



SCOTTISH LAND COMMISSION
COIMISEAN FEARAINN NA H-ALBA

Tenant Farming Advisory Forum

**Minutes of the Meeting of the Tenant Farming Advisory Forum (TFAF) held
online on Thursday 9th July 2020 at 2pm**

Present:		Actions:
Dr Bob McIntosh	Tenant Farming Commissioner	TFC
Sarah-Jane Laing	Scottish Land & Estates	SJL
David Johnstone	Scottish Land & Estates	DJ
Christopher Nicholson	Scottish Tenant Farming Association	CN
Angus McCall	Scottish Tenant Farming Association	AgM
Andrew McCornick	NFUS	AM
Gemma Cooper	NFUS	GC
Alistair Henry	Scottish Government	AH
Fiona Leslie	Scottish Government	FL
Jane Mitchell	SAAVA	JM
Andrew Wood	RICS	AW
Jon Robertson	Agricultural Law Association	JR
Sarah Allen	Scottish Land Commission	SA

1. Welcome and Apologies

TFC welcomed everyone and confirmed that Jane Mitchell would attend for SAAVA in place of Ian Austin. There were no other apologies.

TFC welcomed Fiona Leslie who has taken over as head of the Ag Holdings Branch at SG. Fiona explained that Jen Willoughby had moved post and that she would be leading the team pending a restructuring process.

2. Minutes of the last meeting – 16th January 2020

The Minutes were agreed, and the actions dispatched/discussed as below.

Agenda Item 16.01	Action	Comments/Completed/Further action required
4 TFC Update	SA to circulate invitation to mock mediation event to members.	Event postponed due to Covid; to be rearranged early in 2021. SA to circulate new date once re-arranged. Members who are directly involved in the event or booked as participants will hear directly from ALA. JR confirmed that the event had been heavily subscribed, and places were being held over to the rearranged event unless individual participants had requested otherwise.

4	SA to discuss press coverage with SLC coms teams	SA to note with reference to rearranged event
4	SA/TFC to investigate how best to progress ideas on moving the sector forward on the development of arrangements that encourage landlords and tenants to join together in woodland creation schemes on tenanted holdings.	On-going. TFC explained that he had taken part in a Institute of Chartered Foresters webinar on the carbon code and the market in carbon sequestration to consider the opportunities for tenant farmers to benefit from regular carbon sequestration payments for woodland schemes. Diversification regs are not particularly helpful, so other options may be required/preferable. TFC to keep an eye on developments.
5 Review of TFC Functions	All to complete the survey.	Completed
7 Farming business incubators	JML to update members on progress once the concept has been discussed with stakeholders.	Discussions held with stakeholders. No further action at this stage.
8 Availability of farmland	Members to send relevant tax papers to SLC	Papers received from some members. DJ/SJL agreed to send any further relevant information.
8	SLC to look at producing a comprehensive tax paper.	SLC had commissioned a report from Alba Economics on Land & Property Taxation in Scotland. SLC report to be circulated to members once published. Possible presentation at future TFAF meeting. AW asked if stakeholders had been involved. SA thought that the next stage of the work would involve stakeholders.

3. Update from Members

SLE: Move to online working has gone well with good member engagement. Mark Tennant has become SLE Chair with Dee Ward as Vice Chair. DJ to continue as SLE representative on agri holdings.

NFUS: Has set up a Covid helpline. Some increase in access issues and rural crime. Spike in amnesty enquiries before the deadline was extended.

RICS: AW like others has been working effectively from home. There is likely to be some impact of lockdown on estates, particularly those heavily reliant on fishing and shooting. Reports of an increase in fly tipping in gateways and forest accesses due to local authority sites being closed. From RICS perspective there has been an increase in activity around valuation clauses to secure money and the banks' view on uncertainties and lending issues. The backlog of transactions and registrations by Registers of Scotland (being temporarily closed) is having a catastrophic impact on the property industry, which may turn out to be long term. The furlough and private business support schemes had worked well, but there may be further hardship for the leisure sector.

