



AGRICULTURAL TENANCIES AND RELATED MATTERS

Issued 19 June 2019

ICAEW welcomes the opportunity to comment on the *Agricultural tenancy consultation and call for evidence on mortgage restrictions and repossession protections for agricultural land in England* published by DEFRA on 9 April 2019, a copy of which is available from this [link](#).

We support some of the proposals for simplification and modernisation but believe that the proposal to allow assignments on 25 year terms will have unintended consequences and should not be pursued further.

This response of 19 June 2019 is made by ICAEW's Business Law Department following consultation with members of our Farming and Rural Affairs community committee. This committee includes expert representatives from public practice and the farming community.

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KEY POINTS

POLICY OBJECTIVE

1. We note that, as part of the Agriculture Bill and associated policy statements, agricultural tenancy policy has been identified as an area where changes might be implemented with a view to increasing productivity. Whilst we fully agree with the intention, and the general thrust of sector reform, we have reservations about some aspects of the proposed changes.

IMPACT OF PROPOSALS ON PRODUCTIVITY

2. In particular, we doubt that the proposals on assignment will, in practice, impact enough holdings to have a material effect on productivity in the sector.
3. The paper identifies that there are approximately 20,500 Agricultural Holdings Act (AHA) tenancies covering some 1.4m Ha. The average AHA holding is therefore some 70Ha, and most will include one or more farmhouses. It is accepted at p15 that any lump sum received by a tenant will probably need to be sufficient to cover alternative housing costs, so on the face of it, only holdings well above the average size are likely to provide material assistance with retirement.
4. The paper also states at p17 that 60% of AHA tenancies are held by farmers over the age of 60 and goes on to give a figure of 57% for farms which have no succession plan. These statistics are slightly misleading. The 57% figure includes all relevant farms, irrespective of age of the tenant. If one looks at the sub sample for farmers over 65 from the same document the percentage falls to about 50%. These holdings which “have no nominated successor” may be the less viable ones, which may well only be continuing because of the associated residential element. Alternatively, since AHA succession on retirement will only take place after the tenant is 65, it may be that there is a successor in mind, but that he/she has not yet been formally “nominated”. We are aware that very often succession planning does not really start until the existing tenant is well into their sixties.
5. The paper alludes briefly to fiscal matters. For various reasons as set out in more detail below, these may have a material impact on both landlord and tenant, further reducing the viability of securing a sufficient lump sum to facilitate retirement
6. Taking all these elements together, it seems that at least half of AHA holdings will be too small to benefit significantly from the proposed changes, and the larger and more economically viable half may well be those which have succession identified, if not actually nominated. Accordingly, the number of farms which might benefit from the proposed changes will be small, perhaps no more than 10% of the AHA sector. Given the advanced age of the individuals within the sector, the problem may well resolve itself within a relatively short timescale. Indeed, the consultation paper itself notes that the number of AHA agreements is in natural decline and on current trends will cease to be a significant part of the tenanted sector by around 2050 (ie 30 years).

UNINTENDED CONSEQUENCES

7. If the reforms were likely to increase productivity without risk of adverse impact on the sector, the fact that only relatively few holdings are likely to be impacted might not matter. But we believe there will be unintended consequences that reduce the likelihood of the reforms having the desired effect and may even be counterproductive (as noted in our answers to Q8).
8. If government nevertheless proceeds with the proposal, there is a risk that the move will be perceived as signalling a change in government policy adopted in the 1995 Act. This introduced “a simpler, more flexible framework to encourage more agricultural lettings” (in the

words of the consultation document). By contrast, the proposed 25 year terms on assignment are inflexible and in some cases will extend the impact of the 1986 Act (which the 1995 Act was intended to supersede) beyond its natural life. If landlords have this perception, there may be broader unintended consequences.

ANSWERS TO SPECIFIC QUESTIONS

9. The main focus of our response is on Proposal 1 and we have not provided comprehensive answers to other questions. We have, however, addressed a number of them in general terms as noted below.

Q8. Do you agree that new legal provisions to enable a tenant to assign their tenancy to a third party tenant will help deliver the policy aim of facilitating structural change in the AHA sector?

10. We see significant difficulties in this key proposal largely because it will not be in landlords' interests to have a 25 year term tenancy imposed on them in circumstances when they would not have agreed to it voluntarily. In cases where an elderly tenant has no successor, the prospect of being unable to regain possession for a further 25 years will be particularly unappealing to landlords. The chances of landlords exercising their right to buy out the tenancy in cases like that are very high, regardless of whether or not the land will then be put to productive use. Of course, if the land is not used productively, the proposed change in law would have been completely counterproductive.
11. As noted in our introductory comments, the number of tenants wishing to benefit may be much smaller than anticipated. In our experience, and where there is even a modicum of goodwill between landlord and tenant, under current legislation an agreement can usually be reached where a tenant genuinely wants to retire and the landlord wishes to help them do so.
12. Please also see our comments on "Fiscal Issues" at the end of this response in this context.
13. As identified in box 1 on p 15, the value of an AHA tenancy is difficult to determine, particularly if the tenant is elderly. Any sum payable will be reduced by the landlord's claim for dilapidations (which we would expect to be comprehensively computed and hard fought) and the tenant's taxation liabilities. If food prices rise, the tenant may find it financially more rewarding to keep the house and the farm and carry on. Only if prices fall to the level at which they simply cannot continue will the sale of the tenancy become attractive, but a potential purchaser will then be faced with finding a capital sum to lock themselves into a long-term commitment where revenues may not even cover the direct cost of production.

