Written submission from SAAVA/CAAV

PROPOSED REVISION OF SECTION 79

JANUARY 2016

CONTENTS

1. Introduction

1.1 This note is submitted in response to the call by the RACCE Committee for specific evidence on the paper issued in December 2015 outlining an alternative to the Land Reform Bill's section 79 with its proposals for the conversion and assignation of tenancies under the Agricultural Holdings (Scotland) Act 1991. A second updated version of the proposal paper was then issued by the Scottish Government on 22nd December.

1.2 Evidence more generally on Part 10 of the Bill was submitted to RACCE on 14th August 2015.

1.3 Recommendations - As well as the general review of the proposals for a new s.79, we make two specific recommendations:

- This procedure should only apply where there is a written lease. A tenant with an unwritten lease wanting to trigger this procedure should first use the statutory provisions of s.4 of the 1991 Act to have the lease recorded in writing, giving certainty as to the extent, parties and terms of the lease. The compensatable tenant's improvements and any relevant record of condition should also be submitted for valuation, if necessary using the procedures of s.8 of the Act. (*Section 5 of this evidence*)

- Specific practical and technical consideration should be given to the questions of what is to be valued and the basis for those valuations to ensure that the new mechanism is robust in achieving its ends. We are happy to devote work to this. (*Section 7 of this evidence*)

2. The Scottish Agricultural Arbiters and Valuers Association (SAAVA) and the Central Association of Agricultural Valuers (CAAV)

2.1 SAAVA is the specialist Scottish body for those advising and acting for tenant farmers, farming owners, landlords and other agricultural and rural businesses as well as other interests including government, environmental bodies and lenders. It is affiliated to the CAAV which has a longstanding UK-wide expertise in agricultural and rural property and business issues, allowing SAAVA to draw on that broader range and long experience of tenancy and other issues across the UK and further afield.

2.2 As professional bodies with members acting for such varied interests, our concern is not to promote particular causes but look at matters and proposals practically, considering what will work and what will not. In this, we are conscious that our members will be advising tenants, landlords and potential assignees in the years following the outcome of any changes and will need the position to be clear so that advice can be certain and effective for clients to be able to make decisions and spend money on that basis. Equally, in engaging with public policy we would prefer to see measures that are sensibly implementable and successfully promote the health of the industry.

2.3 Members as individuals will act for tenants, landlords and others with interests in agricultural property. Our professional interest is in a system that functions well to achieve the aims of the parties and for which the law is drafted so that good and secure advice can be given to parties making decisions about their lives, businesses and assets.

2.4 As an arbitral appointments referee, SAAVA is also concerned that, where disputes happen between parties, the mechanisms for resolving those disputes are practical and proportionate, enabling the best answers for the least rancour and at least cost.

3. Policy and Implementation

3.1 As a professional body, we are not commenting on the merits of the objectives of the draft legislation but on their practical implementation. In that, we observe that the proposals allow a tenant without heirs and nearing planned retirement or death to require his landlord either:

- to buy him out on the statutory basis (on a formula which is intended to reflect those circumstances), or

- to accept a qualifying assignee (if one can be found on agreed terms suitable to the tenant) with the tenancy now capable of continuing as a 1991 Act tenancy in near-perpetuity (the proposal in the Bill was for a new MLDT for 35 years which gave a finite, if relatively distant, horizon)

so changing the framework for estate planning affecting both the landlord and other tenants.

3.2 With a view to its effective implementation, it is right to test what is the predominant policy purpose of the proposal. Is the proposed mechanism primarily intended:

- to help a number of existing tenants leave the sector by offering a mechanism for them to be bought out, in general by the landlord but with a fall back to assignation. The availability of the mechanism could prompt this outcome as might its basis, more generous than might be seen in practice in the market where such deals are only struck in particular circumstances and so more often at 20 or 30 per cent of the vacant possession premium. The outcome would probably accelerate the reduction in the size of the let sector.

or

- to transfer 1991 Act tenancies to new entrants or “progressing farmers” (albeit with an initial power of pre-emption by the landlord) with the implication that the land may be perpetually subject to a tenancy?

While the two may in practice not be very dissimilar, the message of each is different.

3.3 The name currently given to the initial notice could appear to crystallise the core concept as an opportunity to “relinquish” (as opposed to a notice of intention to

assign), so pointing to the former option. That may be realistic but is it the intention?

3.4 In considering the practical development of this, the current issues with the implementation of the complex suite of options selected by the Scottish Government for the new CAP prompt a caution for introducing undue complexity here, however attractive the arguments might seem for each individual element. It would be best to focus on the effective achievement of one simple policy objective than to fail to deliver a more sophisticated package.

