



SCOTTISH LAND COMMISSION
COIMISEAN FEARAINN NA H-ALBA

Tenant Farming Advisory Forum

Minutes of the Meeting of the Tenant Farming Advisory Forum (TFAF) held at the NFUS Offices, Ingliston, Monday 3rd April 2023 at 2pm.

Present:

Dr Bob McIntosh	Tenant Farming Commissioner	TFC
David Johnstone	Scottish Land & Estates (SLE)	DJ
Sarah Jane Laing	Scottish Land & Estates (SLE)	SJL
Jackie McCreery	Scottish Land & Estates (SLE)	JMc
Jeremy Moody	SAAVA	JM
Mark Fogden	SAAVA/RICS	MF
Christopher Nicholson	Scottish Tenant Farming Association (STFA)	CN
Douglas Bell	Scottish Tenant Farming Association (STFA)	DB
Rhianna Montgomery	National Farmers Union Scotland (NFUS)	RM
Andrew Wood	RICS	AW
Fiona Leslie	Scottish Government (SG)	FL
Calum Jones	Scottish Government (SG)	CJ
Helen Mooney	Scottish Government (SG)	HM
Sarah Allen	Scottish Land Commission (SLC)	SA
Bruce Morrison	Land Commission (SLC)	BM

Actions:

1. Welcome and Apologies

TFC welcomed everyone to the meeting, and apologies were noted from Jon Robertson.

2. Minutes of the last meeting – 10th March 2023

The minutes were agreed.

3. Agriculture Bill proposals for agricultural holdings

FL explained that the spreadsheet of agriculture reform proposals provided after the last forum meeting was still open to comments from members.

CJ presented the three remaining flowcharts not covered at the last meeting: diversification, schedule 5 improvements, and sustainable good husbandry and management. Members discussed each proposal in turn.

Diversification

The purpose of the diversification proposal is to amend the 2003 Act to allow more types of diversification, including diversification with a positive environmental outcome. The proposal would also seek to alter landlord's grounds for objection to diversification.

TFC asked if this would replace existing arrangements for forestry. FL clarified that the intention of the proposal is to make it easier for holdings to make smaller-scale land use changes such as intentional flooding for river basin management or non-ancillary tree planting, rather than full land use change or taking land out of a secure tenancy.

CN and JMc both felt that the new land use tenancy proposed in the Land Reform Bill wouldn't be attractive to many tenants for diversification as it would mean losing the security of an existing tenancy.

DJ asked about peatland restoration and selling of carbon credits. FL explained that changes to carbon credit trading are expected at a UK level and that implications for landlord/tenant relations might best be discussed then. FL also said that currently, in most cases, the landlord owns and benefits from carbon credits, and tenants cannot trade credits under woodland carbon codes without the landlord's consent. A landlord would typically consent on the condition that they receive some kind of benefit from carbon credits.

TFC said that there is tension between the need to use more land for nature conservation and one of the existing grounds for a landlord to object to diversification, which is that if the intended use of the land would substantially prejudice the use of the land for agricultural purposes in the future.

SJL questioned whether decisions on a holding-by-holding basis were best if a landscape-scale approach is needed to meet environmental goals. TFC asked about the potential for tenants to submit joint diversification applications and discussion indicated openness to the idea.

DJ asked about compensation in instances of diversification – would landowners only be compensated for individual holdings, or would compensation be granted for other holdings or other affected areas of an estate? FL explained that currently compensation would only affect individual holdings however if other areas are affected by a diversification, then this may require further discussion about compensation in future. TFC said that in instances where, for example, flood plain management issues affected multiple holdings, presumably SEPA would be able to regulate or intervene. AW said that SEPA might not take into account the effect of a change in flood plain management on the business or outputs of neighbouring farms, irrespective of whether they are part of the same estate.

TFC asked about the role of mediation in the proposal, which includes the phrase 'decision of the mediator'. TFC clarified that mediators cannot make decisions but can facilitate joint decisions. CJ explained that the intention of including a mediation step in the flowchart was to enable resolution before involving the Land Court.

SJL asked about the difference between a commercial and environmental diversification. CJ said that it is difficult to clarify the difference as environmental diversification can have financial returns as well. SJL also asked whether the proposed changes would apply only to environmental diversification or the whole of section 40 of the 2003 Act. FL said that this is not set and is open to options. TFC also questioned whether the distinction between environmental and commercial was as significant as the distinction between agricultural and non-agricultural.