ALA: JR highlighted how working remotely had proved to be more efficient than travelling into the office each day, and like others would be considering how the benefits could be taken forward into

new ways of working. Business hadn't slowed down with properties being bought and sold during lockdown and tenancies starting and ending. JR confirmed that RoS had been a problem but was open to sasines transactions from today (9 July). ALA meetings had been held by Zoom, the Bulletin has moved online and the website is being used more. This could have happened before now, but lockdown restrictions have speeded up progress.

STFA: CN confirmed that fly-tipping, crime and access issues such as leaving gates open had been on the increase. Amnesties are being completed but delays in replies was likely to lead to more Notices being issued. Rent reviews had generally been shelved at the May term as per TFC advice, but it is becoming increasingly difficult to get comparables. Some tenants are having to wait 6 months to a year or more after the date of quitting to get waygo payments. This problem could increase as more LDTs come to end; tenants need to know in advance what finance they have to set up somewhere else. Looking to the future – support schemes are an issue particularly carbon capture if tenants are unable to benefit. AgM reported that a tenancy being let on Bute had attracted over 30 viewings.

SAAVA: JM reported that lockdown had not had a large effect on farmers in SE Scotland to date. A bigger issue was the lack of land for young farmers and slow movement in the tenanted sector. She hadn't come across difficulties with waygo and asked how widespread the issue was.

SG: FL explained that many staff had been redeployed to Covid-related activities such as testing, guidance for shearing, seasonal workers and economic recovery work on skills and training. One option being considered is a scheme to support the required upgrading of tenant farming housing stock by 2027. An Equality Charter for Agriculture is also in development.

In response to the issue around timely waygo payments, TFC suggested that although there is no legal obligation for the landlord to deal with waygo until 6 months past the waygo date, a TFC Code to encourage early discussion may help. Those with amnesty agreements will be in a better position but valuations are still required and any dilapidation claims need to be considered. It would be better if all these issues could be addressed before the tenant leaves.

Action 1	TFC to look into whether a Code of Practice regarding waygo negotiations would help alleviate the issues raised.
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TFC suggested that Agenda Item 7 on Rent Reviews was taken next.

7. Rent Reviews

AH provided some background to the current situation, highlighting that complex discussions had been in progress for over 10 years culminating in a comprehensive report from Savills in 2019. The stakeholder group had been influential in progress but had not met for some time. Lawyers have not progressed the legislation and have been tied up in Brexit-related work since Jen Willoughby last wrote to them in March. Following consultation with stakeholders the Cab Sec took the decision to defer taking forward the 2016 provisions due to the unknown impact of Covid and Brexit, not wanting to disrupt good relationships in the sector, and given that rents are fairly stable. The Cab Sec asked to speak with STFA prior to announcing any decision. The outcome of that discussion was that AgM was to set up a working group of people not previously involved, to report back to the Cab Sec.

AgM explained that he had expressed concern to the Cab Sec at a decision being held in abeyance for 12 months, effectively delaying implementation into 2023. In STFA's opinion it isn't fair to keep people hanging on for so long, particularly when having to deal with the implications of Covid and leaving the EU. Tenants and landlords need the ability to adjust costs in line with declining profits. AgM couldn't see this being achievable under the current system and had suggested an independent fresh look at current stumbling blocks in implementing the new provisions. AgM expressed the view

that the 3 or 4 areas that are causing problems are not completely insurmountable if viewed with a fresh look; and suggested that 1 or 2 people could look at it again instead of a group.

AgM also suggested that rent disputes required better resolution mechanisms – a step between the TFC and the Land Court, perhaps compulsory mediation prior to the Land Court.

TFC asked members what they thought about making the 2016 Act work.

SJL and DJ said that they were unclear what a new group would bring to the table as lots of experts had already been involved and the details already analysed. They disagreed that the stumbling blocks could be sorted out by different people. They expressed concern about the time and money already spent on trying to implement the legislation. SLE is committed to making the existing legislation work and support development of a new Code and the use of ADR. DJ thought that bringing in another group would create more uncertainty and could create undeliverable expectations.

