

LAND REFORM (SCOTLAND) ACT 2016

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2 – the Scottish Land Commission

Chapter 1 – the Commission

Establishment

Section 4 – The Scottish Land Commission

11. This section establishes the Scottish Land Commission as a body corporate with its own legal personality (subsection (1)). The Scottish Land Commission's Gaelic name (Coimisean Fearainn na h-Alba) has equal legal status. The Commission will consist of a total of six members, comprising five Land Commissioners and the Tenant Farming Commissioner. The Commission will provide staff to support the Land Commissioners and the Tenant Farming Commissioner by virtue of section 6(a).
12. Subsection (5) contains a delegated power to allow the Scottish Ministers to make regulations changing the number of Land Commissioners in the future.

Section 5 – Status

13. This section provides that the Commission is not a servant or agent of the Crown, that it does not enjoy any status, immunity or privilege of the Crown, and that its property neither belongs to the Crown nor is held on behalf of the Crown. Subsection (4) sets out that its members and staff are not servants or agents of the Crown, that they have no status, immunity or privilege of the Crown and that the staff of the Commission are not to be regarded as civil servants.

Functions of the Commission

Section 6 – Functions of the Commission

14. **Section 6** sets out the functions of the Commission, which are to provide property, staff and services to the Land Commissioners and the Tenant Farming Commissioner and to ensure that arrangements are in place to co-ordinate the performance of their functions.

Section 7 – General powers

15. Subsection (1) states that the Commission can do anything which it considers necessary or expedient for the exercise of the functions of the Commission, the Land Commissioners and the Tenant Farming Commissioner. Subsection (2) sets out a non-exhaustive list of particular powers of the Commission, namely the power to enter into contracts, acquire and dispose of land, co-operate with any person and obtain advice or assistance from certain persons and pay that person fees, remunerations or allowances.

Strategic plan and programme of work

Section 8 – Strategic plan

16. To provide for proper corporate governance within the Commission, section 8 imposes a duty on the Commission to regularly set out in a strategic plan how it, the Land Commissioners and the Tenant Farming Commissioner plan to exercise their functions.
17. Subsection (2) requires the Commission to include in each strategic plan the objectives and priorities of the Commission, the Land Commissioners and the Tenant Farming Commissioner, and cost estimates for the exercise of their respective functions. Subsections (3) to (7) set out the required time frames and procedure for the preparation of each strategic plan. In particular, the strategic plan must be submitted to the Scottish Ministers under subsection (3) and, following the approval of the plan, it must be published and laid before the Scottish Parliament under subsection (5). The Scottish Ministers may reject the strategic plan and direct the Commission to submit a revised strategic plan (subsection (4)(c)).

Section 9 – Programme of work

18. In addition to the strategic plan required under section 8, section 9 imposes a duty on the Land Commissioners to prepare a programme of work to set out information on the proposed reviews into the impact and effectiveness of any law or policy under section 22(1)(a), information about other activities being undertaken by the Land Commissioners and the timetable for the programme of work. The programme of work must be submitted to the Scottish Ministers by the Commission on behalf of the Land Commissioners at the same time as the strategic plan, but the Scottish Ministers cannot reject the programme of work. There is no duty on Scottish Ministers to comment upon the programme of work and no duty on the Commissioners to take into account any direction or comment made by the Scottish Ministers. The Commission must then publish the programme of work and lay a copy before the Scottish Parliament. Subsection (4) enables the Commission to submit a revised programme of work to Ministers and subsection (5) places a duty on the Commission to publish and lay before the Scottish Parliament any revised programme.

Membership

Section 10 – Membership

19. Section 44(4) of the Act provides that the members of the Commission are to be five Land Commissioners and one Tenant Farming Commissioner. Section 10 sets out the procedure for the appointment of the members of the Commission.
20. Under subsection (2), the Scottish Parliament has to approve the appointment of the members. Section 11(4) sets out that when an appointment is referred to the Scottish Parliament, the Scottish Ministers must lay a statement before the Scottish Parliament as to how they have complied with the appointment duties set out in section 11. The Scottish Ministers will determine the appointment period for each member and the appointment can last up to five years (subsection (3)). Sections 11 to 13 contain particular conditions regarding the appointment of members, but otherwise the Commission, with the approval of the Scottish Ministers, is free to determine the terms and conditions of appointment under subsection (4). Subsection (5) allows the Scottish Ministers to re-appoint an existing or previous member and subsection (7) places a duty on the Scottish Ministers to select one of the Land Commissioners to chair the Commission.

