**Anonymous submission A**

**Agricultural Holdings Bill, submission of evidence to RACCE Committee**

I support the bill amending the Agricultural Holdings Act, and in the interests of grandchildren anticipating succession from grandparents, the bill should be passed as soon as possible.

However, there is a worsening sense for frustration amongst tenants which has recently resulted in heated debate in the farming press. The problems can mainly be traced to inadequacies in the Agricultural Holdings legislation, questionable behaviour by some landlords and their agents towards tenants, and landlords attempting to optimise their positions with regard to asset valuations, taxation and CAP. The current bill is a good opportunity for the RACCE committee and MSPs to collect evidence and consider the need to modernise the Agricultural Holdings legislation: it is now 20 years since the last consolidating act of 1991. Listed below are some tenancy issues which require debate and resolution. Unless otherwise stated, the tenancies discussed are old style tenancies (secure 1991 Act tenancies, including pre 1949 tenancies). There may be over 6,000 secure 1991 Act tenancies in Scotland, but less than 1,000 of the new 2003 Act limited duration tenancies.

1) Investment in holdings

The nature of farming has changed over the last 30 years, and modern farms are now more reliant on machinery and fixed equipment to remain viable. Landlords are reluctant to invest in fixed equipment, and are not required to upgrade or modernise, and in the case of pre 1949 tenancies, many of which continue, have never been required to provide fixed equipment (section 5 of the 1991 Act which covers fixed equipment obligations does not apply to pre 1949 Act tenancies). An average sized family farm probably requires an investment of £500,000 each generation in order to modernise fixed equipment. This level of investment is unlikely to come from landlords and so tenants must be encouraged to make the investments. There are two main areas of legislation which could be modified to encourage investment by tenants:

i) Obtaining landlords consent

The problem for tenants wishing to make investments is that landlords frequently withhold consent, knowing that the only option for the tenant is to apply to the land court. Landlords then use consent as a bargaining tool, such as giving consent but only in return for something else. The only solution here is to remove all grounds on which landlords can withhold consent to ensure that they cannot prevent future investment (including on farm diversifications) by the tenant.

ii) Waygo compensation for tenants’ improvements

Tenants are unlikely to invest if there is any doubt over the compensation they may receive at waygo for their past investments. The 2003 Act was intended to address this issue, but unfortunately it remains a grey area, particularly with regard to write down agreements and the requirement to prove that proper notices were received.

It is worth noting that tenants on pre 1949 leases are likely to have had no investment on their holdings from their landlords since the start of the lease (now over 60 years ago), so all modern fixed equipment has been provided by the tenant. I do not know what proportion of Scottish leases are pre 1949, but of the tenants I have met about a third have pre 1949 leases. In the case of some old pre 1949 leases the tenant may have provided the original houses, cottages and stone steadings, all services, roads, and all the land improvements including drainage and stone removal. These holdings have seen no significant landlord investment since the enclosures in the 1700’s, and poor quality rough grazing of 200 years ago may now be capable, through continual tenants’ improvements, of high value arable cropping such as potato production. These tenant families have carried out improvements which may represent over 50% of the present market value of the farm, but are unlikely to be eligible for compensation at waygo under current legislation due to past write down agreements or missing letters of consent.
The Agricultural Holdings Act assumes that improvements have been made by the landlord, unless the tenant can prove otherwise with letters of landlord’s consent. However, a fairer way, given the reluctance of landlords to invest in the past and now, would be to assume the improvements are the tenants unless the landlord can prove otherwise. At the very least there should be a better balance than the current system for compensation at waygo.

This aspect of tenancy law weighs heavily in the favour of the landlord, in that when the landlord makes an offer at waygo to the tenant for improvements, there is no element of competition as the landlord is not bidding against any other party. If assignation and succession provisions were broadened, then landlords would be forced to compete with other interested parties when a sitting tenant wished to quit.

2) Succession and assignation of leases
The area under secure tenancies in Scotland is continually diminishing, mainly due to tenants without eligible successors being forced to give up their secure tenancies. This land is usually taken back in hand, contract farmed, or re-let on short term leases, and a potential successor (often a nephew or cousin of the departing tenant) is thus denied an opportunity to enter into farming.

If there was a wider class of relatives eligible to inherit tenancies through succession and assignation, and even non relatives if necessary, many more new entrants would be able to make a secure start in farming, and the area under secure tenancies would be maintained.

