

AGRICULTURAL HOLDINGS (SCOTLAND) ACT 2003

EXPLANATORY NOTES

INTRODUCTION

Part 2: Tenant's Right to Buy Land

Section 24: The Keeper and the Register

78. Under Part 2 of the Land Reform (Scotland) Act 2003 (“the Land Reform Act”), the Keeper of the Registers of Scotland is to set up and keep a Register of Community Interests in Land, to record registrations of community interest to acquire land under the Community Right to Buy provided for in that Act. Section 24 of the 2003 Act requires that the Keeper is to keep that register so that it contains a part for registering tenants’ interests in acquiring land in accordance with section 25 of the 2003 Act.

Section 25: Registration of tenant's interest

79. *Section 25* sets out the process for registering an interest in acquiring the land comprised in the lease and explains the duties of the tenant, the landowner and the Keeper. There is nothing in the 2003 Act that will prevent a landlord from selling tenanted land to that tenant voluntarily. However, the statutory right to buy procedure protects the position of those tenants who have registered an interest in acquiring the land comprised in the lease.
80. Subsections (1) and (4) require tenants who wish to register an interest in acquiring the land comprised in the lease to send a notice of interest to the Keeper, to copy that notice to the owner of the land and to notify the Keeper that a copy of the notice has been sent to the owner. Subsection (1) provides that the right to register an interest in acquiring the land comprised in the lease applies to tenants under a 1991 Act tenancy (cf. section 72(2), which allows general partners within a limited partnership, where the partnership is the tenant in a 1991 Act tenancy, to exercise the rights of a tenant) . The effect of subsection (2) is that where there are two or more tenants under a lease then those tenants may together apply to register an interest (where both or all tenants so agree), while a sub-tenant under a lease may not apply to do so. Subsection (3) sets out the information to be specified in the notice. Scottish Ministers specify the form of the notice in regulations.
81. Subsection (5) sets out the information that the Keeper must register and requires the Keeper to send an extract of the registration to each of the tenant and the owner of the land. The Keeper may charge a reasonable fee for registering a tenant’s interest and for providing an extract or copy extract of registration by virtue of subsection (7). If there is a standard security over the land in question, the owner must tell the tenant about that security and send a copy of the extract to the creditor in the standard security (subsection (6) refers).

82. Subsection (8) confers on the owner of the land the right to challenge the registration of the tenant's interest where any matter contained in the extract registration is inaccurate by giving notice in writing to the Keeper. On receipt of a notice under subsection (8) the Keeper is to make such enquiry as the Keeper thinks fit. If there is an inaccuracy the Keeper must rescind the registration of the tenant's interest if the inaccuracy is material, or amend the registration of the tenant's interest if the accuracy is not material (see subsection (9)). Where the registration of the tenant's interest is rescinded subsection (10) requires the Keeper to intimate that fact to each of the tenant and the owner of the land. Where the registration of the tenant's interest is amended, subsection (10) requires the Keeper to send an extract of the amended registration to both the tenant and the owner of the land. Subsection (11) confers upon both the tenant and the owner of the land the right to appeal to the Land Court any decision of the Keeper made following notice to the Keeper under subsection (8).
83. Subsection (12) limits the effect of registration of a tenant's interest in acquiring land so that it has effect only in relation to land that remains comprised in the tenancy. It also provides that registration of a tenant's interest ceases to have effect upon a registration being rescinded, the tenancy being terminated or the expiry of five years from the date of registration, whichever is the sooner. Responsibility for informing the Keeper where the tenancy is terminated or there is a reduction in the land comprised in the tenancy within that five year period rests with the landlord (see subsection (13)). Subsection (14) permits a tenant to renew registration of the interest in acquiring the land comprised in the lease. Subsection (15) requires the Keeper to remove from the register any registration of interest which no longer has effect.

