

AGRICULTURAL HOLDINGS (SCOTLAND) ACT 2003

EXPLANATORY NOTES

INTRODUCTION

Part 1: Agricultural Tenancies

Section 1: Application of the 1991 Act to agricultural holdings

3. Subsections (1) and (2) provide that parties will in future continue to be able to enter into leases that are subject to the provisions of the [Agricultural Holdings \(Scotland\) Act 1991 \(c.55\)](#) (“the 1991 Act”), rather than the provisions in sections 4 and 5 of the 2003 Act which introduce new forms of tenancy, the short limited duration tenancy (“SLDT”) and limited duration tenancy (“LDT”) respectively.
4. However, as subsection (2) provides, the 1991 Act provisions will only apply to those tenancies entered into where a written lease is agreed before the tenancy commences which expressly states that these provisions should apply to the tenancy. Subsection (4) provides that such a lease or a lease subject to the 1991 Act entered into before the 2003 Act applied (that is not a lease for less than year to year) is described as a “1991 Act tenancy” for the purposes of the 2003 Act. The description “1991 Act tenancy” is also used in these Notes.
5. Subsection (3) repeals section 2 of the 1991 Act. The effects are that no lease shall in future convert to a lease from year to year under the 1991 Act and there is no future requirement for the power previously available to Scottish Ministers to approve that a let of less than one year’s term should not take effect as if it were a 1991 Act tenancy. Section 3 of the 2003 Act provides for a lease of less than one year for grazing or mowing (see paragraphs 10 and 11 below).

Section 2: Conversion from 1991 Act tenancy to limited duration tenancy

6. This section allows for the conversion of an existing or new 1991 Act tenancy to an LDT.
7. Subsection (2) requires that the minimum length of a converted lease is 25 years (i.e. 10 years longer than the minimum length of an LDT) from the date of conversion. A 1991 Act tenancy can only be converted by the agreement of landlord and tenant. That subsection also provides that the new LDT need not necessarily comprise only the same land as the original 1991 Act tenancy. This will allow the parties to agree that additional land is incorporated into the lease in return for conversion of the existing secure tenancy to an LDT. Both the land under the original lease and the additional land can be included within a single LDT with a minimum term of 25 years.
8. Subsection (1) provides for a 30 day cooling off period for tenants and landowners after entering into an agreement to convert to an LDT. Within this period, subsection (3) allows either party to revoke the agreement to convert without penalty.

9. By virtue of subsection (4), compensation from landlord to tenant in respect of any improvements the tenant has made to the land (which can also include compensation for non-agricultural activities) will be payable on conversion, as if the tenancy had terminated (termination of an agricultural tenancy is also known as “waygo”). Subsection (5) acts to disapply the notice to quit provisions under section 21 of the 1991 Act where the parties choose to convert their 1991 Act tenancy by virtue of this section. Section 16 will apply to the new lease (see paragraphs 54 - 58).

Section 3: Leases for grazing or mowing

10. This section enables parties to agree leases for grazing or mowing, for periods of up to 364 days. Such leases are not subject to the same statutory requirements as other statutory leases. Sections 1(3) and 4(1) and (2) of the 2003 Act are also relevant to this type of lease.
11. Subsection (2) provides that a period of at least one day is required between successive grazing and mowing lets involving the same parties. A grazing or mowing lease will be deemed to be an SLDT if its duration exceeds 364 days (see paragraph 13).

Section 4: Short limited duration tenancies

12. Subsection (1) stipulates that, where agricultural land is let to a tenant for a period of not more than 5 years and the lease is neither a 1991 Act tenancy nor a grazing or mowing let, that tenancy is to be an SLDT.
13. Subsection (2) converts grazing or mowing lets to SLDTs, where the tenant continues to occupy the land after expiry of the term of the let with the consent of the landlord.
14. Subsection (3) provides that, where parties agree an SLDT of less than 5 years, they may subsequently agree to extend the overall term of the SLDT to any period up to a maximum of 5 years. Where such agreement is not made and the tenant continues to occupy the land after the expiry of the term with the landlord's consent, the term of the SLDT is deemed to be extended to 5 years.
15. Subsections (4) and (5) treat any new SLDT that is entered into less than one year after an SLDT involving the same parties and the same land expires to be an extension of that earlier SLDT. The effect of this is that if the two SLDT periods combined exceed 5 years, then an LDT is deemed to have been constituted by virtue of section 5(3).