3.5 In practice, this measure, considered on its own, could further reduce the already small and declining area of the Scottish let sector but could achieve some restructuring, whether by aiding either landlord's in-hand farming or that of assignees. Where land is brought back in-hand, the landlord may usually be very cautious about letting it again, save perhaps as part of a mutually beneficial arrangement with another existing tenant.

3.6 There are sufficient differences between this potential disposal of a tenancy and the tenant's power of pre-emption under Part 2 of the 203 Act for that model not to be followed slavishly.

4. Its Practical Effectiveness Will Vary with the Size of the Holding

4.1 Typically, it is likely to require a significant sum of money for a tenant to consider positively leaving a holding on which he has security, the ability to claim income from the CAP's Basic Payment and Greening and quite possibly has his home. However much he may consider his present position to be unsatisfactory, finding a new home (whether to buy or to rent) and a replacement income or pension will come at a cost. How much money might a tenant reasonably consider necessary to be able to establish a new life away from the holding?

4.2 This mechanism is a means of making that sum available to some tenants, whether by the landlord paying on the statutory basis or the assignee paying for the right to the tenancy (potentially a different figure). With such a property-based calculation, in either case the sum required is more likely to be fundable from a larger unit than from a smaller one which may never be able to deliver the kind of finance that would ordinarily be needed to support this move. There is concern that some tenants of smaller holdings may have unrealistic hopes of this mechanism and might anyway be reluctant to afford the initial costs of the process.

4.3 In the great majority of cases, it is expected that the value in this procedure will lie in the land (the half share of the vacant possession premium) rather than the balance of waygo claims. The combined value of land and net claims will be supplemented by the subsequent farm dispersal sale. The sum achieved will be subject to taxation.

4.4 In summary, on the whole this mechanism is naturally more likely to attract effective interest from tenants of larger holdings. It may also have more appeal to tenants who already have housing away from the holding.

4.5 It is then likely that a major effect of s.79 might often be as a backstop for prior discussions between tenants (probably with some prior advice as to likely values) and landlords that may deliver the policy without directly using the statutory mechanism. That outcome is seen as pragmatic sense, not as a problem.

5. The Importance of Certainty for the Process

5.1 General

5.1.1 The initial procedure turns on the statutory valuation of the land (with and without the tenancy) and the potential end of tenancy claims between the parties. It is not set out as a dispute resolution procedure for issues that are uncertain or in contention between the parties.

5.1.2 If the task of the valuer, appointed by the Commissioner, is to value the prescribed items, they should be identified for him: the valuer has to know what it is he is to value. If the valuer has to go on a process of discovery to crystallise and identify those items, whether the lease itself or the compensatable items of improvements or dilapidations, before valuing them that will have consequences as to time, cost and liabilities of the procedure.

5.1.3 Valuation becomes very difficult if it is uncertain that the subject to be valued actually exists. This is an issue for both the land and the claims. In an extreme case, might the valuer have simply to advise that the items have not been defined and so cannot be valued?

5.2 The Land and the Lease

5.2.1 Where there is (or claimed to be) an unwritten lease, there may be issues over:

- the identification of the lease
- the relevant statute (is it actually under the 1991 Act?)
- the area covered by it
- its terms
- who may really be the tenant.

It is not a satisfactory basis for the proposed process if someone can simply assert that they have an unwritten lease under the 1991 Act while offering no clarity on these details and leaving open issues as to whether the landlord accepts the position or whether there are other claimants. It may not even be practically possible to undertake a professional valuation in some such cases.

5.2.2 What is the position if the tenant says that the tenancy covers a larger area than the landlord accepts (or indeed vice versa)? Is the valuer to rule as to the nature of the tenancy that is the subject of the notice to relinquish and so for the landlord or an assignee to purchase? If not, what is the route to be taken?

5.2.3 The tenant's remedy in the event of an unwritten lease is to move under s.4 of the 1991 Act for the terms of the lease to be recorded in writing.

5.2.4 In turn, that written lease then prospectively assists the tenant with an assignation so that the assignee (who may be borrowing money for this or moving home) can be certain that he is actually buying something and what it is. The less certain he is on this, the less he will pay, if he takes it at all.

5.3 The End of Tenancy Claims

5.3.1 If the valuer is to identify the compensatable improvements and dilapidations that will, at the very least, add substantially to the exercise and so its cost. As the valuer, who should have no conflict of interest in this work, is unlikely to know the farm, this may become impossible if no adequate evidence is given to him or the issues are clearly too contested for him to proceed.