Section 26: Notice of proposal to transfer land

84. Where a tenant's interest in acquiring the land comprised in the lease is registered under section 25 of the 2003 Act and the owner of that land (or the creditor in a standard security with a right to sell, where appropriate) proposes to transfer that land or any part of it to another person then subsection (1) of this section requires (unless the transfer is a transfer falling within section 27 and, therefore, not requiring notice to be given) the owner (or creditor, as the case may be) to give written notice of that fact to the tenant and to send a copy of that notice to the Keeper. Ministers will be able to prescribe the form and nature of that notice, by virtue of subsection (2).

Section 27: Transfers not requiring notice

85. This section lists types of transfer that do not require notice to be given to the tenant under section 26. The right to buy is activated under section 28 by either the giving of notice under section 26, or the taking of action with a view to transfer of the land where such notice should have been, but was not, given. Accordingly, the types of transfer listed in this section, being transfers that do not require notice to be given, are transfers of land that will not activate the right to buy. The list is similar to that contained in section 40(4) of the Land Reform Act which lists types of transfer that are not prohibited where a community interest is registered and which, therefore, may proceed notwithstanding a registered community interest in the land being registered. Such a transfer would not activate a right to buy under Part 2 of the Land Reform Act.
86. Subsection (2) aims to prevent the triggering of the right to buy being avoided by the simple device of introducing an intermediate transfer that does not require notice (e.g. by transferring the land to a person otherwise than for value) before then making a transfer that does require notice (e.g. a transfer for value). Subsection (2) provides that any transfer of a type mentioned in subparagraph (2)(a), (e) or (h) of subsection (1) (which, by themselves are transfers not requiring notice) is deemed to be a transfer requiring notice where it is, or is part of, a scheme, arrangement or series of transfers, a main purpose or effect of which is to avoid the requirements of Part 2 of the 2003 Act.
87. Subsection (5) allows Ministers to modify subsections (1) to (4) by order.

Section 28: Right to buy

88. Subsection (1)(a) applies where a tenant's interest in acquiring the land comprised in the lease is for the time being registered under section 25 (i.e. the interest has been registered, has not ceased to have effect by virtue of section 25(12)(b) of the 2003 Act, and only in so far as that registered interest continues to have effect by virtue of section 25(12)(a) of the 2003 Act). In such cases, the giving of notice to that tenant under section 26 confers upon that tenant the right to buy the land to which the transfer relates (i.e. if only part of the land in respect of which the tenant has registered an interest in acquiring is to be transferred then the right to buy can apply to that portion of the land, but not to land that is not to be transferred). Subsection (1)(b) provides that where such notice should have, but has not, been given under section 26, the taking of certain actions with a view to transferring that land or any part of it by the owner or creditor in a standard security also confers upon that tenant the right to buy the land to which the transfer relates. The particular actions that will trigger these consequences are set out in subsections (3) and (4), which the Scottish Ministers may modify by Order using the power conferred by subsection (5). Where the right to buy is conferred upon a tenant by virtue of subsection (1) but the transfer of the land to a person other than that tenant proceeds nonetheless, then, in that event, the tenant has the right to buy that land from the person to whom that land is transferred or from any person to whom it is subsequently transferred (see subsection (2)).

Section 29: Exercise of right to buy

89. Where a tenant's right to buy is conferred by section 28(1) and the land is to be bought from the owner, or creditor, as appropriate, the tenant must, within 28 days of receiving the notice under section 26, give to the owner or creditor, as appropriate, notice of intention to buy the land (see subsection (2)).
90. Where a tenant's right to buy is conferred by section 28(2) (i.e. the tenant has the right to buy but the land is sold to a third party nonetheless) and the land is to be bought from the person to whom the land has been transferred, or subsequently transferred, subsections (3) and (4) apply. Accordingly, the tenant must, within 3 years from the transfer of the land to the person from whom the land is to be bought, give to that person notice of intention to buy the land. For notice to be given to this person the tenancy must be in force on the date when the notice is given.
91. Whether notice is given under subsection (2) or (4), the procedure for buying is set out in section 32 of the 2003 Act. Where the tenant does not intend to proceed to buy then the tenant is to give notice of that fact to the person from whom the land would otherwise have been bought (see subsection (5)).
92. If the tenant fails to give notice in accordance with either subsection (2) or (4), as appropriate, or if the tenant gives notice in accordance with subsection (5), the right to buy is extinguished (see subsection (6)).
93. Subsection (7) provides that the tenant must send a copy of any notice given under this section to the Keeper. .

