

# **AGRICULTURAL HOLDINGS (SCOTLAND) ACT 2003**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

#### **Part 5: Miscellaneous Amendments to the 1991 Act**

##### ***Section 60: Agreements as to fixed equipment***

192. This section amends section 5 of the 1991 Act, which sets out the respective responsibilities of landlord and tenant under a 1991 Act tenancy relating to the provision, maintenance and renewal of fixed equipment, including buildings.
193. Section 5(3) of the 1991 Act is repealed. Consequently, a landlord and tenant can no longer enter into an agreement altering their respective responsibilities in relation to fixed equipment.
194. New subsections (4A) to (4C) inserted into section 5 of the 1991 Act apply to agreements already made by virtue of section 5(3). Subsections (4A) and (4C) set out the general principle, that such agreements continue to be of effect but can be nullified if subsection (4B) is complied with. Subsection (4B) is complied with if, following a review of the rent under section 13 of the 1991 Act the tenant gives notice to the landlord that the agreement is to be nullified from a date specified by the tenant and, on the date on which the agreement is to be nullified, the buildings and other fixed equipment are either in a reasonable state of repair or (if they were in an unreasonable state of repair when the agreement was entered into) are not in a worse state of repair than they were when the agreement was entered into.
195. Subsection (4D) provides that any new agreement made between landlord and tenant which purports to provide for the tenant to bear any expense arising from work for which the landlord is responsible under the lease is of no effect.

##### ***Section 61: Making of records***

196. Section 8(1) of the 1991 Act provides for either the landlord or the tenant under a 1991 Act tenancy, to be able to require the making of a record of the condition of the fixed equipment on the holding or a record of the cultivation of the holding. This can be done at any time during the tenancy. .
197. Subsection (1) inserts a new subsection (3) into section 8 of the 1991 Act. Recorders no longer require to be appointed by the Scottish Ministers. The parties may appoint their own choice of recorder by joint agreement. If they fail to agree, either party may apply to the Scottish Ministers to appoint the recorder. The Scottish Ministers may charge a reasonable fee for doing so, by virtue of new subsection (3A).
198. The record need no longer be in prescribed form. The parties are free to determine the form of the record by joint agreement. In the absence of agreement, the form of the record is a matter for the recorder (see new subsection (3B)) (eg. a record could take

the form of a video recording). Disputes arising out of the making of a record are to be referred to the Land Court. Sections 8(8) and (9) are now restricted in application to recorders appointed by the Scottish Ministers. The remuneration of recorders appointed by the parties is a matter for private negotiation.

199. Subsection (2) makes special provision for the operation of section 8 of the 1991 Act where the Scottish Ministers are a party to the lease. Section 80 of the 1991 Act provides that where the Scottish Ministers are a party to a lease of an agricultural holding then where any provision of the 1991 Act provides that any matter concerning the holding falls to be decided by the Scottish Ministers it should, instead, fall to be decided by the Land Court. This subsection, however, makes special provision in respect of the operation of section 8, instead providing that where the Scottish Ministers are a party to the lease and those parties cannot agree on the appointment of a recorder under section 8(3) of the 1991 Act then the recorder is to be appointed by the sheriff, on the application of either party. It is not appropriate for the Land Court to exercise that power as that Court has jurisdiction over appeals against the recorder's findings by virtue of section 8(6).

### ***Section 62: Interdict in certain cases***

200. This section amends section 7 of the 1991 Act, which confers upon the tenant, subject to the obligations under section 7(3) and the restrictions set out in section 7(5) of the 1991 Act, the right to dispose of the produce of the holding (other than manure) and to practise any system of cropping of the arable land on the holding notwithstanding any custom, or any provision of the lease or of any other agreement. Section 7(3) provides that the landlord's only remedies in respect of injury or damage which has occurred, or is likely to occur, to the holding are interdict or damages payable by the tenant when the tenant quits the holding on the termination of the tenancy. These remain the only remedies by virtue of the wording of newly inserted subsection (3A). New subsection (3A) also provides that those remedies may now be obtained only in the Land Court.
201. The question as to whether the tenant, in exercising the rights under section 7(1) of the 1991 Act, has or is likely to injure or cause deterioration to the holding may be determined either by the Land Court or, where both parties agree, by an arbiter (by virtue of new sections 60 and 61(1) of the 1991 Act (substituted by sections 75 and 76 of the 2003 Act respectively)). Where the question is determined by an arbiter then, in any interdict proceedings brought under section 7(3)(a) of the 1991 Act, then new subsection (4) provides that a certificate of the arbiter as to the decision in the arbitration is conclusive proof of the facts set out in the certificate.

