

Tenant Farming Advisory Forum

Draft Minutes of the Meeting of the Tenant Farming Advisory Forum (TFAF) held at the Saughton House, Edinburgh 30th May 10:30

Present:

Fiona Leslie	Scottish Government (SG)	FL
Helen Mooney	Scottish Government (SG)	HM
Peter MacDougall	Scottish Land Commission (SLC)	PM
Douglas Bell	Scottish Tenant Farmers Association (STFA)	DB
Rhianna Montgomery	National Farmers' Union Scotland (NFUS)	RM
Jackie McCreery	Scottish Land and Estates (SLE)	JM
Heather Bruce	Agricultural Law Association (ALA)	HB
James Bowie	Royal Institute of Chartered Surveyors (RICS)	JB
Jeremy Moody	SAAVA/CAAVA	JER
James Muldoon	Scottish Government (SG)	JAM
Hamish Trench (online)	Scottish Land Commission (SLC)	HT
Christopher Nicholson	Scottish Tenant Farmers Association (STFA)	CN
Sarah-Jane Laing	Scottish Land and Estates (SLE)	SJL

Apologies:

Andrew Wood	Royal Institute of Chartered Surveyors (RICS)	AW
Gemma Cooper	National Farmers Union Scotland (NFUS)	GC
David Johnstone	Scottish Land and Estates (SLE)	DJ
Rob Black	TFC	RB
Mark Fogden	Scottish Agric Arbiters & Valuers Association (SAAVA)	MF
Jessie O'Shaunassey	Scot Gov	JO

1. Welcome and apologies.

Members were welcomed by PMD and informed that the TFC was not able to attend the meeting at very short notice. As a number of members would have already been travelling to the meeting it was considered unfair to rearrange at this time. Furthermore it was also considered that there would be sufficient interest in conducting the discussion on resumption and getting an update on the Land Reform Bill Amendments.

Apologies were put forward as above.

2. Minutes of last meeting. (14th March)

The minutes of the previous meeting have been circulated prior to the meeting, no additional amendments were requested.

Minutes will be uploaded to the SLC website.

3. Update on Land Reform Bill

Fiona Leslie talked through the Land Reform Bill, there have been 509 amendments put forward for it. The window for submission has now officially closed. The Bill will be worked through section by section in order therefore it is still possible to have an amendment lodged as long as it is done before that section is discussed in Parliament which leaves potential for additional Part 2 amendments.

Of the amendments, 40 refer to changes to assignation but these mostly relate to language changes. A question was raised about change from child/grandchild to descendants and whether this would give different meanings but this is not the intention. It was felt that the amendments would give a more cleanly worded Bill.

A point was raised regarding rent reviews and it was highlighted that “disregarding for occupation” was absent from the amendments. Members were advised that in order for this to be undertaken an amendment would need to be submitted. **Action – Jeremy Moody to draft a paper detailing why this needs to be included for consideration by the members. (Paper attached)**

SJ raised a question as to whether additional focus on Part 1 could lead to the squeezing of Part 2 or removal altogether. It was confirmed that although Parliament is locked into completing the process by the end of June, due to timescales being confirmed at the beginning of the process, there would be no partial failure. If the entire bill did not get through the bill would fall. It may be possible to concentrate Stage 3 in order to accommodate the timescale.

FL confirmed that provisions had been lodged for the creation of small landholdings and offered to send out the daily list to members if it was useful. Members agreed this would be useful.

Daily lists will still be published on the website. Keep track of numbers of groupings as these will change.

A number of questions were asked about government amendments as follows:-

Rent Review - JM asked for clarity on why the wording was to be changed around the treatment of grant funding. FL confirmed it was a drafting issue – JM contended it may not be a drafting issue as it changes the outcome – different legal meaning – not transferred the wording over. **Action - JM to follow up with an to FL email for clarity.**

Arbitration - CN raised the issue of using short form arbitration for rent reviews and game damage

FL confirmed there is a proposal on the table to amend arbitration act, route of appeal court of session, can share (FL) were going to share in stage 3 but there is time to do so now. **Action - FL to share with group.** A discussion ensued over how to make it function well.

