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Department
for Environment
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Consultation on modernising the repair and maintenance of fixed equipment and end-of-tenancy compensation in relation to Agricultural Tenancies in England

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Chapter 1 Introduction

1.1 Purpose of the consultation

1.1.1 In relation to agricultural tenancies in England governed by the Agricultural Holdings Act 1986 ("AHA"), we are seeking views on proposed changes to secondary legislation governing the repair and maintenance of fixed equipment and end-of-tenancy compensation.

1.1.2 The legislative changes cover England.

1.2 Background to agricultural tenancy legislation

1.2.1 In England, around a third of agricultural land is rented. The relationship between landlords and tenants of agricultural tenancies is governed partly by the terms of their individual tenancy agreements, and partly by agricultural tenancy legislation. The legislation can act as a barrier, by being too prescriptive and limiting the extent to which landlords and tenants can reach agreements which suit their particular circumstances. However, the need for flexibility needs to be balanced against providing due protection to both parties.

1.2.2 In England, the main relevant legislative provisions are the Agricultural Holdings Act 1986 ("AHA") and the Agricultural Tenancies Act 1995 ("ATA"). The AHA applies to agricultural tenancies entered into before 1 September 1995 and also applies to certain tenancies granted after that date. The ATA applies to most tenancies of agricultural land beginning on or after 1 September 1995 which are known as farm business tenancies.

1.2.3 The changes to secondary legislation considered in this consultation apply to agricultural tenancy agreements governed by the AHA. The AHA consolidated the Agricultural Holdings Act 1948 and the other legislation relating to agricultural holdings. Secondary legislation providing the detailed framework for the repair and maintenance of fixed equipment and end-of-tenancy compensation were made in 1973 (amended in 1988) and 1978 (amended in 1980, 1981, and 1983) respectively.

1.2.4 It should be noted that we currently have a clause in the Cabinet Office Deregulation Bill which subject to receiving Royal Assent and becoming law, will amend the AHA to allow third party determination as an alternative to arbitration for certain disputes including those relating to repair and maintenance of fixed equipment and end-of-tenancy compensation.

1.3 Why the Government is proposing the changes

1.3.1 As part of the Red Tape Challenge Agriculture theme, we reviewed all the secondary legislation covering agricultural tenancies to determine if there are ways

of fulfilling existing policy aims in a less burdensome way, to simplify the legislative landscape and to update existing legislation.

1.3.2 We propose to update the regulation on the repair and maintenance of fixed equipment by including items now in common use, and taking the opportunity to consolidate the new legislation with similar legislation where appropriate. We also propose being less prescriptive on how end-of-tenancy compensation is calculated, to enable compensation to reflect the value of the improvement or matter being compensated for at the time the tenancy is terminated.

Chapter 2 Maintenance, repair and insurance of fixed equipment

2.1 Introduction

2.1.1 Under the AHA the Minister may make regulations prescribing terms as to the maintenance, repair and insurance of fixed equipment on a tenanted agricultural holding.

2.1.2 The current prescribed terms are contained within the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations 1973 as amended in 1988 and known as "Model Clauses". The Model Clauses are deemed to be incorporated in every agricultural tenancy agreement made under the AHA except in instances where there is an agreement in writing, which imposes on one of the parties to the agreement a liability which the Model Clauses would otherwise impose on the other.

2.1.3 The Macdonald Task Force recommended that the existing Model Clauses are updated. We intend to do this by revoking and replacing the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations 1973 as amended by the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment)(Amendment) Regulations 1988.

2.1.4 In addition, while updating the Model Clauses, we propose to take the opportunity to simplify the legislative landscape by consolidating the new Model Clauses with the Agriculture (Miscellaneous Time-Limits) Regulations 1959, and to revoke the Agriculture (Time-Limit) Regulations 1988.

2.2 Current policy

Model Clauses

2.2.1 The Model Clauses allocate the responsibility between the landlord and tenant of an AHA tenancy for maintaining, repairing, replacing as part of the repairing obligation, and insuring fixed equipment.