5.3.2 Again, the valuer's role is not to hear and settle differences or disputes between the parties but to provide a valuation of what is before him. If there are outstanding issues that may not be easy or even possible. There may be cases where he could be asked to provide valuations in the alternative according to what the facts might later prove to be – but that appears to be outside the remit of the Commissioner's appointment and so would have to arise under be a separate instruction by one or both parties.

5.3.3 One specific point is there may, at that point, usually be no tenant's notice in respect of fixtures, let alone any landlord's response as to whether he would take to and pay for them or let the tenant remove them. It will not be known what these items are or if they would be compensated.

5.3.4 The remedy for the tenant as the instigator of the s.79 process is to have moved under s.8(2) of the 1991 Act for the relevant improvements to be settled. It may usually be a matter of fact as to whether there is a record of condition that can be the prerequisite for a dilapidations claim though assessing the resulting dilapidations can be time consuming and contentious.

5.3.5 It is recognised that this will require prior work and cost by at least the tenant on these matters before he embarks on the main procedure but both are practical things that were better done anyway.

5.3.6 It is accepted that the valuer's role will always, as a matter of practice, include some element of appraisal of what is before him but few may wish to accept an appointment where the facts of what is to be valued are not evident, making his determinations very vulnerable to challenge. What is to be the position if, for example the legal validity of an available record of condition (the prerequisite for a dilapidations) is challenged?

Recommendation: This procedure should only apply where there is a written lease. A tenant with an unwritten lease wanting to trigger this procedure should first use the statutory provisions of s.4 of the 1991 Act to have the lease recorded in writing, giving certainty as to the extent, parties and terms of the lease. The compensatable

tenant's improvements and any relevant record of condition should also be submitted for valuation, if necessary using the procedures of s.8 of the Act.

6. Initial Procedure – Appointment of a Valuer by the Commissioner

6.1 Following his receipt of a copy of the tenant's notice, the Commissioner is appoint a valuer. While the skills required of the valuer are better expressed in the second version of the paper, our questions about this are:

- as this process carries an administrative cost, is there to be a charge for the appointment to accompany the copy of the notice to the Commissioner?

- is it intended that this process could be triggered after a tenant's death (but before a notice to quit) by his personal representatives?

- what is the position if only one of joint tenants serves the notice?

- what is the position if the notice is served by someone who proves not be the tenant at all?

- given the potential issues raised by managing conflicts of interest it would be more practical for the Commissioner not to be bound by a time limit for making the appointment but to be subject instead to a requirement to proceed with despatch. What would be the position if he failed to meet the time limit?

- would the Commissioner have enough knowledge of the relevant valuers to make the appointment or might he delegate the task to existing appointment systems, such as those of professional bodies? SAAVA and the RICS are both arbitral appointment referees and the Central Association of Agricultural Valuers makes appointments.

- is the tenant (or indeed the landlord) able to object to an appointed valuer? – as, say, if there is a perceived undisclosed conflict of interest? If so, would that be to the Commissioner as the appointing person?

- might it assist tenants' confidence and sense of participation if they were offered a choice of valuer from which to make the appointment for which they are to pay?

- is the Commissioner to have any duty or place in this process beyond the initial appointment?

6.2 We have understood from the Scottish Government that for valuers to be appointed by the Commissioner they must have been approved through the Government's procurement process but are not clear what this might mean. There is natural concern, drawn from experience with utilities work, that competitive bidding over fees could result in inappropriate people being to the fore, excluding those with genuine skills in competition over cost rather than competence and so risking the repute of the exercise. The requirements as to the valuer's skills are quite properly very specific.

6.3 There may be circumstances where the landlord has no desire or realistic interest in buying the tenant out. In such a case, requiring the valuation stage seems to impose needless effort and cost on the tenant. Might there be a means to allow the tenant to move directly to the assignation stage where the landlord has certified in writing that he does not wish to buy?

6.4 Similarly, might it be possible for a tenant, unsure if his landlord is actually a likely buyer and anxious as to upfront costs, to choose to defer (or even waive) the end of tenancy claims part of this task? If deferred, then the compensation and dilapidations claims could then be triggered as normal on the end of the tenancy if the landlord does purchase. They are not necessarily so relevant to the assignation value.

7. The Valuation

7.1 General

7.1.1 The proposals are for the valuer to provide four valuations which, in general terms are to be:

- the vacant value of the land in the holding
- the value of the holding as let under the terms of the present tenancy to the actual tenant
- the value of the tenant's waygo claims for improvements
- the value of the landlord's claim for dilapidations on waygo.

While the proposals paper makes some further points on these, there are significant issues of definitions and of the basis and assumptions for the valuations that need to be clarified for each of these and considered in this section of our response. We urge that specific care and further discussion be taken on the approach to valuation so that there is a robust framework for this mechanism. We are very happy to participate in those discussions.