Section 5: Limited duration tenancies

16. Subsection (1) defines an LDT as an agricultural tenancy (other than a 1991 Act tenancy) of at least 15 years duration. Any such lease of more than 5 years becomes an LDT, with a minimum length of 15 years - see subsection (4).
17. Subsection (2) converts SLDTs to LDTs where the tenant continues to occupy the land after expiry of the term of the let with the consent of the landlord. Consent may for these purposes be formal or implied (e.g. the landlord continues to accept rent from the tenant).
18. Subsection (3) works with section 4(5) of the 2003 Act, so that an SLDT purporting to be of a duration exceeding 5 years is deemed to be an LDT of 15 years.

Section 6: Assignment, subletting and termination of short limited duration tenancies

19. Subsection (1) prevents the tenant of land subject to an SLDT from either assigning the lease or sub-letting the land. However, as subsection (2) provides, landlord and tenant can agree to terminate an SLDT prematurely. Sections 7 and 8 set out the corresponding provisions to apply to LDTs, the effects of which are quite different. The 2003 Act does not require a notice to quit procedure for SLDTs.

Section 7: Assignment and subletting of limited duration tenancies

20. This section sets out a procedure which enables a tenant to assign an LDT. The tenant may assign the interest back to the landlord rather than terminate under section 8.
21. Subsection (1) provides that the tenant requires the consent of the landlord to an assignment, while subsection (2) sets out the process by which the tenant should seek this consent. Subsection (4) provides that the landlord is deemed to have consented unless the landlord intimates withholding that consent within 30 days of the tenant seeking consent by notice. Subsection (3) provides non-exhaustive grounds for withholding consent. Subsection (6) clarifies how “good husbandry” in subsection (3) (b) is to be defined.
22. Subsection (5) allows the landlord to override a proposed assignment of the tenant's interest to a third party by acquiring the tenancy on terms no less reasonable than those offered by the assignee.
23. Subsection (7) stipulates that a tenant under an LDT may sub-let the land let, but only if and insofar as this is provided for in the lease.

Section 8: Continuation and termination of limited duration tenancies

24. The section sets out the notice to quit procedures that are to apply to LDTs. Tenancies will continue to have effect where these procedures are not complied with.
25. Subsection (1) enables a landlord and tenant to terminate an LDT early by written agreement reached after the lease has commenced. Such an agreement must make provision for compensation due between the parties.
26. Subsections (2) to (5) and (11) act together to require the landlord to serve two notices on the tenant. The first is a notice of intention to terminate the tenancy (subsection (5) refers), to be served no more than 3 years nor less than 2 years before the term of the tenancy is due to expire. The landlord must then serve final notice to quit no more than 2 years nor less than one year before the term of the tenancy is due to expire (see subsections (3) and (4)). At least 90 days must separate the two notices.
27. Subsection (6) sets out that, where these requirements are not complied with, the tenancy will extend for a first short continuation period of 3 years. If, in this period, the same notice to quit requirements are not complied with, then the tenancy will extend again for a second short continuation period of 3 years (subsections (6) and (7) refer).
28. A different notice to quit procedure applies during the second short continuation period, as subsections (8) to (10) set out. Failure to comply with it will result in a long continuation of the lease (as defined by subsection (6)) for a further 15 years. In this instance, the service of preliminary notice to quit is not required and final notice to quit can be served at any time during the second short continuation period. As subsection (10) states, where notice to quit is served, the termination date is the final day of the second short continuation period or the date two years after notice to quit is given.
29. Where leases extend into a long continuation period, subsection (11) stipulates that the notice to quit requirements are the same as if it were a new LDT. So the service of both preliminary and final notice to quit is required before the lease can be terminated after a 15 year extension.
30. Subsections (13) and (14) set out the notice to be given by a tenant who wishes to terminate an LDT. The tenant must serve written notice at least 1 year and not more than 2 years before the expiry of the term or continuation of the tenancy (i.e. this is the same notice of intention to quit requirement as for tenants under 1991 Act tenancies (by virtue of section 21(3) of the 1991 Act)).