GC expressed concerns that the stakeholder group had been asked for their opinion, yet this had been dismissed. She sought assurances about how a new group would operate but was not convinced spending more time on this would resolve the issues or bring anything new. NFUS members were split on the issue, some would like to give the new system a chance whilst others felt the old system could be made to work. AM asked for more information about how a group might operate, including the terms of reference, who would be appointed (and by whom), and who would get to sign off the findings. He said it was difficult to consider something that we don't know anything about.

AgM agreed that they would need to come back with more detail on the group's function.

TFC encouraged members to consider not how the group might operate but the principle behind it. There was little point in considering group membership etc if there was no agreement on the need for the group.

JM stated that further postponement would delay progress and suggested that if a solution was possible it would already have been reached given the amount of work that has been put into it. In her opinion there were too many variables involved in the proposed system that made it unworkable. She confirmed that SAAVA were against developing the new system and thought that it would cause more animosity in the sector. She agreed that greater use of ADR would help those who find themselves in dispute over rent.

AW thought that the issue had been blown out of proportion. There are not many rent review cases put before the Land Court each year and was concerned about increasing confrontation. He agreed that there are so many variables in the new system that it would rack up huge professional costs, not help relationships in the sector and it would lead to rent reviews being process driven. In his experience most people like to agree a sensible approach over coffee, regardless of the legislation.

JR said that ALA had not been involved in the stakeholder group but could see that lawyers would be making money out of disputes if the new legislation was enacted. He felt the worst aspects of the Moonzie rent review had been taken forward in the 2016 Act and that it seems unworkable and unduly complex.

CN referred to the situation in England where there is no problem with the productive capacity element of rent reviews. Rent reviews in Scotland similarly need to be able to accommodate the ups

and downs of agricultural profitability, but noted that average TIFF has been fairly stable since 1997/8 with no real drivers for rents to be reduced. The open market system relies on evidence that is hard to get and other factors such as marriage value complicate comparisons. In the last few years CPI has been used more than then the underlying legislation which shows how ineffective the law is.

CN thought the issues are not insurmountable. Budgets have always been a part of rent reviews and use readily available resources that anyone can use. Economic changes and differences in profitability between sectors can be taken account of in budgets, whereas comparable rents don't have all the necessary information to enable them to be truly comparable. Farmers understand budgets, are used to preparing them, and they are more transparent than using comparables. He thought that the current 1991 provisions and current guidance are unworkable as profitability is not linked to CPI.

FL asked members whether they believed the current system was unworkable and whether that was due to the legislation, and/or whether they felt the 2016 Act was not deliverable. Discussions on rent have been ongoing since 1998 and she suggested that we should be aiming for a transparent simpler system that people can work through themselves.

AM agreed that productive capacity should form part of rent reviews and also agreed with AW that it is best to sort it out at the kitchen table and make it Brexit proof, etc. A simple solution to the legislation doesn't exist.

TFC suggested 2 options: An FBT-type approach that could take account of anything that seems reasonable or the new 2016 provisions that are more formulaic.

DJ questioned whether there was evidence of CPIs working badly and whether the system was being abused. TFC had helped in defusing the situation. The existing system isn't broken and tenants could serve notice to ask rent to be reduced.

TFC said that he had updated the guidance in 2018 but thought that a new Code of Practice would help. He had held off developing a new Code whilst the new provisions were being worked up.

AgM thought that the status quo was not an option. There are difficulties in getting comparables and this hadn't been helped by the 2003 Act. To abandon the 2016 legislation would be very disappointing to all tenant farmers. A new system is needed, one based on productive capacity. Having someone have a fresh look might help crystallise minds; it may even say the 2016 Act is not going to work.

GC suggested that tenants don't always understand how their proposed rent has been arrived at and a transparent rent register may help in making information more readily available.

TFC explained that rent reviews had not to date been a big issue in terms of his casework, but where issues had arisen it had been to do with comparables. He suggested that a Code could look at how to address that.

