The Scottish Agricultural Arbiters and Valuers Association

CONTENTS

1. The Larger Picture for the Agricultural Holdings Provisions
2. The Tenant Farming Commissioner
3. Modern Limited Duration Tenancies
4. Conversion of 1991 Act Tenancies to MLDTs
5. Tenant’s Right to Buy
6. Sale Where Landlord in Breach
7. Rent Reviews
   7.1 General
   7.2 Productive Capacity
   7.3 Surplus Residential Accommodation
   7.4 Phasing of Rent Changes
   7.5 Rent Review Notice
   7.6 The Transition to the New Regime
   7.7 Dispute Resolution for Rent Reviews
8. Assignation
   8.1 Existing Tenancies
   8.2 MLDTs
9. Succession
10. Compensation for Tenant’s Improvements
11. Landlord’s Improvements
12. Taxation Issues
   12.1 Inheritance Tax and Capital Gains Tax
   12.2 Interaction with Income Tax and VAT?

The Scottish Agricultural Arbiters and Valuers Association (SAAVA)

SAAVA is the specialist body for those advising and acting for farmers, landowners and other agricultural and rural businesses as well as other interests including government, environmental bodies and lenders.

As a professional body with members acting for such varied interests, our concern is not to promote particular causes but look at matters and proposals practically, considering what will work and what will not. In this, we are conscious that our members will be advising farmers and owners in the years following the outcome of any changes and will need the position to be clear so that advice can be certain and effective for clients to be able to make decisions and spend money on that basis. Equally, in engaging with public policy we would prefer to see measures that are sensibly implementable and successfully promote the health of the industry.

As an arbitral appointments referee, we are also concerned that where disputes happen between parties the mechanisms for them are practical and proportionate, enabling the best answers for the least rancour and at least cost.
Affiliated to the Central Association of Agricultural Valuers we can draw on the wider range and long experience of tenancy and other issues across the UK and further afield.

SAAVA members as individuals will act for tenants, landlords and others with interests in agricultural property. SAAVA’s professional interest is in a system that functions well to achieve the aims of the parties and on which law allows good and secure advice can be given to parties making decisions.

While we could comment on many of the other provisions in the Bill, its range and scope combined with the time available to prepare this evidence mean that we focus here solely on its agricultural holdings provisions as a core area of SAAVA’s expertise.

1. **The Larger Picture for the Agricultural Holdings Provisions**

1.1 A thriving agricultural tenancy sector is important for agriculture to be a successful industry facing present and future economic and regulatory challenges. When the rest of commerce generally rents the premises it uses, it is an unfortunate burden on the cost structure of a sector overwhelmingly dominated by small family businesses for it to carry much of the capital cost of the land that it farms. A good tenancy sector would provide a framework for those with skills to use their financial resources as working capital for the business of farming rather than for owning land, offering the ability for them to grow and change in response to the flexibility demanded by the modern economy.

1.2 Yet the already shrunken Scottish let sector is in accelerating decline, now accounting for only 23 per cent of the agricultural area of Scotland, and a remarkably low fraction by international standards. Only those countries such as Ireland or Finland that consciously broke their tenancy systems have lower figures. Yet a purely owner-occupied agriculture is not a sufficient answer as the heirs of owner-occupiers may not be the best farmers for the challenges of today and tomorrow while the necessary structural changes can only be effected either by the costly process of buying land or by seasonal arrangements and contract farming.

1.3 The Bill’s measures regarding agricultural holdings may not herald a revived let sector. In practice, they might rather serve as a palliative for some of the issues within the area let on tenancies whose security of tenure is entrenched by the Agricultural Holdings (Scotland) Act 1991. They may soothe it in its continued and regrettable decline – it is recognised that that may unfortunately be a necessary policy but it has costs. Not only has the 2003 Act’s introduction of Limited Duration and Short Limited Duration Tenancies not attracted significant new land into the sector but there is little reason to believe that the proposed Modern Limited Duration Tenancy will do so either. As a result, Scottish agriculture may have to look outside the let sector for its future flexibility, using other business arrangements than tenancies.