CJ explained that that the existing four grounds for objection would be altered as outlined in the flowchart. The intention of this is to enable landlords to be fully aware of tenants' intentions and sets out the potential for a template document to clarify exact plans for diversification. CN welcomed the idea of a template outlining the process as it would avoid unproductive back-and-forth discussions.

Schedule 5 improvements

CJ described schedule 5 of the Agricultural Holdings (Scotland) Act 1991 as an exhaustive list which lacks flexibility and is therefore in need of reform. The flowchart sets out 3 principles for negotiation between two parties, each corresponding to the 3 types of improvements set out in parts 1, 2 and 3 of the existing Schedule 5:

Principle 1: The tenant considers improvement to be long term or major.

Principle 2: The tenant considers improvement relates to capital infrastructure or land management.

Principle 3: The tenant considers improvement to be short term or minor.

CJ explained that the proposal would enable the list of improvements to be non-exhaustive.

MF indicated support for principles 1 and 2 but had reservations about principle 3. He explained more thought was needed as the proposal does not set a baseline of what is considered short term or minor.

CN suggested that the existing exhaustive list could apply to principle 3 only, which would mitigate the risk of landlord objections or complications at waygo.

FL asked the forum about potential options in circumstances where a landlord objects to an improvement under proposed principles 1 and 2. CN and TFC agreed that an intermediate step of dispute resolution would be helpful. DJ agreed and added that this would mean that the Land Court would function as a backstop.

TFC cautioned against expert determination as a form of dispute resolution in this instance. SJL agreed and said that mediation would be better than expert determination in terms of bringing all parties together.

The proposal also prompted discussion on the definition of 'ancillary to agriculture'. DJ asked whether carbon offsetting would be considered ancillary, and FL suggested it could be. CJ suggested that rather than defining the term in legislation, one option for clarification would be to give examples through wording such as: 'examples of ancillary to agriculture include...'

The proposal also raised questions on the definition of the term 'reasonable grounds' in the context of objections to improvements, and FL noted that they would need to look at case law to inform a decision about this.

Sustainable good husbandry and estate management

CJ explained that the proposal's intention is to update the rules of good husbandry and estate management to reflect opportunities for environmental management alongside agricultural production. The flowchart lists both principles and legislation, such as muirburn licensing, that would be incorporated into revised rules of good husbandry and estate management. FL said that better alignment between existing legislation and sustainable good husbandry rules would make enforcement easier, as for example current muirburn legislation is disconnected from any consequences for tenancies.

CJ also explained that the proposals are linked to the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, which requires SG to integrate environmental principles into any new policy.

CN said that current good husbandry rules disincentivise new entrants to agriculture and can be a barrier to farmers making environmentally beneficial land use changes. CN gave examples of existing schemes that support farmers to undertake habitat restoration, yet good husbandry rules require the land to be returned to agricultural use. CJ said that new policy needs to be flexible to ensure that good husbandry

principles wouldn't force tenant farmers to return the land to agricultural use even after schemes come to an end.

CN also suggested that a mediation step should be included as part of the proposed process before a Land Court decision to produce a certificate of bad husbandry, as this would be consistent with the other proposals.

AW felt that the proposal lacked definition and clarity, and that clear definitions of good husbandry and estate management are needed for the legislation to properly function and be enforced. However, FL said that if the approach of definitions rather than principles was taken, then a detailed list of all possible conservation activities would need to be included as part of the legislation, which could be prohibitively complicated. MF suggested the main reason current good husbandry rules are not enforced as often as they could be is due to the prohibitive cost of bringing cases before the Land Court, rather than the rules themselves. CN, MF and TFC favoured the proposal taking a principles-based approach.

FL said guidance might need to accompany the legislation. This would help to distinguish between clear breaches, such as the actions of a negligent farmer, from cases where a farmer might make changes to their practice for environmental benefit and this is misunderstood by the landowner as bad husbandry or estate management. TFC cited the responsible access codes linked to access legislation as an existing example of guidance supplementing legislation: the former containing details, the latter containing broader obligations.

CJ and FL noted that statutory guidance supplementary to principle-based legislation seemed to be the preferred approach of the forum.

TFC thanked the forum for providing useful feedback to SG and asked for members to submit further comments on any of the proposals to SG.