31. A landlord and tenant will be able to extend the term of an LDT by agreement at any time before its termination for any duration. The length of this extension may be as long or as short as the parties wish. This is provided for at subsection (15).

Section 9: Review of rent under limited duration tenancies

32. This section provides an implied lease term covering rent review arrangements for LDTs where the lease contains no such provision. Subsection (1) does not prevent rent review provisions within an LDT lease which override the statutory provisions.
33. By virtue of subsection (2), these review arrangements provide for a possible rent review after at least 3 years has elapsed since either the last rent review or commencement date of the tenancy. This is a similar process to that provided for 1991 Act tenancies by section 13 of the 1991 Act. However, the arrangements are only activated if either landlord or tenant serves written notice seeking the review not less than 1 year nor more than 2 years in advance of the review date (subsection (2)(a) refers).
34. The remainder of the section explains how new rental values should be calculated. Much of this parallels the provisions in section 13 of the 1991 Act (as now amended by section 63 of the 2003 Act) which apply to 1991 Act tenancies.
35. The basic principle, by virtue of subsection (3), is that the rent should be calculated at open market value. Subsections (3) to (5) then set out factors to be disregarded and factors to be taken into account in establishing an appropriate rental value. As with the amendments to section 13 of the 1991 Act, one effect of subsection (3) is to require that the current economic conditions in the relevant sector of agriculture is taken into account in determining the rent. The changes also allow a wide range of comparable evidence.
36. Subsection (4) provides that, in calculating rent, account is to be taken of increases in the rental value of the land arising from its use for non-agricultural purposes. However, as subsections (5) and (6) stipulate, no account is to be taken of increases in the rental value of the land arising from improvements paid for by the tenant (unless they are required by the lease), or improvements paid for by the landlord but supported by grant or the development of a superior system of farming. These provisions are similar to section 13(5) and (6) of the 1991 Act.
37. Subsection (7) sets out that rent should not be reduced to take account of any deterioration to the land or fixed equipment (as section 13(7) of the 1991 Act provides) or any reduction in the rental value of the land resulting from its use for non-agricultural or conservation purposes.
38. Subsection (8) provides that any change in rent takes effect from the review date.
39. Sections 10 and 11 of the 2003 Act also provide for the variation of rent in defined instances.

Section 10: Increase in rent: landlord's improvements

40. This section provides for the increase of rent for an LDT at any time (notwithstanding the standard rent review procedures set out in the previous section) following from certain improvements made to the land by the landlord, provided the landlord serves notice of increase in rent within 6 months of the completion of the improvement. This provision for LDTs is similar to section 15 of the 1991 Act which applies to 1991 Act tenancies. By virtue of subsection (3), the increase in rent must be reduced proportionately where the improvement has attracted grant support to the landlord.

Section 11: Variation of rent by the Land Court

41. This section provides a power for the Scottish Land Court (“the Land Court”) to vary rent for an LDT in disputes arising in relation to the establishment of a written lease (section 13) or in relation to fixed equipment (section 16). This section is similar to section 14 of the 1991 Act, which applies to 1991 Act tenancies.