1.4 Of course, the problems are not solely those of tenancy law. While not directly distorting production decisions, the area-based subsidies of the Single Payment and now the Basic Payment with greening act to freeze land occupation by rewarding the occupation of land. The Scottish adoption of the siphon on without
land transfers of payment entitlements imposes a further handicap on the let sector as half the entitlements will commonly be lost between outgoer and ingoer.

1.5 Nonetheless, tenancy law, the legal framework for letting, is a necessary key to this. If new land is going to come into the let sector, it can only come in volume from private owners. A century ago, 90 per cent of farmland was let but much has since been bought by sitting tenants. What will encourage their heirs, no longer necessarily keen to farm, to let their land? A key question by which to test policy is to consider what measures would attract an aging farmer to let his land rather than continuing to farm it or use other farmers on contracts.

1.6 In our analysis, we are conscious that the present legislation for secure tenancies was last heavily reformed in 1983 (and before that in 1948) and so any new legislation might again last a generation. Representing those who will be advising and acting for both tenants and landlords, we urge that all care be taken to make the new Act practical and certain in its effects, avoiding unintended consequences for people running businesses within this framework.

1.7 With the policy direction for the Bill set, our concern is to ensure that its consequences are considered so that its implementation is practical.

1.8 There are then two last general points:
- any system with complex procedures, as found in much agricultural holdings law, risks creating technical points and traps for the parties, especially when unadvised. In turn these can become points of gamesmanship as advantage is taken of inadvertent or careless errors or misunderstandings. We urge that one principle in reform of the law has to be to minimise these areas and not to create new opportunities for this. As an example, we note below the risks that the detailed provisions for the rent review notice risk such an outcome even though it may be clear that a rent review is desired by the party, tenant or landlord, that served it.
- with this Bill, agricultural holdings legislation will be spread across a yet further Act in addition to the several extant statutes. The Policy Memorandum indicates that other issues from the Agricultural Holdings Law Review Group report are under consideration and so could lead to further legislation still. It would be very helpful to the intelligibility and operation of the system to have a consolidating Act like those of 1949 and 1991.

2. The Tenant Farming Commissioner
Clauses 22 to 34 establish the Tenant Farming Commissioner and how he is to operate. We recognise the Scottish Government’s commitment to this post and look forward to working with the Commission in developing Codes of Practice that will be of genuine, practical and positive assistance to real relationships between tenants and landlords. The resources outlined by the Financial Memorandum suggest that selection of practical and knowledgeable staff familiar with farming and the sector will be important to the success of this post.

3. Modern Limited Duration Tenancies
3.1 Clauses 74 to 78 provide for the future creation of Modern Limited Duration Tenancies (MLDTs) to replace Limited Duration Tenancies (LDTs) again with a
minimum term of 10 years with termination on expiry by the landlord using a similar cumbersome double notice procedure to that for LDTs but otherwise a default to renewal. The tenant can break at will at five years but the landlord only a breach of the lease or the rules of good husbandry. As will be seen, the default rent review provisions will follow those being introduced for 1991 Act tenancies and so exclude consideration of the farmhouse.

3.2 Otherwise, we see few significant changes from LDTs but:
- welcome the flexibility offered over fixed equipment provisions
- are concerned about the inflexibility created by the second period being a further ten years, rather than the present three, both in itself as a rigidity in the system but also imposing a substantial consequence for any failure in following the double notice procedure.

3.3 Reviewing this proposal:
- it will be the framework for those owners committed to letting land
- while perhaps providing a framework of security desired for many tenants’ businesses perhaps especially the core home farm), this is not seen as likely to be attractive to owners who do not now let, including aging farmers considering their options.
- the exclusion of housing for the tenant and his necessary labour from the rent makes it unlikely that many MLDTs will include such housing but rather be land and (where they exist) buildings with such housing as the tenant actually wants let to him on separate residential tenancies. That would drive the process of breaking up holdings well beyond the current natural patterns for farm restructuring driven by economics which anyway see the majority of new lettings now being of bare land.
- as will be seen, in creating a continuing asset with a basis for rent review likely to set the rent at less than market value, this creates a potentially taxable asset for the tenant, even if its value may not be readily realisable for money by disposal.

3.4 We understand the problem found by the Scottish Government is considering the framework for shorter term arable agreements essential to the operation of higher value sectors such as rotational cropping of potatoes and other specialist crops – as well as the general flexibility of the sector.