Section 11 – Eligibility for appointment

21. Land matters are complex and multi-faceted. Therefore, to ensure that there is a range of expertise in the Commission, subsection (1) places a duty on the Scottish Ministers to have regard to the overall expertise of the members of the Commission in—
- Land reform
 - Law
 - Finance
 - Economic issues
 - Planning and development
 - Land management
 - Community empowerment
 - Environmental issues
 - Human rights
 - Equal opportunities
 - The reduction of inequalities of outcome which result from socio-economic disadvantage.
22. Subsection (1)(b) requires the Scottish Ministers to encourage equal opportunities and the observance of the equal opportunity requirements.
23. Subsection (2) requires Ministers, when appointing the Land Commissioners, to take every reasonable step to ensure that at least one of them speaks the Gaelic language.
24. Subsection (3) requires Ministers to ensure that the Tenant Farming Commissioner has the necessary expertise or experience in relation to agriculture.

Section 12 – Disqualification from membership

25. Subsection (1) prevents persons from being appointed as a member of the Commission if they have been in office within a relevant category listed in (a) to (e) within the previous 12 months. For instance, a person who was either a Member of Parliament or a Member of the Scottish Parliament in the last 12 months would be ineligible for appointment as a member of the Commission.
26. Subsection (2) excludes a person who is either a landlord or tenant in a “relevant tenancy” as defined in subsection (3) from being appointed as the Tenant Farming Commissioner. A “relevant tenancy” is a 1991 Act tenancy, a short limited duration tenancy, a limited duration tenancy, a modern limited duration tenancy or a repairing tenancy (in respect of the last two see, respectively, Part 10, Chapters 1 and 2 of the Act).
27. Subsection (4) provides that any member of the Commission who becomes one of the persons listed in subsection (1)(a) to (f) will cease to be a member of the Commission.
28. Similarly, subsection (5) provides that the appointment of the Tenant Farming Commissioner ceases if subsection (2) applies and the Commissioner becomes a landlord or tenant in a “relevant tenancy” under subsection (3).

Section 13 – Resignation and removal

29. Subsection (1) allows a member of the Commission to resign by serving notice in writing to the Scottish Ministers.

30. Subsection (2) sets out the circumstances in which the Scottish Ministers can revoke the appointment of a member of the Commission: for instance, insolvency of a member will allow the Scottish Ministers to use their discretion to end an appointment.
31. Subsection (3) defines insolvency for the purposes of subsection (2)(a).

Remuneration and staff

Section 14 – Remuneration, allowances and pensions

32. **Section 14** permits the Commission to pay its members and employees remuneration and expenses. Subsection (1)(a) sets out that remuneration is to be determined by the Commission with the approval of the Scottish Ministers. Subsection (2) provides that the Commission may also make payment of pensions, allowances or gratuities as the Commission determines, but with the approval of the Scottish Ministers. Subsection (3) allows for pensions, allowances and gratuities to be paid to staff and members in compensation for any loss of office.

Section 15 – Staff

33. Subsection (1) provides that the Commission must employ a person as a chief executive. The first appointment will be made by the Scottish Ministers (subsection (2)), with subsequent appointments being made by the Commission with the approval of the Scottish Ministers (subsection (3)).
34. Subsection (4) allows the Commission to employ other staff, and subsection (5) sets out that the Commission are to determine the terms and conditions for staff, with the approval of the Scottish Ministers.

Operational matters

Section 16 – Validity of things done

35. To ensure that the Commission is always able to perform its functions, section 16 provides that the validity of any of its actions is not adversely impacted by a vacancy of membership, a defect in the appointment of a member or any resignation or removal under section 13 of the Act.