7.1.2 We have commented above on the extent to which the valuer might be expected not only to undertake the statutory valuations but also to discover the facts and potentially make judgments as to the nature and extent of the tenancy and the subjects of waygoing claims, with the associated legal issues and the liabilities that may flow from that.

7.1.3 The proposals imply that the valuer would most naturally be acting here as an expert, appointed under the aegis of the Commissioner to provide the required figures. He is not resolving a dispute or difference between the parties and so would not have the quasi-judicial role of an arbitrator under the Arbitration (Scotland) Act 2010 with its judicial immunity. While appointed on the tenant's prompting and paid for by the tenant, the valuer's duty should be to the process and so implicitly to both parties.

7.1.4 It becomes more difficult if either of the parties seek to rely on the valuation more widely. What is the position if, in the absence of a record of condition, the valuer says there are no dilapidations and then a record of condition is subsequently found? Has the potential for an end of tenancy claim founded on that record then been lost? What is the valuer's liability?

7.1.5 Is the valuer required to release his report before he is paid – as is the practice for arbitrators? A separate contention may arise if the tenant does not like the figures provided.

Recommendation – Specific practical and technical consideration should be given to the questions of what is to be valued and the basis for those valuations to ensure that the new mechanism is robust in achieving its ends. We are happy to devote work to this.

7.2 Part 2 of the 2003 Act May Not Offer a Useful Precedent

7.2.1 The first draft of the proposals paper drew express attention to the provisions of s.34 of the 2003 Act for the valuations for the tenant's right to pre-empt a sale of the landlord's interest to a third party. While that specific reference has now been withdrawn (save at paragraph 4) that raises both general and specific points.

7.2.2 Inquiries suggest that there may have been very few cases where even the initial stages of Part 2 have been invoked. We have heard of one that reached the valuation stage but none that proceeded further. While there is a larger experience of actual but negotiated sales of holdings to sitting tenants (with the statutory provisions possibly in the background), that means there is neither experience nor any decided case on the statutory provisions. Part 2 is, for practical purposes, untested and so is an uncertain basis on which to proceed.

7.2.3 The proposal here differs from the purpose of Part 2 in that Part 2 concerns the purchase by the tenant of the reversion while these proposals are for the purchase of the tenancy by the landlord and so potentially raising waygo issues.

7.2.4 More specifically and reviewing s.34(2)-(7) of the 2003 Act (as prompted by the first draft of the paper), we note that:

- s.34(2)(c) takes account of special purchasers, so not just market value

- s.34(2)(d) specifically mentions the effect of any sporting lease affecting the land but any right affecting the land could be relevant

- s.34(2)(e)'s recognition of moveable property that might be sold with the land is relevant to Part 2 of the 2003 Act does not seem relevant to this procedure as the tenant has those anyway

- s.34(2)(f)(i) disregarding there being no time for marketing may not be needed as it is captured by existing valuation definitions – unless its purpose has been missed here

- s.34(2(g) to (j) effectively apply a "black patch" to both tenant's fixed equipment/improvements (so broader than compensatable improvements)

and dilapidations. We discuss this question below but at this point simply mention the potential risk of both double counting and omission warranting careful thought.

- S.34(4) to (7) asks, in the context of its purpose, for a valuation of the landlord's estate which includes the holding, with and without the holding, not just of his interest in the holding. This may not be relevant in the context of these proposals which seem properly expressed solely in terms of the holding and need not look more widely since the physical extent of the landlord's estate remains unaltered.

These and other issues need careful review in the light of policy intentions and the practicalities of valuation.

7.3 Basis for the Land Valuations

While it might be natural for the vacant and let values of the holding to be assessed on a market value basis, we note that, for Part 2 of the 2003 Act, s.34(2)(b) goes further in also recognising the value that may be available from a special purchaser (usually for marriage value with another property). Which is to be the basis for the valuation? It would require specific evidence for an independent valuer to be confident in identifying a real special purchaser.

7.4 Other Issues for the Vacant Land Valuation

Is the value of the vacant land to be limited to the uses of the land available under the tenancy agreement or take account of any non-agricultural development value? What is intended to be the position if the land is a prospect for, say, housing development?

7.5 The Holding as Let – The Investment Valuation

7.5.1 Among other things, the paper firmly proposes that the valuation must take into account when the landlord would otherwise have been likely to recover vacant possession of the land from the actual tenant. This is very important in practice. The tenant might have a long life expectancy and farming heirs or be aged, infirm and have no heirs. Equally, there may in the circumstances and under the lease be a prospect of some or all of the land going for non-agricultural development. The terms of lease would be relevant to that for the valuation of the holding as let. Those points should, in principle, affect the investment value if the market has confidence that the legal position is stable.

