

Planning and Environmental Law Committee response to the Department of Energy and Climate Change consultation on The Green Deal and Energy Company Obligation

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The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response in respect of the Green Deal and Energy Company Obligation has been prepared by the CLLS Planning and Environmental Law Committee.

General Comments

This Consultation and the questions posed by it raise practical policy issues in relation to the details of the Green Deal and ECO policies that are to be implemented in secondary legislation and under the energy licensing framework.

In light of the technical content and the focus of the Consultation on non-legal issues, we have not responded to the majority of the questions raised, but only those that were particularly relevant to the legal industry and property professionals.

Chapter 1: Assessment

Question 5: Should the current EPC validity period for property transactions be used for Green Deal purposes, or is a shorter validity period more likely to meet the needs of the Green Deal process?

We believe that there should indeed be a shorter, specific validity period for property transactions for Green Deal purposes to seek to ensure maximum cost effective benefit. It would appear to be disadvantageous to the Green Deal if EPC's continue to have a 10 year validity period as they would not reflect advances in technology, the fact that the RdSAP is updated every 12 months or any potential updates of SBEM. There is also a risk that improvements implemented as a result of recommendations in the EPC may not properly be accounted for. We consider that specific Green Deal triggers could be utilised for the requirement for a new EPC, perhaps dependent on the current rating of the property.

Question 6: Do you think that this approach to identifying and assessing non-domestic buildings, based upon the requirements and tools for Energy Performance Certificates, will capture all non-domestic buildings and business sectors for which the Green Deal is relevant?

We understand that the business sectors for which the Green Deal is relevant are (i) smaller businesses; and (ii) larger businesses that need to meet obligations under existing schemes at a lower price (such as under Climate Change Agreements, or the CRC Energy Efficiency Scheme).

The buildings that are potentially not captured in the Green Deal are temporary buildings, industrial sites with low energy demand and stand-alone buildings with a total useful floor area of 50 square metres. However, under the Green Deal Consultation document, we understand that the Green Deal is to incorporate places of worship and agricultural buildings.

Given the nature of, and the energy consumption at, those buildings that may not be included under the Green Deal, we consider that the present proposed arrangements do appear to capture all buildings and businesses for which Green Deal is relevant although there is no reason why any building should be excluded if it meets the relevant criteria.

Chapter 2: Measures, products and systems

<p>Question 12: We propose that the ECO carbon saving obligation should be achieved primarily by promoting and installing solid wall insulation. Should any other measures be supported, and how would these be defined?</p>	<p>We have noted the emphasis in this consultation on solid wall insulation even though it is noted as being a 'relatively novel measure'. The ECO needs to have the flexibility to promote alternative measures, should they emerge, in competition to, or as a result of the poor take up of, solid wall insulation which, of itself, will probably be a major and daunting project for many households.</p>
<p>Question 15: Do you have any suggestions for whether and how we should score, boiler repairs under the Affordable Warmth obligation, such that where repairs are more cost-effective than replacement systems, without significant impact on efficiency, these can be promoted?</p>	<p>As noted elsewhere in the consultation, the Affordable Warmth obligation needs to be focused on where it is most urgently needed and will make the most difference. Where repair would be a more cost-effective measure than replacement then it should be the measure that is promoted, for the benefit of the individual householder and the obligation as a whole.</p>
<p>Question 17: To what extent can existing product lists, such as the list of Microgeneration Certification Scheme compliant products be used as the starting point for the Green Deal products list?</p>	<p>We believe that while such certification schemes can prove very useful as starting points, there is a significant danger if certification schemes do not adapt to recognise new technologies. Innovation must be recognised and rewarded.</p> <p>Our experience from working with start-up technology companies is that the most effective (and therefore, to our mind, the most successful) technologies “break the mould” of existing designs. Unless the certification schemes are sufficiently dynamic and its administrators open-minded, then older, well-established and often less efficient technology, is all that is rewarded, because it is the only technology recognised and certified.</p> <p>We believe this would be disadvantageous to the Green Deal's ultimate goal of improving energy efficiency in buildings.</p>

Chapter 5: Delivering equitable support and tackling fuel poverty through the Green Deal and ECO

Question 31: Do you agree that eligibility for the Affordable Warmth measures should be restricted to households who are in receipt of the benefits and tax credits similar to the CERT Super Priority Group and who are in private housing tenures?