### ***Section 63: Variation of rent***

202. This section makes amendments to section 13 of the 1991 Act in respect of its provisions with regard to the variation of rent to apply to 1991 Act tenancies. It should be noted, however, that section 13 of the 1991 Act is also amended by paragraph 15 of the Schedule to the 2003 Act.
203. Section 13(1) of the 1991 Act, as amended by paragraph 15 of the Schedule, now provides that either landlord or tenant of a 1991 Act tenancy may have the rent payable in respect of the holding determined by the Land Court. The Land Court will determine the rent payable as from the day after the date on which the tenancy could have been terminated by notice to quit, or of intention to quit, and in doing so is obliged, by section 13(2) of the 1991 Act, to carry out that determination in accordance with the provisions of subsections (3) to (7A) of section 13 of the 1991 Act.
204. Section 13(3) of the 1991 Act, as amended by subsection (b), provides that in assessing the rent properly payable by a willing tenant to a willing landlord in respect of the holding, the terms of the tenancy (except those relating to rent) must be taken into account. However, the effect of the tenant's occupation of the tenancy and any distortion in rent arising from a scarcity of lets must be disregarded.

205. Section 13(4) of the 1991 Act, as amended by subsection (c), provides that in determining the rent payable the Land Court shall have regard to information about the rents of other agricultural holdings, including when those rents were fixed, and any factor affecting any or all of those rents, except any distortion arising from the scarcity of lets. It should also have regard to the current economic conditions in the relevant sector of agriculture. This amendment, by removing the provisions of old subsection (4), also allows a wider range of evidence to be considered in respect of rents of comparable holdings (as, until now, old subsection (4) only allowed such evidence to be used where the evidence available was, in the arbiter's opinion, insufficient to enable the rent properly payable to be determined).
206. Section 7(5) and (6) of the 1991 Act remain broadly unchanged by the 2003 Act, other than a modest amendment to section 7(5) by paragraph 15 of the Schedule. Section 7(5) continues to set out the circumstances in which an improvement to the holding which increases its rental value is not to be taken account of by the Land Court. Section 7(6) of the 1991 Act applies where a tenant continuously adopts a standard or system of farming more beneficial to the holding than that required by the lease or, where the lease is silent, than that normally practised locally on comparable holdings. In such cases, the provision continues to provide that this is to be deemed, for the purposes of section 7(5), an improvement carried out at the tenant's own expense and hence left out of account by the Land Court in assessing the rent payable.
207. Section 13(7) of the 1991 Act previously provided that a lower rent shall not be fixed as a consequence of any dilapidation or deterioration of, or damage to, fixed equipment or land caused by the tenant. As amended by subsection (d) and by paragraph 15 of the Schedule, section 13(7) still makes such provision. However, it now also provides that the Land Court shall not fix a lower rent as a consequence of a reduction in the rental value of the holding resulting from the use of or changes to the land or part of the land for a non-agricultural purpose or from the carrying out of conservation activities on the land. This ensures that landlords do not suffer loss of rental from the use of the land they own as a result of any diversification by their tenants, or the carrying out of conservation activities by their tenants. Any increase in the rental value of the holdings arising from a non-agricultural use shall, however, be taken into account in determining the rent payable, by virtue of new subsection (7A).

#### ***Section 64: Tenant's right to withhold rent***

208. This section inserts new section 15A into the 1991 Act in relation to 1991 Act tenancies. It enables a tenant, in certain circumstances, to apply for the Land Court to authorise the tenant to consign to the Court rent otherwise payable to the landlord and, where the tenant is authorised by the Court to carry out work to fixed equipment which the landlord should have carried out, to apply for reimbursement of the costs from that consigned rent.
209. Subsection (3) applies where the conditions of subsections (1) and (2) are complied with.
210. Subsection (1) is complied with where the tenant has obtained from the Scottish Land Court, under section 84(1)(b), an order requiring the landlord either (a) to do or perform some act, other than payment of money (known as an order *ad factum praestandum*) or (b) to fulfil a contractual obligation (known as an order for specific implement) in relation to an obligation in respect of fixed equipment owed by the landlord to the tenant which the landlord has failed to fulfil. In both cases, the granting by the Land Court of an interim order is sufficient for the purposes of compliance with subsection (1).
211. Subsection (2) is complied with where such an order of the Land Court as is mentioned in subsection (1) has not been complied with by the landlord in a material regard by the date specified in that order or such later date as the Court may have fixed in accordance with section 84(2)(b).