3.5 It is a curious inflexibility that no letting agreed for a term of between 5 and 10 years can be effective for such a term.

3.6 With s.5 defining LDTs to be repealed, presumably so that no new ones can be created, how are existing ones then governed without a provision defining them?

4. Conversion of 1991 Act Tenancies to MLDTs
4.1 Clause 79 allows Ministers to provide a conversion process with the termination of a 1991 Act tenancy and a new MLDT for at least the same area of land granted to the tenant. This opens the door to the wider assignation provisions available for MLDTs reviewed below and would enable the transfer of the new lease, possibly for value.
4.2 This nature of this procedure is left entirely to regulations of very wide scope to be made by Ministers. The Bill’s wording that the parties may be “deemed” to have agreed this implies that a conversion may be imposed on the landlord.

4.3 While the Clause’s framework for the regulations provide for a period between notice and conversion, perhaps limiting death bed conversions by a tenant without farming heirs, there will be circumstances where this acts to deny the owner the chance to make that land available either to a new tenant or to assist the viability of other existing tenants. There is thus a balance to be judged between the costs and benefits for the sector of this measure.

4.4 Other landlords will appreciate the ability of this measure, where used, to create a defined term for the tenancy instead of the present indefinite (but possibly lengthy) security of tenure under the 1991 Act. That gives a certainty and a framework for estate planning.

4.5 Much of how this works in practice will turn on the regulations.

4.6 By allowing the tenant to create a defined term which may run well beyond the tenant’s death (while the AHLRG suggested 35 years, the Bill leaves the term to later regulations), this surrender and regrant process will have tax consequences for the tenant even if he may not, in practice, be able to realise financial value by disposal through its potential assignation under Clause 86. While more of the issues are set out in Section 12 below, the surrender will be disposal for Capital Gains Tax with the presumption that its value between arm’s length parties will be that of the tenancy received in exchange. The CGT liability will be on the gain over the nil value on the original grant or the value of the tenancy in 1982. This would ordinarily be taxed at 28 per cent as the lower rate offered by Entrepreneurs’ Relief is unlikely to apply in such a case.

4.7 It will be important to ensure that end of tenancy claims for tenant’s compensation and dilapidations between the parties are required either to be carried forward into the new agreement or crystallised at the conversion. Tenants may ordinarily wish to have all such issues carried over so that current tenant’s fixed equipment, subject to its treatment by the new rent review provisions, does not become the landlord’s for rental purposes.

5. Tenant’s Right to Buy
5.1 We approve of the removal by Clause 80 of the requirement to register. This has simply been a bureaucratic complication of the sort that agricultural tenancy law seems to attract to its detriment.

5.2 Further clarification of the circumstances in which the Right to Buy is triggered would be helpful.

6. Sale Where Landlord in Breach
6.1 The power proposed to be created by Clause 81 for a tenant to set in motion a process that could force the sale of the landlord’s reversion is an extraordinary power.
6.2 If this did prove to be a mechanism that could never actually be used then it is better that it should not be in the statute book since having it there would only add to the opportunities for gamesmanship and weaken confidence among those who are or could be landlords of 1991 Act tenancies while misleading those tenants for whom it might appear designed.

6.3 The compensation provisions of the proposed s.38O seem fully warranted.

7. Rent Reviews
7.1 General
7.1.1 Clauses 82 and 83 of the Bill provide respectively for a new basis for rent reviews for 1991 Act tenancies and a similar new default basis for Limited Duration and Modern Limited Duration Tenancies.

7.1.2 The parties are free to agree what rents they like but the dispute resolution mechanism sets out the basis to be used by the Land Court and so would condition behaviour more widely. The Land Court is:
- to determine the “fair rent” for the holding
- while free to consider any relevant evidence, to have particular regard to three factors:
  o the productive capacity of the holding
  o the open market rental value of such residential accommodation provided by the landlord as is deemed surplus
  o the open market rental value of land and fixed equipment provided by the landlord that is used for non-agricultural diversification.

While the AHLRG perhaps saw those as additive to achieve the rent, the Land Court is to have regard to them in its task of finding the fair rent. No factors are yet excluded – in principle, all factors must be available to the Court in its prime task of finding the fair rent. That freedom of judgment is welcome – fairness is not a matter of arithmetic, especially when holdings and their circumstances are so varied while the Court is dependent on the nature and quality of the evidence available.

