



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 27th January 2022 at 2pm

Present:		Actions:
Dr Bob McIntosh	Tenant Farming Commissioner	TFC
Sarah-Jane Laing	Scottish Land & Estates (SLE)	SJL
Stephen Young	Scottish Land & Estates (SLE)	SY
Christopher Nicholson	Scottish Tenant Farming Association (STFA)	CN
Douglas Bell	Scottish Tenant Farming Association (STFA)	DB
Martin Kennedy	NFUS	MK
Jane Mitchell	SAAVA	JM
Mark Fogden	SAAVA/RICS	MF
Jon Robertson	Agricultural Law Association (ALA)	JR
Fiona Leslie	Scottish Government (SG)	FL
Alan Barclay	Scottish Government (SG)	AB
Calum Jones	Scottish Government (SG)	CJ
Sarah Allen	Scottish Land Commission (SLC)	SA

1. Welcome and Apologies

Apologies were noted from David Johnstone, Andrew Wood and Gemma Cooper. TFC welcomed everyone to the meeting, particularly Stephen Young (SLE) and Calum Jones – a law student on placement to SG for a year.

2. Minutes of the last meeting – 27th October 2021

The minutes were agreed.

3. TFC submission to ARIOB & next steps

TFC invited MK to provide an update from ARIOB. MK advised that 2 elements of support were under development – Track 1 baselining/auditing (e.g. biodiversity, animal health and wellbeing, and carbon) to be completed by 2025 and Track 2 support for activities beyond 2025. Information from auditing would be used to inform decisions regarding Track 2 support and provide a baseline against which future activity could be measured. Both would take account of climate change targets, biodiversity and food production; recognise the Farmer Led Group recommendations; be compliant with the Internal Market Act and the Subsidy Control Bill; align with EU policy where practicable; and be based on activity rather than occupation of land.

In response to questions MK informed members that Track 1 proposals will be published in the next few weeks. He advised that farmers would be incentivised to take part in auditing and a uniform approach and standardisation of data would be very important. He advised that AgriCalc was being

developed to retain ICC compliance and would likely be the standard auditing tool, recognising that others, Arla, Nestle etc., will continue to have their own auditing systems. It was recognised that AgriCalc may not be perfect and all carbon codes were not yet published but auditing needs to progress. Communication is going to be important given that there is a wide discrepancy in starting points – some farmers were already producing their own reports and others hadn't started. If incentives did not persuade people to take part in auditing regulation may be required at a later date.

A standardised baseline audit (score cards) for biodiversity is also under development and again this would help inform decisions moving forwards. It was recognised that a single/wholistic approach to baselining biodiversity, climate change targets and food production is important, to capture scenarios where for example an increase in cattle numbers would increase short term methane emissions but positively contribute to biodiversity and food production.

MK acknowledged that there wasn't the capacity in terms of support for every farmer to undertake a carbon audit in the next year, but there should be within 3 years.

It was recognised that carbon trading does not regulate businesses buying carbon credits – they are under no obligation to reduce emissions prior to/as well as offsetting and land-based business were therefore taking on their carbon burden as well as attempting to address their own.

MK confirmed that a competitive environmental scheme (EACS or similar) would be part of track 2 measures and that 50% of support payments were likely to be in the form of direct area payments and 50% targeted at other activities, whereas area payments in England and Wales are being replaced with introduction of the Environmental Land Management Schemes (ELMS).

In relation to Recommendation 4 in the TFC paper

That the Scottish Government urgently commissions a review of the implications for the tenanted sector of a developing natural capital/carbon market, with a view to identifying any legislative changes needed to ensure an equitable ability of landlords and tenants to benefit from this opportunity.

SJL suggested that that income is only one element to be considered and should include everything that goes with entering a long-term agreement. TFC agreed and confirmed that the intention of the recommendation was to include contingent liability and contractual agreement.

4. Rent Review – new legislative proposals

FL introduced her paper on proposed changes to rent review legislation and invited formal comments to be returned to her by 15 March. She acknowledged that further work was required around repairing tenancies and housing issues, but this shouldn't prevent development of the proposed changes.

