Tenancy Reform Industry Group (TRIG) Code of Good Practice for projects, schemes or works requiring landlord's consent in agricultural tenancies

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- the Welsh government.

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Foreword

The members of TRIG, listed at the front of this document, advise Defra on matters relating to agricultural tenancy legislation. This includes making recommendations for amendments to the *Agricultural Holdings Act* 1986 ('AHA 1986') and the *Agricultural Tenancies Act* 1995 ('ATA 1995'), as well as wider policy issues surrounding the letting of farms and agricultural land. Schedule 3 of the *Agriculture Act* 2020 makes changes to AHA 1986 and ATA 1995 that allow tenants to request their landlord's consent for variation of the terms of their tenancy to enable them to access sources of funding and/or to comply with a statutory duty. It also provides a mechanism for resolving disputes that may arise following the making of such a request.

To coincide with the introduction of *The Agricultural Holdings (Requests for Landlord's Consent or Variation of Terms and the Suitability Test) (England) Regulations* 2021 SI 619, Defra asked TRIG to update the 2004 TRIG Code of Good Practice for agri-environment schemes and diversification projects in agricultural tenancies to make it relevant to the new statutory procedures.

This Code of Good Practice is the result of that work. It will be of benefit to those seeking to apply the new legislation, and also in the wider context of the relationship between landlords and tenants of agricultural land and property. The Code provides a useful framework and guide to negotiations surrounding a range of scenarios as the agricultural industry seeks to adapt to the world outside the EU, and other key challenges around the need to drive improvements in productivity and in managing and mitigating the impacts of climate change.

The members of TRIG are representatives of leading industry and professional organisations who are active in the rural tenanted sector and give their time freely and on a voluntary basis. The footnote to this foreword is a statement from Defra in

recognition of the work that has been undertaken by TRIG, and in particular the Working Group which prepared this Code.

I would like to add my own thanks to the Working Group, and also to RICS who, as one of the TRIG organisations, has made resources available to publish and publicise this Code.

Julian Sayers FRICS FAAV
TRIG Chairman

Footnote

'I would like to thank TRIG for producing this Code of Practice. As the farming sector transitions to new agricultural policies based on public money for public goods and the challenge of delivering environmental improvements alongside food production, the ability and willingness of agricultural tenants and landlords to adapt to change has never been more important. This Code of Practice provides an excellent framework to help tenants, landlords and their advisers take a positive and practical approach to agreeing variations to agricultural tenancy agreements. Defra encourages all tenants, landlords and their advisers to follow this Code of Practice to help the sector adapt and make the most of new opportunities as we move through the agricultural transition period.'

Victoria Prentis
Parliamentary Under Secretary of State (Minister for Farming, Fisheries and Food), Department for Environment, Food and Rural Affairs

Introduction

This Code of Good Practice ('the Code') is designed to provide guidance for landlords and tenants to assist the parties in agreeing terms for variations to an existing agricultural tenancy under the provisions of either the Agricultural Holdings Act 1986 ('AHA 1986') or the Agricultural Tenancies Act 1995 ('ATA 1995'), for reasons including those set out below, to aid all aspects of agricultural and non-agricultural diversification, access to financial assistance schemes and compliance with statutory duties:

- amending user clauses
- varying clauses relating to subletting parts of the holding
- permitting the erection or alteration of buildings for diversification projects
- allowing entry into financial assistance schemes, whether with regard to the environment, conservation, woodland or otherwise
- permitting diversification associated with agricultural activities
- permitting diversification into non-agricultural activities, and
- allowing what is necessary for a tenant to fulfil statutory duties.

The Code also includes guidance specifically in relation to The Agricultural Holdings (Requests for Landlord's Consent or Variation of Terms and the Suitability Test) (England) Regulations 2021 SI 619 ('the 2021 Regulations').

The 2021 Regulations came into force for some of these issues on 21 June 2021, and allows tenants of AHA 1986 tenancies in England to refer a request for consent or varying tenancy terms to arbitration, where they relate to entry into **a financial assistance**

scheme under the Agriculture Act 2020 ('the 2020 Act') or **fulfilling statutory duties**, and where agreement cannot be reached with the landlord.

