain number of allowances to cover his activities in a trading period (*paragraph 6*). A scheme may also allow or require the participant to purchase defined credits to offset his activities, but the regulations can also place limits on the use of credits (*paragraph 7*). A scheme might also operate by requiring payments to be made if the participant did not hold a sufficient number of allowances or credits (*paragraph 8*).
214. A scheme under Part 1 must allow trading in allowances or credits under the scheme, and the scheme must set out the circumstances in which trading will operate. Third parties (who would not otherwise be participants) may also be allowed to trade (*paragraph 9*). A trading scheme may also specify that activities can only be carried out if the participant holds a permit (*paragraph 10*) and may allow recognition of allowances, credits, certificates or other units issued under other trading schemes (whether at domestic, European or international level) (*paragraph 11*).
215. *Part 2 of Schedule 2* contains details of what can or must be included in a trading scheme which operates by encouraging activities that consist of, or that cause or contribute (directly or indirectly) to reductions in greenhouse gas emissions or the removal of greenhouse gases from the atmosphere.
216. A trading scheme under Part 2 must operate by having trading periods (*paragraph 13*), by defining the activities covered by the scheme (*paragraph 14(1)*) and by specifying scheme “units” (which may be specified by reference to the activities themselves, things consumed or used for their purposes, things produced by the activities or other consequences of the activities) (*paragraph 14(3) and (4)*). The scheme must define the participants covered by it; participants can be defined by reference to criteria (*paragraph 15*).
217. A scheme under Part 2 must set targets for participants to achieve in the trading period (*paragraph 16*). They must provide for the issue of certificates to participants; certificates act as evidence of the amount of the activity that has carried on, but can also be used as evidence of the activity of another person. The scheme must require each participant to have, at the end of a trading period, enough certificates to meet his

target (*paragraph 17*), and may provide that a participant who does not have enough certificates should have to make payments (*paragraph 18*).

218. A scheme under Part 2 must allow trading in certificates under the scheme, and the scheme must set out the circumstances in which trading will operate. Third parties (who would not otherwise be participants) may also be allowed to trade (*paragraph 19*). A trading scheme may allow recognition of allowances, credits, certificates or other units issued under other trading schemes (whether at domestic, European or international level) (*paragraph 20*).
219. *Part 3 of Schedule 2* makes provision on the administration and enforcement of trading schemes.
220. The regulations may appoint an administrator of the scheme and impose functions on him; the administrator must be one of the national authorities or a public body, or a combination of any of these (*paragraph 21*). The administrator of a trading scheme is the body which operates the scheme on a day-to-day basis.
221. The regulations can require the disclosure of information to the administrator, national authorities or participants (*paragraph 22*). A scheme may provide for the creation and maintenance of registers to keep track of participants, their obligations, trading and other information in the scheme (*paragraph 23*). The regulations can allow certain information to be published (*paragraph 24*); for example, they might provide for the publication of a list showing participants' performance in the scheme.
222. The scheme can allow the administrator to buy trading units in other schemes, which may be schemes made under the Act or other similar schemes such as the EU Emissions trading scheme (*paragraph 25*). The scheme may also require the payment of charges covering all or part of the costs of the scheme; the charges may be imposed on participants and other people eligible to trade in allowances, credits or certificates (*paragraph 26*).
223. The scheme can include provision setting out how compliance with the scheme is to be monitored and on the keeping of records by participants, the provision of information, audit and the inspection of premises (*paragraph 27*). The scheme can also make further provision for enforcement of the scheme where it is reasonably believed that there has been a failure to comply with the scheme's requirements (*paragraph 28*).
224. The scheme can make provision for the imposition of civil financial penalties or other types of penalty for failure to comply with the scheme rules (*paragraph 29*) and creating criminal offences relating to the scheme (*paragraph 30*). A scheme may also make provision for appeals against decisions and enforcement action, and allow those appeals to be heard by independent appointed persons (*paragraph 31*).