SJL agreed with GC in that confidentiality around comparables was an issue and the problem with a rent register was that people would want to access it but would not want their own data included. She suggested that the sector is not in the same position as it was in 2014, when there was no TFC and amnesty. She thought the current system could be improved.

AgM suggested that Section 13 would need 2 major changes – to be able to compare like with like and an insistence on complete transparency in open market rents. To move away from use of the open market would be a major step forward.

TFC suggested that not everyone supported the principle of a new group and suggested AgM go back to Cab Sec and say that the issue had been thoroughly explored and there was no appetite for it.

FL suggested that members come up with a workable way forward. A rent register could be considered, perhaps anonymised by sector and tenants persuaded to participate for the benefit of the sector.

DJ thought the 2016 legislation was flawed and wanted to move on and make existing legislation work. He asked what would happen to the provisions in the 2016 Act.

FL explained that the section of the Act relating to rent reviews would simply not be enacted. In time it could be repealed but it was not necessary to do that within any given timescale. She would need to bid for any parliamentary time to introduce primary legislation in the next session by January 2021.

SJL suggested that improvements to S13 would not need new primary legislation.

DJ asked what evidence was there of the problem and AW also asked about the scale of the issue as he was fearful of thousands being spent to remedy half a dozen disputes a year. TFC guidance had made a huge difference in terms of engagement and he didn't personally see it as a major issue.

AgM stated that most rent reviews happen without fuss, but a failsafe backstop was needed for those that don't. No-one wants to refer to the Land Court as the costs are disproportionate to the gains, and tenants therefore feel pushed into agreement. He thought that there were 15-20 difficult rent cases at each term date. These should be referred to a Code but people won't make a formal complaint as it might impact on their relationship.

DJ suggested that the TFC Codes have changed how people think and act.

AgM agreed as he used to ask the Land Court how many cases had crossed their books, and over time this has come down to virtually zero. He suggested that S13 is flawed in that as it is based on an open market that doesn't exist, and information presented on comparables with no evidence could be quite intimidating.

TFC summarised, seeing that the discussion had veered away from the 2016 provisions to re-working the S13 system. He thought it preferable that rents should have some relationship to the earning capacity of the holding and that a rent test should be able to cope with the implications of a downturn in profitability. He suggested investigating how productive capacity could be adequately incorporated into the existing system and asked members whether they were opposed in principle to a productive capacity test, or whether they thought productive capacity should be an element? Budgets are used when cases do advance to the Land Court, so earning power isn't divorced from rent reviews. As there is clearly a role for use of budgets in S13 he suggested that perhaps it should be given more prominence and/or used as a sense check.

FL said that there was a ranking of evidence to be considered in S13 but these were in not in listed in any particular order when the legislation was drafted, however the Land Court gave more status to those aspects that are higher on the list.

JM suggested that a Code should be put in place with better ADR available in disputed cases. Time and resources would be better spent making more tenancies available.

CN acknowledged that the provisions were required mostly for secure tenants.

AM thought that the provisions available now could be tidied up and people would become happier with the process.

TFC suggested that FL go back to Cab Sec and say stakeholders had discussed the issues and there was no real appetite to open discussions on the 2016 Act but all would work together to make the current system work and maybe suggest legislative change in the future.

AgM thought there was still merit in an independent look at the situation, to see that fairness is done.

SJL suggested that the Savills report had already done that and the majority opinion was not to revisit old ground.

AW agreed that we have had an independent review, why do it again?

CN questioned how you could have a fair rent test without using productive capacity.

AgM suggested a substitution of S13 with the 1986 AHA test.

AgM and CN agreed that if productive capacity and related earnings could be built into S13 then all well and good, but CN expressed concern that the underlying law may not accommodate that or not give it enough status.

TFC summarised that the general feeling was that budgets should have more importance; and as the legislation does not preclude use of budgets, he would investigate. Ultimately if that doesn't work, we could go back and change legislation.

FL said that SG would need an evidence base for abandoning 2016 Act.

