



Recommendations by the Tenant Farming Commissioner (TFC) for Changes to Schedule 5 of the Agricultural Holdings (Scotland) Act 1991

Background

1. Schedule 5 of the 91 Act sets out a list of improvements to agricultural holdings which may be eligible for compensation when the tenant leaves the holding. If tenants are to be encouraged to invest in the holding it is important that the list of improvements eligible for compensation keeps pace with changing technology and agricultural practices and is regularly updated. It is some years now since the current list was created and some structures and practices which are readily accepted now as being legitimate improvements are not listed.
2. The 2016 Land Reform (Scotland) Act set out the functions of the TFC and included a requirement to prepare a report setting out recommendations for a modern list of improvements to agricultural holdings, having consulted with any persons appearing to the TFC to have an interest in the draft recommendations.

Scope of the Review

3. In formulating my advice to Ministers I have considered the following: -
 - a) What improvements are clearly missing from the list
 - b) Whether further clarification is required with respect to some of the improvements already on the list
 - c) Whether there is a need to change the status of some improvements with respect to whether they should be a Part 1, Part 2 or part 3 improvement
 - d) Whether some form of catch-all clause could be included to avoid the need for regular updating of the list
 - e) Whether any improvements could be removed from the list because they are no longer relevant.

Consultation

4. The following organisations have been consulted and provided with the opportunity to provide written submissions on two drafts and to discuss the issue at a meeting of the Tenant Farming Advisory Forum.
 - The Scottish Tenant Farmers Association (STFA)
 - Scottish Land and Estates (SLE)



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- National Farmers Union Scotland (NFUS)
- Royal Institute of Chartered Surveyors (RICS)
- Scottish Agricultural Auctioneers and Valuers Association (SAAVA)
- The Central Association of Agricultural Valuers (CAAV)
- Agricultural Law Association (ALA)

Discussion

Removal of items from the list

5. While some activities currently listed, such as “warping and weiring of land” are of limited application nowadays, the general view is that there is little to be gained by removing anything from the current list for fear that it disadvantages someone somewhere.

Inclusion of a catch-all clause

6. It was noted that the Crofters (Scotland) Act 1993 included the following clause: -

“all other improvements which, in the judgment of the Land Court, will add to the value of the croft as an agricultural subject”

A provision of this type in the 91 Act might avoid the need to update the schedule periodically but may be too open to interpretation. Consultees had mixed views on this. Those supporting the inclusion of a catch-all clause point to the fast-changing nature of the economic climate within which the sector operates and the need for innovation and technological advancement. Unless the schedule is updated regularly, there is a risk that some tenants will be disadvantaged because new activities don't make it to the list quickly enough. Those opposed to a catch all clause point to the risk that it is too open to interpretation and will lead to more disputes and disagreements over what is in scope and what is not. They favour a commitment to regularly review and, if necessary, update the schedule.

Changing the status of some improvements

7. The general direction of travel since 1923 appears to have been towards most of the important and relevant improvements being in Part 2 (requiring notification to the landlord and with an ability for the landlord to object). It was noted however that there does not appear to be any clear logic surrounding the allocation of activities. The general view is that most new activities are best placed in Part 2 since this allows both parties to consider the merit and relevance of the activity. However, suggestions were also made regarding



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updating of some of the Part 3 activities to reflect modern practices in respect of the use of manures, soil improvers etc and to recognise that clearance of land (item 29) is of relevance to more than just arable land. No case for changes to Part 1 was identified.

New improvements

8. There is general agreement that there are some clear omissions from the list of eligible improvements. Slurry stores are an obvious and readily agreed omission but there is also support for the inclusion of installations producing renewable energy and for recognising the value in permissions and consents which have been obtained by the tenant and which have value to an incoming tenant. There was also support for extending the range of anti-pollution devices that are eligible and for inclusion of the use of modern soil improvers and digestates.
9. Renewable energy sources, and associated structures, are a relatively new but potentially beneficial contribution to the running costs of the holding and should be recognised as an eligible improvement. Such facilities that produce electricity should already be covered by item 17 in the current schedule 5 but those producing heat are not and therefore an amendment to item 17 is felt to be appropriate. It is recognised that there is potential for an overlap with the issue of diversification, which has its own regulations with respect to consent and compensation. The boundary between the two does not seem to be always entirely clear and it needs to be made clear that tenants cannot claim for the same improvement under two different regulations.

Need for further clarification

10. This issue was raised primarily in relation to work on the farmhouse and other dwellings forming part of the holding. The current item 18 in schedule 5 refers to "Erection, alteration or enlargement of buildings". This has led to some disputes in the past about whether improvements to houses are included in this item. While current practice is generally accepting of their inclusion, it is felt that clarification would be useful, involving the addition of a new item referring to improvements to dwellings. It is recognised that there is still scope for debate about what improvements to dwellings should be eligible but it is felt that, if further clarification is needed, this should be in the form of a separate guidance note.



Recommendations

Amendments to Schedule 5

- (a) No items should be removed from the schedule.
- (b) A new item to be added to Part 2. – “Structures for the management and storage of manures and slurries.”
- (c) A new item to be added to Part 2. – “Silage clamps, pits and pads.”
- (d) A new item to be added to Part 2. – “Works to dwellings.”
- (e) A new item to be added to Part 2 – “Permissions, consents, contracts, authorisations and restrictions.”
- (f) Wording of item 22 to be amended to read – “Provision of means of sewage, waste, pollutants and run-off management and disposal, including septic tanks, effluent tanks, reed beds, sediment traps, filtration ponds and other bio-filters.”
- (g) Wording of item 17 to be amended to read – “The provision, distribution and storage of electricity, gas, power and heat.”
- (h) “Arable land” should be removed from item 29 in Part 3 to recognise that such improvements are also carried out to pasture.
- (i) Item 30 in Part 3 should be expanded to include soil improvers, conditioners and digestates.
- (j) In item 30 in Part 3, the word “purchased” should be removed to recognise situations where farmers do muck/straw swaps to obtain products free of charge.

Options for further changes

- (a) The pros and cons of inclusion of a catch-all clause are finely balanced. On balance I would recommend not including one if there is reasonable certainty that Schedule 5 can be reviewed regularly and that any accepted changes can be made relatively quickly.
- (b) To avoid possible confusion there may be a case for including a note in Schedule 5 drawing attention to the fact that improvements that are part of a diversification are subject to different regulation with respect to approval and compensation arrangements.

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