Regulations specific to Wales are expected in autumn 2021, and will provide a mechanism for tenants of AHA 1986 tenancies in Wales to refer a request for landlord's consent or varying tenancy terms to arbitration, for the purposes of fulfilling statutory duties and where agreement cannot be reached with the landlord in those circumstances. The Welsh regulations will not at this time include provisions for the same in relation to a Welsh equivalent of financial assistance schemes, as the policy of future schemes is still subject to the Welsh government's proposed *Agriculture (Wales) Act* and the proposed Sustainable Farming Scheme.

Users of the Code are urged to ensure they understand which proposals are subject to the 2021 Regulations and which are not. Users should also note that the statutory procedures under the 2021 Regulations are not applicable in the case of all proposals for which a tenant may be seeking landlord's consent or cases where the landlord is seeking consent from the tenant.

The Code is designed to assist parties in reaching an agreement, whether or not the 2021 Regulations apply, and before turning, where possible, to the statutory procedures set out in the 2021 Regulations to decide the matter.

The Code also provides an outline summary of the suitability test provisions, which come into force on 1 September 2024, under the 2021 Regulations. These provisions are set out in the same Regulations relevant to the Code, but are not directly related, so a summary is provided for the readers' information.

The Code is divided into four sections:

- Section 1: Context – a time of transition

- Section 2: General guidance
- Section 3: Requests for landlord's consent or variation of terms under the 2021 Regulations (England only)
- Section 4: The suitability test under the 2021 Regulations

All users of the Code are advised to check the terms of the tenancy agreement to ensure they fully understand the terms of that agreement in the context of proposals covered by the Code. Landlords and tenants may not require each other's consent in all circumstances, depending on the tenancy terms. Checking the terms of the tenancy agreement should therefore be the first port of call.

1 Context – a time of transition

Agriculture and the management of rural land is seen to have entered an age of accelerated change. This is much broader than the simple but eye-catching fact of the United Kingdom having left the EU, with the CAP moving into the past and new polices now being introduced.

New trade arrangements, changing markets and public tastes, environmental concerns and the advent of innovative technologies are joined by the fact and mitigation of climate change, with the net zero target for greenhouse gas emissions and growing recognition of the need to improve productivity. These are all pressures for change in farming.

Nonetheless, the fact of Brexit required the 2020 Act to provide the powers to manage agricultural policy, inherited and new, that had previously been held by European institutions. That is being used to take new directions.

Tenancy law changes

Amid the range of agricultural policy measures covered, the 2020 Act makes a number of changes in agricultural tenancy law for England and Wales in response to these pressures. As the Code discusses, making the best of a let farm in these new conditions may require more change than was envisaged when a tenancy agreement was written, often several decades ago. The Code encourages and offers a framework for positive discussion of potential needs and opportunities between tenant and landlord. More specifically, and as reviewed in the Code, the 2020 Act offers some situations a defined recourse to dispute resolution that could change the terms of a 1986 Act agreement where this is found to be 'reasonable and just' between the parties. The emphasis is, however, on practical and open discussion to find mutual benefit where change may be needed. Other tenancy law

changes, noted below, simplify succession but set a higher standard for it and are designed to encourage investment by landlords.

England

The powers of the 2020 Act are being used in England for the purposes of the November 2020 *Agricultural Transition Plan*, which developed from the thinking of the February 2018 *Health and Harmony* consultation as framed by the *25 Year Environment Plan*, applying it to the transition period to 2028 with the twin aims of:

- 'a renewed agricultural sector, producing healthy food for consumption at home and abroad, where farms can be profitable and economically sustainable without subsidy
- farming and the countryside contributing significantly to environmental goals including addressing climate change'.

Those goals touch on many areas of agricultural and land management policy. The Basic Payment Scheme, now a legacy from the EU, is to be phased out with the money moving to:

- public goods schemes, using new 'financial assistance schemes' to buy standards, largely but not solely environmental, that are both above a regulatory baseline (itself being reviewed) and not generally paid for in the marketplace
- productivity measures to improve the competitiveness of farming, in international as well as domestic markets.

