

POLICY NOTE

THE AGRICULTURAL HOLDINGS (MODERN LIMITED DURATION TENANCIES AND CONSEQUENTIAL ETC. PROVISIONS) (SCOTLAND) REGULATIONS 2017

SSI 2017/300

1. The above instrument is made by the Scottish Ministers in exercise of the powers conferred by section 5B(3) of the Agricultural Holdings (Scotland) Act 2003 (“the 2003 Act”) and section 127(1) of the Land Reform (Scotland) Act 2016 (“the 2016 Act”). It is subject to the negative procedure.

Background

2. The Bill for the 2016 Act received Royal Assent on 22nd April 2016. Chapter 1 of Part 10 of the 2016 Act amends the 2003 Act to provide for the creation of a new type of agricultural tenancy, the Modern Limited Duration Tenancy (“MLDT”). It also inserts a new section 5B into the 2003 Act which allows a lease constituting an MLDT to contain a break clause in certain circumstances. This is where the tenant under such a lease is a new entrant to farming. Section 5B(3) enables the Scottish Ministers to make provision about tenants under an MLDT who are new entrants to farming. Chapter 1 of Part 10 of the 2016 Act, along with some other provision of the 2016 Act relating to MLDTs, is being brought into force on 30th November by SSI 2017/299. These Regulations set out who is a new entrant to farming for the purposes of MLDTs.

Policy Objective

3. The overall policy objective of Part 10 of the 2016 Act is to modernise legislation relating to agricultural tenancies. Chapter 1 of Part 10 introduces the MLDT as an option for future agricultural tenancies. This replaces the existing Limited Duration Tenancy (“LDT”) option set out in the 2003 Act. LDTs in existence immediately before the coming into force of this Regulation will continue to exist.

4. The policy intention of the MLDT is to offer increased flexibility to landlords and tenants to negotiate lease provisions in relation to fixed equipment, rent to that meet their needs, and encourage landlords to let to new entrants to farming, and to encourage new entrants to take up farming.

5. Section 85 of the 2016 Act inserts new section 5B into the 2003 Act. This provides that a lease constituting an MLDT may contain a 5 year break clause where the tenant under an MLDT is a new entrant to farming. Such a break clause must be in accordance with the new section 8D of the 2003 Act, which is inserted by section 87 of the 2016 Act. The intention of section 5B of the 2003 Act is to encourage landlords to let to new entrants, and to encourage new entrants to take up farming, giving more flexibility to meet evolving needs by allowing both parties the reassurance by providing the ability to end the tenancy, if the arrangement is not working. However, it only provides that the lease **may** contain a break clause – so the landlord is not obliged to offer it, even if the tenant is a new entrant to farming and vice versa, the tenant is not obliged to accept a break clause even if the tenant is a new entrant to farming.

6. These Regulations make provision as to who is a new entrant to farming for the purposes of whether or not a person's lease of an MLDT can contain a break clause. The Regulations provide that a tenant under a lease constituting an MLDT is a new entrant to farming unless they are excluded by the Regulations. The Regulations set out the circumstances in which a Tenant is excluded from being a new entrant to farming.

7. For the purposes of defining a new entrant, the policy intention is to exclude those individuals who are already experienced tenant farmers, small landholders, crofters or landowners, but to include individuals who may have (in the 5 years preceding entering into the lease constituting an MLDT) been a contract farmer, only held grazing lets, Short Limited Duration Tenancies of less than 3 continuous years, or owned less than 3 hectares of agricultural land in aggregate, to still be classed as a new entrant. The intention is for these groups of individuals, are not entirely new to farming but have not had the opportunity either to farm for themselves, or with any permanence or scale, to also qualify.

8. A Tenant is defined in the 2003 Act and can cover a variety of people. Regulation 3(7) excludes some of those people from the definition of tenant for the purposes of determining who is and who is not a new entrant to farming. This ensures that some specific groups of individuals who are not already a Tenant, and subject to their individual circumstances may still be eligible for the purposes of becoming new entrant.

9. Regulation 3 applies where an MLDT is entered into by a single tenant ("T"). Where T is a legal person, the question of whether or not T is a new entrant depends on the status of the person controlling T – if the controlling person would be excluded from being a new entrant if they were the tenant in their own right, then T is also excluded. Regulation 5(1) makes provision as to how to determine if a person controls a legal person for the purposes of these Regulations.

10. Where T is a legal person, and no one person has overall control of T, then the question of whether or not T is a new entrant depends on the status of the persons who between them control T. Regulation 3(5) provides that where 50% or more of the persons who between them control T (using criteria which reflects regulation 5(1)) would qualify as new entrants if acting on their own then T qualifies as a new entrant. This is to ensure that a tenant who is a legal person seeking to farm with a more experienced farmer sitting behind that legal person along with inexperienced, or less experienced, farmers (which may give the landlord additional reassurance and encourage them to let to T) is not excluded from being a new entrant to farming.

