



SCOTTISH LAND COMMISSION
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Has the Introduction of the Fixed Duration Tenancy Saved the Tenanted Sector in Scotland?

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Introduction

The Agricultural Holdings (Scotland) Act 2003 introduced the fixed duration tenancy and I thought it might be interesting to look back on nearly 20 years' experience of the operation of the fixed duration tenancy, to reflect on the extent to which that introduction has arrested the decline in the area of agricultural land that is let, and to consider where we might go from here in the future, given that current Scottish Government policy is still to encourage the development of a vibrant tenanted sector.

The Decline of the 1991 Act Tenancy

Just to recap: in the period up to 2003 the area of land tenanted was in freefall. Between 1982 and 2003 the area reduced by about a third and following the introduction of the 1991 Agricultural Holdings (Scotland) Act the rate of decline appears to have increased, no doubt due in part at least to some of the new measures introduced by that Act.

The Need for Action

It was clear the something needed to change if a viable tenanted sector was to be maintained. Landlords were voting with their feet by getting out of 91 Act tenancies wherever possible. The reasons for that are well known and remain valid today. The secure nature of a 91 Act tenancy, the rights of succession and the pre-emptive right to buy are just some of the reasons why landlords have shied away from 91 Act tenancies. Successive legislative changes are perceived as having altered the nature of the contract that landlords thought they had entered into by granting a secure tenancy and the fear of further changes that might alter the balance of rights and responsibilities of landlord and tenant, to the detriment of the landlord, is clearly still an issue that concerns many landlords.

In particular, the prospect of the introduction of an absolute right to buy continues to be of concern to landlords of 91 Act tenancies. Although successive Cabinet Secretaries have given assurances that there are no plans to introduce an absolute right to buy, it's clear that this threat is still seen as real by landlords, perhaps due in part to the fact that I think I am correct in saying the current Government supported the principle of a right to buy when in opposition.

In an attempt to halt or reverse the decline, the Scottish Government responded by the introduction of the SLDT and the LDT in 2003 and by the addition of the MLDT and repairing tenancies in 2016, the latter still to be introduced.

These tenancy reforms aimed to provide a degree of security for tenants, introduce fair maintenance obligations for landlords, provide tenants with an opportunity to diversify and plant trees and introduce procedures to reduce the costs of dispute resolution.

The Current Picture

What's happened since then? Unsurprisingly, the number of 91 Act tenancies has continued to decline steeply. The ability to have a 91 Act tenancy within a limited partnership structure temporarily halted the rate of decline but that route is no longer available and there seems no reason to think otherwise than that the number of 91 Act tenancies will continue to decline until none are left.

In contrast, the number of fixed duration tenancies has steadily increased and because of this the overall decline in the number of tenancies, while that is still the trend, has significantly slowed. The total area of land in fixed duration tenancies now exceeds the area in 91 Act tenancies.

So we've seen an improvement in the state of play but not a reversal. Over the last seven years, it appears that some 245K ha of land in 91 act tenancies left the rented sector and only 194K ha of FDTs entered the sector.

And short-term letting very much predominates. The desire of landlords to maintain maximum flexibility remains strong and the SLDT, with a maximum period of five years, accounts for some 60% of the total number of FDTs. There are no Government figures available on the number of annual grazing lets but I'm sure that the popularity of those will also have increased in recent times.

It's interesting to look at what is happening to tenancies that come to an end. These figures are from the CAAV/SAAVA annual land occupation survey which provides a useful snapshot each year of what is happening in the tenanted sector. Of the 104 tenancies recorded as coming to an end in 2019, 2020, and 2021, 63 were relet (that's about 60%), 11 of the holdings were sold, seven taken in hand, 11 went to some form of contract farming or share farming arrangement, eight to annual grazing lets and four to forestry. And I guess that's fairly typical of what is happening at the moment.

The current Government's Climate Change Plan targets for afforestation, combined with the rapid development of a market in tradeable carbon credits, means that we should expect more pressure for hill land in particular to be converted to forestry and therefore more likelihood of landlords deciding not to renew tenancies where afforestation is an option.

Is Loss of a Tenancy Always to be Regretted?

Dare I suggest that not every lost tenancy is necessarily a bad thing. The Scottish Government estimated that half of the land coming out of tenancies between 2005 and 2015 was due to tenants buying their farms and I'm sure that all of those tenants were very pleased to have had the opportunity to buy their holding.

It's also clear that some have disappeared as a result of amalgamation of holdings to create a single viable holding out of two marginally viable holdings and that has generally been a positive development.

It shouldn't be forgotten too that the Scottish Government's land reform policy includes the aim of greater diversity of land ownership and where a landlord enables some of their tenants to buy their holdings, the result is a contribution to that policy aim.

Some Conclusions

So what would I conclude from this analysis? The introduction of the fixed duration tenancy has kept the sector alive but has not reinvigorated it. The patient is perhaps out of intensive care, but without further treatment, will continue to deteriorate. Many landlords still see letting as a high risk, low return option and where they do grant a tenancy, are clearly reluctant, in most cases, to commit to a long-term agreement.

From the tenants' point of view, there are more opportunities available than would have been the case if the 91 Act tenancy had been the only show in town, but those opportunities tend to be few and far between and the tenancies on offer are generally short term and very strongly competed for.