Since the resource for Affordable Warmth measures is finite, it is necessary to focus it on where it is most urgently needed and will make the most difference. The suggested restriction is a sound starting point to pursue this but implementation will need to be monitored to ensure ongoing efficacy and equity.

Chapter 6: Consent, disclosure and acknowledgement

Question 34: Do you think the framework for consent for the Green Deal charge and measures provides effective protection for the parties involved?

Yes, we believe that the framework for consent gives current tenants and owners effective protection (although such measures may prove to be a barrier to the Green Deal, where consent for either measures or the charge is refused or where consenting parties cannot be contacted).

However, we consider that there may be a deficiency in the availability of information for future bill payers/owners. We recognise that there is a disclosure and acknowledgement procedure. However, the framework for consent, disclosure and acknowledgement may not fully consider the position in which adequate consents have not been obtained, but where Green Deal measures have nevertheless, been implemented.

We believe that a requirement to provide further evidence in respect of written consent should be lodged with the Green Deal Provider (at the same time as such consents). For example the lease requiring consent or a Land Registry search (which would highlight owner(s) and tenant(s) for consent).

Whilst we understand that EPCs will be available to the public from April 2012, we believe it would be beneficial for the purposes of consent and disclosure, to allow prospective buyers/bill payers limited access to the register that will contain the Green Deal Advice Reports (which will presumably include the appended written consents and evidence).

We believe that this further, more robust mechanism could be established, in order to prevent the situation where a new owner/bill payer's business or home is disrupted by either having to seek retrospective consent, or by the requirement to remove Green Deal measures (should retrospective consent not be forthcoming). We also consider that this would be beneficial to the goals of the Green Deal as it would aid in preventing energy efficiency measures from being removed.

As such, we have also considered and debated the introduction of a guarantee, which would underpin the Golden Rule and would assist in giving even further protection to the consumer and also increase confidence in the Green Deal.

	<p>We recognise the difficulties associated with a guarantee scheme, but we have concerns about the potential hardship that might be caused without such protection (notwithstanding the consumer protection provisions).</p> <p>As such, we have considered whether some form of a levy, paid on/by each individual accredited advisor, assessor, provider and/or installer could be introduced. Such levy, for example to protect those home owners who find themselves in a position where no retrospective consent can be obtained. In this instance we can certainly see the benefits in a “one stop shop”. However, this will clearly not be appropriate in all cases.</p> <p>Such arrangements are also common place in many professions as a means of protecting client/customer interests.</p> <p>In the first bullet of paragraph 22 of this chapter we suggest that reference should be to the wider concept of 'owner of a property' rather than referring solely to 'freeholder'.</p>
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Chapter 6: Consent, disclosure and acknowledgement

Question 35: What is the best way to draw the future bill payer's attention to the acknowledgement wording?

In order to draw the future bill payer's attention to the acknowledgement wording, the method of disclosure first needs to be addressed. Under paragraph 41, page 144 of the Consultation Document, concern is expressed that Green Deals will not be disclosed, damaging confidence in the Green Deal, in the event of non-compliance with the EPB Regulations.

We consider that a more robust method to ensure disclosure of a Green Deal charge is necessary.

The two further mechanisms suggested under paragraphs 48 to 50 of the Consultation Document may prove to be inadequate. The first mechanism, utilising the Local Land Charges register may be ineffective, in the instance where the Local Authorities do not hold such notifications. Given such uncertainty, a search of the Local Land Charges Register may not aid the landlord in discharging its duty to disclose. The second mechanism, although useful as long stop for disclosure, in the event that no disclosure or acknowledgement has been made, the future bill payer will have no option but to pursue the dispute procedure.

