CLIMATE CHANGE ACT 2008: WHAT DOES IT MEAN IN PRACTICE?

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1. The Climate Change Act 2008 has its roots in a growing understanding that carbon emissions must be reduced to prevent the deleterious effects of climate change. It is a reaction to both the international movement – from Kyoto onwards – towards responding to climate change, and also to the growing domestic realisation of the need to join that movement. It is in part a reaction to the Stern Review, published in October 2006,[1] which reported that, in economic terms, the benefits of strong, early action considerably outweigh the costs.

2. This paper provides an overview of the provisions of the Act, and seeks to identify the areas which may, in practice, have the most significant impacts.

Part 1: The carbon target and carbon budgeting

3. The Act starts by imposing a statutory duty on the Secretary of State to "ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline" (s 1(1)). The baseline is the aggregate of carbon dioxide emissions in 1990, and other targeted greenhouse gases (such as methane, nitrous oxide and hydroflourocarbons) in their appropriate base year.

4. Inevitably, the Act provides for the amendment of both the baseline and the 2050 target by order. However, the circumstances in which such an amendment may be made are limited to where there have been significant developments in (i) scientific knowledge about climate change since the Act was passed or (ii) European or international law or policy that make it appropriate to do so (s 2(2)).[2] Any amendment must be made through the affirmative

[1] http://www.hm-treasury.gov.uk/sternreview_index.htm

[2] The Climate Change Committee, which will be considered below, has a statutory duty to advise on the possible amendment of 2050 target: s 33(1). No amendment can be made without taking into account that advice: s 3(1)(a).

procedure in Parliament (s 2(6)). The 2050 target is therefore not merely an aspiration, but a legal duty. The circumstances in which the goal posts can be moved are limited.

5. The target is to be met through the setting of "carbon budgets" (s 4). The Secretary of State must set carbon budgets for the first three budgetary periods up to 2022 by 1 June 2009. The Committee on Climate Change has recommended appropriate budgets. Future budgets must be set eleven and a half years before each period. Those budgets can then only be altered if "there have been significant changes affecting the basis on which the previous decision was made" (s 21(2)). The amendment procedure is again by affirmative resolution. This long term setting of budgets is at first a startling proposition. However, the motive behind it is found in the Stern Review. There are two aspects of long term carbon budgeting. The first is a desire to place at the forefront of the Act a link between current decisions and long terms goals. The second is a response to the economic analysis in the Stern Review, which identified the need for long term predictability in the cost of carbon. It is only by achieving that predictability that business will make long term investment decisions based on a scarcity of carbon.

6. Section 10 of the Act sets out the matters the Secretary of State must take into account in setting the carbon budget. The Secretary of State must then prepare policies and proposals to meet the carbon budget (s 13) and report on UK emissions (s 16). He must have regard to the need for UK action on climate change (s 15). He may by regulation bring emissions from international aviation and shipping into the carbon budgeting system (s 30-31).

7. The practical implications of 2050 target and the budgeting process to get there are not immediately apparent. The Act does not give the route map that will lead to this huge shift away from carbon consumption. There is little legal analysis which can be done, but the following observations should be made. What is immediately clear is that this is an enormous task in the medium term. The 80% figure is derived from the Stern Review and the Committee on Climate Change's recommendation in October 2008. When the Climate Change Bill was first introduced to Parliament, the Government thought a 60% target was realistic; the global consensus (such that exists) is probably closer to 50%. It is only by aggressively budgeting for carbon reduction over the next five to ten years that there could be a realistic hope of the necessary systemic change by 2050.

8. How might this shift be achieved? Putting to one side the challenges for the aviation and shipping sector, the biggest issue is the power sector. That sector, accounting for about a quarter of global greenhouse gas emissions, presents a number of well known practical challenges:

   a. Can such levels of carbon reduction realistically be achieved without a shift from fossil to nuclear power?

   b. What contribution can renewables realistically make?

   c. Can the cost of any shift in production source be swallowed by the wider economy?

   d. If the power sector fails to deliver for whatever reason – challenges to planning permissions for windfarms, wholescale challenges to nuclear policy – can the deficit realistically be made up elsewhere?

9. As it stands, the ambitious target in Part 1 of the Act will have significant and wide-reaching effects. From a lawyer's perspective, there is a series of strict duties imposed upon the Secretary of State, with particular relevant considerations identified and an inbuilt inflexibility in the interests of economic certainty. It inevitably will be the source of controversy and more likely than not litigation in the years to come.

