

Written submission from Dunecht Estates

Submission to the Rural Affairs, Climate Change and Environment Committee (RACCE) on the Government's Proposed Stage 2 Amendment relating to S79 of the Land Reform (Scotland) Bill

Introduction

Dunecht Estates (owned by the Pearson family) is a diverse rural property business based in Aberdeenshire and Kincardineshire. The business is committed to Scottish agriculture and letting farms plays a significant role with 50 units let on 1991 Act secure tenancies and 20 units let on a mixture of Limited Duration and Short Limited Duration tenancies. In addition the Pearson family have their own farming business operating on a large low ground unit at Dunecht (arable, beef and low ground sheep) and extensively in Strathdon (upland sheep).

Dunecht is fundamentally opposed to the Scottish Government's proposed amendment. It seeks to replace S79 of the Bill with a wholly new provision and the proposal will do little to deliver a vibrant tenanted sector. In fact it has every prospect of achieving the exact opposite. Current and prospective landlords will view the proposal as a damaging piece of retrospective legislation that does not balance the interests of the parties. As such it will deliver a crushing blow to confidence to let land going forward and therefore sabotage other proposals in the Bill that are aimed at encouraging letting.

It is especially frustrating that this new proposal is being introduced at Stage 2 without any Stage 1 scrutiny and as a replacement for a recommendation from the Agricultural Holdings Legislation Review Group (AHLRG). As a consequence not only will the proposal be severely detrimental to the health of the sector but there is every prospect that if hurried through the outcome will be bad law that is exposed to successful legal challenge.

Below are Dunecht's comments on the principle of the new proposal and also comments on the detail.

The Principle - AHLRG

The AHLRG (chaired by the Cabinet Secretary) spent many months touring the country, gathering evidence and engaging with stakeholders before presenting its report and recommendations. S79 of the Bill as scrutinised during Stage 1 effectively incorporated the AHLRG's recommendation which it presented in its package of measures for the sector. It is very difficult to see what has changed in the short time since the AHLRG reported and why the 'conversion' proposal has been replaced with an 'assignation' proposal that will see the perpetuation of 1991 Act tenancies. Also the RACCE committee after completing its Stage 1 process did not recommend in its report that 'conversion' as proposed should be replaced with 'assignation'. As such there appears no sound justification for the significant change in direction.

The AHLRG's conversion proposal was designed as a mechanism that would facilitate retirement of 1991 Act tenants thereby creating more turnover in the sector and therefore opportunities for new entrants, expanding businesses etc. Importantly

as part of its work the AHLRG looked at the assignation for value model and concluded that the public interest case for it had not been made. Not only did the AHLRG arrive at that conclusion but they also noted that they were not persuaded that any marginal additional incentive in relation to retirement would be significant over that arising from conversion.

It is also relevant to highlight that the AHLRG concluded that the merits of the case for ring fencing 1991 Act tenancies was unclear. Dunecht agrees with that view. Public policy since 2003 has accepted that farms will be let on fixed duration tenancies. If there is a school of thought that secure tenancies are required if production is to be maximised then this calls into question current policy on letting vehicles. There is no-one in the industry seeking the replacement of fixed term tenancies with secure tenancies

Many (including the AHLRG) have recognised that confidence is essential if existing landlords and potential new landlords are to embrace letting. The Scottish Government's readiness to first accept (conversion) and then ignore (assignation) the recommendations of the AHLRG serves to deliver a message that very significantly damages that confidence. As such there is the real prospect that existing landlords will favour short term arrangements and potential new landlords will shy away from the sector altogether. Certainly before progressing with such a change in approach detailed evidence should be taken from the industry on the impact the proposed new measure is going to have.

Conversion vs Assignation

Although the original S79 proposal lacked detail (as identified by the RACCE committee in its Stage 1 report) it imported a principle from the AHLRG's recommendations that has received considerable support across the industry. There is no doubt that it too represented retrospective legislation and a concept that was not in the best interests of landlords but it did deliver on turnover (providing financial incentive to 1991 Act tenants to retire) and thus the creation of opportunity while at the same converting secure tenancies to fixed term vehicles. Essentially S79 as originally introduced had a measure of balance and that was recognised by landlords. That balance has been ignored in the Scottish Government's new proposal.

Dunecht Estates is of the view that conversion is much more likely to achieve the objective of a vibrant tenanted sector. Turnover in tenancies is part of what is required to deliver vibrancy and arguably that turnover will be driven by the price paid by an incoming tenant for the lease. There is no evidence to suggest that a higher price will be paid if acquiring an 'assigned' lease rather than a 'converted' lease. There is a strong argument using financial mathematics principles that the price someone will pay for a long MLDT will be no more than the price someone will pay for a 1991 Act tenancy. The price will be a function of future income streams discounted back to the present day with the discount factor reflecting the risk associated with achieving that forecast income.