2.2.2 Fixed equipment, as defined by the AHA:
"includes any building or structure affixed to land and any works on, in, over or under land, and also includes anything grown on land for a purpose other than use after severance from the land, consumption of the thing grown or of its produce, or amenity, and any reference to fixed equipment on land shall be construed accordingly;"

2.2.3 The underlying principle of liability is that the tenant is responsible for the day to day maintenance and repair of fixed equipment and operational parts. The landlord is responsible for the structural integrity through maintenance, repair, replacement and insurance against fire.

Agriculture (Miscellaneous Time-Limits) Regulations 1959

2.2.4 The Model Clauses provide for issues arising under them to be determined by arbitration. Where a liability in respect of fixed equipment has been transferred under sections 6,7 or 8 of the AHA, the Agriculture (Miscellaneous Time-Limits) Regulations 1959 provide the period of one month in which:
a) a landlord may require an arbitration to determine compensation payable by the tenant where liability for maintenance and repair of fixed equipment has been transferred to the landlord; or
b) a tenant may require arbitration to determine their claim against the landlord for the landlord's previous failure to discharge the liability for the maintenance or repair of any item of fixed equipment which is transferred to the tenant.

Agriculture (Time-Limit) Regulations 1988

2.2.5 This regulation provided a three month period after the date the 1988 amendment to the Model Clauses came into force during which a landlord or tenant could make a reference to an arbitrator for the purposes of specifying the terms of their tenancy agreement in writing under section 6 of the AHA. The arbitrator determining that reference must disregard the variation to the Model Clauses.

2.3 Issues/reasons for proposals

Model Clauses

2.3.1 The Model Clauses were made in 1973 and amended in 1988. They are considered out of date because they do not prescribe terms as to the maintenance, replacement and repair of fixed equipment which are now in common use such as central heating, and for technologies developed since the regulations were drafted.

2.3.2 There are also a number of existing liabilities where a more detailed breakdown would better define the liability or allow a more pragmatic and reasonable allocation of liabilities between landlord and tenant.

2.3.3 Monetary caps have not been updated since 1988 and no longer reflect the costs of the liabilities concerned. Those caps are:

- The tenant is required to renew all broken or cracked roof tiles or slates and to replace all slipped tiles or slates when damaged to a limit of £100 in any one year of the tenancy. This limit has not increased in line with inflation.
- Currently if the landlord fails to execute a replacement which is his liability within three months of receiving written notice of the necessary replacement from the tenant, the tenant may carry out the replacement and recover reasonable costs. The tenant's recovery of those replacement costs is limited to a sum equal to the rent for a year or £2000, whichever is the smaller in respect of the total costs of all the replacements carried out. The tenant can recover that amount during each year of the tenancy until the cost of the works is recovered in full. This is in contrast to repairs for which the tenant is able to recover reasonable costs with no annual cap.

Agriculture (Miscellaneous Time-Limits) Regulations 1959

2.3.4 The legislative landscape needs to be simplified. With that in mind, the above regulation could helpfully be consolidated with the Model Clauses.

Agriculture (Time-Limit) Regulations 1988

2.3.5 This regulation provided transitional arrangements for a three month period in 1988 and is therefore now redundant and can be revoked. However similar transitional arrangements may be required when the new Model Clauses come into effect.

2.4 Proposed changes on which we are consulting

2.4.1 We are consulting on:

- Changes to the Model Clauses that:
    i. add new liabilities,
    ii. provide a more detailed breakdown of liabilities to allow a more pragmatic allocation of liabilities between landlord and tenant, or change the existing split of liability between landlord and tenant; and
    iii. increase or remove monetary caps.

- Consolidation of the Model Clauses with the Agriculture (Miscellaneous Time-Limits) Regulations 1959 and revocation of the Agriculture (Time-Limit) Regulations 1988.

