

# Landlords and Tenants

## The CRC Energy Efficiency Scheme - Are you ready for the change?

### What is the CRC Energy Efficiency Scheme?

The CRC Energy Efficiency Scheme (CRC) is the UK's new **mandatory** carbon emissions trading scheme starting in **April 2010**. It will apply to a wide range of non-energy intensive private and public sector organisations and will place **legal obligations** on qualifying organisations to disclose information and (for larger energy users) to report on energy use and buy allowances for emissions.

### Ways in which you might be affected

The CRC focuses on generic energy use rather than particular business activities or specific properties/sites and therefore CRC issues potentially apply to any organisation who themselves use energy and are responsible for emissions in both their business premises and their operational activities. Your own organisation may well qualify under the scheme

### How to find out if your organisation is affected

Organisations that consumed 6000MWh of electricity or more from half-hourly metered sources during 2008 (the first qualification year) must **participate fully** and will have to:

- > **monitor** energy use (electricity, gas and fuels) from **1 April 2010**
- > **register** with the scheme administrators (the Environment Agency in England and Wales) by **30 September 2010**
- > **purchase** allowances in **April 2011** to cover emissions from estimated energy use for **April 2011 to March 2012**
- > **report** on energy use for April 2010 to March 2011 by **29 July 2011**
- > continue to **monitor, purchase** allowances, **report** and **register** for ongoing compliance years and phases.

If your organisation or an organisation in whose performance you are interested occupies more than 55,000 m<sup>2</sup> / 580,000 ft<sup>2</sup> or paid over £500,000 for electricity in 2008, then typically you or the organisation in which you are interested will be a full participant.

### What does this mean for landlords and tenants?

#### Liability

Where a landlord supplies energy to its tenants, the responsibility for energy supply under the CRC remains with the landlord organisation. The extent to which a landlord is responsible for energy consumed by its tenants will therefore depend upon the energy supply arrangements in place. In the context of a single-let office building, it is likely that the single tenant will be responsible for procuring its own energy supplies from the authorised licensed suppliers. In such circumstances, the tenant will be responsible for the energy supplies under the CRC. In the context of a multi-let office building, typically the landlord will procure supplies to the building from the authorised licensed suppliers and the tenants will take a feed from the central supply for which they will be charged on a sub-metered basis. In such circumstances, the landlord will remain responsible for the supplies under the CRC.

#### Facilities management companies

Is it possible for landlords to avoid responsibility for energy supplies under the CRC by appointing a facilities management company to enter into the supply contracts with authorised licensed suppliers? In normal facilities management arrangements, the management company purchases fuel or energy for the purpose of supplying or delivering it to the landlord (and not for its own consumption). In those circumstances, the fuel/energy is excluded from the management company's CRC emissions and responsibility for the CRC emissions would lie with the landlord.

#### Existing leases

The CRC regulations do not contain any provisions that enable landlords to automatically pass on CRC costs to their tenants. This is a matter for agreement between individual landlords and tenants. Typical outgoing clauses and/or service charge provisions in existing leases are unlikely to extend to the costs incurred by a landlord under the CRC because those costs arise from collated energy use across the landlord's organisation rather than being attributable to individual assets or properties.

## New leases

In relation to new leases, various approaches to the manner in which CRC costs and benefits are apportioned between landlords and tenants have been proposed but a consensus is yet to emerge. One possible approach in a lease of part is for the landlord to bill its full estimate of CRC costs by way of advance service charge but to give fair credit for any recycling payment when computing the service charge reconciliation. An alternative, and possibly less administratively burdensome, approach is for the landlord not to include estimated CRC costs in the service charge but to bill net CRC costs (costs less a fair proportion of any recycling payment) at the end of the service charge year. However, this approach will clearly have cash flow implications for landlords. The British Property Federation has recently conducted a consultation of property owners and occupiers to explore whether a cross-industry consensus can be reached on how CRC costs should be apportioned between landlords and tenants in new leases. We will be closely monitoring the outcome of that consultation.

## Green leases and memoranda of understanding

The cost burden on landlords and tenants created by the CRC provides greater incentive for landlords and tenants to co-operate in implementing energy efficiency measures. In addition to dealing with CRC cost allocation, it is likely that landlords and tenants will also be seeking to revisit other standard lease provisions with a focus on driving down CRC costs. Green lease provisions and/or non-binding memoranda of understanding that require or encourage energy efficiency measures may become much more prevalent in commercial leasing arrangements.

## Corporate social responsibility and reputation

Performance in the CRC will be annually published in a league table which will allow organisations to be compared against their competitors. Penalties for non-compliance will also be published and may give rise to adverse publicity and reputational impact.

## How to stay ahead of the game

### Take advice and act now

Taylor Wessing can advise on all legal aspects of the CRC including in relation to compliance, identification of which organisations the CRC will affect and implementing strategies to deal with its impact. For further information on any of the issues raised above and other relevant factors such as the costs involved and the consequences of breach, please contact **Noel Doran**, in Taylor Wessing's Environment group, or **Paul Leamy** in the Real Estate group.

For those who are prepared, there may be reputational and competitive advantage to gain.

For further detail on the CRC Energy Efficiency Scheme, please click to view our briefing:

**Climate change and the Carbon Reduction Commitment Energy Efficient Scheme – a commercial reality.**

## Contacts



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