Written submission from moray Estates Development Company LTD

Land Reform (Scotland) Bill

Moray Estates welcomes the opportunity to comment on the Land Reform Bill. Before commenting on the specifics of the Bill we would make a general observation about the unsatisfactory position of including agricultural holdings provisions in the Bill. Agricultural holdings legislation is already complex and not delivering for the agricultural sector. The outcome of the Agricultural Holdings Review Group (AHRG) work is still being considered and in some respects the workability and impact of proposals is not at all understood. The group produced a suite of measures which they wanted addressed as such, that is, not cherry picked. Yet we appear to have, one has to assume for political reasons, a rush to introduce legislation. As a result not all the measures suggested by the AHRG are taken forward, a number of measures require to be largely implemented by regulations introduced by Scottish Ministers not yet spelt out and there seems a grave risk of rushed legislation making agricultural holdings legislation even more complex and unwieldy. The consequence of this, together with the impression of agricultural holdings being associated with land reform, is a further contraction of the sector as property owners seek other less politically manipulated frameworks.

Part 1

Land Rights and Responsibilities Statement

It would be helpful if the first version of the LRRS could be produced during the passage of the Bill so that the intention of Ministers can be clear. The LRRS will need to draw together a number of other policy statements such as the NPF. We note the recent consultation on a vision for agriculture but what rural Scotland really needs is an overall land use strategy address the challenges and opportunities of all land uses and seeking to explore how the balance of those land uses might sit.

Part 2

The Scottish Land Commission

We have no objection to the establishment of a Scottish Land Commission. We believe the commission could have a positive role to play in the independent assessment of the land use options and strategy for Scotland which would lead to a more informed debate about the challenges and opportunities which exist in both rural and urban Scotland. We consider it important that the Land Commission focuses on land use and the delivery of land use objectives. We would be concerned if the Commission was used as a convenient tool for the promotion of, what are political objectives, of land redistribution.

We are concerned that experience is practical land management is not listed as desirable experience. It is vital that such experience is also drawn upon by the commission and such should be added to clause 1 (a).

The creation of a Tenant Farming Commissioner is supported.
Part 3

Information about Control of Land etc.

We are supportive of transparency in the ownership of land and therefore offer no objection to the proposals.

Part 4

Engaging Communities in Decisions Relating to Land

Whilst we support the general principle it is unfortunate that there is no detailed guidance yet as to how Ministers anticipate this operating in practice. A balance will require to be struck in the guidance between land use activities that genuinely have an impact on neighbouring residents and communities and those which don’t. An excessive need to engage over every day to day management activity is likely to lead to disengagement on the part of both the manager and the community.

We believe the provisions should apply to the party in day to day control of the land in question. Many tenanted farms carry out activities which are of interest to communities over which the owner has no control. In that instance the tenant is the relevant party to engage the community.

Part 5

Right to Buy Land to Further Sustainable Development

We are concerned about a number of elements of this proposal which are not resolved by the drafting of the Bill. These are:

What constitutes sustainable development is not sufficiently defined. It is almost by definition a subjective assessment but a good deal more clarity on the Government’s position is required.

A decision about sustainable development is likely to require a subjective judgement between different land uses. It seems entirely likely that more than one land use could be deemed appropriate. For instance the use of a field adjacent to a community for agricultural production seems entirely appropriate. However it is equally possible that a community could argue that they would enjoy a greater benefit if the land were used to deliver affordable houses. If this met the test it would seem a property owner could, in some circumstances, have their ability to choose between productive land uses severely circumscribed. It needs to be much clearer how such an assessment would be made.

The ability of a “third party” to acquire the property in the place of the “community” seems wholly inappropriate and open to potential abuse. This provision should be removed.

It would seem more appropriate that a clear test would if the owner / manager of the land were in persistent “breach” of regulation which was causing harm to the community. This should also be easier to define.
In the absence of further clarity on the issues above we object to the provisions in the Bill.

**Part 6**

**Entry in Valuation Roll of Shootings and Deer Forests**

We object to the removal of the rates relief currently in place for shootings and sportings. Our own business carries out very little shooting for sport but carries out very significant levels of deer control for the protection of forestry and to allow us to operate a largely “no fence” forestry operation. It is our view that the reintroduction of rates could have a detrimental effect on deer control for woodland management particularly if owners / managers believed exemptions would be available if no activity was undertaken. In addition we would expect a negative impact on shooting activity with the consequential impact on rural jobs often in remoter communities.

The policy memorandum states that it wishes to see parity of treatment with other land uses which is odd given that neither agriculture nor forestry pay rates. It seems more likely that this is a political act, which has little regard to the potential consequences or the very modest levels of net revenue likely to be obtained from collection.