JER – applying the provisions of 2010 Act – Section 17 may not be right route, arbitration can be final and binding. Appeal grounds can be on sheer misdirection

Both parties need to be willing, two parties can do so now but no backstop, CN if rent review dispute, one party can still frustrate with threat of land court. FL need to protect the legal rights of both sides.

FL biggest issue, rent reviews sisted in court and never move anywhere. JER – caught by a time limit for action. Having to give notice of a rent review 12 months in advance may be the cause of problems due to being too long, would 6 months more appropriate?

HB Arbitrations historically grew to become similar to the land court. What JER is suggesting is making more use of professional advice.

This would only be proposed for certain types of dispute, rent review and game damage. Liability would need to stay with the land court. An affirmative procedure is needed to change, amendment to Section 60, 61 and 61A,

The point of dispute resolution is to give people answers, only 3 rent reviews in the last 10 years have reached the stage of being heard in the land court, in all cases the land court split the difference on what parties were proposing. All cost six figures.

CN – can we make default position to go to arbitration? FL no – must still have the right to go to land court. It would be a breach article 6 of ECHR and Article 7 (appeal), you can't drag anyone into it due to this,

HB suggested a TFC code may be appropriate in this instance to take people through the process

It was highlighted that SAAVA did something similar before, but it was undermined as you could take it to land court.

Previously rules round about Arbitration were clear and difficulties still arose, often due to cost

CN raised a point about the use of unidentified comparables in rent reviews. He discussed an example of the same comparable being use by a group of land agents for multiple rent reviews. A question has previously been put to the information commissioner by FL asking whether the information is commercially sensitive, a clear answer was not forthcoming as although business information is not considered commercially sensitive its not clear how this interacts with tenancies which are also home addresses.

FL suggested it may be worth getting information on the amount of information being shared south of the border for comparison?

JB offered come clarity on this point - Need permission of one party and that party has to be the tenant? Yes. The question remains of how to encourage tenants to share their details?

FL confirmed that although it is not the top level of business information, it is still protected information.

JM asked for clarification on the point at which the clock starts in relation to the right to buy, there are concerns over defining what triggers it.

4. Resumption

A discussion was held on the government's amendments which set out the procedure for appointing a valuer to value a resumption. The process allows a landlord and tenant to agree a valuer in the first instance. JM highlighted that at present there is no timeframe outlined for this appointment to happen. It was felt that 28 days was too short to expect both parties to reach agreement therefore a timescale of 42 days was considered more appropriate. If no agreement/appointment was possible the TFC would appoint, it was felt the current NIR timescale of 28 days would be suitable for this to take place.

HB highlighted a loophole where a tenant could serve a notice to quit on receipt of a notice of resumption. There may need to be a limitation as if it were a partial resumption in such cases. So S32ZA(4) needs left out.

Incontestable Notices to Quit would still need to be considered but it was felt that no further amendments were required to allow debate on this at stage 2 as there is an amendment from Rhoda Grant/Mercedes Vilalba which will open the door for debate and it can then be brought back at stage 3.

JM offered to put together an amendment which reflected the majority consensus from last meeting. This will be probing so – can put in amendment of any type and this allows it to be discussed and then brought back at stage 3.

The potential to address resumption for 2003 Act tenancies out with the Ag holdings legislation was discussed and the possibility of addressing the perceived unfairness to those with longer standing tenancies where significant investment has been made.

It was agreed that a follow up meeting would be useful to discuss this option in more detail when the TFC is available.

The issue of individuals signing up to leases without sufficient understanding of the conditions attached was discussed and it was agreed that more could be done to address this problem though making information more available and visible.

The extent of the problem was discussed along with a discussion on whether this was a real or perceived problem. The group was unable to identify how many tenants would be affected and of those how many would be facing resumption. It was discussed that if TFAF struggled to define this group then it was unlikely to be able to be defined in legislation.

