

EAG LEGAL BRIEFING	Notes
Carbon Reduction Commitment	<p>When it takes effect in 2010, the Carbon Reduction Commitment (CRC) Scheme will require non-intensive energy users to purchase emissions' allowances. These allowances will then need to be surrendered commensurate with energy use. Intensive energy users will be covered by the CRC Scheme in relation to their energy usage from core sources that are not already covered by the EU Emissions Trading Scheme.</p> <p>Organisations whose total half-hourly metered electricity use is greater than 6,000 MWh in the calendar year 2008 (<i>which equates to an annual electricity bill of approximately £500,000</i>) will be within the CRC Scheme. They will need to register as CRC organisations in early 2009. There are expected to be approximately 5,000 initial firms registering, and they include all the well-known retailers and quite a lot of landlord organisations as well. Within a corporate group, the highest UK parent will be designated as the CRC organisation, and it will have responsibility within the CRC Scheme for emissions associated with the energy consumption of all its subsidiaries.</p> <p>Businesses will be included in the CRC if they have at least one meter settled on the half-hourly market – and its total half-hourly (HH) metered electricity use is greater than 6,000 megawatt-hours (MWh) between 1 January 2008 and 31 December 2008. Qualification for the scheme is based solely on HH electricity usage. However, once the scheme starts, those affected will need to monitor and report all their energy use emissions from all sources (all electricity, gas and other fuels), except for transport emissions, emissions covered by the EU ETS and emissions covered by Climate Change Agreements. (The Government is recommending that organisations monitor and report their total energy use emissions from October 2009.)</p> <p>CRC organisations will need to buy emissions' allowances from the CRC Scheme administrator (which will be the Environment Agency) equivalent to their estimated future carbon emissions for the forthcoming scheme year, and surrender those allowances according to their energy usage. During the introductory phase (the first three years), CRC organisations will be able to buy allowances from the scheme administrator at a fixed price. The Government estimates that this will add approximately 15% to the cost of energy at the outset.</p> <p>From 2013, participants will need to buy their emissions' allowances through auctions. After the first eighteen months, during which different timeframes apply, revenues achieved by the auctioning of allowances will be recycled back to participants, based on their ranking in a league table. The league table will be based on performance against a rolling five-year baseline of the organisations' emissions. From the Government's point of view, the system is revenue-neutral, although the timing of the recycling payments means that the Government will be holding six months of auction revenues at all times, on which it will retain the interest.</p> <p>The rationale behind the CRC Scheme is that although it will involve additional administration, it ought to lead to lower energy bills overall as organisations compete to rank higher in the annual league tables by reducing their energy consumption.</p> <p><i>Leases after the CRC scheme has been introduced:</i> The organisations that will need to include the energy bills in their calculations of their energy consumption and hence emissions are the "counterparties" to the energy contract i.e. the people who pay the bill. Similarly, the recycling payments will be paid to those people. In a case where a tenant pays his/her own energy bills for the leased space that it occupies, then neither the landlord nor that tenant is affected by the matters raised within this briefing note. However, in a situation where a landlord who is a CRC organisation pays the energy bills for a building and charges the costs to the tenants (either directly or through the service charge), the energy associated with those bills will have to be reported to the scheme administrator by the landlord as part of its organisation's overall energy consumption, and it will be responsible for buying and subsequently surrendering allowances to cover the emissions associated with such energy consumption. So where a building contains one or more tenants that do not pay their own energy</p>

bills, or contains common parts (or both), it will be necessary to develop a structure to enable the landlord and the tenant to take account of the CRC Scheme.

There are generally no provisions in typical modern institutional leases that would allow landlords to pass to the tenants the costs of buying emissions allowances and other administration associated with the CRC Scheme. Even if landlords could claim that (for example) the “cost of electricity” is sufficiently wide to cover the cost of emissions’ allowances, that is unlikely to take into account the landlord’s administrative costs, and how any recycling payments are to be addressed.