7.1.3 It is the fair rent for the holding that is to be found, not a fair rent for the specific tenant. That conventionally assumes a hypothetical tenant with general skills, finance and competence and so disregard whether the tenant is:
- in occupation or not
- in a specialist enterprise
- more than competent
- less than competent.

While the Bill implies that basis when assessing non-agricultural uses and surplus accommodation, it does not say so more generally, despite Recommendation 3 of the AHLRG report:

“farmed by a hypothetical tenant (who is an efficient and experienced farmer of adequate resources who will make best use of the land) using the fixed equipment provided by the landlord”.

It is then noteworthy that the Bill makes no distinction as to who has provided the fixed equipment and so has no disregard of (the effect of) fixed equipment provided by the tenant, so making it possible for the rent to be based on the tenant’s actual fixed equipment. If that is to be disregarded, it would be easier professionally if the Bill stated expressly that it is deemed not to be there for the review. Nor does the
Bill disregard the dilapidations or damage caused by the tenant. The rent should not be the less if the tenant has run the holding down.

7.2 Productive Capacity

7.2.1 It is recognised that the Scottish Government wishes to put the holding’s agricultural productive capacity at the heart of the new rent review process. The Policy Memorandum states:

“Under the new test the Land Court in assessing fair rent must, among other things, have regard to the productive capacity of the holding which reflects the underlying public interest in the productive use of agricultural land.”

That is a wider goal of supporting productivity as an objective.

7.2.2 As all farms are individual, it is not a piece of simple arithmetic to identify a holding’s productive capacity and then establishing its economic output. Forcing a farm rent to fit a simple and perhaps retrospective straightjacket would be neither fair nor practical in its results.

7.2.3 The first step is to find the farming system (such as an arable rotation or a particular form of beef enterprise) suitable to the holding with its nature, opportunities, disadvantages and the terms of the lease. That may often be the system followed by the tenant but will not necessarily be so – as where the tenant is pursuing a specialist enterprise for which he, but not others, has an aptitude or where the tenant is, for whatever reason, not farming the holding to the potential that interests public policy.

7.2.4 That done, the productive capacity is the yield and output of that farming system using that holding, as tonnes of barley, numbers of lambs a year and so on. That may be helped by evidence of yields over several years (“rolling yields”) for land of that capacity as well as by knowledge of farming in the area. Holdings are so variable that it is not right to use standard textbook yields or assume that all land in a given Macaulay land class has the same potential.

7.2.5 Having found the productive capacity, values for sales and costs can be applied to the system. Those should be figures relevant to the review date, since the rent set is to run for the following three or more years. Past accounting data is not useful here and could indeed lead to destructive results, imposing rent increases as farming economics deteriorate. It would not be right to judge a rent for Martinmas 2015 on the Scottish Farm Accounts data for years ending in 2011/12, 2012/13 and 2013/14 when prices have changed so much. The easy but potent example is that the milk price is now down by a third on its figure 12 months ago, having fallen from the low 30s pence per litre to the low 20s ppl with no significant attendant decrease in input costs. The volatility we have seen since 2006 has seen similar price movements for cereals and some input costs.

7.2.5 While the economic result of the “productive capacity” seems likely to take production subsidies (such as the beef and sheep schemes) into account, the decoupled subsidies of the Basic Payment, Greening element and the Young Farmer top-up payment of the direct payments regime of the CAP have nothing to do with productive capacity. Access to Rural Development Programme payments would also have to be assessed it the same way. It is assumed that access to such
payments (which may, of course, change substantially with the next CAP after 2019: a point relevant to rent reviews after 2017) will be one of the circumstances of the Land Court to consider in reaching a “fair rent”.

7.3 Surplus Residential Accommodation
7.3.1 Where housing provided on the holding is identified as surplus to the holding’s labour requirement, its value in the holding’s rent is to be assessed on an open market basis.