**Part 7**

**Common Good Land**

No comment

**Part 8**

**Deer Management**

No comment

**Part 9**

**Access Rights**

No comment

**Part 10**

**Agricultural Holdings**

**Chapter 1 - Modern Limited Duration Tenancies**

Whilst the acknowledgement of the benefits of a flexible letting vehicle we are disappointed that the new MLDT appears little different to the LDT. It therefore begs the question why any changes are being made to what we already have. An opportunity has been lost to create a genuinely flexible tenancy which meets the needs of an industry which is much more complex and varied in its land uses than in the past.
By way of specific remarks;

- The MLDT remains inflexible as regards term by retaining a minimum period. Whilst we understand the argument about certainty for the prospective tenant there is little to be gained by setting minimum terms which then mean the parties use a non lease structure. The parties should be left to determine their own term and instead the government should explore other incentives to the industry to offer longer terms.

- The consequences of not terminating the lease, with a continuation for a further 10 years, seem quite penal and we’d suggest using the provisions used for LDTs.

- The flexibility over fixed equipment is welcome though continues to be more complex than it needs to be. The parties should just be able to agree what the fixed equipment is without having to use the lease description to define the farm use in terms which rule out the need for equipment.

- We welcome the continued availability of SLDTs though these are only required because of the unnecessary constraint on the minimum term in MLDTs. We also welcome the continued ability to define the rent review arrangements which given the impending mess of the new proposed mechanism will be necessary.

**Conversion of 1991 Act Tenancies**

It seems extraordinary that such a potentially significant proposal is being left to Ministerial regulation and not available for scrutiny at this stage. We repeat our earlier concerns about the prematurity of providing for agricultural holdings provisions at this stage when they are clearly not ready.

Should measures be introduced it is important that the provisions strike a balance between one of the potential objectives, incentivising tenants to retire, and protecting the landlords interest. This balance will largely have to be struck in the period that the converted MLDT will run for. If this is too long then it will run the risk of further intervention by landlords at conversion to remove land from the sector and enhance the chance of a claim for compensation by landlords because of the detrimental impact on their property rights. This impact will be particularly acute for those who expected the farm to return to vacant possession imminently. We would suggest 15 years as appropriate as beyond this term the incoming tenant is unlikely to pay materially more and a short term may diminish the incentive to challenge the policy from an ECHR perspective by landlords.

We would also note at this point that we have not seen any evidence from the Scottish Government that such a measure is required to encourage retirement or whether other mechanisms might be more effective. This is largely because of an absence of research into decision making by older farm tenants who may be deferring retirement. The Future of Farming Paper prepared for DEFRA identified a number of reasons why tenants deferred retirement. These included the maintenance of an attractive “trading” category for taxation purposes and retaining the farm as it represented a cost effective housing / lifestyle choice. Neither of these instances are necessarily driven by need. If these are important factors then it seems
to undermine the social requirement to allow tenants the ability to “sell” a tenancy they were not required to “buy”.

The policy could also run counter to the position that premiums are not paid for farm leases. The acquiring tenant would be doing just that. Could a landlord of a farm coming new to the market do the same thing?

**Chapter 2 – Tenant’s Right to Buy**

We do not accept the premise that the need to register has caused reluctance on the part of tenants to register through a fear of upsetting the relationship with the landowner. Most tenants would expect to be the likely purchaser on sale in any case as the investment market for let farms has evaporated in Scotland and very few let farms are sold as part of a wider property.

The requirement to register provided a useful opportunity to ensure that there was agreement and clarity as to the extent of the holding, the nature of the lease and any other relevant considerations. Having been addressed at the outset issues of fact then needn’t hold matters up later in the event the right is triggered.

The AHRG recommended greater clarity of what ‘proposing to transfer land’ meant. It is disappointing that the Bill does nothing to clarify this. It is essential that sensible workable provisions are drafted to allow owners of land to have preliminary discussions with third parties, which may not initially have anything to do with purchase, without reluctance because of a fear of triggering the tenants’ rights inadvertently.

We would suggest retention of the need to register because of the practical benefits this provides but removal of the need to re-register after 5 years.

**Chapter 3 – Sale where Landlord is in Breach**

It is accepted that this measure is only likely to be used in extremis and in principle we don’t offer an objection to the policy. We would however note that the provisions for the operation of Certificates of Bad Husbandry although require review. They are very rarely used, not because there are no tenants failing to fulfil their responsibility, but because landlords are often averse to the potential negative publicity and the procedure itself relates more to technical farming failures (such as stocking rates) than to more common failures to maintain the farm. I would seem appropriate that both sets of provisions are reviewed at the same time.