212. Where subsections (1) and (2) are complied with, subsection (3) confers upon the tenant the right to apply to the Land Court for either or both of the orders specified in paragraphs (a) and (b). The first of these, under paragraph (a), is an order authorising the tenant to carry out the work that the landlord would have required to have carried out to comply with the order referred to in subsection (1).
213. The second, under paragraph (b) of subsection (3), is an order authorising the tenant to withhold payment of rent due to the landlord in respect of the holding. The right to withhold rent under paragraph (b) can only be granted subject to the condition that the tenant must consign (i.e. pay) to the Land Court the rent that would otherwise have been payable to the landlord. Any right of the landlord to irritate the lease for non-payment of rent or to take action under sections 20 (removal, of tenant for non-payment of rent) or 22 (restrictions on notices to quit) of the 1991 Act is unenforceable if the non-payment is in consequence of an order of the Court under subsection (3)(b) (see subsection (8)).
214. Under subsection (4) a tenant who carries out work authorised by an order of the Land Court under subsection (3)(a) may apply to the Land Court, asking that it release to the tenant funds from the rent payments held by the Court. These funds may be used towards, or in satisfaction of, the costs incurred by that tenant in connection with the carrying out of work authorised by the Court under subsection (3)(a).
215. An order under subsection (3)(b) continues in force until such time as the Land Court, on the application of the landlord, considers that it would not be appropriate for the order to continue and so terminates it. In considering terminating such an order the Court must have regard to any work that the the tenant was authorised to carry out under subsection (3)(a) and any costs referred to in subsection (4) (see subsection (5)) The Court shall then, by virtue of subsection (6), divide the consigned funds, or any remaining amount of the consigned funds, between landlord and tenant as it considers to be equitable.
216. To the extent that the tenant is compensated from consigned funds for the costs arising from the work they have been authorised to undertake, that work is to be treated as an improvement carried out at the landlord's expense for the purposes of compensation payable on the tenant quitting the land on termination of the tenancy (see subsection (7)). Subsection (9) prohibits the parties from contracting out of these provisions.

### ***Section 65: Termination of Tenancy***

217. This section inserts new section 16A into the 1991 Act and applies to those 1991 Act tenancies which have leases that contain terms which purport to require the tenant to reside on the holding. There is no right under common law for a landlord to irritate a lease as a result of a tenant's failure to reside on the holding.
218. Section 16A(1) prohibits a landlord from terminating an agricultural lease and evicting the tenant on the basis that the tenant has not been resident on the land. Section 16A(2) replaces such a lease term with an undertaking by the tenant, where that tenant does not reside on the holding, to ensure that a person with suitable skills and experience resides on the holding instead.

### ***Section 66: Assignment and subletting of tenancy***

219. This section inserts new section 10A into the 1991 Act. Section 10A(1) enables a tenant under a 1991 Act tenancy to assign, with the landlord's consent, their interest in the tenancy to a person who would be entitled to succeed to that tenant's estate on intestacy under the Succession (Scotland) Act 1964, notwithstanding any term of the lease to the contrary (see section 10A(5)). Section 10A(2) provides that the tenant must give to the landlord written notice of the intention to assign, specifying details of the proposed assignee, the terms of the proposed assignment, including the date from which it is to take effect.

220. Section 10A(3) confers upon the landlord the right to withhold consent on reasonable grounds and sets out a non-exhaustive list of grounds on which consent could reasonably be withheld.
221. Section 10A(4) provides that where the landlord withholds consent that fact, along with a note of the grounds on which consent is withheld, must be intimated to the tenant within 30 days of the giving of notice by the tenant under section 10A(2). If no such intimation is made then the landlord is deemed to consent to the assignation. In the event that the landlord does withhold consent and the tenant does not accept the grounds for such withholding of consent, then it is open to the tenant to apply to refer the matter to the Land Court for resolution under new section 60 of the 1991 Act (inserted by section 75).