There was discussion around the meaning of productive capacity and it was broadly agreed that this should include not only food production but all earnings including support schemes, subsidies, environmental activity and carbon trading. TFC suggested that it would be what the total holding can earn rather than the physical output. CN suggested that this would be similar to farm tenancies in England. MF highlighted that there is a difference between earnings and economic potential and definitions needed to be clear.

There was discussion as to whether consideration of economic conditions in the next 3 years was sufficient timeframe and may need flexibility. Members generally agreed that 3 years makes sense as it also follows the same timeframe as rent reviews. FL suggested that any timescale must be agreed by both landlord and tenant.

SJL asked what could be done to increase availability of comparables. CN suggested that further guidance around “appropriate” or “meaningful” comparables would be useful so as not to use rents which have huge adjustments and hence a huge margin of error.

MK thought the proposals were flexible enough to allow reasonable parties to come to agreement. He suggested that there needs to be an affordable alternative dispute resolution (ADR) process as some parties due to their relationship will not be able to agree.

FL said that she would circulate a paper in advance of the next meeting on ADR which she will discuss in advance with Civil Justice colleagues and TFC. The aim of ADR is to be cost effective, transparent and unbureaucratic.

Action 1	FL to circulate paper on ADR in advance of next TFAF
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In relation to housing TFC asked whether housing regulations would be clear in time for drafting of the Agri Bill. FL replied that housing targets were ambitious and would be costly and the impact of the cost of improvements was complex and being compounded by energy prices and living costs. Housing proposals are moving rapidly and the tenant farming sector shouldn't be left behind, but targets for the sector should be achievable.

SJL referred to the consultation A New Deal for Tenants and suggested that the impact on tenancy terms would need to be considered including the impact on tied housing where it is proposed to provide security of tenure beyond employment. FL said that concerns on the implications for the agricultural tenanted sector had been raised and encouraged members to respond to the consultation with evidence by 15th April deadline.

Action 2	All to consider response (to relevant sections) to A New Deal for Tenants - draft strategy: consultation - gov.scot (www.gov.scot)
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FL indicated that it was unusual for Parliament to repeal legislation and members may be invited to provide evidence during the Committee process to support the repeal.

FL advised that the paper was not for sharing but members may wish to share with their own relevant groups and committees. FL asked that members put in writing to her who they were sharing the paper with internally.

Action 3	Members to inform FL about circulation of the rent review paper in their organisations and to respond by 15 March 2022
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5. Securing Tradeable Carbon Credits in an Agricultural Holdings Situation – An Interim Guide

Following discussion at TFAF in October, and with the continuing developing interest in carbon trading, TFC had drafted an interim guide to explain the requirements in tenant farming situations and invited members' comments. The main message in the interim guidance is that there is no alternative to the 2 sides agreeing a way forward to first earn carbon credits and then either retain

them or sell them. At present this could be possible to earn £20/t so could amount to considerable income.

MF suggested that the debate around carbon should be decoupled from forestry and forestry should be used to illustrate broader principles. TFC highlighted that only woodland and peatland codes were in operation at present hence the focus on these in the guidance.

CN said that some in England are already receiving payments for sequestration of carbon in soils. Contracts are for 5 years which seem appropriate for the tenanted sector, could this happen in Scotland and would landlords be able to prevent tenants from taking up such projects if they had tenure beyond the 5 year contract? This would be particularly important if a landlord won't engage or disagrees. He also provided an example of a dairy farmer required to plant 0.25ha trees/year as part of their milk contract and suggested that tree planting should be allowed at a small scale without consent.

MK suggested 5% of a farm should be plantable without consent. There was a discussion about whether small scale planting requires to be agreed with a landlord as a diversification project. JR advised that it was not common for a trees to be planted under diversification provisions and with reference to the legislation JR confirmed that it is possible for a tenant to plant trees according to the definition of agriculture in the 1991 Act "the use of land for woodlands where that use is ancillary to the farming of the land for other agricultural purposes". TFC suggested that in CN's example of the dairy farmer it would be possible to plant trees. TFC said that he would amend the interim guide accordingly.