Section 12: Right of tenant to withhold rent

42. **Section 12** gives the Land Court a new power in instances where a landlord has failed to comply timeously with an order from the Land Court for specific implement or an order *ad factum praestandum* (ie. any court decree to enforce the performance of an act) in relation to the landlord’s obligations in respect of fixed equipment. Its effect is to allow the tenant to carry out any work which may be required or to withhold rent until such time as the Court terminates the order. Its effect is the same as section 15A of the 1991 Act (as inserted by section 64 of this Act) in relation to 1991 Act tenancies.
43. Subsection (1) limits this provision to these types of Land Court order. In such instances, and where the landlord has failed in a material way to comply with the order by the date specified in that order, subsection (2) permits the tenant to apply to the Land Court for an order under subsection (3). Such an order may authorise the tenant to carry out the necessary work in place of the landlord and/or to consign rent to the Court rather than paying it to the landlord.
44. Subsection (4) states that the Land Court can release funds from the consigned rent to the tenant, on the application of the tenant, to cover reasonable costs the tenant incurs in conducting this work.
45. Such an order continues until the landlord applies to the Land Court under subsection (5) and the Court considers that it is no longer appropriate for the order to remain in force. At this time, the Court will decide how the remaining rental income consigned to it should be allocated between tenant and landlord (subsection (6) refers).
46. Improvements to fixed equipment carried out by the tenant under such an order are to be treated as a landlord’s expense to the extent to which the Land Court releases funds to the tenant for the costs reasonably incurred in carrying out these works (subsection (7) refers).
47. Subsections (8) and (9) respectively clarify that a landlord cannot irritate the lease for non-payment of rent if it is as a result of an order made under this section and that this section overrides any contractual term to the contrary.

Section 13: Written leases and the revision of certain leases

48. The 2003 Act does not require that SLDTs or LDTs be entered into in writing. The general law on the constitution of leases and specific statutory provisions, for instance section 1 of the [Registration of Leases \(Scotland\) Act 1857 \(c. 26\)](#) as amended, which requires that long leases for terms exceeding 20 years are required for certain purposes to be entered into in writing and registered in the property registers, continue to apply.
49. This section provides for SLDTs and LDTs provision similar to section 4 of the 1991 Act in relation to 1991 Act tenancies. Subsection (1) provides landlords and tenants with the scope to produce a lease in writing, or to supplement a written lease which is incomplete in relation to certain matters. Subsection (2) sets these out: those matters specified in Schedule 1 to the 1991 Act, and fixed equipment (Section 16 – see paragraphs 54-58).
50. By virtue of subsection (3), if the lease is not concluded within 6 months of the service of notice to request that a lease in writing be entered into, the Land Court may determine the terms of the lease. Such terms as may be set include the existing terms of the tenancy, reasonable terms as to the matters which require to be specified, and additional terms

*These notes relate to the Agricultural Holdings (Scotland) Act 2003 (asp 11)
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as agreed and not inconsistent with the 2003 Act under subsections (4) and (5). Section 11 of the 2003 Act also empowers the Land Court to vary the rent payable under an SLDT or LDT when determining any matter under subsection (3).

51. Subsection (6) provides the Land Court with discretion to apply its determination from a later date if to do so would allow either landlord or tenant to remedy a situation that would otherwise have left them in breach of a term of their tenancy.

Section 14: Freedom of cropping and disposal of produce

52. This section acts to extend the scope of section 7 of the 1991 Act to include SLDTs and LDTs. The principal effect of this is to provide that the tenant has the right to dispose of any produce of the land (other than manure) and practice any system of cropping any arable land as they see fit. This right applies regardless of any provision in the lease to the contrary. As with section 7 of the 1991 Act, it is subject to certain restrictions to protect the holding from deterioration and does not apply in the year before the expiry of the lease.

Section 15: Permanent pasture

53. This section extends the scope of section 9 of the 1991 Act to apply to SLDTs and LDTs as well as 1991 Act tenancies. That section allows either landlord or tenant to serve a notice on the other, to demand a reference to arbitration on the question of whether land required to be maintained as permanent pasture by the lease need in fact be maintained in this way. Disputes on this matter are to be within the exclusive jurisdiction of the Land Court (see paragraph 14 of the Schedule to the 2003 Act).