Section 30: Meaning of "creditor in a standard security with a right to sell land"

94. This section defines the term "creditor in a standard security with a right to sell land" for the purposes of Part 2. The first definition is a creditor in a standard security where a calling-up notice in respect of the security has been served upon the debtor and has not been complied with. In this case the debtor is in default within the meaning of standard condition 9(1)(a) (the standard conditions are set out in Schedule 3 to the Conveyancing and Feudal Reform (Scotland) Act 1970 ("the 1970 Act")). Such a creditor has a right to sell the security subjects by virtue of section 20(2) of the 1970 Act.

95. The second definition is a creditor in a standard security where the debtor is in default within the meaning of standard condition 9(1)(b) and a notice of default has been served under section 21 of the 1970 Act to which the debtor has not objected under section 22(1) of the 1970 Act. The definition also covers situations where the court has upheld or varied the notice of default under section 22(2) of the 1970 Act, in cases where the debtor has objected to the notice, and where the debtor fails to comply with any requirement of the notice, or varied notice. Such a creditor has the right to sell the security subjects, or any part of the security subjects, by virtue of standard condition 10(2).
96. The third definition is a creditor in a standard security where the debtor is in default within the meaning of standard condition 9(1)(c) and the creditor has obtained a warrant to exercise any of the remedies which the creditor is entitled to exercise on default within the meaning of standard condition 9(1)(a), which includes the right to sell the security subjects.

Section 31: Effect of extinguishing of right to buy

97. Where a tenant's right to buy has been extinguished by virtue of either of section 29(6) (tenant fails to give notice of intent to buy/tenant gives notice that does not intend to proceed to buy) or 32(8) (tenant fails to comply with an order of the Land Court under section 32(7) or has not otherwise concluded missives within a reasonable period) the tenant may acquire a subsequent right to buy the same land, or any part of the same land, under section 28(1). This right can be acquired in one of two ways. First, if the period of 12 months from the extinguishing of the right to buy has expired the tenant will acquire a right to buy if section 28(1) is satisfied. Second, if during that 12 month period the land is transferred to another person and that person requires to give notice under section 26 the tenant will acquire a right to buy if section 28(1) is satisfied.

Section 32: Procedure for buying

98. Subsection (1) provides that it is for the tenant to make the offer to buy in exercise of the tenant's right to buy under section 28
99. Subsection (2) provides that the offer to buy is to be at a price agreed between the tenant and the person from whom the land is being bought, or where there is no agreement, the value assessed under section 34(8) or determined by the Lands Tribunal on appeal against the valuation carried out under section 34. The offer must specify the date of entry and of payment of the price.
100. Subsection (3) makes provision as to how the date of entry and of payment are to be determined. A time limit of 6 months from the date when the tenant gave notice under section 29(2) or (4) of the tenant's intention to buy is set for the date of entry and of payment of the price, unless some later date is agreed between the parties. Where the price payable is subject to an appeal which has not, within 4 months after the date when the tenant gave notice of intention to buy, been determined or abandoned the date of entry and payment is to be not later than 2 months after the determination or abandonment of the appeal, unless some later date is agreed between the parties. Under subsection (4), the offer may include other reasonable conditions. Where the tenant has not, within the period fixed or agreed under subsection (3), either concluded missives, or taken all reasonable steps towards concluding missives, for the sale of the land to the tenant then the seller may, under subsection (5), apply to the Land Court for an order directing the tenant either to conclude missives within a period specified in the order or to take such remedial action as is specified in the order for the purpose of concluding missives, or to direct the tenant and seller to incorporate into the missives any term or condition as is specified in the order in respect of the sale of the land. If the tenant fails to comply with such an order from the Land Court or, where the seller has not sought such an order, if the tenant otherwise has not concluded missives for the sale of the land

to the tenant within a reasonable period from acquiring the right to buy, the right to buy is extinguished (see subsection (8)).