## **Authorities and regulations**

### ***Section 47: Relevant national authorities***

225. This section defines who is the "relevant national authority" in relation to trading schemes, and in doing so sets out the scope of the powers available to each national authority.
  - *Subsection (2)* allows the Scottish Ministers to make trading schemes within the scope of the legislative competence of the Scottish Parliament (that is, to the extent that the Scottish Parliament would have been able to make a trading scheme of its own accord).
  - *Subsection (3)* allows the Welsh Ministers to make trading schemes in relation to matters that relate to limiting, or encouraging the limiting of, activities in Wales that consist of the emission of greenhouse gases, with the exception of activities in connection with offshore oil and gas exploration and exploitation. If

the National Assembly for Wales gains legislative competence that would enable it to make trading schemes of its own accord, the power of the Welsh Ministers to make trading schemes under this Part will extend to match the scope of that legislative competence. *Subsection (4)* defines “offshore oil and gas exploration and exploitation” to have the same meaning it has in the [National Assembly for Wales \(Transfer of Functions\) Order 2005 \(S.I. 2005/1958\)](#) and defines “Wales”, for the purpose of subsection (3), by reference to section 158(1) of the [Government of Wales Act 2006 \(c.32\)](#). This definition includes the sea adjacent to Wales out as far as the seaward boundary of the territorial sea.

- *Subsection (5)* allows the Secretary of State or the relevant Northern Ireland department to make trading schemes in relation to reserved matters under the [Northern Ireland Act 1998 \(c.47\)](#); the relevant Northern Ireland department may make trading schemes covering reserved matters, but only with the Secretary of State’s consent (see section 48(6)).
- *Subsection (6)* allows the relevant Northern Ireland department to make trading schemes in relation to all other matters within the scope of the legislative competence of the Northern Ireland Assembly (that is, to the extent that the Northern Ireland Assembly would have been able to make a trading scheme of its own accord on “transferred matters” under the Northern Ireland Act 1998).
- *Subsection (7)* provides that the Secretary of State has the power to make trading schemes in relation to all other matters.

#### ***Section 48: Procedure for making regulations***

226. This section sets out the procedure which must be followed when regulations under Part 3 containing a trading scheme are made or amended. It includes a requirement to consult persons likely to be affected by the scheme, a requirement to seek advice from the Committee on Climate Change and rules on parliamentary procedure.
227. *Subsection (1)* provides that before making regulations about trading schemes, the relevant national authority must consult such persons as it considers are likely to be affected by the regulations, and also that it must seek, and take account of, advice from the Committee on Climate Change. In the case of schemes limiting activities, the authority must in particular obtain the Committee’s advice on the appropriate level of the limit (*subsection (2)*).
228. *Subsection (3)* sets out the circumstances in which the affirmative resolution procedure applies to the making of regulations (such as where a new scheme is established, the application of an existing scheme is extended, the burden on participants is increased, where enforcement powers are strengthened or where the regulations amend primary legislation). *Subsection (4)* requires that the affirmative resolution procedure also applies to the first set of regulations which contain provisions relating to appeals.
229. *Subsection (5)* provides that the negative resolution procedure applies at all other times.
230. *Subsection (6)* makes special provision in relation to “reserved matters” in Northern Ireland. The relevant Northern Ireland department is allowed to make provision in a trading scheme dealing with a reserved matter under the [Northern Ireland Act 1998 \(c.47\)](#) only if it has obtained the Secretary of State’s consent.

#### ***Section 49 and Schedule 3: Further provisions about regulations***

231. This section introduces Schedule 3, which makes further provision on the procedures to be followed when making regulations containing trading schemes.