I think we have to conclude that we haven't yet found the perfect model that provides the best balance of rights and freedoms for both landlord and tenant and which will incentivise landowners to provide tenancy opportunities.

It's particularly challenging for any new entrant wishing to get onto the farming ladder. The [Scottish Land Matching Service](#) is proving effective in matching up those wishing to enter farming and those with an opportunity to offer, be it in the form of a tenancy or some form of contract farming or share farming opportunity, but demand greatly outstrips supply.

In 2015 the final report of the Review of Agricultural Holdings Legislation concluded that: "For the new entrant with skills and good ideas but little capital the prospects are poor, and the inevitable consequence of this is a sector characterised by an ageing demographic and lower levels of industry innovation and competitiveness than might otherwise be the case," and it's difficult not to conclude that this is still the position today.

The new entrant and progressing farmer provisions built into the operation of the MLDT and the Relinquishment and Assignment legislation, and intended to give some help to aspiring tenant farmers, have yet to deliver fruit.

Has England Got the Answer?

It is sometimes suggested that England has got it right with the introduction of the Farm Business Tenancy and the degree of freedom of contract that it delivers. It's certainly true that that introduction has stabilised the situation in England, with the area of land rented staying relatively stable at around 35%. However, these tenancies are generally of short duration, the average being less than five years and tenancies can generally be brought to an end at one year's notice. That is not likely to incentivise tenants to take a long-term view and to invest in the future productivity of the holding. It's clear that the Tenant Farmers Association in England is not happy with the situation and indeed, as some of you will have noticed, Defra has set up a Tenancy Working Group and one of its objectives is "consideration of what policy initiatives will secure the long-term sustainability of tenant farming in England" so it's clear that the current situation is not satisfactory in England either.

The Changing Nature of the Agricultural Tenancy

I think the other important factor in all of this is the changing nature of the agricultural holding and therefore in the nature of an agricultural lease. Some 30 years ago, the tenant's business would have been built largely around standard agricultural activities, but raising income through diversification into non-agricultural activities has become increasingly important.

In the 2019-2020 Scottish Government Farm Business Income survey, income from diversified activities represented 22% of the total income, and the average income of farms with diversified activities was twice that of those with no diversification.

Looking ahead we can see that other, strictly non-agricultural activities will become more important. The current emphasis in the regime of support payments is moving away from primarily supporting conventional agricultural activities to support for activities that contribute to reducing net greenhouse gas emissions, such as tree and hedgerow planting, and for activities that increase biodiversity and help to prevent flooding.

So far it has been possible to accommodate diversification within the agricultural holdings legislation and agricultural leases but I wonder if it's going to get increasingly difficult to fit these new activities into legislation that is primarily designed to deal with conventional agricultural activities. I'm tempted to ask the question – has the agricultural tenancy, as we know it, had its day, and do we need something that is more able to accommodate a much wider range of land management activities?

Some Final Thoughts

Where do we go from here? I'd like to leave you with a few thoughts:

1. The problem is clearly at the supply end. There is no shortage of demand and whatever problems the agriculture sector may have, it's a lifestyle that many people aspire to have. It's not all about large scale agricultural tenancies. Demand for crofts and small holdings, with or without a house, is high too. Perhaps we focus too much on the conventional agricultural tenancy as the answer when the questions are really about how to improve the productivity of our agricultural land and how to create opportunities for people wishing to enter the sector. Partnerships, contract farming, share farming, crofting and small holding agreements and even allotments are all part of the solution for people who wish to own agricultural land but not farm it themselves.
2. But if tenancies are to be a part of the solution, it's certain that the number of agricultural tenancies will continue to decline unless measures are taken to create a greater incentive for landowners to let land. Letting land on other than a very short-term basis continues to be seen as high risk, low return and the alternatives of contract farming, annual grazing lets, etc are seen as safer and more comfortable alternatives.
3. The Irish experience of the impact of using tax relief on income from let land as an incentive is worthy of note and may have relevance in Scotland. Clearly taxation is largely a reserved matter so any change would have to be negotiated on a UK-wide basis but I sense that there may be support for such a move within the other parts of the UK.
4. If it's in the public interest for new tenancies to be created, perhaps there might be a bigger role for the public sector in creating tenancies. Land holding public bodies such as Forestry and Land Scotland have helped in the past by creating starter farms by allocating some space from land bought for afforestation, and that body provides the Scottish Government with a vehicle for buying and holding land and allocating various uses to it. Might be an expensive way of creating tenancies but one perhaps worthy of consideration.
5. There is a pressing need to consolidate, simplify and update agricultural holdings legislation with the aim of providing a single more concise piece of legislation that is fit for purpose and reflects the changing nature of farming and the changing nature of the agricultural tenancy. Another reason for that, if more reasons are needed, is the increasing mismatch between the way that housing in agricultural holdings is treated by the agricultural holdings legislation and the way it is treated by the existing and proposed housing legislation.

6. Any new legislation must take account of the increasing variety of land management activities that will be part and parcel of the future of agriculture. Perhaps we need to be thinking about developing legislation that supports a land management tenancy and a land management lease rather than an agricultural tenancy and an agricultural lease. That, I think, would make it easier for land to be let for a variety of purposes.

*Bob McIntosh, Tenant Farming Commissioner
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