7.5.2 However and even with assumptions resolved, the evidence base for identifying the investment value of a let holding in Scotland is very thin. A swift trawl has found two instances of the landlord's interest in a Scottish holding being offered on the market since 2010 – by contrast the same trawl has found 11 for England in 2015 alone. While it might ordinarily be possible to work from potentially relevant English evidence across, here that could require very substantial adjustment for Scottish circumstances in which the Agricultural Holdings Law Review Group noted that:

"A secure 1991 Act tenancy that had previously been seen as a low-return/low-risk investment is now regarded as a low-return/high-risk investment." (Paragraph 195, Interim Report)

Scottish let land values are thought to be much further below vacant possession values than English ones. That lack of evidence consequently weakens the valuation process and gives much room for reasonable disagreement with obvious consequences for the tenant and the landlord as the parties involved.

7.5.3 Even if it is true that, as is often loosely said that Scottish let land values are generally half of vacant land values that figure will be neither precise not true of every holding. Purely for illustration, there would be a £300,000 difference in the landlord's payment for a reasonable 500 acre arable farm turning on whether the let value is either 40 per cent or 60 per cent of vacant value.

7.5.4 The alternative to working from comparable sales is to use an investment approach applying an investment yield to the rent. That is again problematic not only for want of relevant contemporary evidence but also because very slight changes in the very low levels of yields usually seen for let farmland have large effects on value. The most recent public offer of let land sought a 1.4 per cent yield and modelling that points to a landlord's s.79 payment for the holding of £1,570/acre. At a 1 per cent yield that payment would be £1,000/acre; at 1.8 per cent yield it would be £1,890/acre. The current sense of low long term interest rates across the world could point to the argument being at the lower end of the yields used with the higher sensitivities illustrated. The consequences of those small differences in yield rates would be very significant for the parties and the outcomes could easily be contentious. That could suggest the need for at least one Lands Tribunal case (and possibly several) before there is a sense of the values for let land that can be sustained under challenge.

7.5.5 Not only may the necessary evidence for the valuation be very limited but it may be most limited for situations where vacant possession is seen as in prospect, whether because of the circumstances of the tenant or the prospect of development. Investment interests might rarely be sold in such cases when a much larger value could be obtained by waiting. That compounds the problems of meeting the paper's expectations that the investment valuation should reflect those circumstances. That does suggest the importance of an express provision in the statute equivalent to or clearer than s.34(2)(c) which says:

"taking account of when the seller would in the normal course of events have been likely to recover vacant possession of the land from the tenant"

so that the valuer's attention is drawn to an approach that assesses this prospect in its own right.

7.6 Issues Over Waygo Claims

7.6.1 The valuer is also asked to value the compensatable improvements and dilapidations with those figures then used to adjust the payment by the landlord. It may often be that in most instances the waygo claims aspect will be of less significance in this than the land values.

7.6.2 The issue here is that the holding as it stands already has the benefit of the tenant's improvements and the burden of the tenant's dilapidations. They would therefore ordinarily be reflected in the two land valuations, perhaps with more effect on the vacant value than the let land value. With the understandable view that the tenant should have benefit of his improvements but face the consequences of his dilapidations, making the problem one of ensuring that there is an equitable approach that sees neither double counting nor omission.

7.6.3 Part 2 of the 2003 Act handled this issue by requiring its land valuations to disregard ("black patch") all the tenant's fixed equipment (s.34(2)(j)) and improvements (s.34(2)(g)) and the dilapidations (s.34(2)(i)(i)). Waygo is, though not relevant to the Part 2 procedure.

7.6.4 Perhaps the root of the issue here is the parties can only enforce claims for payment (the basis of valuation) so far as there is a legal basis for payment. That may not usually cover all items disregarded by s.34 as:

- only those tenant's improvements that lie within Schedule 5 and, where required, have consent will be compensatable

- dilapidations can only be claimed where there is a valid record of condition.

A possibly lesser issue is that the statutory basis for assessing improvements (value to an incoming tenant) may produce a value that is different from the effect that an improvement may have on the land value (market value as a whole).

7.6.5 It may be that one answer is to ensure that the land valuations are only to disregard those items for which compensation is due but that requires them to be clearly defined beforehand.

7.7 Time Allowed for the Valuation

The differences in this process from that of Part 2 of the 2003 Act do warrant a longer period for the valuer's work than six weeks. It may sometimes be that the work of assessing waygoing claims and dilapidations will require more work than the land valuations. We appreciate that the second paper proposes a period of eight weeks, rather than six. The right period will depend on the extent of the work expected of the valuer.