**Chapter 4 – Rent Review**

Whilst we accept there has been political pressure to change the basis on which rents are assessed we believe the criticism of the existing provisions was often misplaced and that the implementation of the proposed provisions is likely to lead to greater complexity, volatility and conflict.

It seems extraordinary that the AHWG chose to ignore the conclusions of the experts on the Rent Review Working Group who had only recently reviewed the way in which farm rents were assessed and concluded that the method of assessing rents remained the most appropriate but that further clarity was required as regards how
certain elements were implemented in practice. In addition we are now in a position where a wholly new methodology is proposed without first having assessed its workability and critically what the financial consequences of the approach would be. Having attended the first professionals’ workshop with the Scottish Government to address this point it was clear that this work is barely started and that a number of fundamental problems were identified and not resolved. This seems an almost reckless way to formulate policy.

There is no evidence in the real world of either spiralling rents or the kind of sudden changes which could destabilise businesses. In fact the current system has delivered very stable rents at levels which even the AHRG noted provided no evidence that rents were too high.

Turning to specifics:

- It appears to be intended that the proposed rent should be set out no less than 12 months before the review date. Given that the proposed system is to base the assessment on productive capacity, and therefore a theoretical budget, the data will be substantially out of date before the review date has arrived. Both parties are likely to want to calculate the rent closer to the date in question. Current guidance calls for the proposal 4 months before the review date.

- To assess the mechanism properly key elements such as the definition of productive capacity should be in the bill not left to regulation.

- The AHRG recommended that allowance should be made for any surplus residential accommodation. This is not reflected in the Bill which restricts this principle considerably. Moving to a productive capacity test for small farms could easily produce distorted results in respect of rent payable which may not reflect the lifestyle and residential benefit accruing to the occupant who may well not generate much of their net income from the holding. We propose that the approach proposed by the AHRG be implemented.

- The concept of a “fair rent’ is introduced but there is no provision for what this may mean in practice. Using productive capacity and very low prices from a budget perspective could result in no rent in certain circumstances. Is this fair to the landlord?

- There is no provision for how profit might be split in a budget calculation – we understand this is deliberate. However this leaves one of the greatest points of contention unaddressed. Using the productive capacity / budget approach not only will the parties have to agree the farming approach of the hypothetical tenant, they will need to agree expected yields and prices and then how to split the surplus. The idea that this will be either easier or less contentious than the S13 approach seems naive.

We suggest that more realistic and deliverable improvement to rent reviews would be direct the industry to provide greater clarity and guidance on adjustment of comparable rents – for instance marriage value and scarcity – than the current approach which seems destined to increase rental volatility and potential conflict.
As a test of what the real world will make of the proposed approach we think it highly unlikely that future MLDTs will opt for the default statutory mechanism with the parties instead choosing alternative approaches. Many LDTs actually use the statutory approach which currently exists because it was understandable and produced satisfactory outcomes.

Chapter 5 – Assignation and Succession to Agricultural Tenancies

We are fundamentally opposed to the proposed widening of assignation and succession. The impact is to largely create perpetual tenancies giving landlords almost no prospect of obtaining access to their farm. This is to the significant detriment of the landowners’ interests and it seems highly likely that the policy will either be challenged or compensation sought.

The government have not made clear what these changing social norms are and how many purported cases of hardship are created because succession could not be planned as the tenant wished. We are aware that small numbers of cases arise where a close family member (sibling / nephew-niece) who has been involved in the business has not been able to succeed but it seems likely that specific consideration could be given to how these cases could be addressed without such a fundamental and counter productive change.

The impact of such a step will be further disengagement of landlords from the let sector. The message sent by this step is one of almost complete disregard for the owners’ rights and expectations and is likely to have a profoundly negative effect on their view of the sector as a whole.

It is regrettable that this policy, and to an extend conversion of 1991 tenancies, looks more like an apology for the failure to deliver ARTB than it does a positive measure for the future health of the sector.

Chapter 6 – Compensation for Tenants Improvements

We support this proposal.

Chapter 7 – Improvements by the Landlord

No comment

Consistent with our earlier remarks we recommend the removal of the Agricultural Holdings section from this Bill so that it can be brought forward under a more realistic timeframe. This will allow for a more complete and considered package of measures hopefully included within a consolidation bill to bring much needed clarity to the law in this area. If this is not done we fear this Bill will have exactly the opposite effect on the sector than the Bill purports to have.

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