Model Clauses – new liabilities to be added

2.4.2 We propose including the following new liabilities to take into account developments since the last drafting of the Model Clauses. The additions will not impose any liability on the landlord in respect of tenant's improvements or tenant's fixed equipment.

a. Reed beds - landlord to repair/replace, tenant to keep clear and in good working order.
b. Slurry, silage and effluent systems – landlord to repair and replace, tenant to keep clean and in good working order.
c. Fixed equipment generating electricity/heat/power e.g solar panels, heat pumps and wind turbines – landlord to replace, tenant to repair.
d. Fuel, oil tanks, gas pipework and fixed liquid petroleum and gas tanks – landlord to replace, tenant to repair.
e. Fire, carbon monoxide, smoke and similar detection systems – landlord to repair and replace on the basis they must fulfil their obligations under the fire insurance. Given the health and safety aspect of this liability, provision will be made for the tenant to repair and replace, with the ability to recover reasonable costs.
f. Radon pumps – landlord to replace, tenant to repair.
g. Insulation including roof, wall and pipes – landlord to replace, tenant to repair.
h. Livestock handling systems and sheep dips – landlord to replace, tenant to repair.
i. Flood banks – landlord to repair and replace.
j. Tile and pipe for field drainage system – landlord to repair and replace, tenant to keep field drains and their outlets clear from obstruction.

k. Signs and notices – tenant to repair and replace.

Question 1. Are you content with adding the above liabilities proposed to the Model Clauses?

Model Clauses – more detailed breakdown of existing liabilities or a change in existing liability

2.4.3 The items below are already captured in the Model Clauses but we are proposing either a more detailed breakdown of liabilities to allow a more practical allocation of liabilities between landlord and tenant, or a change of liability between landlord and tenant. The revisions will not impose any liability on the landlord in respect of tenant's improvements or tenant's fixed equipment.

l. Main walls and exterior walls expanded to include structural frames, cladding and internal plaster - landlord to repair and replace.

m. The landlord is currently responsible for chimney stacks and pots – we propose to expand this to include chimney linings, fireplaces, firebacks and firebricks which would be for the landlord to repair and replace.

n. We propose to expand roofs to include bargeboards, fascias and soffits with the landlord to execute all repairs and replacement. In respect of this work, we propose the landlord may recover one-half of the reasonable costs from the tenant with the caveat that if the work is completed before the fifth year of the tenancy, the sum which the landlord may recover from the tenant is restricted to one-tenth of such reasonable costs for each year that has elapsed between the start of the tenancy agreement and the work being completed.

o. Door and window furniture including glass, glass substitute, sashcords, sealed glazing units– tenant to repair as currently but now to also replace when such items become incapable of repair. This moves liability for replacing door and window furniture which is incapable of repair from the landlord to the tenant.

p. Electrical supply system including consumer boards except for switches, sockets and light fittings– landlord to maintain/repair/replace. This changes the repairing liability so that the landlord is solely responsible for the electric supply system except for items which fall more easily to the tenant to repair or replace due to ease of access namely switches, sockets and light fittings. This links to the change proposed at paragraph "q" below.

q. Electrical switches, sockets and light fittings – tenant to maintain/repair and to replace when item becomes incapable of repair. The tenant is currently responsible for repairing the electrical system. Under our proposal their repairing obligation will be limited to sockets, switches and light fittings and they will be responsible for replacing these items if incapable of repair.

r. Fitted kitchens we believe are already provided for in law under the tenant's obligation "*to repair and keep and leave clean and in good tenantable repair, order and condition the farmhouse, cottages and farm building together with all fixtures and fittings*... " and landlord's obligation to replace. Our preference is not to include this item but would you find it helpful to have it covered explicitly in the Model Clauses?