Part 2: The Committee on Climate Change

10. Part 2 of the Act gives a statutory mandate to the Committee on Climate Change (CCC).[3] The CCC has a crucial role in the scheme of the Act as the primary advisory body in respect of carbon budgeting. The work of the CCC is likely to be highly influential: the Government accepted its recommendation to change the 2050 target to an 80% reduction as opposed to 60%. Its work is likely to be wide-ranging as it has to assess the appropriate level of budgeting against the likely constraints, technological and otherwise. Its specific programme of works leading up to its next major report in September 2009 includes:

[3] More background information is to be found at http://www.theccc.org.uk/

a. Power sector decarbonisation including wind generation trajectories and the viability of tidal range generation;

b. Energy use in buildings – improving efficiency, incentivising reduction in residential and small business, assessment of potential for CHP on large and small scales;

c. Mitigation of fuel poverty impacts of carbon budgets;

d. Support technology for electric cars;

e. Reduction of transport emissions through behaviour change and town and country planning;

f. Aviation including the economics of improving aviation infrastructure in carbon constrained world, and the scope for switch to rail over short haul aviation.

11. In legal terms, the CCC is a non-departmental public body, accountable to the Secretary of State and subject to his direction (s 42) but otherwise able to set its own agenda and allocate its own budget. It is likely to rely heavily on the private sector to support its research.

Part 3: Trading schemes

12. Although there is currently no clear picture as to how the trading scheme provisions will be used, there is scope for a radical impact across a broad range of sectors from the implementation of trading schemes. The first point to note is that the establishment of new carbon trading schemes is a devolved function, exercised by the Secretary of State, the Scottish Ministers, the Welsh Ministers or the relevant Northern Irish department (s 44). There are broadly two types of scheme which may be created under the Act:

    a. "Cap and trade schemes" which limit activities that consist of the emission of greenhouse gas or that contribute (directly or indirectly) to such emissions;

    b. Schemes which incentivise activities which contribute (directly or indirectly) to the reduction of greenhouse gas emissions.

13. Schedule 2 to the Act sets out the shape of the two different types of scheme. Cap and trade schemes would have to work by reference to particular trading periods, and identify the participants to whom the scheme applies. They may provide for carbon credits which can then be traded within the scheme, and for payments to be made when credits are exceeded in a particular period. The cap and trade schemes could therefore take a form very similar to the EU Emissions Trading Scheme. Schemes which encourage activities which reduce greenhouse gases must provide for the issue of certificates in respect of the particular activities. The scheme may set a baseline obligation, and if insufficient certificates are attained in the relevant period the participants may be required to make payments. The regulations which establish such schemes may make provision for certificates to be recognised as equivalent credits under any other scheme (domestic, EU or international).

14. The range of activities which may be caught be such schemes is incredibly broad (s 45(1)):

    a. Activities involving the consumption of energy. That would include, for example, most manufacturing processes but also many other activities in both the industrial and service sector;

    b. Activities involving the use of materials in whose production energy was consumed. That might include, for example, the construction industry;

    c. The disposal of materials in whose production energy was consumed (other than by recycling);

    d. The production or supply of anything whose subsequent use directly causes or contributes to greenhouse gas emissions. For example, the sale of heating fuel and the sale of motor vehicles might be included in such a scheme.

15. Schedule 2 also provides for wide ranging enforcement powers to be established by regulation, including schemes for the levying of penalties.

16. What safeguards exist in respect of the establishment of trading schemes? In short, very few. However:

a. The relevant national authority must consult the CCC and take the CCC's advice on any overall limit to be imposed;

b. The relevant national authority must "consult such persons likely to be affected by the regulations as the authority considers appropriate" (s 48(1)(b));

c. Any regulations which set up a scheme, extend it or make it more onerous must be subject to the affirmative resolution procedure.

17. To assist in setting up schemes, Schedule 4 of the Act provides for powers to require information from electricity suppliers and distributors (in respect of who is using electricity, and how much) and from potential participants in a trading scheme. It is an offence to fail to provide such information. The Schedule 4 powers lapse on 1 January 2011, so it can be expected that there will be a rash of information requests during the course of next year.

18. Trading schemes will have a significant impact on any sector to which they apply. The Stern Review recommendation that clarity and predictability is required to reap the rewards of carbon trading is not reflected in this part of the legislation: there is no timescale for the implementation of schemes, and no certainty as to which sectors will be affected. Unlike the EU ETS, there is also no statutory *de minimis* level beneath which carbon generating activities are excluded from the scope of such schemes. Clearly any regulations will establish such thresholds, but in the meantime any undertaking could potentially be affected by a trading scheme. In that way, the statutory provisions could be seen as a "carrot and stick" mechanism, whereby sectors which do not of their own initiative reduce their carbon impact will face the risk of being subjected to a scheme.

