

CARBON REDUCTION COMMITMENT

As the range of topics covered by this newsletter demonstrates, “green” issues are becoming increasingly important from a legal perspective – particularly in the fields of property and construction. In recent years, there have been a number of legislative changes – for example, to support construction of buildings in ways that reduce their impact on the environment. Other sustainability initiatives such as reducing the carbon footprint of a business have, however, largely been encouraged on a voluntary basis. That is about to change though with the introduction of the new Carbon Reduction Commitment Energy Efficiency Scheme in 2010.

The Government issued draft regulations for the carbon reduction scheme for consultation earlier this year and has recently published its response to that consultation. The scheme will come into effect in April 2010 and the final form of the regulations will be published this month.

The new compulsory scheme will be known as the Carbon Reduction Commitment Energy Efficiency Scheme (CRC) and will affect all public and private organisations on half hourly electricity meters. If an organisation’s annual electricity bill exceeds £500,000 (based on 2008 usage) it will be a full participant in the scheme. Those organisations on half hourly meters but with lower electricity consumption will still be required to provide figures on energy consumption and may become full participants in future years of the scheme. The Government anticipates that this is likely to affect 5,000 businesses and organisations initially but the number of organisations indirectly affected will be considerably higher.

CRC registration packs are being issued to all organisations on half hourly meters in the next few weeks by their electricity providers.

WHAT ARE THE REQUIREMENTS FOR 2010?

During the first “compliance year” of the scheme (April 2010 – March 2011) participants will simply be required to record all energy usage and submit an annual report. From April 2011 onwards, however, participants will be required to purchase allowances in advance that equate to the amount of energy that the organisation anticipates using during that year. At the end of each year, the organisation will need to ensure that it has sufficient allowances to surrender to cover the energy that it has used.

The first three years of the scheme (2010 – 2013) will be an introductory phase, during which allowances will be purchased direct from the Government at a fixed price. The scheme is intended to be revenue neutral and each October the net money raised from the purchase of allowances in April will be “recycled” back to participants. The proportion received back by each participant will be weighted according to the organisation’s position in a league table to reward more efficient energy users. Future phases of the scheme will, however, restrict the amount of allowances available and these will be sold by auction and traded between participants and third parties and costs may increase substantially.

ARE YOU READY FOR CRC?

Initially CRC will only affect the largest businesses and organisations. Many of those have had their own energy reduction schemes in place voluntarily and may already have the resources in place to capture the data required for CRC. For others, CRC will be a new concept and they may face challenges in collating and processing the data required in time for the 2010-2011 reports. Going forward, businesses will also need to ensure that they plan ahead to budget for allowances that will be required. If an organisation is keen to maximise its recycling payments and to demonstrate its credentials in reducing carbon, it will also need to give some thought to how best to maximise its position in the league tables.

For companies looking to restructure, CRC will be a factor to take into account in the fact finding process. For example, the responsibility for CRC reporting attaches to the parent company in a group but, if a subsidiary would have qualified as a participant in its own right, any sale of that subsidiary will have to be notified to the Environment Agency (the CRC administrator). Apportionments will have to be made between a seller and buyer of a company for energy usage at the time of sale based on ownership at the start and end of a CRC compliance year (April – March).

For those working in the property sector, there is a lot of speculation about how exactly the CRC regulations will be implemented. The Government has provided some guidance but, to date, the detail has been left to the industry to co-ordinate. It remains, for example, unclear how CRC allowances and recycling payments (which are intended to follow organisations rather than the buildings that they occupy) will work in the landlord and tenant sphere.

The regulations will state that energy use will be attributed to the party to the energy contract. In single-let buildings this will usually be the tenant but, in multi-let buildings, the landlord may supply electricity to a building and re-charge this to tenants based on either metered usage or a proportional split. This raises a number of questions – for example:

- Will landlords be able to pass on the cost of allowances that they have to buy for multi-let buildings and, if they do, how will these be split between tenants?
- How will this be reflected in lease documents without adversely impacting on rent review?
- Will the tenants also be entitled to a proportion of any recycling payments available and, if so, how will this be calculated and will either landlord or tenant be able to require this be spent on energy saving schemes?

FINALLY...

The British Property Federation, RICS and the legal profession are currently all consulting on industry views and how to address the issues ahead of the implementation of the regulations. All those involved in the process seem to be agreed on one matter and that is that the scheme needs to be managed consistently in the property management and investment sector in order to be successful.

This article offers general guidance, it reflects the law as at December 2009. The circumstances of each case vary and this article should not be relied upon in place of specific legal advice.

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