



CRC Energy Efficiency Scheme – the next steps for Landlord and Tenant

In April 2010, the CRC Energy Efficiency Scheme came into force and introduced a compulsory emissions trading scheme applying to large non-energy intensive organisations, not already included in the EU Emissions Trading Scheme or covered by Climate Change Agreements. The scheme affects those who are party to energy supply contracts. The introduction of the scheme poses many questions for landlords and tenants as to the practical steps in incorporating the allocation of responsibility and costs under the scheme into lease provisions.

The premise of the scheme is that organisations with significant energy demand should pay for the carbon emissions they produce, in line with the 'polluter pays' principle.

If a landlord is a Participant in the scheme and the energy supply contract is in the landlord's name, the landlord will have to account for the emissions even though the energy is used by its tenants.

An organisation will be a Participant in the scheme if it has one or more half-hourly electricity meters settled on the half-hourly market and its total half-hourly metered electricity use in 2008 was at least 6,000 MWh.

Subsidiaries and their parents are grouped together and the highest UK parent body will need to consider the energy use of all its subsidiary companies in order to assess whether the group as a whole is included in the scheme, or whether certain parts of the business are disaggregated.

While it is clear who should have responsibility under the scheme, i.e. the party to the supply contract, no clarity is provided on how landlords and tenants should apportion costs and responsibilities associated with the scheme. With regard to this and in response to the government consultation, a property industry working party was established to explore the lease drafting implications of dealing with the obligations and allocation of costs under the scheme. Unfortunately, the working party was not able to identify a clear one size fits all approach and concluded that "the responses to the consultation revealed no consensus about the next steps to be taken". Even landlords could not agree amongst themselves. This makes it difficult to progress as originally intended to drafting a standard CRC lease clause.

This leaves both landlords and tenants without guidance or experience in understanding how to deal with the scheme in negotiations and could cause some complication to the landlord/ tenant relationship as although it is the landlord who can alter the fabric and fittings of a building to make it more energy efficient, it is the tenant who will be occupying and who can make operational changes to reduce energy consumption. Consideration must therefore be given to how costs, penalties and financial bonuses associated with participating in the scheme are dealt with by landlord and tenant. Landlords will be of the opinion that in order to maintain the principle of an institutionally acceptable lease the tenant should contribute towards the costs of the scheme in the same way in which they pay for outgoings. The frustration for the tenant will be that where the tenant either does not have the ability to increase the building's efficiency or where it does but there is no ability for it to receive the benefit of the recycling credits under the scheme, it will view the cost as being a burden of the landlord that should remain with the landlord.

The options for dealing with the allocation of CRC costs are: including the costs in the service charge; running a separate CRC service charge; charging a levy on energy costs; or leaving the lease silent as to CRC costs.

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All of the options have strengths and weaknesses but the best option for the tenant may be that the lease should be silent on CRC costs provided that the tenant is confident that they can ensure that the landlord does not disguise the costs within the service charge. This option protects the tenant from changes in the landlord (because the CRC costs are personal to the Landlord rather than the property) and ensures that the tenant does not pay for the cost without the possibility of receiving the recycling charge credit.

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The Commercial Property department in the Manchester office is commended in the Legal 500 as an 'excellent' practice for industrial and logistics work with national coverage which provides 'a great balance between technical ability and commerciality' and 'excellent personal service'. The team is led by Jim Purves who is described as having 'great technical knowledge' and 'understands his clients' business'. Matthew O'Brien, an Associate in the team is described as 'an excellent junior lawyer, old beyond his years.'

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