19. The trading schemes also raise the possibility of a new level of carbon trading with all the incidental effects that will have. For example, schemes which affect smaller businesses will raise the possibilities of micro-carbon financing, and new market places for carbon trades. One can also imagine, particularly in an economic downturn, the importance of carbon credits on a company's balance sheet. Of course, until the nature and extent of the new carbon trading schemes is known, we can only speculate as to their effects.

Part 4: Adaption to climate change

20. This part of the Act imposes a duty on the Secretary of State to lay reports before Parliament, at least once every five years (s 56(3)), containing an assessment of the risks for the UK of the current predicted impact of climate change (s 56(1)). The Secretary of State must take into account the advice of the CCC, which is under a duty to advise. The Secretary of State must then lay a programme before Parliament setting out how the Government proposes to adapt to those risks.

Part 5: Other provisions

(i) Waste reduction schemes

21. Perhaps the most publicly controversial element of the Act, ss 71-76 and Schedule 5 to the Act provide for the establishment by local waste collection authorities of waste reduction schemes. Amendments are made to the Environmental Protection Act 1990 which allow local authorities to establish waste reduction schemes where they have a "good recycling service available", have taken account of the needs of groups who may be disadvantaged by it and have a strategy for dealing with unauthorised dumping of waste. The scheme must incentivise (by council tax rebates) or by introducing charges for the collection of residual waste.

(ii) Charges for single use carrier bags

22. Schedule 6 sets out regulation making powers whereby sellers of goods can be required to make charges for single use carrier bags. Civil sanctions may be imposed for breaches of the regulations, and those sanctions are effectively borrowed from the Regulatory Enforcement and Sanctions Act 2008.[4]

(iii) Renewable transport fuel obligations

[4] For background to that Act, see Simon Pickles' lecture at http://www.landmarkchambers.co.uk/__data/assets/pdf_file/0007/35809/Implications_for_environmental_regulators.pdf and for discussion of the legal issues arising from the Act see: http://www.landmarkchambers.co.uk/__data/assets/pdf_file/0008/35594/Possible_legal_issues_arising_under_the_Act.pdf

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23. The Energy Act 2004 created a scheme by which specified transport fuel suppliers could be required to provide evidence that in a specified period a specified amount of renewable transport fuel had been supplied for delivery in the UK. The first such scheme's obligations commencing in April 2008. The Climate Change Act 2008 amends the powers in respect of the scheme.

(iv) Carbon emission reduction targets

24. Amendments are made to the Gas Act 1986, the Electricity Act 1989 and the Utilities Act 2000, which allow the Secretary of State to impose carbon emissions reduction obligations on the gas companies and electricity generators governed by those statutes. The obligations can thereby be imposed by direct regulation of those sectors, rather than through the general trading scheme system.

(v) Miscellaneous

25. Further reporting obligations, including an obligation to report on the carbon efficiency of the civil estate each year, and other miscellaneous provisions are set out in ss 80-88.

CONCLUSIONS

26. The Stern Review set out three ways to address climate change. The first was establishing a price on carbon, which could be done through taxation, carbon trading or sectoral regulation. The Act relies on trading and regulation. Stern's particular concern was that any trading scheme would be clear and stable, leading to confidence in the cost of carbon which would incentivise short term investment in long term changes. It is not clear whether the Act, which establishes a direction of travel but not the mode of transport, will achieve that in the short term. Stern also recommended increased investment in research and development. That may be achieved simply by imposing carbon limits on industry. Finally, Stern identified the need to remove the barriers to behavioural change through a range of mechanisms from education to product requirements. The Act may in part satisfy that objective by the stringent reporting requirements and the likelihood of certain short term mechanisms affecting consumers (charges for waste and carrier bags are good examples).

27. But what does the Act mean in practice for industry and their advisors? It means a long term commitment by Parliament to dealing with carbon emissions. It also means the possibility of creating numerous trading schemes, which will create a national carbon market, possibly on a very large scale. The Act is characterised by strict obligations. Firstly, there are obligations on the Secretary of State (and in part the devolved governments) to reduce carbon emissions at a significant rate. Secondly, there is the possibility of the Secretary of State in turn passing on those obligations to industry and the consumer. In a contracting economy, the cost of imposing such obligations (estimated to be up to 2% of GDP) will inevitably lead to fall out at some stage.

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