7.3.2 While both the Policy Memorandum and the Explanatory Memorandum say that this is to disregard the tenant’s residence, the Bill extends this to any accommodation all or part of which is occupied by the tenant of the holding – how many houses can a tenant occupy for this? While understanding the Scottish Government’s aim in this, we hope that the scrutiny of the Bill will avoid possibly unintended consequences. As drafted, the effects appear to include:

- however small or uneconomic the holding is, no account is to be taken of the tenant’s own farmhouse, however large it might be.
- while the farmhouse does not affect the rent, the tenant can then lease out other property he may have.
- two holdings, identical in all respects but for one having a house and the other not, potentially paying the same rent.
- no rent is being paid for an asset that may on occasion involve the landlord in substantial expenditure on renewals
- the interaction of this with the assignation provision could enable the tenant to convey cheap housing to eligible people by assigning the tenancy.
- it is likely to deter including a house in any MLDT on the default rent review provisions

We do not understand how this will work where there are joint tenants, whether all are farming or not, or the tenant is a partnership or company.

7.3.3 When looking at other dwellings which might be considered as part of the rent review, those required by the “standard labour requirement” of the holding are also to be excluded. Even taking it that it will be a function of the assessed productive capacity, using the identified enterprises and their scale, the current conventional figures, are now outdated – those cited in the current SAC Farm Management Handbook 2014/15 were issued in 2004 - and clearly will become more so as time passes and farming practices change. Further, on scrutiny they appear insecure as figures – a point which will matter if they are to bear the strain of this role.

7.3.4 Two practical points then arise:
- many farm staff and their families now prefer to live in villages, away from the farm and nearer facilities. Where they do so and the dwellings are rented out, should they still be considered for this?
- with the increasing use of contractors by farmers, should the labour requirement of enterprises using contractors be considered? The Bill makes no distinction. Only specialists are now likely to have the machinery and other resources for potatoes but they do so on other farmers’ land. If a potato enterprise is part of the agreed rotation but likely to use a contractor/sub-tenant with labour from elsewhere, should that be relevant for this calculation?
If it is, it may create a practical bias for tenants to use more contractors and then let out cottages on which no rent is assessed.

7.3.5 Having identified the surplus accommodation, we are not clear if the Bill provides for the open market rent to be assessed on:
- the right to rent in the property for own occupation (what the sub-tenant would pay)?
- the right to be the sub-landlord of that property, receiving rent but meeting repairs, regulatory requirements and the prospect of voids and letting costs?
That is the actual position of the tenant and the figure might then in many cases be a third of the former figure.

7.4 Phasing of Rent Changes
The Bill proposes that where the Land Court increases the rent by 30 per cent or more, the tenant can ask that the new rent be phased in. If the Land Court agrees that imposing the full new rent immediately would cause undue hardship to the tenant, it can order that the increase be phased in over three years in equal thirds. It seems equitable to have an equivalent provision where the rent is reduced by 30 cent or more. Aside from equity, it could also serve as a practical means to dampen swings in rents in the current volatility of farm economics.

7.5 Rent Review Notice
7.5.1 One of objects of reform should be to remove unimportant requirements that can encourage gamesmanship or confusion rather than focus on real practical issues and assisting the process. Unfortunately, the proposed rules for the rent review notice risk doing just that by being over-prescriptive as to what is required. Such is the level of detail that it would be easy for a party, especially an unadvised one, to make a mistake at risk of invalidating the whole process.

7.5.2 Why does the current rent need to be stated? Is that rent to include any VAT that may apply to it? – rent review case law says it does but that may not be widely perceived.

7.5.3 Why is the notice to state both the rent agreement date and the effective date? The former may be confused by the extra 14 days grace to be given before recourse to the Land Court is lost.

7.5.4 What tolerance is to be allowed to those who make typographic or other errors in the notice while leaving it clear that a review is intended?

7.5.5 More fundamentally, the requirement to set out the proposed rent and the basis for it more than a year in advance risks pointlessly prejudicing relationships. As the present pass in dairying shows, any rent proposed by either landlord or tenant in early September 2014 would now look very silly for a review as at this Martinmas. The requirement risks driving the parties apart to protect their positions lest circumstances change radically. Those who see the trap may wish to make more extreme proposals, those who do not may feel badly treated. No benefit is seen in requiring this unrealistic foresight.