TFC suggested that the 2016 Act sits where it is and there is no need to repeal it, whilst we can see if S13 can be made to work.

DJ suggested that stakeholders were going to make progress on this they need to work together and not conduct discussions via press articles.

TFC thought that members could sign up to that principle.

Action	TFC to draft Code of Practice on existing rent provisions and where possible to give more prominence to use of productive capacity/budgets; include use of CPI during negotiations and use of ADR. Circulate to stakeholders.
	FL/AgM to go back to Cab Sec to say that it's been explored but there is no appetite from wider stakeholders to re analyse 2016 rent provisions either by a

new group or independent expert, but in the short term all want to work together to try and make the current system work.
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4. Update from TFC

SA introduced the paper that summarised TFC activity from April 2019-March 2020. Casework remains steady, with the now usual annual peak in the autumn and a noticeable rise in contacts in January following the joint Cab Sec/TFC amnesty reminder in December 2019. Most contacts are still from tenants (73%) with most enquiries being about the Amnesty.

In response to a question from AgM, SA explained that the mock mediation event would be rearranged in early 2021 as the venue (Battleby) had been closed for the rest of the year. AH asked whether regional events had been considered. SA explained that they had but due to the level of input required from a significant number of participants it was felt that a central event would make best use of everyone's time. She explained that the event would be filmed and the edited film would be available for regional promotion.

5. SG Review of TFC functions

SA introduced the paper and members were invited to discuss the recommendations. JM said that it was important to consider the TFC powers in their own right, separate from the person having that role. SJL asked for clarity on recommendation (iii) extending the TFC remit to cover joint ventures. TFC explained that this was for consideration only at this stage and the recommendations do not imply that they will happen.

6. Land Matching Service

GC explained that 130 people had registered to date in a ratio of 4 seekers :1 providers. Ian Davidson had been busy since lockdown and was hoping that 3 matches would progress to agreements. The website had 577 new users, spending an average of 3mins 20 seconds on the site, most coming through the seeking part of the site. AH asked how many come back after registration, GC said she would ask the website provider if that was possible to ascertain. Biggest issue is that there is a lack of providers.

8. GDPR & comparable rents

TFC had been in touch with the Information Commissioner and would include the guidance about the release of personal data in the use of comparables in the new Code.

9. Relinquishment & Assignment

FL updated members on progress. Still awaiting SG legal opinion on Limited Partnerships. Hope to have the Statutory Instrument in place in late November, but a parliamentary slot is not guaranteed.

There was discussion around whether parties were doing deals in advance of the legislation. AgM thought there was no reluctance on tenants' part and some good deals had been done, but the legislation will help where a landlord doesn't want to make a deal. TFC had been involved in advising parties, but where there was a considerable sum built up in tenant's improvements it might be best to quit the tenancy to get the waygo payment. AgM said that those who had undertaken an amnesty were in a better position, and talk of assignment to a member of the family often brings people to the table. AW suggested that creating an amalgamated surrender figure that included improvements could help tenants with CGT.

CN asked about Sale when landlord is in breach. FL said affirmative legislation is required to enact this part of the legislation. It would be the last to be enacted and would very much depend on Covid and Brexit activity.

TFC said that he must appoint a valuer where both landlord and tenant agreed to relinquishment and would be inviting valuers to apply to be on a panel of valuers.

10. AOB

In response to a question from DJ about Limited Partnership court cases, FL explained that she was unable to comment as the cases were live and awaiting further court proceedings.

AW said that it might be possible to find a volunteer to hold the comparables data as for e.g. rating data was held by the local authority.

AH asked if members could estimate how many amnesty agreements had started due to the extension. CN was aware of 4 or 5 new cases. GC said that she could ask if data was available from the NFUS helpline from 1 June.

Action	Members to send data on new amnesty activity from June to AH
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11. Date of next meeting

TFC thanked members for attending the extended meeting. The next scheduled meeting is in January 2021 but members agreed to be flexible if a meeting would be useful before then.

Action	SA to circulate a date nearer the time
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