s. We propose adding garden/yard gates and doors to the list of liabilities and propose that the liability to repair sits with the tenant and to replace with the landlord. In respect of this work, the landlord may recover one-half of the reasonable costs from the tenant with the caveat that if the work is completed

before the fifth year of the tenancy, the sum which the landlord may recover from the tenant is restricted to one-tenth of such reasonable costs for each year that has elapsed between the start of the tenancy agreement and the work being completed.

t. We propose boilers, ranges and grates are expanded to include central heating systems, immersion heaters, heating apparatus and ranges – landlord to replace, tenant to repair.

u. Underground water pipes - provision will be made for the tenant to carry out the necessary work without providing the landlord with prior notice with the ability to recover reasonable costs up to a cap of £2,000 per incident. This is without prejudice to the existing provision that the tenant can serve written notice to the landlord calling on him to do this work and if the landlord has not done the work in a week, then the tenant can do the work and recover the reasonable cost in full.

Question 2. Are you content with the proposed changes to existing liabilities and to the additional prescribed terms to be added to the Model Clauses?

Question 3. Do you agree that the liability for fitted kitchens is already captured within the tenant's obligation to repair and the landlord's obligation to replace if incapable of repair, or do you think there is a need to make a specific reference to fitted kitchens in the Model Clauses?

Model Clauses – increase or remove monetary caps

2.4.4 Current Model Clauses require tenants to renew broken and cracked tiles or replace slipped tiles on roofs up to a cost of £100. We propose to increase this to £500 in line with current costs of such repairs.

Question 4. Are you content with the proposed increase to the monetary cap?

2.4.5 Currently the Model Clauses have a cap on the tenant's ability to recover costs of replacements in any given year from the landlord, and the tenant's recovery of those replacement costs is limited to a sum equal to the rent for a year or £2000, whichever is the smaller in respect of the total costs of all the replacements carried out. The tenant can recover that amount during each year of the tenancy until the cost of the works is recovered in full. This is in contrast to repairs, for which the tenant is able to recover reasonable costs in full at the outset.

2.4.6 Whilst the option exists to simply increase the limit from £2000 to £10,000 to reflect increased costs since the cap was set in 1988, a more consistent approach would be to align tenant's cost recovery for replacement with current policy on cost recovery for carrying out repairs. This would remove the cap altogether.

Question 5. Are you content with permitting tenants to recover their reasonable costs for replacements in a single payment, rather than the tenant

having to recover up to a cap for each year of the tenancy until reasonable cost of the works involved is fully recovered?

Consolidation and revocation

2.4.7 We propose consolidating the Agriculture (Miscellaneous Time-Limits) Regulations 1959 with the Model Clauses to simplify the legislation governing agricultural tenancies.

Question 6. Are you content that the legislation is consolidated as proposed?

2.4.8 We propose revoking the Agriculture (Time-Limit Regulations) 1988 which provided a transitional period of three months in 1988 as it is now redundant.

2.4.9 The question is should we provide a similar transitional period for the introduction of the proposed new Model Clauses? This would cover cases where the new proposals vary the terms of a tenancy agreement that is either:

(a) not in writing; or

(b) in writing, but not providing for one or more of the matters that the AHA stipulates should be provided for in written tenancy agreements.

In such cases, if a referral is made to an arbitrator within three months of the new Model Clauses coming into force, that arbitrator would be required to disregard the variation made by the new Model Clauses. Should the law be changed to permit third party determination of such cases, the transitional arrangement would apply in such circumstances.

Question 7. Do you consider that a transitional period is required? If yes, please state why. Please also state the period you consider appropriate and why.

Chapter 3 Agriculture (Calculation of Value for Compensation) Regulations

3.1 Introduction

3.1.1 The AHA makes provision for the right to compensation payable to a tenant upon termination of an agricultural tenancy and for the measure of such compensation. Schedule 8 of the AHA provides a comprehensive list of improvements and tenant right matters for which compensation is payable to tenants.