7.8 Assistance from the Parties

7.8.1 The issues underlying the paper's mention of the need for the parties' co-operation with the valuer suggests the need for an equivalent of s.36 of the 2003 Act (after review). The tenant triggering the process should certainly be expected to provide all the information relevant to his position, including improvements asserted to be compensatable.

7.8.2 The tenant will usually have an active interest in demonstrating as many compensatable improvements as possible but even here there may be issues as if the tenant regards them as self-evident and so does not organise himself to

demonstrate their status. He may simply overlook an old but still important land improvement or assert that a slurry store is an improvement when it lies outside Schedule 5. Is the valuer to have an investigatory role in such cases?

8. Appeal Against the Valuation

8.1 The paper does not specify the mechanism to make the appeal. We think there is no experience of the operation of the appeal provisions of s.37 of the 2003 Act to assist.

8.2 Any appeal will be against the valuation and not be a dispute between the parties. That interacts with the issue of the approach to the costs of the appeal. In practice, the appeal is asking the Tribunal for an opinion and it so would be at the cost of the party concerned. Perhaps the most ready comparison is with an application to the Lands Tribunal to modify or remove a burden on title (a restrictive covenant) which also may only be between the applicant and the Tribunal. While it would have the valuation before it, the valuer is not a party to the issue.

8.3 That raises a question for the Tribunal as to how the valuation and the appellant's evidence is tested if the other party does not join the issue. There might be some issue here where the appeal concerns something on which the party might reasonably have provided the information directly to the valuer.

8.4 As the Lands Tribunal's role is to resolve the valuation, any issues and action over any alleged misconduct by the valuer (perhaps most often perceived undisclosed conflict of interest) are assumed to lie directly against him and not be part of the Tribunal's remit.

8.5 More generally, that might suggest an emphasis here (as we suggest more generally for Part 10) on providing for more effective and lower cost dispute resolution procedures, whether as alternatives or under the aegis of the Land Court or Lands Tribunal.

9. The Tenant's Opportunity to Withdraw

9.1 The tenant, now having the statutory figures and with time to reflect, may prefer to remain where he is, rather than continue with the process. The second paper combines the two previously proposed periods into a 35 day window for this option. The tenancy then remains as though no initial notice had been served.

9.2 Should that notice of withdrawal be copied to the Commissioner?

10. The Landlord's Chance to Buy the Tenant Out

10.1 The end of that 35 day period is when the landlord acquires an active role in the process. He could simply have been a bystander up to this point, aware but with no obligation to act (save for any duty to co-operate that may be imposed). Indeed, he need not act at this point.

10.2 The paper proposes that the landlord is pay "at least" the statutory figures. What does "at least" mean here? The proposed statute would identify the measure of payment which is what would then be due under the statute and anything else,

more or less or involving other assets, would be a matter of private contract between the parties.

10.3 The second paper gives the landlord six months to buy out the tenant. It is taken that this is to see the transaction completed with the settlement of any other terms, the raising of finance and the conveyancing processes. The developing regulation of bank lending for property, commonly slowing processes, is a factor here.

10.4 The resulting timetable if all goes without a hitch appears to be:

Tenant serves notice on landlord/Commissioner	
TFC appoints valuer	2 weeks (say)
Valuation to be done within	8 weeks
Period before landlord can enforce buy out	5 weeks

so the landlord's opportunity to buy the tenant out on the statutory basis arises some 15 weeks after notice and closes 41 weeks after the notice, when the tenant can move to assign the tenancy.

11. Assignation

11.1 General

11.1.1 If the landlord does not complete the purchase in that six month period, then the tenant can assign. He may have reasons for doing that to a family member but can equally offer it for sale in the open market where the value may most often be driven either by:

- the perpetual benefit of the profit rent (the excess of the market rent over the proposed fair rent)
- the residential opportunities of the tenancy.

The assignee would potentially be buying the near-perpetual right to:

- the use of the land for agricultural purposes
- the use of the existing dwellings
- any diversification and sub-letting feasible under the 1991 Act and the lease

subject to:

- the obligation to pay the rent
- any exposure to repossession for non-agricultural development

- having a landlord

- any other exposure to notice to quit

and with the same right to attempt to realise an exit value through the same proposed assignation route.

11.1.2 There is no reason for the value that could be paid to become the tenant to be similar to the payment that the landlord might make to extinguish the tenancy under the statutory process suggested.

11.1.3 If there is not a written lease by this point, one will almost certainly be essential for a third party assignee to want to commit his life and money to the purchase of the holding, especially if he is to rely on borrowed money for that. While potential further use of the assignation route could allow a tenancy to be used a security, it seems likely that lenders will be reluctant to do so (with issues over taking possession and re-marketing), preferring other collateral (owned land or a house) and guarantors while taking comfort in the tenancy and its profit rent.