Q12. Do you agree with proposal 2 to remove the minimum age of 65 for succession on retirement applications?

14. Essentially this proposal is an attempt to modernise the 1986 Act to take account of societal and pension changes, and we would not anticipate any significant adverse consequences arising from the proposal

Q13. Do you agree with proposal 3 to remove succession rights when the tenant reaches 5 years past the state pension age?

15. Answer to Q12 applies similarly here.

Q18. Do you agree with proposal 4 to amend the 1986 Act so that council farm retirement notices to quit can only be issued when the tenant has reached current state pension age?

16. Answer to Q12 applies similarly here.

Q20. Do you agree with proposal 5 to remove the 'Commercial Unit Test'?

17. Answer to Q12 applies similarly here.

Q21. Do you agree with proposal 6 to modernise the suitability test?

18. Answer to Q12 applies similarly here.

Q25. Do you agree with proposal 7 to amend the definition of close relative so that children (or those treated as children) of cohabiting partners can apply to succeed to an AHA holding tenancy?

19. Answer to Q12 applies similarly here.

Q27. Do you agree with proposal 8 to extend the definition of close relative so that nieces and nephews of the tenant could apply to succeed to AHA holdings in future?

20. Answer to Q12 applies similarly here.

Q33. Do you agree with proposal 9 to enable restrictive clauses in AHA agreements to be challenged and varied through a dispute resolution process?

21. Answer to Q12 applies similarly here.

Q36. Do you agree with proposal 10 to exclude the landlord's return on investment from rent review considerations?

22. In our experience, where landlords wish to invest in a let property, they will normally come to an arrangement of some sort with the tenant to safeguard their investment, so we do not believe this to be a problem in itself. A greater difficulty is normally experienced where the landlord is reluctant to carry out repairs or modernisation which would be the landlord's responsibility and the absence of which eventually leads to parts of the let property no longer being usable. Nonetheless, we agree that improvements to the 1986 act as suggested would be helpful.

Q39. Do you agree with proposal 11 to provide shorter notice to quit procedures for new FBTs of ten years or longer in each of the specific circumstances in the table below?

23. We believe that the prime driver for shorter term lets is not so much the difficulty in serving notice on default, but more the wish to retain as much control as possible over the use of the land and the possibility of taking it back in hand at the shortest possible notice should need arise. As stated above, we feel that the changes outlined in proposal 1 would actually discourage landlords for letting at all, much less encourage them to create longer term tenancies.

Q44. Do you agree with proposal 12 to enable a third party expert to be appointed to resolve a rent review dispute at any time ahead of the rent review date?

24. Answer to Q12 applies similarly here

Q45. Do you agree with proposal 13 that the prescribed fee for appointing an arbitrator or record keeper under the 1986 Act should be updated to £195?

25. Answer to Q12 applies similarly here

Q50. Do you agree the non-legislative options outlined above in section 4 should be considered as a way of delivering our policy aims of facilitating structural change and enabling productivity improvements in the tenanted sector?

26. We would support the non-legislative options listed in pages 41-42. We are not aware that mortgage restrictions significantly restrict the ability of landlords to grant tenancies, and we believe that the number of reposessions in relation to agricultural land are extremely small

FISCAL ISSUES

27. The consultation document refers obliquely to fiscal issues, but we believe that these are a fundamental driver for decision making in this area, and the use of fiscal incentives or disincentives may be extremely important as follows;

- At present land let under an AHA tenancy stands at an Inheritance Tax (IHT) disadvantage compared to land let under a post 1995 tenancy. We would anticipate that land re-let under the terms set out in proposal 1 would be deemed subject to a new tenancy, but this point needs clarification.
- Similarly, the proposals set out in 2-9 and 11-13 would seem to be purely legislative and would not constitute the creation of a new tenancy as such i.e. an AHA tenancy would be unchanged for IHT purposes) but clarity on that point would be welcomed.
- The whole issue of IHT on let agricultural land is regarded by some as being at risk in the event of a comprehensive review of IHT reliefs and allowances (irrespective of the distinction between pre and post 1995 tenancies set out above). Bearing in mind that a new tenancy might last for 25 years, prudent landlords may wish to safeguard against political and other risks of change by taking the land back to in hand farming once it becomes available rather than risk tying it into a potentially riskier long-term structure. Any minor inconveniences as identified in proposal 11 are insignificant compared to the possible loss of 40% IHT relief
- In addition to the IHT advantages and security of farming land in hand as opposed to letting, a landowner farming in hand enjoys Capital Gains Tax (CGT) advantages in the form of Entrepreneur's relief and rollover relief and some income tax relief, particularly as regards pension payments. The absence of these reliefs will again tend to discourage re-letting once land comes back in hand. If these reliefs could be extended to land re-let under post 2020 tenancies, the proposals are more likely to find favour with landlords.
- One consequence of making AHA tenancies assignable is that they would have value for IHT purposes in the hands of the tenant. At present a small value is ascribed to these under case law but this is normally covered by BPR and is therefore frequently ignored. If BPR reliefs were to be reduced in future, this could cause hardship to businesses on the death of the tenant.
- We believe that, as currently drafted, the grant of a new tenancy under proposal 1 could give rise to a Stamp Duty Land Tax liability.