Section 33: Appointment of valuer

101. This section covers the appointment of a valuer (or 2 valuers with an oversman (see subsection (5)) where the the seller and the tenant do not agree the offer price..
102. Unless subsection (2) applies, subsection (1) provides that the valuer should be appointed by agreement between the seller and the tenant or by a person nominated by them.
103. Subsections (2) and (3) apply where the land in respect of which the tenant is exercising the right to buy forms part of an estate comprising other land in respect of which any other tenant has given notice of intention to buy under section 29(2) or (4). Where subsections (2) and (3) apply the land that is the subject of the tenants' right to buy is to be valued by a valuer appointed by agreement between the seller and at least half of the tenants who have given notice of intention to buy under section 29(2) or (4).
104. If there is no agreement as to the appointment of a valuer under either subsection (1) or (3) then, under subsection (4), the valuer is to be appointed by the Land Court or by a person nominated by the Land Court.

Section 34: Valuation of the land

105. This section makes provision in respect of the valuation of the land by the valuer appointed under section 33. Subsection (1) provides that the valuer is to assess the value of the land in respect of which the right to buy is being exercised as at the date of notice of the seller's proposal to sell the land under section 26.
106. Subsection (2) requires the valuer, in assessing the value of the land, to have regard to the value that would likely be agreed between a reasonable seller and buyer of such land on the assumption that the seller and buyer are willing parties to the transaction and where the buyer is a sitting tenant. It also specifies certain matters that the valuer is to take into account, and certain matters that the valuer is to take no account of, in assessing the value of the land. Unless subsection (4) applies, the price payable to the seller by the tenant is to be the value assessed under subsection (2) (see subsection (8)).
107. In some circumstances, the land in respect of which the right to buy is being exercised, and the value of which is to be assessed by the valuer, will form part of a larger area of land, an estate, being offered for sale by the seller (see subsection (7)). In such a situation subsection (4) requires the valuer not only to assess the value of the land under subsection (2), but to assess the value representing the difference between the value of the whole estate were it being sold by the seller to a person other than the tenant, and the value of the estate were it being sold by the seller to that person, but minus the land in respect of which the tenant is exercising the right to buy.
108. Where more than one tenant is exercising the right to buy in respect of an estate, the valuation process is complicated by the fact that the overall value of the estate if sold as one lot is not necessarily equal to the sum of the values of the individual parts within it if sold individually. In particular, the values of the individual farms being sold to sitting tenants through the statutory right to buy might not fully compensate the selling owner for the reduction in the overall value of the estate being sold, if sold as one lot, that arises from the estate being sold in parts due to different tenants exercising the right to buy. As a result, subsection (5) allows the valuer to apportion (or to re-apportion if sale of a part does not proceed for any reason) equitably among each of those parts in respect of which the right to buy is being exercised the reduction in the value of the estate as a result of it being sold in parts. Where the land subject to the right to buy forms part of an estate, the price payable to the seller by the tenant is to be the greater of the values assessed under subsection (2) and subsection (4). This valuation mechanism

ensures that the selling owner receives the full market value for the land being sold notwithstanding the exercise of the statutory right to buy. It also ensures that, where a valuer does apportion the reduction in value to a landlord's estate in this way, that the valuer can fairly apportion this reduction among each purchasing tenant.

109. Subsection (6) enables Scottish Ministers to issue guidance, both general and in respect of a particular class of case, for the purposes of valuation under this section.