It would be time-consuming and not cost-effective for every lease negotiation to have to involve discussions of how the CRC Scheme is to operate in relation to the particular building – particularly since those negotiating the lease are unlikely to be familiar with the minutiae of the CRC Scheme. Accordingly, there needs to be a set of model clauses that can be incorporated by reference into new lettings, with no (or minimum) discussion between the parties.

Existing leases: There are generally no provisions in typical modern institutional leases that allow for the passing through of costs associated with compliance with the CRC Scheme, or indeed of recycling payments back to tenants. Even if landlords could claim that the “cost of electricity” is sufficiently wide to cover the cost of emissions credits, that is unlikely to cover the recycling payments or the administrative costs. Some landlords will try to recover the cost of allowances from tenants under existing provisions in leases, but BRC take the view that it is likely the courts will say that existing provisions are not sufficiently wide to allow this. In any case, the property industry does not wish to have individual discussions with all of its tenants about whether the cost of compliance with the CRC Scheme is recoverable, or the inevitable subsequent litigation.

Serious thought will have to be given on how the issue of existing leases is to be dealt with on an industry-wide basis. One initial thought is for the Regulations to contain a default scheme that will provide – in the case of existing leases only – for landlords to be able to charge the cost of emissions to the tenants or to the service charge fund, and for any recycling payments to be distributed to the tenants in the same proportions. It would then be open to the landlord and tenant to agree between themselves an alternative system if they wished, but so long as they did not do so, the default scheme would operate. This is the same basis on which the adjudication scheme within Part II of the Housing Grants, Construction and Regeneration Act 1996 operates.

The BRC is arguing that any default scheme should apply to any lease, whenever granted, in which the parties have not expressly excluded it. The reason for this is that, even in leases granted after the CRC Scheme comes into effect, it will affect only a small number of landlords, and it has to be assumed that landlords who are not affected will not bother to make arrangements in the lease for what should happen if the landlord should become a CRC organisation (either because the CRC Scheme is extended in the future to cover more organisations, or because the building is sold to a landlord who is a CRC organisation).

Accordingly, BRC believes that it is vital that there is a method for landlords to be able to impose on tenants the right to charge tenants for the cost of the allowance emissions, and to refund recycling payments to them, for any premises. If there were no default scheme, then institutional landlords who are subject to the CRC Scheme would not be able to afford to buy buildings containing leases that did not contain such provisions. That would have a detrimental effect on property values and could have a significant impact on the viability and timing of transactions already in the pipeline at the point the CRC scheme takes effect.

BRC is urging the property industry to develop, in conjunction with DEFRA, a model default scheme for leases that will apply to any lease (whenever granted) unless the parties to a lease have expressly provided that the scheme will not apply to it.

CRC timetable - a quick Summary:

	<p><u>At the end of this year:</u> Large booksellers and publishers with HH meters will need to calculate their electricity use based on information provided by their suppliers. If their electricity consumption through these meters is greater than 6,000MWh per annum, the organisation will be covered by CRC.</p> <p><u>Early 2009:</u> the Environment Agency will contact all UK billing addresses with half hourly meters providing them with Registration Packs. BA and PA members in this category will then need to provide information on their total half-hourly electricity consumption in 2008, together with a list of their half-hourly meters, assisted by their electricity suppliers.</p> <p><u>October 2009:</u> CRC Regulations come into force.</p> <p><u>2010:</u> Allowances will be sold to participants at a fixed price of £12/tCO₂.</p> <p><u>2011:</u> The first sale will take place in April 2011. This first sale will be unique as it will be for both 2010/11 allowances and 2011/12 allowances. All subsequent sales / auctions will be for allowances for the year ahead.</p> <p><u>2013:</u> The first capped phase begins, with the auctioning of carbon allowances.</p>
Climate Change Bill	<p>The Climate Change Bill has drifted in Parliament – it is now expected to get Royal Assent in November 2008. The consultation on the secondary legislation needs to be drafted and then consulted on for 3 months – this is not expected to be published until early 2009. The EU will need to consider and approve the proposals. Therefore, any secondary legislation requiring charging is not expected to come into force until the end of 2009 / beginning of 2010. This means that retailers and publishers would have a much longer window within which to reach Ministers' desired 65 / 70 per cent reduction via voluntary measures. In such circumstances the Government would be unlikely to take statutory measures requiring a charge (the Government remains most concerned, we think, with supermarkets).</p> <p>The newly amended Bill has also just been published and can be viewed at the link below. Clause 75 and Schedule 6 in the Bill now relate to carrier bags. http://www.publications.parliament.uk/pa/cm200708/cmbills/129/2008129.pdf</p>
Energy from Renewable Sources	<p>DEFRA, have decided that companies who buy their energy from green suppliers can no longer claim zero emissions for that energy use. This is causing a lot of problems. The BA has made representations to DEFRA inviting the Department to talk about the issue at the EAG.</p>
Energy Performance Certificates	<p>Buildings are apparently responsible for almost 50% of the UK's energy consumption and carbon emissions. Even small improvements to the energy performance and the way buildings are used could have a significant effect on fuel bills. <i>From 1 October 2008, all commercial properties will now require an Energy Performance Certificate (EPC) when bought, sold or rented.</i> Whilst the landlords and occupiers need to provide these when any transactions take place, EPCs are also aimed to help existing tenants/occupiers of buildings to do a health-check on the energy efficiency of their buildings, and also to see where they could be saving money on their fuel bills. The certificate provides a rating of the energy efficiency and carbon emissions of the building on a scale of A to G, where A is the best, and there is also a recommendation report providing information about ways to improve the energy efficiency of the building. The certificate also shows the rating that could be achieved if all the recommendations were implemented. The Government is encouraging owners and occupiers of buildings to act on their EPC recommendations to help cut energy consumption, save money on bills and safeguard the environment.</p>
Environment:	<p>The Scottish Government has produced a consultation paper entitled '<i>Potential Legislative Measures to Implement Zero Waste</i>'. While welcoming the spirit of the inquiry, the BRC in Scotland has</p>

Zero Waste in Scotland	<p>expressed concern over some of the assumptions upon which the Scottish Government's proposals have been based, especially in relation to costs to the sector and the environmental impact. Retailers in Scotland, say the SRC, are already making huge strides in reducing the environmental impact of their operations. The retail sector has, for example, committed to sending less than 50 per cent of its waste to landfill by 2013. The SRC points out:</p> <ul style="list-style-type: none"> • Packaging amounts to only 1.5% of total waste to landfill yet the majority of the zero waste consultation proposals focus on packaging • Packaging regulations already exist. If they are not working they need to be addressed rather than the Scottish Government introducing new legislation • The proposals seem driven by weight rather than the net environmental impact of materials and associated supply chains. •
Environment: BRC's A Better Retailing Climate Initiative	<p>BRC launched in April '<i>A Better Retailing Climate</i>', a sector-wide initiative to tackle climate change addressing impacts in and on retail businesses, working with suppliers, staff and customers, and shaping Government policy and regulation related to climate change. 40% of UK retailing signed up at the launch and the BRC is continuing to recruit new members. The initiative is aimed at supporting actions being taken within businesses by sharing good practice and by identifying and removing regulatory and institutional barriers to progress. BRC's Environment PAG is currently working on the metrics and baseline year data to measure and report progress against deliverables. What concerns the BA is that each of these footprint measurement tools (e.g. The Carbon Trust; Reed Elsevier; The Legal Sector's Alliance; and the BRC) seems to be using different criteria. Far better to have one measurement tool for all businesses.</p>
Plastic Bags	<p>The Government might add an amendment to the Climate Change Bill to permit 'relevant national authorities' to make regulations about charges for single use carrier bags. This has now happened. Phil Woolas [Minister of State, Office of the Deputy Prime Minister] has tabled such an amendment.</p>
Plastic Bags in Scotland	<p>On 23 September, and at the First Minister's Supermarket Summit on 24 September, it was agreed that retailers in Scotland would aim to achieve a 50% reduction in bag use by Spring 2009. It was further agreed that the baseline would be 2006. It was also agreed that the Scottish Government would, as part of its overall Greener Scotland campaign, run a campaign to support work by retailers to reduce bag use.</p> <p>In order to help it develop sensible policies, the Scottish Government has asked if it might be possible for it to find out the:</p> <ul style="list-style-type: none"> • Total number of carrier bags handed out by retailers in Scotland • Total number of carrier bags handed out by stores in Scotland: <ul style="list-style-type: none"> ○ Split by material (e.g. plastic; paper; other) ○ And also showing a split between "bags for life" and "single use" bags. <p>BA Council members with shops in Scotland have been asked if they might be able to provide this information to the Association.</p>
Impact of Direct Marketing	<p>The Publicly Available Specification (PAS) 2020, which has been developed over the past 10 months, is expected to be published in December 2008.</p>
Renewable Energy Tariff	<p>The Renewable Energy Association has been campaigning for the urgent introduction of a simple Tariff mechanism to reward investment in smaller renewable technologies. Such a Tariff simply offers a set payment on each kWh of renewable heat and/or power produced. This now looks likely to happen, with a Tariff possible within one year. However, it is by no means certain this will apply to the scale of technologies suitable for the commercial sector. REA understands the Government is likely to push for a small threshold for the Tariff that would work for domestic users, but which would not help strategic ('community-scaled') developments or large installations, such as would apply to</p>