FL and CJ also welcomed the feedback from the discussion.

Action 1	Members to submit any further comments on the proposals to FL and TFC
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4. HMRC/HM Treasury Consultation on Taxation of environmental land management and ecosystem service markets

JM provided a summary of the consultation paper and its three main sections:

- 1. general taxation of environmental assets and opportunity to discuss valid business inputs such as carbon.*
- 2. Proposals on redefining Agricultural Property Relief (APR).*

JM described these proposals as UK-wide, with implications for Scotland. The proposals aim for fiscal neutrality and JM suggested that any proposal to redefine APR to include both agricultural and environmental land use should be seamless so that land doesn't fall between the two.

The consultation describes a 3-fold test for land being considered for inclusion in APR in the future:

- a) has been in agriculture
- b) is in an official environmental scheme. JM suggested the Sustainable Farming Incentive is unlikely to be included, but higher-level schemes would qualify for relief.
- c) has been taken out of agriculture.

The forum discussed point b), raising the question of what happens at the end of commitments made in long-term official environmental schemes, whether for biodiversity, carbon credits, or any environmental aim, as it is unlikely the land can be returned to agriculture. DJ and JM both felt there was a risk that a landowner might be faced with difficulty at the end of an environmental scheme if there is uncertainty.

The forum also discussed valuation in the context of the proposals. At the moment, there is the broad provision which disregards hope and development values, and APR is on the agricultural value of the holding, meaning there is a specific assumption that the land will be in agricultural use for all time. This raised questions from both JM and MF about whether environmental uses will be valued higher or lower than agricultural use.

JMc asked whether Business Property Relief (BPR) might be an option for creating tax neutrality between environmental and agricultural land use. JM cautioned against this approach as the function of APR is predominantly to protect let land and farmhouses from inheritance tax, and such protections are not afforded by BPR.

Generally, the forum viewed the proposals as a positive step and noted that the consultation was a sign of quick action from the Treasury. FL said that, in terms of the consultation's links to underlying climate change commitments, the aforementioned aim of fiscal neutrality is a huge step forward.

3. A proposal to only grant APR on new lettings of 8 years and longer – 8 years being the current average) let of a tenancy in England. This stems directly from the Rock Review of agricultural tenancies in England.

JM explained that this proposal, in the Scottish context, would likely have implications for Short Limited Duration Tenancies (SDLTs) and Modern Limited Duration Tenancies (MLDTs). The eight-year limit would mean that MLDTs would qualify for APR whereas SDLTs would not. JM asserted that the Treasury is aware of arguments for and against this proposal and asked the forum what implications this posed for the let sector in Scotland.

The forum discussed whether the proposal creates an incentive for landowners and tenants to favour one type of tenancy over another. JM said there was a risk that landlords and tenants might opt for the shortest possible tenancy option.

AW suggested this proposal might discourage new entrants to the tenant farming sector.

Overall, the forum identified the need to consider very carefully the implications of this proposal for Scotland, in particular the risk of unintended consequences identified. The proposal may also have implications for the 5-year break clause in MLDTs, which could risk reducing the number of these available to new entrants.

TFC concluded the discussion by suggesting it would be helpful for member organisations to respond to the consultation individually, however TFAF can provide a collective response to SG to inform their discussions with the UK Treasury, addressing any potential unintended consequences of the consultation's proposals. The forum agreed that TFC should draft a letter to SG and provide to members for approval at the next meeting.

CN said that he would consult the Tenant Farmers Association (representing tenant farmers in England and Wales) in April.

Action 2	TFC to draft response to SG on HMRC consultation, to be shared with TFAF for approval.
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5. Member updates and AOB

CN made a further enquiry about the rules on shooting feral pigs. FL to send literature to TFC clarifying aspects of game legislation to help resolve the enquiry. TFC referred CN to NatureScot guidance and encouraged tenant farmers to contact local NatureScot officers. CN and JMc also agreed to discuss the issue further outwith the forum.

Action 3	FL to send literature to TFC clarifying aspects of game legislation to help resolve feral pigs enquiry.
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6. Date of next meeting

The forum agreed that scheduling another meeting in May would be useful for further discussion both on SG proposals and TFAF's response to the HMRC consultation.

Action 4	SA to arrange next TFAF meeting for early-mid May
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