As already stressed vibrancy in the sector will also be achieved if there is confidence to let land. Confidence will see existing landlords remaining committed and willing to let using long fixed term vehicles. It will also encourage potential new landlords into

the sector. Some have argued that the new S79 proposal will have no effect on the future use of LDTs/MLDTs on the basis that it only applies to 1991 Act tenancies. There is no evidence to support that position and it does not reflect the sentiment that is being expressed in many quarters.

Balance

The new S79 proposal removes the element of balance contained in the original provision. That loss of balance exposes the legislation to a successful challenge under the European Convention on Human Rights (ECHR). While there is an argument that the original proposal is also exposed it is evident that the new provision is much more susceptible to successful challenge. Dunecht is aware that this view has been drawn to the RACCE committee's attention by Scottish Land & Estates and that they have exhibited an Opinion from Counsel to this effect. The RACCE committee raised its own fears in this direction in its Stage 1 Report and the Delegated Powers and Law Reform Committee had similar concerns too.

It will not be in the interests of the let sector and therefore farming generally if poor legislation is enacted and then successfully challenged. Everyone is well aware of the damage (*Salvesen v Riddell*) that arose as a result of ill thought through provisions introduced in 2003. Every effort should be made to avoid a repeat but the new S79 proposal being rushed through at Stage 2 heightens that real prospect.

Some have accused those who have emphasised the need to comply with ECHR of making threats. That accusation is simply unfair. To do anything other than highlight the matter would be irresponsible. What is key is that property rights are correctly balanced.

It is understood that the option to 'buy out' the tenancy has been included in the proposal to provide a degree of balance and therefore a means to protect the rights of the landlord. However that will be of no benefit to a landlord who does not have the financial means to do so.

Also it must not be emphasised that the proposal is not a right of pre-emption. The landlord is not being given the opportunity to match the price being offered by the proposed acquirer of the lease. Instead the proposal is requiring the landlord to pay a price based on a function of the capital value of the farm – a farm that he/she already owns.

The Detail – Valuation Methodology

No sound justification has been given as to why the landlord if exercising the proposed right to buy has to pay a price that is different to that of any acquirer of the tenancy. Also there is no sound basis provided for the price to be a function of the capital value of the farm. If the Scottish Government remains determined to proceed with its proposal then the buy out must be at the same price as that paid by the proposed acquirer i.e. a true pre-emption. This does not prejudice the 1991 Act tenant seeking to assign his/her lease as that is all that he/she is expecting to receive from the proposed incoming tenant. As such it will have no impact on the objective of encouraging turnover.

It is not apparent whether the Scottish Government has conducted any testing of their proposed valuation methodology. If that is not the case then it again highlights the dangers of rushing through complex legislation at Stage 2. For example does the Scottish Government know whether there is any robust evidence to support the valuation of farms that are subject to a 1991 Act tenancy. Dunecht's understanding is that there is very little is any market evidence to support any valuation. Without knowing whether it will be possible to provide the valuations required it makes no sense to be introducing the provision.

If this proposal had been contained in the Bill as originally presented then the RACCE committee could have taken evidence from professional valuers on the methodology. If there is no opportunity to do so to properly consider the Stage 2 amendment then it should be rejected.

Potential Acquirers (Assignees)

The proposal highlights that the potential acquirers will be limited to new entrants or farmers wishing to progress in the industry. The definition of both class of acquirer is unclear and needs to be given considerable detailed thought.

There has been suggestion that the definition of a farmer wishing to progress in the industry will exclude anyone who already has a 1991 Act tenancy. However what if any restriction will be placed on owner occupiers who seek to buy the tenancy. They could be of any size (and potentially considerable size) and able to demonstrate that they wish to progress in the industry. The same could be said for tenants already farming on a long term LDT. Will they be eligible to acquire a 1991 Act tenancy?

This concern also raises the question of who will determine whether a proposed acquirer meets either definition and whether the landlord will have a right of objection if he/she considers that the proposed acquirer does not fall into either category.

Conclusions

The Scottish Government's proposal to introduce this significant new proposal at Stage 2 should be rebutted by the RACCE committee. Considerable time and effort was expended by the AHLRG on coming up with proposals and the new S79 dismisses their conversion recommendation in favour of something that will be to the prejudice of landlords with the resulting consequence set out in this submission. What is very strange is that the stated objectives of the Bill can be achieved in a far less damaging way by developing an appropriate conversion model – something that all in the industry expected to see as Stage 2 developed. The primary questions for the Scottish Government are what has changed and why proceed with an approach that will not achieve the Bill's objectives? To add the proposal with its lack of balance will expose the Scottish Government to a successful legal challenge.

It is a rushed and cavalier approach with no evidence demonstrating that the Scottish Government has done a full assessment of the likely impact.

15th January 2016