Section 35: Special provision where buyer is a general partner in a limited partnership

110. This section makes special provision for the valuation of land under section 34(2) where the right to buy is exercised by a general partner in a limited partnership that is the tenant under a lease constituting a 1991 Act tenancy entered into before the coming into force of section 72 (rights of certain persons where tenant is a limited partnership). Such a general partner is able, in certain circumstances in accordance with section 72, to exercise the right to buy under section 28 as if that general partner were the tenant. In such a case, the valuer, in assessing the value of the land under section 34(2), is to have regard to the fact that the buyer is not a sitting tenant in their own right under a 1991 Act tenancy, but is a general partner of a limited partnership. The valuer also is to have regard to any provision of the partnership agreement entitling a limited partner to dissolve the partnership. Section 34(2)(a)(ii) is to have no effect in respect of such a valuation, and so the valuer is not to carry out the assessment of the value on the basis that the buyer is a sitting tenant.

Section 36: Valuation etc.: further provision

111. This section sets out additional requirements regarding the valuation process.
112. Subsection (1) requires the valuer to invite and to have regard to any written representations on specified matters from the seller, tenant and, where the land forms part of an estate, any other person whom the valuer considers to have an interest in the estate. The specified matters are the valuation of the land and, where the land forms part of an estate, any valuation of the estate, and any apportionment of a reduction in the value of the estate to be made by the valuer under section 34(5) (see subsection (2)). Subsection (3) allows the valuer to enter onto land and to make any reasonable request of the seller and tenant for the purposes of assessing the value of the land.
113. Subsection (4) requires the valuer, within 6 weeks of being appointed, to send to the tenant and the landowner written notification of the price payable by the tenant for the land under section 34(8) and setting out how the price payable was calculated.
114. Subsections (5) and (6) concern liability to the valuer for the valuer's expenses in carrying out a valuation of the land under section 34. In all cases, responsibility for meeting the valuer's expenses falls to the tenant or, where the land forms part of an estate in respect of which more than one tenant has given notice of an intention to buy, those tenants, equally among them. If, however, the seller has sought and the Land Court has made an order against the tenant under section 32(7), the tenant has complied with that order and the seller does not proceed with the sale of the land to the tenant, then the seller is liable to the tenant for the valuer's expenses.
115. Subsection (7) enables the Scottish Ministers to make further provision in respect of this section and sections 33 (appointment of valuer) and 34 (valuation of land) of the 2003 Act by regulations.

Section 37: Appeal to the Lands Tribunal against valuation

116. This section provides both the seller and the tenant with a right of appeal to the Lands Tribunal for Scotland against the valuation of the land reached by the valuer under section 34. Such an appeal must state the grounds on which it is being made and must

*These notes relate to the Agricultural Holdings (Scotland) Act
2003 (asp 11) which received Royal Assent on 17 April 2003*

be lodged within 21 days of notification of the valuation given by the valuer (see subsection (2)).

117. Subsection (3) allows the Lands Tribunal to reassess the value of the land, and any factor affecting its value, or the value of an estate and how any reduction of the value of an estate is to be apportioned under section 34(5) and to determine the price payable by the the tenant under section 34(8). Subsection (4) permits the valuer whose valuation is being appealed against to be a witness in the appeal proceedings. Subsection (5) sets out the people who, in addition to the seller and tenant, are entitled to be heard in the appeal proceedings.
118. Subsection (6) requires the Lands Tribunal to give reasons for its decision on an appeal and to issue those reasons in writing. Subsection (7) provides that the decision of the Lands Tribunal in an appeal under this section is final.

Section 38: Referral of certain matters by Lands Tribunal to Land Court

119. This section provides that where, in an appeal against valuation under section 37, an issue of law arises that can competently be determined by the Land Court by virtue of its jurisdiction under either the 2003 Act or the Agricultural Holdings (Scotland) Act 1991 the Lands Tribunal should refer that issue to the Land Court for determination unless the Tribunal considers that it is not appropriate to do so. This enables the Tribunal to refer appropriate legal issues falling within the jurisdiction of the Land Court which may arise in the course of an appeal against valuation to that Court for determination.