Action 4	TFC to amend the interim guide on securing tradeable carbon credits to include reference to possibility of planting without landlord's consent where use of land for woodlands is ancillary to the farming of the land for other agricultural purposes.
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FL explained that her team were tasked with addressing equality of opportunities in access to schemes and would welcome comments on Just Transition Activity. It was agreed that anyone should follow up with comments to the TFC.

Action 5	Members to pass any comments on addressing/providing equal opportunity for access to future schemes to TFC, who would assimilate and pass on to FL.
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SJL thought the guidance was useful as there was a lot of noise around the issues, and that it was helpful to articulate the limitations for landlords to resume. She suggested that it wasn't always sensible to attempt to shoehorn new ways of working into old legislative systems and perhaps new land use/farm business tenancies might be more fit for purpose and futureproof. Current legislation may no longer reflect how we (want to) let land.

FL advised that there was an intention to develop a new land use tenancy for inclusion in the Agri Bill and she would bring a paper back to a future TFAF to discuss what might be in scope and its purpose. SJL suggested that it should not be too prescriptive.

Action 6	FL to bring a paper to TFAF for discussion on development of a new land use tenancy.
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MF asked about the work from Andy Wells' (CES) group, who had been looking at a framework to address matters regarding tree planting. TFC advised that a framework would be useful and that the

work had been picked up by SLC. SY advised that CLA and TFA in England were also looking at agreements which may be helpful.

JM suggested that there would be tax implications if holdings were totally wilded. SY said there was a general lack of knowledge about carbon trading and suggested that FAS step up activities providing information on how carbon credits work.

6. Game Damage – summary of member responses & next steps

TFC introduced the paper about the impact of intensification of sporting activities. In his experience some issues were addressed using the TFC Code of Practice and Memorandum of Understanding but he had dealt with several cases where there had been no resolution.

MF expressed surprise that this was an issue as he wasn't aware of it and there is a process to claim for damages and negotiate. He thought the problem is more likely related to the relationship between the parties and the lack of an effective dispute resolution process. He suggested further guidance and communication coupled with effective ADR procedures.

MK suggested that every farm is different and there is not a formula that would suit all. Any loss of income (e.g. inability to take second cut of silage) should be reflected in the rent. MF confirmed that this capacity for adjustment exists at present.

TFC said that with deer there is a way to address the issue and he had been directing people to NatureScot's Deer Management Officer. Pheasants were more of a problem, not a widespread issue but where it does happen damage is difficult to quantify and it was causing considerable angst.

SJL suggested that the routes available for resolution should be reiterated.

CN explained that it was very difficult for a tenant to cull deer on a tenanted holding; deer easily move into the safety of neighbouring woodland where the tenant has no right to shoot. Problems were exasperated where the shooting tenant was a third party unconnected to landlord or tenant, and when they didn't live in the community.

FL suggested that sporting tenants are likely to be insured through BASC and a more formal engagement with them might result in raising the issues in terms of compliance with good practice. She suggested that standardised methods of assessing damage might be possible given NatureScot's experience in determining damage by geese. She also suggested that any amendments to current legislation could be included in the Agri Bill, for example what constitutes notification to the landlord – to prevent landlord saying that they didn't have time to inspect.

It was felt that this needed further thought and guidance as the issues are only likely to get worse with more tree planting and increases in deer numbers.

SJL suggested raising the issues at Rural Environment Land Management (RELM) and Aim to Sustain meetings.

Action 7	SJL to raise issues regarding agricultural tenancies at RELM and Aim to Sustain meetings.
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7. SAAVA Survey on Relinquishment

JM provided an update on the survey that SAAVA/CAAV had issued to members to help estimate the numbers of relinquishments being negotiated privately.

9 replies had been received indicating 27 relinquishment discussions had been initiated by a landlord and 48 by tenants. Reasons for considering relinquishment were given as lack of successor, lifestyle, and realising that value falls as age of tenant increases. Obstacles to negotiations were given as reconciling expectations, and most respondents did not think that the introduction of the legislation has resulted in more discussions regarding relinquishment. Private negotiations were being pursued rather than the statutory route as it provides more flexibility in the timing and process, tax and costs. As expected, some negotiated deals included transfer of house and land. Once the tenancy had been relinquished some land was being re-let and some being kept in hand and some of that was to be used for forestry development.