Section 17 – Committees

36. Subsection (1) allows the Commission to set up committees for any purpose relating to the functions of the Commission, the Land Commissioners or the Tenant Farming Commissioner. Subsection (2) authorises the Commission to delegate the exercise of its functions to any committee but the Commission will remain responsible for the exercise of its functions notwithstanding any such delegation of the exercise of its functions (subsection (3)). Similarly, section 23(1)(a) authorises the Land Commissioners to delegate the exercise of their functions to any committee and section 25(1)(b) authorises the Tenant Farming Commissioner to delegate the exercise of the Tenant Farming Commissioner's functions to any committee.
37. Subsection (4) enables persons who are not members of the Commission to be appointed to be a member of any committee established.
38. Subsection (5) allows for the payment of remuneration or allowances to any person who is not a member of the Commission who is appointed to be a member of any committee established.
39. Subsection (6) provides that any committee established must comply with any directions given to it by the Commission.

Section 18 – Regulation of procedure

40. Subsection (1) imposes a duty on the Commission to establish and maintain a register of interests for its members. Subsection (2) clarifies that, with the exception of the duty in subsection (1), the Commission is free to regulate its own internal procedures.

Accounts and annual report

Section 19 – Accounts

41. Subsection (1) imposes a duty on the Commission to keep proper accounts and accounting records, and prepare a statement of accounts for each financial year.
42. Subsection (2) requires the Commission to send accounts to the Scottish Ministers and subsection (3) provides that the Commission must comply with any direction from the Scottish Ministers regarding the preparation of the accounts under subsection (1).
43. Subsection (4) places a further duty on the Commission to ensure that an audited statement of accounts and accounting records is made available for public inspection.

Section 20 – Annual report

44. Subsection (1) places a duty on the Commission to prepare an annual report shortly after the end of each financial year, with an assessment of its performance in carrying out its functions, of the performance of Land Commissioners and the Tenant Farming Commissioner in carrying out their functions, an assessment of the performance of the Commission and its members in achieving their main objectives as set out in any strategic plan having effect in that financial year, and an assessment of the performance of the Land Commissioners in relation to any programme of work having effect in that financial year.
45. Subsection (2) imposes procedural duties on the Commission to ensure that the annual report is published, sent to the Scottish Ministers and laid before the Scottish Parliament.
46. Subsection (3) enables the Commission to publish other reports and information in relation to its functions, and where it does do, it is under a duty to lay the report before the Scottish Parliament.

Application of public bodies legislation

Section 21 – Application of legislation relating to public bodies

47. This section makes a number of consequential amendments to other primary legislation in relation to public bodies. Subsection (1) adds the Commission to the list of public bodies required to produce a code of conduct under the Ethical Standards in Public Life etc. (Scotland) Act 2000. Subsection (2) makes the Commission a “Scottish public authority” for the purposes of the Freedom of Information (Scotland) Act 2002, conferring a general entitlement for any person to request information from the Commission, subject to the procedures and exemptions in that Act. Subsection (3)(a) makes the Commission subject to the Scottish Ministers’ power under section 14 of the Public Services Reform (Scotland) Act 2010 to make provision by order to improve the exercise of public functions, and subsection (3)(b) makes the Commission subject to the duties to provide information contained in Part 3 of the 2010 Act.

Chapter 2 – the Land Commissioners

Functions of the Land Commissioners

Section 22 – Functions of the Land Commissioners

48. Subsection (1) sets out the functions of the Land Commissioners, which generally concern matters relating to land in Scotland.
49. Subsection (2) imposes a duty upon the Land Commissioners to consider any matter referred to them by the Scottish Ministers.
50. Subsection (3)(a) lists a number of matters that the Land Commissioners must have regard to when exercising their functions, including the land rights and responsibilities statement to be published by the Scottish Ministers under section 1 or revised under section 2. Subsection (3)(b) provides that the Land Commissioners must work with the Tenant Farming Commissioner in exercising their functions.
51. Subsection (4) provides that the Land Commissioners must have regard to the exercise of the Tenant Farming Commissioner’s functions under section 24 when the Land Commissioners exercise their functions in relation to agriculture and agricultural holdings.
52. Subsection (5) defines “matters in relation to land in Scotland” for the purposes of subsection (1). Subparagraphs (a) to (c) state that this definition includes ownership and other rights in land, management of land, and use of land. Subparagraph (d) ensures that the Land Commissioners, when exercising their functions, can take in to consideration the land use strategy prepared under section 57(1) of the Climate Change (Scotland) Act 2009 (“the 2009 Act”), Subparagraph (d) does not affect Scottish Ministers’ obligations under section 57 of the 2009 Act, nor does it allow the Land Commissioners to produce a new or revised Land Use Strategy themselves to supersede that produced by Scottish Ministers under that Act.