11.1.4 It is clearly for a tenant with potentially eligible successors to resolve any family issues on moving to consider assignation to a third party for value.

11.1.5 Assuming the tenancy is to be bought as a farming project and not simply for its access to a possibly desirable house, the value is more likely to be based on the profit rent. That would be the difference between what would be paid as a market rent for the holding and the "fair rent" that would in future be determined at a rent review. The capital value that some would pay to benefit from that annual profit rent might then be adjusted for potential end of tenancy claims/liabilities.

11.1.6 As an assignation, the tenancy does not end but is transferred as a continuing asset to new hands. Thus, the rent review cycle should not be disturbed. There is thus no occasion for end of tenancy claims (as there would be if the tenancy were handed back to the landlord). The assignee takes the tenancy with its improvements and dilapidations at the date of the handover.

11.1.7 The second paper clarifies that the assignment may only be to a natural person, and so not to company or partnership. It does however propose that the assignation may only be to those qualifying as either new entrants or "a tenant farmer who is progressing in the industry" (also "progressing farmer").

11.1.8 Aside from issues of definition that also poses an issue if those people are less able to provide the sum of money that would encourage the tenant to leave the holding. That returns to the question of whether the paper's proposals are intended to help tenants out or assist progressive farmers in. If the latter is a significant part of the policy, the class of potential assignees needs to be broader rather than narrower since enabling larger payments will assist more to exit. If an assignee cannot offer enough money to enable a tenant to move, he will not do so.

11.1.9 Is there a case for allowing assignation to a farmer who is releasing an entry or progression opportunity elsewhere?

11.1.10 The proposed assignee is then to be put with a justification to the landlord who has 30 days to object on specified grounds.

11.2 New Entrant

11.2.1 We have a working and, to an extent, tested definition from the CAP regime as to who qualifies as a new entrant. It is clearly not intended to have an age limit and some of the more interesting new entrants are those with experience and capital from others areas of business and so need not be "young".

11.2.2 That EU definition looks back over five years for testing "head of holding" – is that to be kept? Keeping it would appear a useful safeguard for some applicants who might be thought desirable who could be prejudiced by circumstances no longer relevant disqualifying them. As "holding" here is a CAP term, it would be preferable to test the issue directly in terms of the control of a farming business, partly also to avoid confusion with the tenancy use of "holding".

11.2.3 As elsewhere in the agricultural holdings provisions of Part 10 of the Land Reform Bill, we doubt that simply a proposed entry to a farming course is sufficient to satisfy any reasonable requirement for training and experience, especially of the larger holdings that may be released by this mechanism. We fear that this is more likely to store up problems for the future where an assignee fails to complete the course and more generally weaken the credibility of the system. Meanwhile, the acceptability of interim arrangements might be seen merely to affirm the legitimacy of the essentially non-farming assignee using contractors, and so bypassing the supposed point of restricting who can be assignees.

11.3 "A tenant farmer who is progressing in the industry"/"Progressing farmer"

11.3.1 This concept raises more issues of definition. Progression is at least as important to the future of the sector as entry into it. While the words used imply that the assignee must hold a tenancy of some sort, progressing farmers may be involved in all sorts of structures of business – and may own some land whether by inheriting a field or having an involvement in another business. Limiting this definition too tightly is more likely to encourage creativity as to "new entrants".

11.3.2 The second paper has properly moved away from expressly excluding anyone with a 1991 Act tenancy, however small.

11.3.3 By definition, such people are already "head of a business" or they would be new entrants. The implication is that the business is not so substantial a holding that the Scottish Government thinks they should not be able to be an assignee. That might be tested on the basis of securely held land by:

- reviewing land that is not occupied:
    - on a grazing or mowing lease under s.3 of the 2003 Act
    - on an SLDT

  - on an LDT with less than […] years until the expiry of its term – that period to be a matter for policy

  - as an executor, receiver, etc

- then applying the succession two man unit test of Case 7 of Schedule 2 of the 1991 Act to the remaining owned and long term land.

A view would have to be taken as to how to treat the assignee's share in jointly owned land and land held by partnership.

11.3.4 If the issues of defining progressing farmers prove too difficult, the preferred solution would be to have no such restriction and allow assignation to everybody and so maximise the benefit of the s.79 mechanism as a means for exit, facilitating re-structuring.

11.4 Landlord's Grounds of Objection

11.4.1 We see these to be modelled on those for assignation and family succession. Where the assignee is unknown to the landlord and the information submitted by the tenant may not appear complete, there may need to be a process for the landlord to seek further details before the 30 day period for objection starts.