### ***Section 67: Notices to quit***

222. Where a landlord under a 1991 Act tenancy serves notice to quit upon the tenant under section 21 of the 1991 Act the tenant may, under section 22(1) of the 1991 Act, serve a counter-notice on the landlord within one month of the giving of the notice to quit (or, where section 23(3) applies, within the extended period mentioned in that section). The effect of such a counter-notice is to prevent the notice to quit having effect unless the Land Court, after scrutiny, consents (in accordance with section 24 of the 1991 Act) to its operation. However, a tenant is unable to serve a counter notice (and so has no opportunity to prevent a notice to quit from having effect) where any of the provisions of section 22(2) are complied with and are given in the notice to quit as the ground for termination.
223. Prior to amendment, a landlord was able to comply with section 22(2)(b) of the 1991 Act (and thus avoid the notice to quit being scrutinised by the Land Court) even in situations where planning consent was not required and where, consequently, there had been no scrutiny of the proposed development by the planning authorities (e.g. where the proposed non-agricultural use did not involve a change from the existing use, in which case planning permission was not required for a reason independent of the town and country planning enactments).
224. As amended by section 67(1) of the 2003 Act, however, section 22(2)(b) of the 1991 Act is only complied with where the land is required for use, other than agriculture, for which permission both requires to be, and has been, obtained under the Town and Country Planning Acts. In short, it is only complied with where the proposed development has been scrutinised, and permission has been granted, by the planning authorities. Consequently, neither outline planning permission nor permitted developments, which do not require full planning permission, comply with section 22(2)(b) as amended. In these situations, the tenant will always be able to serve a counter notice and thus require the notice to quit to be scrutinised by the Land Court.
225. Section 24(1) of the 1991 Act sets out the matters in respect of one or more of which the Land Court must be satisfied before giving consent, under section 22 of the 1991 Act, to the operation of a notice to quit. Section 24(2) of the 1991 Act sets out the circumstances in which the Court must withhold consent to the operation of a notice to quit, even where it is satisfied under section 24(1) of the 1991 Act. Previously, the only ground on which the Court required to withhold its consent was if, in all the circumstances, it appeared to the Court that a fair and reasonable landlord would not insist on recovering possession. As amended by subsection (2), section 22(4) of the 1991 Act still makes such provision. However, it now also provides that, where the notice is to quit the whole holding, the Land Court shall withhold its consent where, in all the circumstances, the landlord's proposed use of the land would not create both greater economic and social benefits to the community than would otherwise be the case if the tenancy continued in existence. Subsections (5) and (6) provide definitions for the purposes of this new provision. Subsection (7) provides that the Land Court is

to have regard to such representations as it considers may assist it in its consideration of the matters set out in the new provision.

***Section 68: Restoration of agricultural holding following mineral exploitation***

226. This section inserts section 29A into the 1991 Act. New section 29A(1) provides subsection (2) is to apply where there exists a continuing 1991 Act tenancy and where part of that tenancy had been terminated by virtue of section 29(1) of the 1991 Act for a purpose set out in section 29(2)(f) of that Act (including the mining or extraction of minerals and other materials or the construction or works or buildings connected with such purposes).
227. Subsection (2) provides that where the land in respect of which the tenancy was terminated has been made suitable, and is available, for agricultural use then, if both of the conditions set out in subsection (3) are satisfied, that land shall be restored to the holding.
228. The conditions set out in subsection (3) are satisfied where the tenancy of the holding continues in force with the same tenant and landlord under the lease and any compensation paid to the tenant because of the termination took into account in the calculation of that compensation that the land would be restored to the holding under this section.

***Section 69: Good husbandry and conservation activities***

229. This section amends section 85 of the 1991 Act to prevent tenants under a 1991 Act tenancy from being determined as having failed in their obligations to fulfil their responsibilities to farm in accordance with the rules of good husbandry by reason only that they are undertaking conservation activities or a non-agricultural use of the land in accordance with section 40 or 41 of the 2003 Act.
230. Subsection (2) inserts new subsections (2A) and (2B) into section 85 of the 1991 Act. These new subsections require conservation activities and non-agricultural uses under section 40 or 41 to be treated as being in accordance with the rules of good husbandry if any of the criteria set out in subsection (2A) are met.