Land Commissioners: delegation of functions

Section 23 – Land Commissioners: delegation of functions

53. Subsection (1) allows the Land Commissioners to delegate their functions to a committee established by the Commission under section 17, any employee of the Commission or any other person. The Land Commissioners cannot delegate their functions to the Tenant Farming Commissioner. Subsection (2) makes it clear that any delegation under subsection (1) does not affect the responsibility of the Land Commissioners for the exercise of the functions delegated.

Chapter 3 – the Tenant Farming Commissioner

Functions of the Tenant Farming Commissioner

Section 24 – Functions of the Tenant Farming Commissioner

54. This section makes provision about the functions of the Tenant Farming Commissioner.
55. Subsection (1) sets out the functions of the Tenant Farming Commissioner
56. Subsection (2) places a duty on the Tenant Farming Commissioner to exercise their functions with a view to encouraging good relations between landlords and tenants of agricultural holdings.
57. Subsection (3) places a duty on the Scottish Ministers to review the functions of the Tenant Farming Commissioner within three years of this section coming into force and to publish the findings of the review.

58. Subsection (4) requires Scottish Ministers, when carrying out a review of the Tenant Farming Commissioner's functions, to seek and have regard to, the views of the Commissioner on the operation of the Commissioner's functions and, in particular, on the question of whether the Commissioner has sufficient powers to carry out his or her duties. Scottish Ministers must also seek views from any other persons appearing to Ministers to have an interest in the Commissioner's functions (i.e. stakeholders within the tenant agricultural sector such as tenants, landlords and groups that represent them.)
59. Subsection (5) gives the Scottish Ministers the power to make regulations to amend, remove or add to the functions of the Tenant Farming Commissioner.

Section 25 – Tenant Farming Commissioner: delegation of functions

60. **Section 25** makes provision for when the Tenant Farming Commissioner can delegate functions and to whom those functions can be delegated.
61. Subsection (1) gives the Tenant Farming Commissioner the power to authorise another person to exercise some, part of or all of the Tenant Farming Commissioner's functions. This includes the Land Commissioners, a committee of the Commission, and an employee of the Commission.
62. Subsection (2) sets out an exception to subsection (1) and makes clear that the Tenant Farming Commissioner cannot delegate the power under section 24(1)(f) and section 38 to refer for the opinion of the Land Court any question of law relating to agricultural holdings. That is a discretion which only the Commissioner can exercise.
63. Subsection (3) makes clear that the Tenant Farming Commissioner remains responsible for the exercise of the Commissioner's functions, even if some, or part of those functions are delegated to another person.

Section 26 – Acting Tenant Farming Commissioner

64. **Section 26** makes provision for the Scottish Ministers to appoint an acting Tenant Farming Commissioner to carry out all of the functions of the Tenant Farming Commissioner when no Commissioner is in office.
65. Subsection (2) makes clear that if a person is disqualified from being appointed as the Tenant Farming Commissioner then that person is also disqualified from being appointed as an acting Tenant Farming Commissioner. The circumstances under which a person can become disqualified are set out in section 12.
66. Subsection (3) sets out specific provision for when the acting Tenant Farming Commissioner can resign or be removed and allows the Scottish Ministers to otherwise determine the terms and conditions of the acting Tenant Farming Commissioner's appointment.
67. Subsection (4) makes clear that an acting Tenant Farming Commissioner is to be treated the same as the Tenant Farming Commissioner, except for the terms under which the Commissioner can resign, be removed or remunerated. For an appointed Tenant Farming Commissioner, provision is made for resignation and removal in section 13 and provision for remuneration, allowances and pensions in section 14. Subsection (3) of this section provides the equivalent of these sections for an acting Tenant Farming Commissioner.

Tenant Farming Commissioner: codes of practice

Section 27 – Tenant Farming Commissioner: codes of practice

68. **Section 27** places a duty on the Commissioner to prepare and publish codes of practice for the purpose of providing guidance to landlords and tenants of agricultural holdings and their agents.

