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SCOTTISH LAND COMMISSION
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CODE OF PRACTICE – Amnesty on Tenants’ Improvements

This code of practice has been issued by Scotland’s Tenant Farming Commissioner (TFC) after consultation with, and with the support of, Scottish Land and Estates (SLE), the Scottish Tenant Farmers Association (STFA) and the National Farmers Union Scotland (NFUS). It is issued under the authority of the Land Reform (Scotland) Act 2016 and it is one of a suite of codes intended to guide and shape the behaviours and processes which accompany the interactions and negotiations between landlords and tenants, including agents and intermediaries acting for either party. Their aim is to ensure that, wherever possible, landlord and tenant relationships and interactions are conducted in a spirit of mutual respect and understanding and with a view to reaching agreed positions which are reasonable and fair to both parties.

Where the code uses the word **must**, this means that the action is a legal requirement and failure to comply would constitute a breach of agriculture holdings legislation.

Where the word used is **should**, this indicates that failure to behave in this way may constitute a breach of the code of practice and may result in a formal complaint being made to the TFC.

Where the code **recommends** a course of action it means that this is good practice but, recognising that other approaches may be equally effective, failure to follow this recommendation will not in itself be a breach of the legislation or the code.

While every effort has been made to provide an accurate presentation and interpretation

of relevant legislation, it is not possible to cover every situation and users of the code should obtain professional advice appropriate to their own situation.

All users of this code should bear in mind that the function of the Tenant Farming Commissioner is to be impartial and concerned with the procedure and manner which parties adopt when dealing with each other. It is not the function of the TFC to mediate, arbitrate, or to persuade either party to see things the way the other party does, or to forego any legal rights they may have.

Whether or not an Improvement is capable of being treated as such under the Amnesty is a matter for the parties, and if they do not agree or resolve matters by some other dispute resolution procedure, only the Land Court can decide.

Background to the Amnesty

Effective recording of, and agreement to, tenant farmer's improvements is central to providing fair and reasonable compensation at waygo and this requires a clear and up to date record of agreed improvements to be maintained. It is clear, however, that, for a variety of reasons such records are sometimes absent or incomplete, with tenants and landlords unclear, or unable to evidence, what agreements were made or if the appropriate notice was given. This may result in the tenant being unable to claim compensation for improvements and is often a source of dispute and difficulty which may prolong and sour the process of agreeing compensation at waygo.

In recognition of this the Scottish Government has introduced an amnesty period, during which tenants and landlords have the opportunity to agree on a definitive record of tenant's improvements, even if the proper procedures surrounding the notification and recording of the improvement were not fully implemented. The main relevant legislation is in the Land Reform (Scotland) Act 2016 Sections 112 -118. The amnesty is only concerned with agreeing what improvements should be eligible for compensation at waygo; it does not affect the current rules applying to determining the level of compensation payable at termination of the tenancy.

Clarity over who provided the improvement, landlord or tenant, is important in the context of rent discussions so even if a tenant does not anticipate reaching waygo, it is important that there is an up to date, accurate and agreed record of tenant's improvements and the equipment provided by the landlord.

This measure has the full support of Scottish Land and Estates, the National Farmers Union of Scotland and the Scottish Tenant Farmers Association and is an important opportunity which all tenants and landlords should take advantage of. The amnesty period begins on 13 June 2017 and will last for 3 years. This should give ample time for discussions to take place and agreements to be reached.



1. The Scope of the Amnesty

- 1.1 The amnesty measures are available to tenants under 1991 Act tenancies, Short Limited Duration Tenancies and Limited Duration Tenancies and will be available to tenants under Modern Limited Duration Tenancies when the provisions relating to this new type of tenancy come into force.
- 1.2 Only improvements which would have been eligible to be treated as such at the time they were carried out are within the scope of the amnesty. The rules applicable to different types of improvement changed over the years and these are now set out in Schedules 3-5 of the Agriculture Holdings (Scotland) Act 1991. If an improvement could not, at the time it took place, be treated as such under the categories set out in those schedules it cannot be claimed under the amnesty. During the amnesty period it is likely that the list of 'new' improvements in schedule 5 of the 1991 Agricultural Holdings Act will be updated but any additions to the list will not qualify under the amnesty provisions.