3.2 Current policy

3.2.1 The Agriculture (Calculation of Value for Compensation) Regulations 1978 (as amended) ("the Compensation Regulations") contain detailed provisions for the method of calculating the amount due to an outgoing farm tenant for the items listed in Schedule 8 of the AHA. The Compensation Regulations also include tables prescribing the values for compensation for phosphoric acid, potash, purchased farmyard manure and the unexhausted manurial value of certain feeding stuffs. The Compensation Regulations were last amended in 1983, and the valuation tables were last updated at this time.

3.2.2 Compensating an outgoing tenant for the value of fertilised land or crops left behind encourages the tenant to farm sustainably in the last years of a tenancy, and therefore assists an incoming tenant whose tenancy may start too late in the year to effectively cultivate the land or to remedy any deficiencies in soil status.

3.3 Issues/reasons for proposals

3.3.1 The Compensation Regulations were last amended in 1983 and accordingly do not compensate for the value of inputs to the land at current market prices. For example manurial values of both fertiliser and feed consumed on the holding have been based on the cost of nitrogen, phosphate and potash fertiliser in the late 1970s. Since then fertiliser prices have been volatile and risen sharply. Accordingly outgoing tenants are not being adequately compensated for their inputs and are therefore not incentivised to maintain the land when nearing the end of their tenancy.

3.3.2 The AHA does not currently require the landlord to compensate for benefits derived from the application of:

- Inputs that have not been purchased (such as the by-products of waste crops used in anaerobic digestion plants that are then applied to the land);
- certain trace elements which might not ordinarily be understood to be "fertiliser";
- soil conditioners including compost; and
- manure produced by certain livestock species.

3.4 Proposed changes on which we are consulting

3.4.1 The AHA provides that an outgoing tenant shall be compensated for the "*Application to land of purchased manure and fertiliser, whether organic or inorganic*".

3.4.2 The restriction of compensation to "purchased" items means that no recognition is given for value contributed by other arrangements, for instance, the by-products of waste crops brought in for an anaerobic digestion plant on the holding which can be used to fertilise the land.

3.4.3 Furthermore, there is currently no recognition for the value of trace elements (although Magnesium and Copper are currently provided for separately in the Compensation Regulations) which might not ordinarily be understood to be "fertiliser", nor of soil conditioners including compost.

3.4.4 It is proposed that an outgoing tenant should be compensated for non-purchased inputs, trace elements and a wider range of beneficial material.

Question 8. Do you agree that the tenant should be compensated for inputs that have not been purchased, trace elements in addition to magnesium and copper, and other beneficial material such as soil conditioners?

3.4.5 The AHA provides that an outgoing tenant shall be compensated for the "*Consumption on the holding of corn (whether produced on the holding or not) or of cake or other feeding stuff not produced on the holding, by horses, cattle, sheep, pigs or poultry*". Since this provision was drafted farming has diversified to include other forms of livestock such as deer, camelids and other species which may provide manurial value to the holding for which no compensation is currently payable.

3.4.6 It is proposed that the AHA should be amended to include deer and camelids or other species that may now be agricultural livestock.

Question 9. Do you agree that compensation to an outgoing tenant for manurial value from consumption of corn and brought in feed should include that by any animals kept on the holding for agricultural purposes?

3.4.7 Defra consider that the provision in the AHA in respect of the measure of compensation is adequate and that there is no need to prescribe a detailed method of calculation in secondary legislation (as is current practice). This would allow the parties flexibility to settle a claim in a way that reflects current market prices.

3.4.8 It is therefore proposed that the Compensation Regulations be revoked. Instead compensation will be on the basis stipulated in the AHA namely that the amount of compensation for any improvement or matter outlined in the Act "*shall be the value of the improvement or matter to an incoming tenant*". There will be no method of calculation prescribed in secondary legislation.

Question 10. Do you agree with the proposal to remove the prescribed method for calculating compensation and the tables specifying the unit value of commodities i.e. to revoke The Agriculture (Calculation of Value for Compensation) Regulations 1978 (as amended)?