11. Regulation 4 applies where an MLDT is a shared lease, meaning where the tenants are joint tenants or are tenants in common. Similarly to situations where T is a legal person and no one person has control of T, if 50% or more of the joint tenants or tenants in common would be new entrants if they were acting on their own, then the tenants can be a new entrant.

12. As well as providing for the creation of MLDTs, the 2016 Act also provides for the creation of another new type of agricultural tenancy, the Repairing Tenancy ("RT"). The relevant provisions of the 2016 Act which provide for the creation of RTs are not yet in force. Schedule 1 contains provisions which modify various instruments to insert references to MLDTs and RTs. This is in consequence of the coming into force of the provisions of the 2016 Act which introduce MLDTs on 30th November 2017, by SSI 2017/299. As the

provisions of the 2016 Act which introduce RTs are not yet in force, paragraphs 2 to 3 and 5 to 6 of schedule 2 make transitory provision in connection with the modifications made by schedule 1. The effect of these are that the references to a “Repairing Tenancy” in the instruments modified by schedule 1 are to be ignored until section 92 of the 2016 Act (which provides for the creation of Repairing Tenancies) comes into force for all purposes.

13. Paragraph 2 of schedule 1 modifies the Organic Aid (Scotland) Regulations 2004 (“the 2004 Regulations”). Paragraph 2(2) inserts references to MLDTs and RTs into the 2004 Regulations. Paragraph 2(3) substitutes a new sub-paragraph (b) for the existing regulation 16(8)(b) of the 2004 Regulations. This is necessary because this provision of the 2004 Regulations currently refers to sections 11(6) and 12(3) of the Agricultural Holdings (Scotland) Act 1991 (“the 1991 Act”). Sections 11(6) and 12(3) were repealed by section 109 of the 2016 Act. That repeal took place on 23rd December 2016 on the commencement of section 109 of the 2016 Act via the Land Reform (Scotland) Act 2016 (Commencement No. 3, Transitory and Saving Provisions) Regulations 2016 (“the 2016 Regulations”). At the same time, new sections 12A and 12B were inserted into the 1991 Act. The modification made by paragraph 2(3) of schedule 1 of these Regulations is to update the cross-references in regulation 16(8)(b) of the 2004 Regulations following the repeal and insertion of the 1991 Act provisions. The repeal of sections 11(6) and 12(3) of the 1991 Act was subject to saving provision contained in the 2016 Regulations, which preserved the old law in certain circumstances. That means that despite the repeal of sections 11(6) and 12(3) of the 1991 Act, those provisions remain active and relevant in certain situations. Accordingly, paragraph 4 of schedule 2 of these Regulations makes similar saving provision to that made by the 2016 Regulations. The effect is that regulation 16(8)(b) will apply as if it were not amended by these Regulations in the circumstances set out in paragraph 4 of schedule 2. These circumstances relate to where an agricultural tenancy was the subject of a bequest contained in a will or other testamentary writing made before 23rd December 2016. The circumstances also relate to where a person died before 23rd December 2016 and that person had not made any will or other testamentary writing containing a bequest of an agricultural tenancy but where an interest in an agricultural tenancy forms part of the deceased’s estate.

Consultation

14. No formal consultation was required to be carried out in relation to these Regulations. However, as part of the preparation and development of the Land Reform (Scotland) Bill, a formal consultation exercise was carried out between December 2014 and February 2015, with an analysis of responses published in May 2015. Informal consultation with stakeholders will continue to take place during the implementation process. The link below shows the relevant consultation documentation: <https://consult.scotland.gov.uk/land-reform-and-tenancy-unit/land-reform-scotland/>

Impact Assessment and Financial Effects

15. Both an Equality Impact Assessment and a Business and Regulatory Impact Assessment were carried out in relation to the 2016 Act. The Financial Memorandum which was prepared for the 2016 Act considered the financial impact and remains valid. The links below show the relevant documentation.

Link to the Equality Impact Assessment: <http://www.gov.scot/Resource/0048/00480754.pdf>

Link to the Business and Regulatory Impact Assessment:

<http://www.gov.scot/Resource/0048/00481018.pdf>

Link to the Financial Memorandum:

[http://www.parliament.scot/S4_Bills/Land%20Reform%20\(Scotland\)%20Bill/SPBill176AFM/S042016.pdf](http://www.parliament.scot/S4_Bills/Land%20Reform%20(Scotland)%20Bill/SPBill176AFM/S042016.pdf)

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