***Schedule 3: Trading schemes regulations: further provisions***

232. *Part 1* of Schedule 3 sets out the procedure to be followed where regulations are made by a single national authority. *Paragraph 2* sets out the affirmative resolution procedure applying in Parliament and the devolved legislatures. *Paragraph 3* sets out the negative resolution procedure applying in Parliament and the devolved legislatures. *Paragraph 4* allows any regulations that could be made using the negative resolution procedure to be made using the affirmative resolution procedure; this will allow, say, amendments which would otherwise have to be made using different procedures to be made in the same instrument.
233. *Part 2* of Schedule 3 sets out the process where regulations are made jointly between the Secretary of State and/or the Welsh Ministers and/or the relevant Northern Ireland department. The affirmative and resolution procedures apply as they do in Part 1 of Schedule 3. Where the affirmative resolution procedure applies, if either House of Parliament or the relevant devolved legislature does not approve the instrument, then the instrument cannot be made. Where the negative resolution procedure applies, if either House of Parliament or the relevant devolved legislature resolves that the regulations should be annulled, then nothing further can be done under the instrument and it may be revoked by Order in Council.
234. *Part 3* of Schedule 3 sets out the process for making joint trading schemes by Her Majesty by Order in Council. The Order in Council procedure is to be used in two situations. First, where a scheme extends or applies both to Scotland and to one or more of England, Wales and Northern Ireland. Secondly, where a scheme relates to matters which are within the legislative competence of the Scottish Parliament and also to other matters which are not within its legislative competence. Where the affirmative resolution procedure would apply to regulations making the same provision, Her Majesty cannot make an Order in Council unless all the relevant legislatures have passed a resolution approving a draft of the Order in Council. Where the negative resolution procedure would apply to regulations making the same provision, the Order in Council is laid before all the relevant legislatures; if any of them resolves that the Order in Council should be annulled, then nothing further can be done under the Order in Council and Her Majesty may revoke it.

**Other supplementary provisions**

***Section 50 and Schedule 4: Information***

235. This section introduces Schedule 4 to the Act, which contains powers to enable the collection of information for the purpose of developing a trading scheme. Schedule 4 allows the national authorities and certain agencies to require, by notice, electricity suppliers and potential participants in a trading scheme to provide information required for the establishment of the scheme.
236. *Subsection (2)* is a “sunset” provision. It provides that the information-gathering (but not the information-sharing) powers in Schedule 4 will cease to have effect on 1st January 2011, the date by which it is anticipated that they will no longer be required.

***Schedule 4: Trading schemes: powers to require information***

237. *Schedule 4* contains powers that could be contained in regulations made under Part 3 of the Act. The intention behind providing these specific powers on the face of the Act is to allow information to be gathered for the establishment of the Carbon Reduction Commitment, a new trading scheme, within a relatively short time-scale.
238. *Schedule 4* makes provision about who is able to exercise the information gathering powers; these are the national authorities, the Environment Agency and the Scottish Environment Protection Agency, collectively referred to as the “environmental authorities” (*paragraph 1*).



239. It provides that the environmental authorities can seek information, for the purposes of enabling a trading scheme to be established, from electricity suppliers and distributors (*paragraph 2*) and from the potential participants in a trading scheme (*paragraph 3*). The information that may be collected includes, among other things, information about contact details, electricity meters, levels of electricity consumption and any climate change agreements (within the meaning of Schedule 6 to the *Finance Act 2000 (c.17)*) that have been entered into.
240. If an environmental authority requests information (in writing) from a person under this Schedule, and the person does not comply with the request within 28 days, the authority may issue a formal notice requesting the information. *Paragraph 4* sets out the requirements relating to such formal notices. A person who fails, without reasonable excuse, to comply with a notice, or who provides false or misleading information (either knowingly, or suspecting that it is false or misleading) is guilty of a summary offence and liable to a fine not exceeding level 5 on the standard scale (currently £5000). (*paragraph 5*).
241. *Paragraph 6* allows information collected using the powers in Schedule 4 to be shared with the other environmental authorities or with the administrator of the trading scheme. This is the only paragraph in the Schedule which is not subject to the sunset provision in section 50(2).

### ***Section 51: Powers to give guidance***

242. This section gives the relevant national authority (see section 47) the power to give guidance to an administrator of a trading scheme about how to carry out its functions. The administrator is required to have regard to guidance issued to it.

### ***Section 52: Powers to give directions***

243. This section gives the relevant national authority (see section 47) the power to give general or specific directions to an administrator of a trading scheme. The administrator must comply with directions given under this section.

### ***Section 53: Grants to administrators and participants***

244. This section enables the relevant national authority (see section 47) to make grants to participants of trading schemes and impose conditions when giving a grant.

### ***Section 54: Power to make consequential provision***

245. This section gives the relevant national authority (see section 47) the power to make regulations amending, repealing or revoking primary or secondary legislation as a consequence of regulations made under this Part of the Act, and to make any transitional and saving provisions in connection with such amendments, repeals and revocations.

## **Interpretation**

### ***Section 55: Interpretation of Part 3***

246. This section defines the terms “administrator”, “participant” and “trading period” used in Part 3.