One stumbling block in this area is landlords’ expectations of eventually taking land back in hand (achieving vacant possession) without the need to pay any compensation to out going tenants for vacant possession. Landlords see that with the existing limited scope for leases to be passed on through assignation and succession, it is only a matter of time before any holding comes back in hand. This long term desire of landlords to obtain vacant possession is much stronger now than 40 years ago due to the huge rises in land values since the 1960’s, and has resulted in some tenants finding themselves in very uncomfortable positions as their landlords resort to any means available to them to bring holdings back in hand. Many current disputes and long drawn out legal cases are a direct result of landlords aiming for vacant possession at any cost.

If this expectation of eventual vacant possession could be removed from the equation, by say broadening the class of people eligible to inherit through assignation and succession, or ring fencing secure tenancies so that there is no prospect of them being taken back in hand, many of the current disputes and poor relationships could have been avoided. The current legislation, which largely originates from the 1949 Act when land values were low, fails to deal effectively with the present situation. To put into perspective, land values prior to WWII were about 15 times the annual rent payable, by the 1960’s not much more than 20 times the annual rent, but in today’s market (hugely distorted from agricultural value by lifestyle buyers, large city bonuses, roll over requirements to avoid capital gains tax, Agricultural Property Relief from inheritance tax etc), land values are about 80 times the annual rent. It is no surprise that many of today’s landlords will go to great lengths and use any tactics to achieve vacant possession, and their secure tenants find themselves in stressful, high pressure situations which previous generations could not have foreseen.

3) Rent reviews
There are two main inadequacies of the current rent review process:

i) Process
The existing land court process of dispute resolution is time consuming and costly, and an alternative method should be encouraged. Currently members of the TFF are working on alternative dispute resolution.

ii) Methodology
From my experience of rent reviews, I have never seen any methodology from landlords’
agents except for the method of asking for a certain rent which they ‘feel is about right’ and threatening legal action if one does not agree to it. Even in the recent court case involving Moonzie Farm, Fife, the court mentioned in its decision the lack of methodology shown by the landlord’s agent, and his inability to demonstrate how he had reached his asking figure. The current methodology of assessing rents is governed by section 13 of the 1991 Act, and is based on an open market rent for 1991 Act tenancies. However, this is no longer practical as there no longer exists a market for 1991 tenancies, and the complex adjustments necessary give rise to widely varying results. Recent RICS/SAAVA rent review open days, where leading land agents attempt to set the rent for an example farm, result in such wide differences in rents from different agents that the difference from lowest to highest is sometimes 100%. No wonder there is so much uncertainty over rent reviews, if land agents are seen to fail in such a non contentious classroom environment.

One solution to the rent review problem would be to review section 13 of the 1991 Act, and develop a process and methodology similar to crofting rent reviews. However, this would be strongly opposed by landlords.

Furthermore, there is growing frustration amongst tenants who are issued rent review notices by landlords who have shown no intention of complying with their minimal landlord obligations, such as removing fallen trees from wood sides and fixing the resulting damage to fences. Landlords continually fail to fulfil their obligations yet continually expect increased rents. **Possibly the easiest and least contentious way to encourage landlords to fulfil their obligations would be to make all rent review notices invalid if landlord obligations have not been fulfilled.**

4) **Abuse by landlords of the tenant’s repairing, and in some cases renewing obligations**

The tenant’s responsibilities under the 1991 Act extend to repairs and in some cases to the renewing of fixed equipment, which is fair enough if the tenant is the sole user of the fixed equipment. However, some fixed equipment is subject to heavy use by the landlord, for example farm roads used by gamekeepers, shooting tenants, estate foresters, and estate staff who may live on the tenant’s holding, as well as shared water supplies, electricity supplies and some buildings that may be used by the landlord: in these cases the landlord should be obliged to contribute to the maintenance of the fixed equipment which he makes use of. **At the very least, the 1991 Act requires modernising so that it is clear that a tenant cannot be forced to bear the repair or renewal burden for fixed equipment which is also used by the landlord.**

5) **Conduct for land agents**

Landlords usually employ land agents to deal with tenants. The recent tactics of some agents have left tenants in shock and can only be described as bullying behaviour which has had a very negative effect on landlord/tenant relations. The TFF guide to good relations is mostly ignored by agents which questions the usefulness of RICS sitting on the TFF. However, they are only acting as instructed by the landlord. There is a recent trend for landlords to choose agents with ruthless reputations at the expense of those agents who are most likely to follow the TFF guide. A code of conduct or system of accreditation for land agents may help in restoring relationships, but the aspirations of landlords regarding the methods used by their agents also needs to change.

It is also worth mentioning the approach of some legal firms when dealing with tenants which is often based on maximising the duration of any litigation in an attempt to maximise the tenant’s legal costs to the point where the tenant’s cash flow runs out. There are many recent examples of this tactic being employed successfully by landlords to achieve, for example, the prevention of assignation or succession of tenancies and increases in rents.