	<p>an office block or retail park. This would mean that before detailed consultation takes place, the opportunity for a Tariff to apply to larger local renewables will have been ruled out at this stage. A Tariff would, it is argued, offer commercial investors in different renewable technologies on or near their premises a set reward over a fixed period of years.</p> <p>REA would expect investments made under the Tariff to be admissible under the Carbon Reduction Commitment (CRC) and the GHG reporting methodology. The REA is very concerned by the proposed treatment of onsite/dedicated renewable energy under the CRC and in the GHG reporting methodology. Currently these proposals effectively disincentivise investment in renewables by the sector. Yet the commercial sector is potentially a vital investor in onsite renewable energy - indeed many UK companies have been pioneering in their use of renewables - something that should be clearly reflected in the CRC and GHG methodology. The retail sector is particular important as it can bring the technologies directly into the public realm offering wide cultural benefits in the context of climate change. The Tariff would mean that retailers, or retail estate owners, could invest directly in onsite or local renewables. The Tariff would reward not just onsite renewable power from e.g. photovoltaic, wind, microhydro, but also renewable heat and chp. This would therefore also reward the production of renewable heat from biomass/biogas chp or biomass boilers, air and ground source heat pumps and solar thermal heating.</p>
Sustainable Consumption & Production (SCP)	<p>The SCP will have significant impacts on retailers as it is the first step towards regulation. The package includes proposals for:</p> <ul style="list-style-type: none"> • A regulation revising the EU Ecolabel scheme • A regulation revising the European Management and Audit Scheme (EMAS) • A Communication on the implementation of green public procurement • A revised eco-design products directive.
Lords Science & Technology Committee's Report on Waste Reduction	<p>Although the report acknowledges that too much focus has been given to consumer/local authority waste, and not enough on business and industrial waste, many of its chief conclusions focus on retailing and consumer waste. In particular it calls for greater understanding of waste, increased investment in reducing waste and clearer direction of priorities. It also encourages the Government to offer business incentives to switch to more sustainable production where market signals do not support 'doing the right thing'. Fast fashion, unrepairable electrical items and excessive packaging on non-food products all come in for criticism.</p>
VAT Energy Efficient Products	<p>The EU's Energy Tax Directive is proposing to look at reducing VAT on energy efficient products. The BRC is drawing together evidence which demonstrates that a VAT reduction on energy efficient products would result in consumers shifting their purchasing in favour of VAT-reduced products and, as a result, helping to reduce their carbon footprints.</p>
E & OE	Tim Godfray - 29 th October 2008