*These notes relate to the Land Reform (Scotland) Act 2016
(asp 18) which received Royal Assent on 22 April 2016*

69. Subsection (2) provides an indicative list of the issues relating to agricultural holdings that the codes of practice may cover.
70. Subsection (3) requires the Commissioner to review the codes of practice and revise the codes if appropriate. There is no set period within which a review must be carried out.
71. Subsection (4) provides that the Commissioner must consult with persons appearing to the Commissioner to have an interest in the draft code before publishing any code of practice.
72. Subsection (5) requires the Commissioner to lay a copy of the code before the Scottish Parliament when the code is published. There is no prescribed form for a code and a code can be published in any form the Commissioner considers appropriate.
73. Subsection (7) provides that any published code of practice can be admitted as evidence in any proceedings before the Scottish Land Court.
74. Subsection (8) requires the Scottish Land Court to take into account any part of a code of practice that it considers may be relevant to any proceedings before it.
75. Subsection (9) provides that a published code of practice can also be admitted, and should also (where relevant) be taken into account, as part of any arbitration proceedings under the 1991 and 2003 Agricultural Holdings Acts.

Section 28 – Tenant Farming Commissioner: promotion of codes of practice

76. **Section 28** places a duty on the Tenant Farming Commissioner to promote the observance of codes of practice published under section 27, in accordance with the Tenant Farming Commissioner’s function under section 24(1)(b), and sets out a non-exclusive list of ways in which this is to be done.

Tenant Farming Commissioner: inquiry function

Section 29 – Application to inquire into breach of code of practice

77. **Sections 29 to 35** make provision about the exercise of the Tenant Farming Commissioner’s function to inquire into alleged breaches of the codes of practice under section 24(1)(c). Section 29 sets out the process for a person with an interest in the tenancy, or who would have an interest but for an alleged breach, to apply to the Tenant Farming Commissioner to inquire into an alleged breach of any code of practice published under section 27.
78. Subsection (2) sets out what any application under subsection (1) must contain.
79. Subsection (3) provides that an application must be accompanied by the appropriate fee, unless the Commissioner waives the need to pay the fee under subsection (5).
80. Subsection (4) requires the Commissioner, when setting the fee for the application, to consider the likely impact that the amount of the fee might have on the number of applications.
81. Subsection (5) sets out the circumstances in which the Commissioner can waive the fee for an application under subsection (1).
82. Subsection (6) makes clear that any application under subsection (1) does not affect any time limits for proceedings before the Scottish Land Court.

Section 30 – Procedure for inquiry

83. **Section 30** provides for the process of an inquiry into an alleged breach of a code of practice, following receipt of an application under section 29, by setting out the conditions that must be satisfied in order for the Tenant Farming Commissioner to

inquire into an alleged breach; what the Commissioner may do in cases where those conditions are met; and in cases where those conditions are not met.

84. Subsection (1) sets out the conditions that must be satisfied in order for the Tenant Farming Commissioner to inquire into an alleged breach of a code of practice. For example, the effect of subsection (1)(c) is that repeat applications concerning the same alleged breach are not permitted.
85. Subsection (2) provides that, where the Commissioner is not satisfied that the application contains sufficient information to proceed with an inquiry, the Commissioner can require the applicant to provide any additional information that is considered appropriate within a specified period.
86. Subsection (3) sets out the circumstances under which the Commissioner may dismiss an application.
87. Subsection (4) sets out what the Commissioner must do when satisfied that an application meets the conditions in subsection (1).

Section 31 – Enforcement powers

88. **Section 31** makes provision for requests by the Tenant Farming Commissioner for information for the purposes of applications and inquiries relating to alleged breaches of published codes of practice, and for the imposition of non-compliance penalties.
89. Subsection (1) gives the Commissioner a general power to make a request during an inquiry for any person to provide information appropriate for the purposes of that inquiry.
90. Subsection (2) provides that the Commissioner may impose a non-compliance penalty where a person has failed to provide a response to an application which meets the relevant conditions within the period specified by a request under section 30(4)(c); and where a person has failed to provide information requested under subsection (1) for the purposes of an inquiry.
91. Subsection (3) sets out that the Commissioner must set the amount of the non-compliance penalty, but this must not be set above £1000.
92. Subsection (4) provides that any non-compliance penalty imposed must be paid to the Commission.
93. Subsection (5) gives the Commission the power to recover any non-compliance penalty that is not paid as a civil debt.