Given these issues, we believe that a more robust way to ensure disclosure would be achieved by requiring that all Green Deal charges are registered with the Land Registry. This could be effective, given that the charge remains with the property, not with the original improver.

The requirement to register the Green Deal charge with the Land Registry (and thus, the duty to disclose), would still sit with the landlord/licensor/transferor, as envisaged under the Consultation Document. Registration with the Land Registry (coupled with disclosure of the new EPC), should therefore satisfy such duty. This should not add any significant burden to the Land Registry, the solicitor (or landlord/transferor/licensor) registering the charge or the solicitor making enquiries (for example, for a buyer). We believe that this would help to simplify the disclosure procedure and in effect make the Green Deal more accessible.

As suggested by the Consultation Document, we consider that an acknowledgement is still a necessary requirement, given practices in the

	<p>residential rental market, where greater awareness needs to be established as parties often operate without advisors.</p> <p>We consider the best way to draw the future bill payer's attention to the acknowledgement wording, is indeed to incorporate this within documents such as the lease/licence/sale agreement. However, given the need for greater awareness, the documents may need to make clear on the face of them, for example, utilising a warning on the front page, that they contain an acknowledgement by the tenant/buyer/licensee that they are consenting to the Green Deal charge. Such documents could also include an annex with an example of what an energy bill will look like with the Green Deal charge (assuming this is itemised separately). We consider that this will improve access and public understanding of the Green Deal, enhancing its ultimate goal.</p>
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Chapter 6: Consent, disclosure and acknowledgement

Question 36: What will property professions need to do to assist with the effective discharge of the disclosure and acknowledgement obligations? If property professionals assume a duty to discharge these obligations on behalf of property owners, should they face the same consequences as the owners, where they fail to do so?

We believe that registration at the Land Registry will assist property professionals with the effective discharge of the disclosure obligation. As set out in our reply to Question 35, such registration would put a duty on, for example, a solicitor to register the Green Deal charge.

Indeed, we believe that the benefits of registering the Green Deal with the Land Registry are two fold in respect of property professionals. Firstly, the seller's solicitor registers the charge, which discharges the seller's duty to disclose, in addition to provision of the EPC. Secondly the buyer's solicitor who will have a duty to the buyer (under the solicitor's retainer), will search the Land Registry as part of the conveyancing process, meaning that there will be two layers of protection for a client utilising a solicitor.

Public access to EPCs will indeed aid property professionals in the disclosure process, but also heighten awareness of the Green Deal. As a further point, where a future bill payer requests further information, (which is envisaged to be the future bill payer's responsibility under paragraph 54 on page 148 of the Consultation Document) the ability to give the future bill payer (subject to instructions from the client) access to certain aspects of the Green Deal Assessment Report on the relevant register.

We believe that property professionals should not face the same consequences as property owners, where they fail to discharge a duty under the Green Deal. There are already adequate safe guards (including regulation by the applicable authorities) in place to ensure that property professionals discharge their various duties to their clients, under their respective retainers. We consider that solicitors will develop standard clauses relating to the Green Deal in their retainers, where applicable.

Chapter 8: Payment collection

Question 49: Do you agree with the proposed level of the annual administration fee? If not, please give reasons for your answer and, if relevant, provide additional evidence of likely cost impacts.

We would comment, in relation to paragraph 34 of this chapter, that the collection resource is expended whether or not the Green Deal charge is successfully collected. Introducing a contingency fee here would seem inequitable in penalising electricity suppliers for factors which will normally be beyond their reasonable control.

Question 50: Do you agree with retaining the existing £200 arrears limit (including Green Deal repayment arrears) for pre-payment customers with a Green Deal plan? If not, please suggest an alternative limit with appropriate supporting evidence.

If the arrears limit includes Green Deal repayment arrears, the effect will be to reduce the available amount of 'other' electricity arrears currently permissible, which may introduce new hardship. If the arrears limit is to include Green Deal repayment arrears we suggest that a small uplift in the limit would be appropriate. Without any supporting figures we suggest an arbitrary figure of £50 such that the Green Deal inclusive arrears limit is £250.

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