

Supplementary information in response to the CRC order consultation.

Paragraph 27 of the consultation document states:

“Government reiterates that landlords have the greatest ability to influence a building’s energy consumption”.

CIBSE is deeply concerned that this is being presented as, effectively, government policy. Not only is this view technically flawed, it also contradicts current legislative requirements imposed by government.

The landlord tenant relationship is a complex and difficult one. There are many forms of tenancy, and landlords take a variety of positions on the use of “green” or environmental provisions within leases. Tenants similarly are a very diverse group, with a wide range of views on energy performance and environmental responsibility. As a consequence, the relative influence of landlords and tenants over energy use within rented buildings depends on a range of factors.

A group of property member organisations who collaborate as the Green Property Alliance have previously examined the implications of the CRC for the property sector and produced a Guide for Landlords and Tenants (with a second version issued in August 2010)¹. They also consulted in 2010² on industry views concerning the application of the CRC EES in new leases, in order to determine whether it would be possible to agree industry standard clauses. These would ensure that tenants understood how landlords approach the implementation of the CRC and avoid unintended consequences on property transactions.

It is helpful to view energy consumption in rented buildings as ‘shared’ and ‘exclusive’ consumption.

Shared consumption is obtained by the landlord and may include energy for use in common areas of the building (e.g. atrium lighting). It may also include electricity for tenant consumption under shared, unmetered arrangements (e.g. ventilation, heating or air conditioning from central plant).

Exclusive consumption generally falls into two categories:

- energy procured by the tenant, and separately metered, directly from energy companies, often for special uses such as data centres. This energy use is entirely under the tenant’s control, and will, under the existing arrangements, count toward the CRC responsibility of the tenant; and
- energy procured by the landlord and provided for tenant consumption on an exclusive metered basis. Although the tenant controls the actual level of use of this energy, including intensity of use, hours of operation and occupancy, which all have a measurable effect on the use of the tenant, this energy use will count towards the CRC responsibility of the landlord.

Where energy for exclusive tenant use is provided by the landlord, not only is it largely within the control of the tenant how much energy is used, but the landlord’s influence over that energy use is in law constrained by the 1954 Landlord and Tenant Act, which says that tenants can exclude all others from their premises, including the landlord, save for reasonable access for maintenance and other specific purposes.

Under these conditions, it is clearly quite unreasonable and in contradiction to legal precedent to argue, as paragraph 27 of the consultation does, that *“landlords have the greatest ability to influence a building’s energy consumption”*. On this ground alone, the assertion by government is nonsense – the law actually prevents landlords from influencing recalcitrant tenants!!

Some landlords are experimenting with green clauses in leases³, but the majority of leases are already in place and do not contain provisions which place enforceable expectations on tenants

¹ http://www.bpf.org.uk/en/files/bpf_documents/CRC_Guide_2010.pdf

² http://www.bpf.org.uk/en/files/bpf_documents/CRC_Industry_Consultation_FINAL_-_17th_December_2009.pdf

³ <http://www.betterbuildingspartnership.co.uk/download/bbp-green-lease-toolkit.pdf>

concerning their use of energy (and indeed, requirements on landlords for efficient environmental management of buildings).

In the case of new leases, many who have sought to introduce green clauses into leases have been compelled instead to introduce green memoranda of understanding which are time limited and sit alongside the lease. Such memoranda are, however, unenforceable and dependent on the continued goodwill of both landlords and tenants to ensure ongoing observation of their clauses.

To further add to the complexity of these arrangements, though patterns of energy procurement may vary, the tenant will pay for all energy use associated with the building (save the landlord's own operations on-site). This means that if an energy efficiency improvement is made to a building, the key beneficiary of the improvement will be the tenant. Unless specified in the lease, it is unlikely that the landlord will be able to recover the cost of the energy efficiency investment from the tenant. A corollary of this is that if landlords are unable to pass some or all of the cost of participation in the CRC to the tenant, then the tenant has no incentive to assist the landlord in managing his CRC participation. The withdrawal of recycling payments, although it has removed a number of complexities within the CRC which were an issue in a landlord and tenant context⁴, has raised the stakes insofar as the passing through of costs are concerned.

It is therefore misleading to say that landlords have the most influence over the energy consumption within buildings. As well as being contrary to the basic "polluter pays" principle, it belies the complexity of the patterns of energy use, control and procurement within those buildings. Given the usual rigour and increasing reliance on evidence in the formulation of policy, the inclusion of paragraph 27 is deeply disappointing.

There is another class of de facto landlords affected by the CRC. Local authority participants with responsibility for schools must purchase allowances on their schools' behalf with no means of passing on this cost. With the recycling payments abolished there is no commensurate incentive for schools to take any action to reduce their emissions as they do not have to pay for the allowances. Schools generally account for approximately 50% of a local education authority's emissions so by not addressing this the Government will effectively remove these emissions from the scheme. Government will effectively have implemented a £12/tCO₂ levy on local authorities. In the case of larger authorities this will amount to a sizable levy, we understand that for Lancashire it amounts to £1.8 million.

The success or failure of the CRC in terms of rented non domestic buildings depends critically upon finding appropriate ways to incentivise energy efficient behaviours within the existing constraints of leases and the Landlord and Tenant Act, reaching across the landlord and tenant divide to influence both parties to act appropriately in reducing their use of energy.

If DECC really believes paragraph 27, then why has DECC undertaken significant efforts to improve the energy performance of its headquarters building in 3 Whitehall Place? If "*landlords have the greatest ability to influence a building's energy consumption*" then DECC should have displayed their Display Energy Certificate, which had a G rating in 2008, and promptly issued a ministerial statement condemning the landlord for the appalling waste of energy in the building. They certainly should not have embarked on a programme of improvements to the building and a campaign of behavioural change with the staff to achieve a better DEC rating. And if it's true that "*landlords have the greatest ability to influence a building's energy consumption*", then CIBSE speakers must stop congratulating DECC and using it as a case study of a model tenant for its improvement in the performance of 3 Whitehall Place, since it clearly isn't down to the tenants, it must all have been achieved by the landlord, because that is what government policy states! Furthermore, all the behavioural activity should be investigated by the public accounts committee as a significant and misguided waste of public funds.

We have laboured this point, and used the excellent and exemplary progress in improving energy use at DECC's HQ as an example, in order to underline the error of the statement in paragraph 27 of the consultation. It cannot be stressed too much that energy use in an individual tenancy is predominantly under the control of the tenant. Whilst there are landlords who fail to provide adequate mechanisms

⁴ See section 3 of the CRC Guide for Landlords and Tenants for further details

for tenants to reduce their energy consumption, the issue is far more complex than the one line statement in para 27 admits. In further reviewing the CRC EES CIBSE argues that it is absolutely essential to reconsider the balance of control over energy consumption in multi tenanted buildings.