7.6 The Transition to the New Regime
It would be helpful to understand how the transition to the new provisions is to work. If the Bill is enacted next year, notices will have been served this autumn under the current law for rent reviews in Martinmas 2016, possibly after the new Act has taken effect. Will the notice served remain valid, despite not meeting the new requirements? If so, would the review be under the present s.13 or the new Schedule? Notices may already have been served for Whitsunday 2017 while those for Martinmas 2017 could be served before the end of this year.

7.7 Dispute Resolution for Rent Reviews
7.7.1 We believe that the 12 years of experience of the Land Court as the default recourse for disputes over rent reviews has shown that it is not a suitable forum for this and urge the Scottish Parliament and Government to have the confidence they should have in the modernising and practical legislation of the Arbitration (Scotland) Act 2010 intended to make Scotland a leading seat for arbitration. While reasonable people may often have reason to disagree, it is remarkable that only three real rent review cases have reached a determination out of the 20,000 or so possible references when analysis suggests that there might have been between 60 and 150 cases where a third party determination was desired since 2003. Having frustrated parties with sub-optimal outcomes does nothing to help the sector forward.

7.7.2 Arbitration or expert determination is more apt to the issues, flexible in approach and would only cost a small fraction of a Land Court case. At the very least, the Land Court should positively develop such options under its statutory aegis as better suited to the increased focus on the practicalities of farm budgets.

8. Assignation
8.1 Existing Tenancies
8.1.1 Clauses 84 and 85 of the Bill create a right to assign 1991 Act tenancies and LDTs to a defined but large range of “near relatives” effectively providing a means for life time succession within the tenant’s family.

8.1.2 The landlord’s challenges are limited to the assignee’s character, financial resources, training and experience. Give the Policy Memorandum’s clear interest in the productivity of the land, the ability to satisfy the last two points simply by commencing a training course seems seriously inadequate to the objective. It would surely be right to look for such professional achievement as a farmer that would satisfy a landlord having the assignee as an applicant for the tenancy. There is no requirement for the assignee even to complete the course or to demonstrate the practical or business ability that is necessary for future successful farming. With all the challenges facing agriculture it seems strange that simply signing on for a course is the basic condition to gain access to the fifth of Scottish farmland that is let when others who may be much more competent wish to start farming on their account or develop existing businesses that would benefit from the land.

8.1.3 This is the more so since assignation may prove in practice to be a means on smaller units to transfer long term security for cheap housing (the rent would not be based on the farmhouse) to heirs who, with little agricultural interest, then have other farmers do their work.
8.1.4 A more professional test is needed to support the future success of the let sector – and perhaps even its future credibility, especially in the eyes of those who do not find opportunities to farm on their own account.

8.1.5 A practical approach could be to consider whether, were the landlord to be letting the land and the proposed assignee were the only applicant, the landlord would go to the expense and effort of re-advertising rather than take him. The expectation for this should be to accept a tenant who would farm the holding commercially to proper standards of efficient production and care for the environment while keeping it in a condition to enable such standards to be maintained in the future. Such an approach would much more effectively enact the Policy Memorandum’s proper objective for the productive capacity of Scottish farmland and so warranting the legislative intervention.

8.2 MLDTs
8.2.1 A wider right to assign MLDTs would be created by Clause 86, not limited to near relatives. The tests for those who are near relatives are again compromised by the ability for them simply to be met by signing onto a course - the above points again apply. However, where the proposed assignee is not a near relative rather more is said about what is expected but the same more explicit test of public policy expectations is again proposed.

8.2.2 This does inter-relate with the ability to convert 1991 Act tenancies into MLDTs, so achieving a more widely assignable long term interest, possibly for value.

8.2.3 While it is possible that farming estates and larger farmers will find opportunities in this for expansion and so may pay tenants something for their interest in a below-market rent tenancy. Such a facilitation of change could be of benefit to the productive capacity of Scottish agriculture. It will though remain for the market to show how much that payment might prove to be. In practice, it may be that only the larger units will offer enough value to provide the capital for tenant to find new housing and fund retirement.

8.2.4 It seems unlikely that this would offer an effective additional form of security for commercial lenders who are likely to be wary of the consequences of repossession, managing the farm subject to the obligations of the lease and then delivering the onward assignment to another farmer. With typical loans at no more than 50 or 60 per cent of vacant land values, that ratio might be much lower on tenancies whose assignability may do not more than give larger comfort to a lender in decisions it might anyway make.