Section 32 – Notice of non-compliance penalty

94. **Section 32** makes provision about the content of a notice of a non-compliance penalty given by the Tenant Farming Commissioner under section 31(2) and provides a right of appeal for any person in receipt of such a notice.
95. Subsection (1) sets out the information that must be included in a notice of a non-compliance penalty.
96. Subsection (2) provides that a person served with a notice has the right to appeal to the Scottish Land Court against the notice and sets out the permitted grounds for any appeal. The grounds for appeal are broad and allow, for example, the Court to consider whether a request for confidential information should be upheld.
97. Subsection (3) requires any appeal under subsection (2) to be made within 28 days of the day the notice of non-compliance was received.
98. Subsection (4) provides that, where a non-compliance notice is appealed, the penalty is suspended from the day the appeal is made until the appeal is determined or withdrawn.

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99. Subsection (5) allows the Scottish Land Court to overturn, confirm or vary any notice of non-compliance that is appealed.

Section 33 – Report on inquiry

100. [Section 33](#) makes provision for the production and publication by the Tenant Farming Commissioner of a report following an inquiry into an alleged breach of a code of practice.
101. Subsection (1) provides that the Commissioner must publish a report as soon as practicable after the completion of an inquiry and sets out the information the report must contain where (a) there is sufficient information to reach a decision and (b) where there is not sufficient information to reach a decision.
102. Subsection (2) provides that any report published can be admitted as evidence in any proceedings before the Scottish Land Court.
103. Subsection (3) requires the Scottish Land Court to take into account any part of a report that it considers may be relevant to any proceedings before it.
104. Subsection (4) provides that any report published can also be admitted as evidence, and should also (where relevant) be taken into account, as part of any arbitration proceedings under the 1991 and 2003 Agricultural Holdings Acts.

Section 34 – Tenant Farming Commissioner: confidentiality of information

105. [Section 34](#) makes provision about the confidentiality of information obtained by or on behalf of the Tenant Farming Commissioner for the purposes of an inquiry into the breach of a code of practice.
106. Subsection (1) prohibits any person mentioned in subsection (6) from disclosing any information obtained for the purposes of an inquiry into the breach of a code of practice unless authorised to do so under subsection (2).
107. Subsection (2) sets out the limited circumstances under which a relevant person can disclose any information obtained for the purposes of an inquiry into the breach of a code of practice.
108. Subsection (3) provides that any person who knowingly discloses any information obtained for the purposes of an inquiry into an alleged breach of a code of practice, where they are not authorised to do so under subsection (2), commits an offence.
109. Subsection (4) sets out the potential penalty where a person is found to be guilty of an offence under subsection (3).
110. Subsection (5) sets out the defences available to a person charged with an offence under subsection (3).

Section 35 – Protection from actions for defamation

111. [Section 35](#) provides that, for the purposes of the law of defamation, any statement made by the Tenant Farming Commissioner as part of the exercise of the Commissioner's function under section 24(1)(c) to inquire into alleged breaches of the codes of practice attracts qualified privilege. This means that any such statement would not be defamatory unless it could be shown that the statement was motivated by express or actual malice.

Section 36 – Report on operation of agent of landlords and tenants

112. [Section 36](#) places an obligation on the Tenant Framing Commissioner to prepare a report on the operation of agents of landlords and tenants and to submit this report to Scottish Ministers within 12 months of this section coming into force. In preparing the

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report the Commissioner must consult any persons appearing to the Commissioner to have an interest in the operation of agents of landlords and tenants.

Section 37 – Recommendations by Tenant Farming Commissioner for modern list of improvements

113. **Section 37** places an obligation on the Tenant Farming Commissioner to prepare a report for submission to the Scottish Ministers with recommendations for a modernised list of improvements to agricultural holdings. The Commissioner must consult persons appearing to the Commissioner to have an interest in the draft recommendations before submitting the report to the Scottish Ministers.

Tenant Farming Commissioner: power to refer questions of law to Land Court

Section 38 – Referral of questions of law by Tenant Farming Commissioner to Land Court

114. Under section 24(1)(f), the Tenant Farming Commissioner has the function of referring for the opinion of the Scottish Land Court any question of law relating to agricultural holdings, and this section provides the Commissioner with the power to make such a reference where the question of law is one which may be competently determined by the Scottish Land Court.