Section 16: Fixed equipment

54. The effect of this section is to provide for the respective rights and responsibilities of landlord and tenant in relation to the maintenance, replacement and in certain cases provision of fixed equipment on land comprised in SLDTs and LDTs. Section 5 of the 1991 Act (as amended by section 60 of the 2003 Act) makes similar provision for 1991 Act tenancies.
55. The definition of fixed equipment is set out in section 93 of the 2003 Act, while the definition of “produce” is set out in section 16(4) of the 2003 Act. Both definitions follow those used in section 85 of the 1991 Act (section 85 of that Act refers).
56. Subsections (1) and (2) provide that any fixed equipment on the land is to be specified in the lease, and that landlord and tenant may adjust that specification in writing at any time during the term of the lease.
57. Subsection (3) sets out for LDTs and SLDTs the landlord’s liability for providing and maintaining fixed equipment both at the start of and during the term of the tenancy, while subsection (5) restricts the liability of the tenant for maintaining fixed equipment. These provisions have similar effect to section 5(2) of the 1991 Act, which applies to 1991 Act tenancies.
58. Subsection (6) prevents landlord and tenant from entering into an agreement under which the tenant would bear the cost of meeting the landlord’s responsibilities under this section. Section 5(4D) of the 1991 Act (as introduced by section 60 of the 2003 Act) makes similar provision for 1991 Act tenancies. Subsection (7) stipulates that any term in an SLDT or LDT lease that requires the tenant to pay part or all of a premium due under a fire insurance policy for fixed equipment on the land is of no effect.

Section 17: Resumption of land by landlord

59. This section acts to restrict the circumstances in which a landlord may resume from an SLDT or LDT the land let under that tenancy before the end of the term of the lease.

60. Subsection (1) provides that resumption is permissible only where both the landlord requires to obtain planning permission and this planning permission has been obtained for a non-agricultural purpose, and the lease does not expressly prohibit resumption. A landlord cannot use planning permission obtained by an LDT tenant which allows the tenant to diversify as a trigger to resume the land, unlike in the case of an SLDT. The landlord must give written notice of any intention to resume land, one year in advance of the intended resumption date, by virtue of subsection (2).
61. Where the landlord intends to resume part of the land, subsection (3) gives the tenant the power to terminate the tenancy over the whole land. Where the tenant chooses not to terminate the tenancy in this way, subsection (4) provides that the tenant is entitled to a reduction in rent commensurate with the proportion of the land resumed.
62. Subsection (5) and (6) provide for the restoration of resumed land to the tenant in certain circumstances, where part of the land is resumed in connection with mineral extraction. These circumstances are that the tenancy remains in effect between the same landlord and tenant and any compensation payable to the tenant on resumption was made on the basis that resumed land would be restored to the tenancy (see also paragraphs 226-228).

Section 18: Irritancy of lease and good husbandry

63. Subsection (1) allows the landlord and tenant of an SLDT or LDT to agree and specify within the lease the grounds that will allow for irritancy of the lease (i.e. termination of the lease by the landlord due to breach of contract by the tenant). However, the remainder of this section also places restrictions on irritancy.
64. Subsection (2) prevents a landlord from being able to irritate a lease and evict the tenant only on grounds of the tenant's failure to reside on the land.
65. Subsection (3) and (4) define "good husbandry" for leases where failure to use the land in accordance with the rules of good husbandry is used as a basis for irritancy. That definition is by reference to the Sixth Schedule to the [Agriculture \(Scotland\) Act 1948 \(c. 45\)](#). However, it is also extended to include the carrying out of conservation activities. These activities qualify under this section if they are carried out under a management agreement that has a statutory footing, or in accordance with the conditions of a public grant paid from the Scottish Consolidated Fund or from other sources as specified by the Scottish Ministers by order.
66. Where the tenant of an LDT enters into non-agricultural activities by virtue of the statutory provisions in sections 40 and 41 of the 2003 Act, subsection (5) provides that these activities are to be treated as being in accordance with the rules of good husbandry. Subsections (4) and (5) make similar provision to section 69 of the 2003 Act, which amends the definition of "good husbandry" in section 85 of the 1991 Act for 1991 Act tenancies.
67. Subsections (6) and (7) set out the process by which a landlord may irritate the lease. This requires the landlord to serve notice of at least 2 months of their intention to irritate the lease and remove the tenant.