JM Potential issues – statutory resumption primarily there to protect the tenant,

If they have signed up to a lease that was silent on resumption, they may not be aware of the statutory backstop.

JM asked whether the problem with the current position on resumptions would be helped if contractual resumption is allowed. For 1991 Act Tenants defence is fraud on the lease but if its statutory resumption it can be "all or part" So fraud on the lease does not apply in the statutory situation. However allowing contractual resumption could help resolve that.

CN confirmed that he was not arguing against resumption but was concerned that tenants are treated fairly. He was thinking of cases where there had been investment in the holding and the tenant was left with an over equipped holding. It was discussed whether there could therefore be a

non statutory solution under other aspects of the legislation such as dealing with improvements. CN notes that this may not get dealt with in the Bill but would need looked at later.

HB highlighted that it may be worth CN asking his Board to consider the potential to benefit a small group versus the greater good, but CN advised his members would not be persuaded by the greater good argument. In any event he believed LDTs are not being offered as landlords now want the majority of the land for trading income and this is why LDTs not being offered. JB noted however that a large number of SLDTs are being offered so this does not stack up with the tax argument.

A lengthy debate was held over whether there is fairness in the treatment of the tenant. Issues such as draconian conditions being applied, the similarities with a declining tenanted sector in England and continued decline of the tenanted sector in Scotland and the underlying reasons for this.

It was agreed that there was a role for TFAF to make sure people are entering into the leases with full knowledge of the implications. A Code of Practice, which forearms the tenant before entering into an agreement would be useful. The organisations at TFAF could all help in ensuring members are informed about the law.

Actions

There was agreement that TFAF should recommend what was agreed with 91 Act tenancies as per the note prepared by HT.

Hold a meeting with the TFC to define the group he believes will be disadvantaged by the resumption provisions and discuss potential solutions through a CoP.

There should be direct engagement by TFC office, as part of developing a CoP, with the older 2003 Act tenants which may be disadvantaged with regards resumption.

STFA and SLE to speak further about a possible amendment on game damage.

5. AOB

Section 177 IHT FL confirmed that positive conversations had been had with colleagues in HMRC and treasury understand the intent in the drafting of this section.

Rent reviews, production capacity and related earnings capacity. 1st includes second. CN believed that CAAV had indicated it does not include REC but this needs checked. FL noted that you would need to make an argument to put forward an amendment and government would need a view from each group. JM need to speak to JER – ask his position. JB to revert with a position

Deer – the deer working group recommendation that that applies to occupiers was not brought forward into the Nat env bill, so this will not help tenants. CN asked whether

something can be done through LRB? FL indicated that if it crossed over into the Deer Act provisions then it needs amendment to the Natural Environment Bill rather than LRB.

Tenant cannot claim compensation still, as they have the right to control. Growing season out of season for control of deer. An option is to control during later in the year, they would not be on the cropping land at that point therefore no ability to control in real terms. It was considered not to be a popular solution amongst those who control deer as many would be in calf.

It was felt that although there was the power to control, they were very limited, the limitations were discussed at length

STFA asked if the wording could be amended to phrase in such a way as to only discount the tenant from receiving compensation where they have the right to control deer across the entire holding. SLE and STFA agreed to discuss a potential amendment to S20 and feed back to the group.

If a sporting tenant was present, they would need the ability to opt out

It was asked if SLE members would be opposed to extending the ability to shoot deer across the whole holding, JM committed to take to members but JM and FL advised this veered into interference with other property rights as shooting rights are a separate interest in land. A tenant could lease the shooting rights. If there was no shooting tenant then landlords may well not have a problem allowing shooting over the rest of the holding but can't be forced to.

The cost to control deer across an extensive hill farm was highlighted as a barrier and a conversation was required where the cost of managing deer control was disproportionate in comparison to the income of the holding.

6. Date of Next Meeting

PM to put out doodle poll for the next meeting – ideally July time but TBC

Arrange additional online meeting with Rob, end of next week,