TFC thought the results accorded with what members expected. Of 2 Notices of Intention to Relinquish received by the TFC only 1 was proceeding to date. Most activity is therefore outwith the formal route and it was good to hear that many are moving to agreement.

CN pointed out that some tenants have difficulty finding out/agreeing the extent of their lease which is important for rent reviews as well as relinquishment. He wondered if there could be any guidance provided.

JR agreed that there would also be serious consequences when the prt b register was abolished as the register currently requires a map of the tenancy as part of the registration process.

TFC thought this would make a good subject for a future Blog and would give it some consideration.

8. Update from TFC

SA introduced the paper noting that the first final order had been issued by the Land Court in relation to Amnesty cases. Most of those that hadn't reached agreement were still under negotiation.

CN asked about mediation and SA advised that no mediations had taken place under the scheme last year, adding that there was some interest but sometimes one party would agree to mediate but the other wouldn't. She advised that she is working on a paper that describes the process and lessons learned to those who might be considering mediation. This paper was being circulated to pilot scheme participants for their comment and endorsement.

9. Member updates/AOB

SJL suggested that SG housing colleagues might be invited to a future meeting of TFAF

CN said that he was advising tenants that fitting smoke alarms was the responsibility of the tenant if they had a PLA or an MLDT that specified that the tenant is responsible for renewals/improvements, otherwise it was the responsibility of the landlord. In relation to rent reviews he said that there continued to be difficulties in accessing comparables, which would be particularly important with the rise in CPI. No one is enthusiastic about giving consent for use of their rent figures and he asked whether consent needs to be from both landlord and tenant to use as a comparable.

TFC advised that he had asked keepers of GDPR but they had not provided a specific answer. SJL suggested that a landlord couldn't use the data without the tenant's permission but was unsure if a tenant needed the landlord's consent. JR thought that consent would apply both ways. It was agreed that this should be given more thought in relation to rent review proposals.

CN raised an issue regarding recent storm damage. A tenant has to wait 3 months to make an urgent improvement after issuing notice letter to landlord. He wondered whether a tenant could have improvement recognised if arising as a consequence of emergency.

JM suggested that the tenant could put in a quote for the work which the landlord could forward to their insurance broker. It was agreed that this would be a sensible way to proceed if the landlord engages. CN referenced Andrew Thin's (2013) guidance that recognised the consequences of emergencies and asked that this might be considered in future guidance.

TFC advised that there is provision for a landlord to make emergency repairs but not the tenant who is usually the one feeling the full impact of the damage. FL advised that the legislation could be looked at in terms of balance.

MF hadn't come across the issue but advised that the landlord would have insurance obligations and loss adjusters may well invalidate landlords claims if a tenant carried out emergency repairs.

FL informed members that the new skillseeder website was live for searching training and development opportunities www.skillseeder.com

10. Date of Next Meeting

The next meeting would normally be in July 2022, however it was agreed that a topic specific meeting on housing would be valuable in April/May. SA and FL to liaise with housing colleagues on when might be most effective. FL advised that in person meetings with stakeholders were likely to take place from February onwards.

At the close of the meeting DB welcomed the reappointment of the TFC on behalf of TFAF.

List of Actions

Action 1	FL to circulate paper on ADR in advance of next TFAF
Action 2	All to consider response (to relevant sections) to A New Deal for Tenants - draft strategy: consultation - gov.scot (www.gov.scot)
Action 3	Members to inform FL about circulation of the rent review paper in their organisations and to respond by 15 March 2022
Action 4	TFC to amend the interim guide on securing tradeable carbon credits to include reference to possibility of planting without landlord's consent where use of land for woodlands is ancillary to the farming of the land for other agricultural purposes.
Action 5	Members to pass any comments on addressing/providing equal opportunity for access to future schemes to TFC, who would assimilate and pass on to FL.
Action 6	FL to bring a paper to TFAF for discussion on development of a new land use tenancy.
Action 7	SJL to raise issues regarding agricultural tenancies at RELM and Aim to Sustain meetings.