The actions of a few land agents who operate nationwide (and are gradually replacing resident factors), combined with the actions of some legal advisors over the last decade, have damaged landlord and tenant relations to such an extent that it is difficult to see good relationships ever being restored.
6) Absolute right to buy
This is a wide topic and is not just about ownership and rights to occupation, but also about rights to succession and assignation, rights which landlords will attempt to restrict to themselves. Along with many NFUS tenant members, some of whom sit on the NFUS Tenants’ Working Group, I do not agree with NFUS’s assessment of the effects of ARTB. By comparison with Continental Europe where there has been considerable land reform, it is clear that the division of land amongst a greater number of landowners makes for a more vibrant tenanted sector.

ARTB is seen by some as the lasting solution to the current problems in the tenanted sector. However, given current land prices ARTB would be out of reach for many tenants and their situation would be no better than the current one. A more practical solution may be to significantly increase the rights of assignation and succession for tenants, which can only be fair given that some tenant families have made several generations worth of investments and improvements to their holdings. One only has to visit pre 1949 Act tenanted holdings to see how little has been done by landlords since WWII. Unlimited rights of succession and assignation may be a more suitable solution for many tenants, and serve as a means to encourage investment in holdings by tenants. If tenants are not to be given an ARTB, then freedom of assignation and succession may be the only way to maintain a healthy tenanted sector.

A half way measure to ARTB is one which is common in some European countries, whereby the tenant owns the farmyard sites which may contain all the houses and buildings on the holding. This offers many advantages, in particular allowing the tenant to use the buildings (usually provided by the tenant) as security to raise money from bank loans. At present, a bank cannot have a mortgage or security charge over a tenant’s buildings as the current restrictions on assignations would prevent any transfer of the asset to the bank if the bank ever wished to exercise its right to possession of the asset. The current arrangement makes it difficult for tenants to raise loans from banks on the back of their investments in tenant’s improvements. Given that tenants are relied upon to make the investments in fixed equipment, this measure - ownership of farmyards and sites of fixed equipment - would encourage investment by tenants and make the financing of fixed equipment more available to tenants.

7) Retiring tenants and landlords’ expectation of vacant possession
Due to the narrow class of persons able to acquire tenancies through assignation or succession, some older tenants find themselves farming without any successors. Landlords see this situation as a golden opportunity to take land back in hand without the need to pay any compensation to the tenant; they only need to wait until the tenant gives up through ill health or death. As compensation for vacant possession and fair compensation for improvements is unlikely to be forthcoming in such a situation, the tenant has little means to afford retirement and so continues farming into old age. The resulting situation is far from ideal, and one often hears landlords complaining about older tenants with no successors struggling on with farming and so denying someone else the opportunity.

Here are two possible solutions to this problem:

i) The first solution could be to broaden the class of persons able to acquire tenancies through assignation or succession and even include non-relatives if necessary to allow security of tenure to continue, and to ensure a successor to allow a smooth transition from old tenant to new.

ii) The second solution could be to allow the landlord to take the farm back in hand provided fair compensation for vacant possession and improvements have been paid to the tenant. A fair price for vacant possession could be 25% of market value, which is approximately half the difference between vacant and non vacant possession values, and would allow the tenant to retire off the holding.

8) Conflict with game rearing and shooting
As game shooting becomes more and more intensive with ever greater numbers of birds
reared, there arises more conflicts between landlords’ shoots and agricultural tenants. The problems arise in many different areas, and apply to shooting tenants as well as in hand shoots, for example:

i) Crop damage
Reared pheasants are usually released in late August, at the same time most arable farms are starting their autumn sowing. Up to 1000 pheasants may be released in one wood of only a few acres from where they wander to surrounding fields. Crops are at their most vulnerable when germinating and pheasants can do a lot of damage at that stage, particularly so with oilseed rape, peas and beans. At this time of year, before the shooting season starts, it is not unusual to see up to 200 pheasants on a single 20 acre field. Further damage occurs at the other end of the growing season if there are significant numbers of pheasants left after the shooting season, when they have a tendency to live in, feed off, and trample ripening crops.

ii) Damage to fixed equipment
Fences and dykes are often cut or knocked through to allow easier access for guns to reach their stands, or for gamekeepers to access their pheasant feeders. Shoots nowadays may involve up to 40 people (guns, beaters, pickers up) and a dozen vehicles. Such activity every week for 4 months over winter creates significant damage to farm roads and tracks, and any fence or dyke used as a crossing point. It is usually left to the tenant to fund the repairs, as the only recourse at present is to apply to the land court to withhold rent.

iii) Bio-security
Modern farm livestock production, in particular poultry, is required to have a high degree of bio security and good health status which is monitored and audited by DEFRA or the Animal Health Office (SGRPID). In contrast, reared pheasants for shooting are not subject to the same monitoring by DEFRA or SGRPID, yet it is in essence intensive livestock production. Some of the diseases carried by reared pheasants (eg salmonella and Blackhead) create a bio-security risk for farm livestock, in particular poultry. Furthermore, pheasant hopper wheat feeders support large uncontrolled rat populations which would otherwise not be there, and which tend to move into farmhouses and buildings when pheasant feeding stops.