Section 19: Resumption and irritancy: supplementary

68. This provision provides that specified rights for landlords override the termination arrangements for SLDTs and LDTs, as set out in sections 6 and 8 of the 2003 Act respectively. These are the right for landlords to resume land under section 17 of the 2003 Act, any right of the landlord to remove a tenant whose estate has been sequestrated and any irritancy which has been incurred .

Section 20: Section 16 of the Succession (Scotland) Act 1964

69. This section amends those provisions of the [Succession \(Scotland\) Act 1964 \(c. 41\)](#) (“the 1964 Act”) which apply to agricultural leases to set out how they are to apply to LDTs and SLDTs.
70. New section 16(4A) and (4B) ensures that, notwithstanding any provision in a lease prohibiting assignation, the executor can assign the deceased tenant’s interest in the tenancy to a member of their family or to any other person.
71. New section 16(4C) provides executors with a new power to terminate the tenant’s interest in a lease where a tenant dies intestate or a bequest fails, if they are satisfied that the tenant’s interest cannot otherwise be disposed of according to the law of succession. This will enable the executor to realise the value of the tenancy and distribute any sum realised among the beneficiaries of the tenant’s estate more quickly in circumstances where beneficiaries are clearly not interested in assuming the tenancy. It also allows the executor to terminate the lease if a successor has not been found within the period defined in new subsection (4D).
72. Subsection (4E) requires the executor to exercise these powers in the best interests of the deceased’s estate.

Section 21: Bequest of lease

73. This section provides that tenants under LDTs and SLDTs may bequeath their interest in the tenancy to a member of their family, including sons-in-law or daughters-in-law or to any other person. This provision is similar to section 11 of the 1991 Act for 1991 Act tenancies. The interest in the tenancy is to be treated as intestate estate if that person does not accept the bequest or if the Land Court declares the bequest to be null and void, unless section 16 of the 1964 Act, as amended by section 20 of the 2003 Act has effect (subsection (3) refers).

Section 22: Right of landlord to object to acquirer of tenancy

74. This section extends the provisions of section 12 of the 1991 Act to SLDTs and LDTs. Its effect is to oblige the person assuming the deceased tenant’s interest in the lease to notify the landlord within 21 days of the transfer taking place, or if that is not possible, as soon as it is practicable - subsection (1).
75. Subsection (2) applies the provisions of section 12(2) to (4) of the 1991 Act to SLDTs and LDTs. Its effects are to enable the landlord to serve a counter-notice to the new tenant and apply to the Land Court for an order terminating the tenancy. The succeeding tenant retains possession of the land unless and until the Land Court agrees to a landlord’s application to terminate the tenancy.
76. Subsection (3) allows the landlord to acquire a deceased tenant’s interest in a tenancy when the executor intends to assign the interest outwith the family (this right does not extend to transfers to members of the family who, by virtue of new section 16(4B)(a) of the 1964 Act, are entitled to succeed to the deceased’s intestate rights or claim legal rights or the prior rights of the surviving spouse). To do so, the landlord must give notice in writing and within 30 days of receiving notice under subsection (1). The landlord must also match or exceed any reasonable terms upon which the lease was transferred to the person outwith the family.

Section 23: Effect of termination of tenancy where tenant deceased

77. This section stipulates that, if a lease is terminated following the death of a tenant, compensation at waygo is payable as it would be if the lease had been terminated on expiry of the terms of the lease.