2. Tenant's Right to Claim During the Amnesty

- 2.1 In relation to Part I improvements (those requiring the landlord's consent) a tenant may not claim an improvement which was carried out without the landlord's consent or where consent was given but the improvement was carried out in a substantially different manner to that agreed.
- 2.2 In relation to Part II (those requiring notification to the landlord) and Part III (no notification or prior consent required) improvements a tenant may not claim an improvement where the improvement was carried out despite an objection by the landlord or where the improvement was carried out in a substantially different manner to that which was notified.
- 2.3 Subject to the above constraints, a tenant may advance a claim for any improvements that would be of a type which would qualify for compensation at waygo but where the requisite notice was not given or where there is no record of whether the correct procedures were followed.
- 2.4 A landlord may object to a tenant's claim where he/she considers that the improvement was carried out in whole or in part by the landlord, where the landlord gave or allowed benefit in consideration of the tenant carrying out the improvement or where the landlord considers that it is otherwise not fair or equitable for compensation to be paid.
- 2.5 A tenant may initiate the process by issue of an amnesty notice as set out in section 7 of this code but following the steps in sections 3 to 6 will allow more time for discussion and will increase the chance of an amicable resolution without involvement of the Land Court.

3. Preparing for the Amnesty Discussion

- 3.1 It is in the interests of both landlords and tenants to have an up to date and accurate record of tenant's improvements eligible for compensation at waygo. It is the tenant's responsibility to initiate the discussion and thereafter landlords and tenants **should** accept joint responsibility for the task of preparing an agreed list of eligible improvements.



- 3.2 Both parties **should** assemble, and be prepared to share with the other party, all relevant documentation, and any other evidence, of past agreements and transactions relating to tenant's improvements. This may require former owners, tenants, contractors or agents to be contacted to establish whether they can help to provide evidence of agreements, invoices and any other relevant supporting material.
- 3.3 Where any Record of Condition is available this will usually be helpful in identifying potentially eligible improvements. Where there is no current Record of Condition, or schedule of fixed equipment, landlords and tenants may wish to consider commissioning or updating one as part of the preparation for an amnesty discussion.

4. Conducting the Amnesty Discussion

- 4.1 Landlords and tenants, or their agents, **should** meet on the farm to compare notes and to discuss, and view if appropriate, improvements which might qualify under the amnesty.
- 4.2 Once the discussions have begun, each party **should** promptly acknowledge all communications and respond without undue delay to proposals by the other party with the aim of concluding the stages set out in sections 4 and 5 of this code within 9 months.
- 4.3 In deciding whether it is fair and equitable to accept an improvement as being eligible for compensation, landlords and tenants **should** use as a guide, the following criteria: –
- The improvement is within the scope of the amnesty and
 - It involved investment in fixed equipment or land improvement which is reasonable and desirable on agricultural grounds for the efficient management of the holding or
 - It involved upgrading living accommodation to a reasonable level compatible with modern standards and expectations.
- 4.4 A record of the meeting **should** be produced, highlighting the issues discussed, recording any agreements reached along with any disagreements over the eligibility of a claimed improvement.

5. Recording the Outcome of Successful Amnesty Discussions

- 5.1 Where the parties agree what improvements will be accepted as eligible for compensation at termination of the tenancy, they **should** enter into an 'amnesty agreement'.



- 5.2 The 'amnesty agreement' **should**:
- Record that the two parties have discussed tenant's improvements in the context of the amnesty.
 - Record the items of fixed equipment which are agreed to be tenant's improvements and which will be eligible for compensation at termination of the tenancy.
- 5.3 Either party may take responsibility for drawing up the agreement and any costs **should** be shared equally by both parties.