The attitude and behaviour of some landlords and their gamekeepers towards agricultural tenants clearly shows the flaws of the current system, in that the only option for the agricultural tenant is to apply to the land court which landlords know tenants are reluctant to do due to expense and delays, and the practical problem of having to prove the damage has resulted from game rather than other causes. Furthermore, in some cases the actions of gamekeepers appear to be used as a tool by landlords to intentionally obstruct tenants’ interests. Some landlords instruct their gamekeepers to avoid communication with agricultural tenants which demonstrates the desperation of such situations.

Some landlords are considerate in the management of their shoots, but others steadfastly refuse to pay anything towards crop damage; in these cases the tenant is forced, at considerable cost, to adopt his farming to the pheasant population and avoid growing susceptible crops such as beans or oilseed rape.

One solution would be for landlords to require the consent of secure agricultural tenants before rearing pheasants. This would ensure that landlords came to a sensible arrangement with tenants to determine compensation for game damage in order to obtain the tenant’s consent, and would result in a fairer system. Alternatively, tenants could be permitted to control pheasants causing crop damage which might encourage landlords to manage their pheasants more considerately.

There exists a BASC code of conduct for shoots, but it does not cover any agricultural tenancy related issues.

9) New Entrants
New Entrants are unfortunately the body which is not well represented by NFUS and established landowner groups, but is often used as a political football by them. In the last 40
years, the old MAFF small holdings have disappeared and land prices have rocketed, so new entrants outside of established farming families have not had much of a chance. Abolition of Agricultural Property Relief on inheritance tax would help the case of new entrants by reducing land values, but is unlikely to be supported by established farming organisations.

10) Tenants and Agricultural Property Relief (APR)
There have been some cases where a tenant’s estate on death has been valued for inheritance tax (IHT) purposes, and HMRC has attached a significant value to the tenant’s agricultural lease. At present this does not represent a problem to the tenant’s successor, as the full value of the lease is exempted from IHT by APR. However, this may become a serious problem for tenants if APR is ever abolished. Landlords can avoid IHT by transferring the freehold of land to a next of kin, often when still a minor, to take advantage of the 7 year rule and Potentially Exempt Transfers (PET), whereby the land is not subject to IHT and is considered a PET if the landlord survives for at least 7 years from the date of the transfer. This transfer typically takes place when the landlord is still young enough to obtain cheap life assurance for the 7 year period to cover the IHT liability in the event of his death before the 7 year period has passed. In contrast, there is no certainty that tenants will be able to use the same 7 year rule to avoid IHT on the value of their leases as they cannot assign their leases without their landlord’s consent. If APR is eventually abolished and tenants do not have freedom of assignation, then tenants will be at a great disadvantage compared with landlords when it comes to managing their assets in order to minimise IHT liabilities.

11) Limited Partnership Tenancies
Limited partnership tenancies were introduced as a means to avoid the security of tenure that the 1949 Act provided to tenants. Most tenancies created during the 1970’s to 2003 were limited partnerships, often to new entrants at the time, who, now that the contractual period has finished (typically 10 -20 years) find themselves farming on a year to year basis with no security of tenure, and in no better position than tenants were prior to the 1949 Act. Methods of affording greater security of tenure to limited partnership tenants should be explored.

12) Tenant representation
Finally, it is difficult to find tenants willing to represent tenants’ interests, not just because of continual daily hands on farming commitments which prevents most tenants taking time off from their farming duties, but also because of the fear that any tenant who dares to stick his or her head above the parapet will draw unwelcome interest from land agents, factors, and landlords. It is clear that tenants who represent other tenants’ interests by sitting on the STFA board or the NFUS’s Tenants Working Group are often the ones who are singled out and pursued to the land court by landlords who clearly want to put tenants off the idea of taking part in any debate regarding the tenanted sector. For a similar reason it is hard to persuade tenants in difficult and unpleasant situations to allow their problems to become public, as they rightly see that doing so will only make their situation worse. If government is to encourage a debate over the tenanted sector, consideration should be given to these difficulties which will prevent many tenants from making a valuable contribution to this debate.