8.2.5 As the tenant assigning outside his family may have little concern as to who is paying for his tenancy, consideration should be given to allowing the landlord the opportunity of a limited period in which to match the potential assignee’s offer and pre-empt the assignment of an asset in his property.

9. Succession
Clauses 87 to 89 would allow a broader range of near relatives to receive a 1991 Act tenancy, an LDT or an MLDT by bequest. That is likely to mean that the life of the 1991 Act sector is prolonged (and to that extent possibly restraining the usual
processing of economic restructuring) making it important to ensure that the arrangements for this support the most productive management of the land, as desired by the Policy Memorandum. In that it is again concerning that the landlord’s right to object to the successor on the grounds of training and experience can be trumped by that person simply signing on with a course.

10. Compensation for Tenant’s Improvements
10.1 The amnesty mechanism for past tenant’s improvements proposed by Clauses 90 to 95 appears a sensible means of resolving the issues in this area.

10.2 We suspect that there may be a reasonable number of cases where tenants will use this opportunity to establish their position regarding fixed equipment. Within that number there will be some cases where the facts and circumstances mean that there are reasonable grounds for disagreement as to whether an item does qualify as a compensatable improvement. Recourse to the Land Court appears an unnecessarily demanding and expensive way to resolve such disputes, likely to deter many from using it, and we suggest that it would be more practical and effective to provide for these disputes to be referred to arbitration (under the Arbitration (Scotland) Act 2010) or to expert determination.

11. Landlord’s Improvements
11.1 Given the burdens on the landlord to provide fixed equipment we do not understand the vice that this Clause 96 is intended to remedy. We are concerned that this creates a mechanism that may not be needed but which creates another means of dispute.

11.2 If there is genuine problem of landlords imposing fixed equipment on tenants – with the expense and other effort involved - the Policy Memorandum suggests the public interest lies in maximising the future productive potential of the holding.

12. Taxation Issues
12.1 Inheritance Tax and Capital Gains Tax
12.1.1 So far as the proposed basis for rent review is intended to achieve less than a market rent, it creates a profit rent. That is, the tenant on such basis is paying less rent than he would to take that or an equivalent holding in the market. The capital value of that profit rent (rather than a share of the value offered by a surrender of the tenancy) that goes to the value of the tenancy for taxation and other purposes (including compulsory purchase) – see such Inheritance Tax cases as Baird and Walton, compulsory purchase cases such as Anderson v Moray District Council and disputes such as Greenbank v Pickles.

12.1.2 With the present full relief on the agricultural value of agricultural property for Agricultural Property Relief (APR) and on the market value of business property for Business Property Relief (BPR), that may currently mean few issues for Inheritance Tax. However, farmhouses may be in contention as HMRC is increasingly checking if dwellings are actually used as farmhouses and generally identify a non-agricultural value. Changes in those regimes, such as reduction in the rate of APR could open up taxation liabilities for tenants on this score.

12.1.3 That value of the tenancy has consequences on:
- a surrender and regrant, as may arise with the transfer from a 1991 Act tenancy to a Modern LDT with potential liabilities for the outgoing tenant to CGT and the ingoing tenant under the Land and Buildings Transactions Tax (for which, is the same person, the value of the old lease might also be a premium for this purpose).
- an assignation between connected parties where market value will be imputed (even if it not paid), perhaps with a further value where the assignation is in reality of the secure tenancy of a house that stands in at no rent. Again, that disposal potentially attracts CGT.
- as the Scottish farming case, Russell v HMRC, shows, the simple disposal of some farmland does not qualify for the lower CGT rate of Entrepreneurs’ Relief which is only available on the disposal or cessation of all or part of a business. In principle, an assignation or surrender would only qualify if it was all or part of the tenant’s withdrawal from the farming business in question.

12.2 Interaction with Income Tax and VAT? – We are still exploring how the disregard of the farmhouse in the rent may interact with the application of VAT to rents, HMRC’s assessment of the value of residential element of the tenancy for Income Tax purposes and the disallowable fraction of the tenant’s costs relating to that occupation?

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