6. Resolving Disagreements

- 6.1 Landlords and tenants **should** make every effort to reach an agreed settlement, adopting the principles in section 3.2 where there is doubt or uncertainty about the status of an improvement.
- 6.2 In circumstances where agreement cannot be reached, a range of Alternative Dispute Resolution mechanisms are available to facilitate agreement.
- (i) Mediation is most useful where the main reason for failure to agree may lie in the nature of the relationship between the two parties. A trained mediator will not attempt to decide who is right and who is wrong but will work with both parties to try to help them to reach agreement. Mediation normally involves, at some stage, a round table meeting facilitated by the mediator.
 - (ii) Expert determination can be helpful, particularly where the dispute is of a technical nature. The expert will use his knowledge and experience to offer an opinion, which can be binding if the parties agree it should be so.
 - (iii) Arbitration involves the consideration of evidence submitted to the arbitrator by both parties and the decision by the arbitrator, based on an assessment of the evidence and reference to any relevant legislation, is normally binding.
- 6.3 Each of the above methods will often be quicker and less expensive than referral to the Land Court for a decision. Unless both parties agree that use of one of these methods is unnecessary, or would be unlikely to help achieve agreement, they **should** agree to involve mediation, expert determination or arbitration and to share equally any costs involved.
- 6.4 If this step resolves the impasse the parties **should** move to completion of an 'amnesty agreement' as per section 5 in this code.
- 6.5 Such improvements as have been agreed **should** be recorded in the 'amnesty agreement' and the steps set out below need only be used to deal with improvements where no agreement can be reached.

7. Dealing with Unresolved Issues

- 7.1 In cases where all attempts to reach agreement on the eligibility of a particular item have failed and the tenant still wishes to have an improvement accepted as eligible for compensation, the tenant may issue an 'amnesty notice'.
- 7.2 The amnesty notice **must** be given in writing to the landlord before the expiry of the amnesty period and **must** include the following: -
- The names and designations of the landlord and tenant.
 - The name and address or such other description of the holding as will identify it.
 - Details of the relevant improvement, including the manner in which it was carried out.
 - The tenant's reasons as to why it is fair and equitable for compensation to be payable for the improvement on the tenant quitting the holding at termination of the tenancy.
- 7.3 The landlord can object to the amnesty notice within two months of receiving it. A notice of objection **must** be in writing, **must** be dated and **must** state the landlord's reasons for objecting to the improvement.
- 7.4 The landlord's reasons for objecting **must** be one or more of the following: -
- That it is not fair and equitable for compensation to be payable.
 - That the landlord carried out the improvement in whole or in part.
 - That the landlord gave or allowed a benefit to the tenant (under the lease or otherwise) in consideration of the tenant carrying out the improvement, whether or not the landlord agreed to such benefit in writing.
- 7.5 Where the landlord has issued a notice of objection the tenant may, within 2 months of receiving the notice, apply to the Land Court for approval of the relevant improvement.
- 7.6 The Land Court may approve the improvement unconditionally or conditionally or may withhold approval. Where approval is given the Land Court must be satisfied that the landlord has benefited or would benefit from the Improvement and that it is just and equitable for compensation to be payable.
- 7.7 No compensation will be payable if, or to the extent that, the Land Court decides that the landlord carried out the improvement or gave a benefit to the tenant in consideration of the tenant carrying out the improvement.

8. An Alternative Approach to Conducting the Amnesty Discussions

- 8.1 The above procedures reflect the content of the legislation that underpins the amnesty and both landlords and tenants are entitled to have the amnesty discussions and negotiations carried out in accordance with those procedures. However, the legislation also enables the discussions to be carried out without reference to the constraints set out in section 2 of this code.
- 8.2 Landlords and tenants can therefore, by mutual agreement, agree to accept improvements as being eligible for compensation at waygo even if the required prior notice was not given or if the improvement was carried out in a manner different from that agreed or if the landlord objected at the time or if the improvement would not otherwise have been eligible for compensation.
- 8.3 This approach is only available to tenants if the landlord agrees. Tenants cannot issue an amnesty notice for improvements to which sections 2.1 and 2.2 of this code apply, or where the improvement is not within schedules 3-5 of the Agriculture Holdings (Scotland) Act 1991, but which the landlord has agreed to discuss but is unwilling to accept.
- 8.4 Where agreements are reached on improvements the parties should progress by means of section 5 of this code.
- 8.5 The parties are free to come to any arrangements acceptable to both parties in relation to improvements which are not within the above schedules but any such agreements are outwith the scope of the amnesty. The parties are recommended to record any such agreements separately.

9. Updating the Record of Improvements

Once the final record of improvements is agreed it is imperative that it is regularly updated by the parties to take account of subsequent improvements. A review of the record of agreed improvements should be an integral part of rent review discussions.

10. Making a Complaint

If you have been directly involved in amnesty discussions and believe that another party has been in breach of the principles and procedures set out in this code of practice you can make a complaint to the Tenant Farming Commissioner. **Details of the complaints system can be found on the Scottish Land Commission website (www.landcommission.gov.scot) or by calling 0300 244 4452.**