11.4.2 We do not believe that a landlord's objection to a new entrant on the grounds of inadequate training and experience can be properly answered by a simple commitment to attend and complete a course at a college. It would be very unlikely for a holding save perhaps for a small area of bare land or a single building to be let voluntarily on such basis and then only to someone known to the landowner for a defined term, not a whole equipped farm let on a secure tenancy.

11.5 Cut-Off Date for Assignation

11.5.1 A cut-off for assignation under the authority of the initial notice is in the interests of certainty for all involved, rather than leaving the issue open indefinitely.

11.5.2 The tenant may feel he is not in a position to market his tenancy to potential assignees until the landlord is no longer able to insist on buying the tenancy although discussions with the landlord may equally continue after the statutory period has expired. The nine months or so from the initial notice to the expiry of the landlord's right to buy may mean that it is impractical for the tenant to have an arms' length assignee in mind from the start.

11.5.3 An unwritten lease may need to be recorded in writing or other issues resolved for it to be marketed. Once on the market, there may be no adequate interest in the way the tenancy is offered. An agreed assignee may fail to find the finance and so a fresh marketing exercise may have to be undertaken. There are times when the land market is slow and lenders' attitudes may be significant. Even when an assignee has been found the procedure with the landlord must be followed and the conveyancing then done. A three year period is suggested as reasonably covering the process with all its possible slips.

12. Possible Consequential Issues

12.1 General

If a 1991 Act tenancy in principle becomes capable of being transferred for money, that has taxation and other consequences.

12.2 Taxation

12.2.1 The tenant is disposing of an asset, whether the tenancy is transferred to the landlord or the assignee. That is liable to CGT as on the disposal of any other asset. That will be due, typically at 28 per cent, on the taxable gain after reliefs. Where lease is assigned within the family, HMRC will impute a market value for it (though it may be possible for the acquirer to claim Holdover Relief where the tenancy has been given to him).

12.2.2 The gain would be assessed by deducting from the disposal value:

- the transactions costs
- any acquisition cost (probably nil at this stage but relevant to an assignee's future assignation)
- the value of the lease in March 1982 if it was held by the tenant then
- any costs in defending title and enhancement expenditure.

12.2.3 It is possible that if the tenant is indeed retiring completely from farming (rather than just one rented part of his business) the disposal may be taxed instead at the 10 per cent rate offered by Entrepreneurs' Relief, available where someone disposes of all or part of business or of the business assets after ceasing business. However, the simple disposal of an asset such as a tenancy of farmland does not, of itself, qualify – as demonstrated by the Tribunal's decision in the Scottish farming case, *Russell*. If the tenant has other farming interests that may require careful planning over the timing of the disposal of the tenancy which may not always be feasible since:

- any disposal before cessation of the business will not qualify.
- any farming after the disposal (exchange of contracts) will exclude that asset from the relief

12.2.4 If the tenant has not given up farming or is moving into another business, he may use Rollover Relief to defer the tax liability.

12.2.5 The acquirer of the lease (landlord or assignee) may have a liability under LBTT.

12.3 Future Issues – Inheritance and Divorce

12.3.1 While it has been clear for many years that an unassignable tenancy has a value (a point a tenant will assert on compulsory purchase), this has been less significant for Inheritance Tax since the rate of Agricultural and Business Property Reliefs (APR and BPR) were increased to 100 per cent in 1992. Any relevant

qualification of those reliefs or reduction in that rate could expose a tenant to some tax liability.

12.3.2 The value achieved by the tenant for the tenancy would, as cash, not benefit from any relief from Inheritance Tax beyond the normal nil rate band for all assets, unless it was redeployed into other relievable assets.

12.3.3 Having a clear mechanism by which value can be achieved for a 1991 Act tenancy will open up a range of issues, whether or not the tenant actually assigns.

12.3.4 Interaction with Inheritance - The proposed removal of the distinction between heritable and moveable property for Scottish inheritance law is understood (from a conversation with officials) to lead to the potential division of continuing un-assigned tenancies between heirs where this is necessary to effect the principles of succession – the mechanism for doing that is not clear in writing this. The proposed access to value by the new mechanism would strengthen the pressures for that to happen in seeking equity between the farming heir and other siblings. In some cases, a tenant might prefer to use the s.79 mechanism in the hope of a payment that allows the distribution of money than retain the tenancy as perhaps where there are few other assets.

12.3.5 Divorce - It may also bear on divorce proceedings. Valuers may currently be asked to advise on the value a tenancy in this context but need also to comment that it is a value that cannot be realised. This change would now make that value available for division should the court wish to do that rather see the tenancy as the source of the business income to fund its award.