Wales

In Wales, the direction of policy has been set out in the consultation papers, *Brexit and our Land*, *Sustainable Farming and our Land* and the *Agriculture (Wales) White Paper*. An *Agriculture (Wales) Act* is expected to provide for the replacement of the Basic Payment Scheme with a Sustainable Farming Scheme focused on sustainable land management and improved economic resilience.

The move away from the Basic Payment Scheme

For nearly 30 years, one form or another of area payment, whether Arable Area Aid and livestock premia with stocking limits, Single Payment and now Basic Payment, has accompanied land occupation. The erosion and removal of Basic Payment in both England and Wales is a direct prompt to focus many minds on the business changes needed to manage this process, as farm enterprises, financial values (for produce, rents and other matters), investment and agreements for the occupation and use of land all evolve in response.

The productivity challenge

That process of change interlocks with increased recognition of the need to improve productivity – not absolute volumes of production, but the efficiency with which inputs are turned into outputs, which increases profit and competitiveness and therefore improves business survivability. The UK government has set the Food and Drink Sector Council a priority to '[a]ccelerate the growth of UK agricultural and horticultural productivity to overtake our major competitors by 2030'.

Improving productivity traditionally calls for innovation, investment and flexibility in land occupation as well as skills.

There will be cases where lower output will achieve a higher profit, while finding ways to produce something that is not a commodity may be a more sure way to win and hold margin for the business. Some may find environmental agreements, whether under the new polices or with private sector finance, to be a positive way to these ends. All these issues are as relevant to wholly or partly tenanted businesses as to any other farm.

Climate change, biodiversity and other environmental challenges

These issues now frame much of public policy. While climate change brings increased flooding, the move to net zero is expected to drive change in farming and rural land, with greenhouse gas reduction, carbon sequestration and renewable energy. For wider environmental issues, the Defra Secretary of State said in July 2020:

> 'This Government's pledge is not only to stem the tide of loss, but to turn it around - to leave the environment in a better state than we found it'.

With post-Brexit environmental legislation aimed at setting an array of targets ranging across, for example, air, water quality and biodiversity, combined with the regulatory baseline (as with legislation for slurry and silage storage), as well as financial assistance schemes for public money to buy public goods and other measures such as biodiversity gain agreements, there will be a number of powerful influences on the decisions to be made in the business of farming.

Tenancy law changes

In 2017, Defra ministers asked TRIG to consider what changes in tenancy law could assist productivity improvement. TRIG reported on measures under AHA 1986, ATA 1995, taxation, new entrants and council farms. Defra and the Welsh government then put many of those proposals, with others, out for consultation in 2019. A number were then brought forward in the 2020 Act and regulations under it. All but one apply to AHA 1986

rather than to the more recently agreed farm business tenancies. In summary, and with effect from 11 January 2021 unless otherwise noted, they are as follows.

- **Challenging tenancy terms**: to enable an AHA 1986 tenant to take a suggested variation of the terms of the tenancy or a refusal of landlord's consent to dispute resolution where this would enable access to a financial assistance scheme or compliance with a legal requirement. Detailed regulations for this took effect on 21 June 2021 and are awaited in Wales (where using this for access to new schemes awaits the *Agriculture (Wales) Act*).

- **Encouraging landlord investment**: where a landlord's improvement has been made to the holding with an agreement for payments in respect of it by the tenant, to disregard that improvement and those payments at a rent review under AHA 1986 Section 12 and Schedule 2.

- **Tenancy succession**: to revise the suitability test for succession, making it more demanding, and to repeal the commercial unit test for succession, making both changes at a future date. Detailed regulations for the enhanced suitability test have been issued in England, with both that and the repeal of the commercial unit test to take effect from 1 September 2024, giving notice of the changes to all affected. The equivalent regulations are awaited in Wales.

- **Retirement succession**: to enable an application for retirement succession to be made to the Tribunal whatever the age of tenant.

- **County farms**: to change the operative point for a Case A notice to quit for local authority smallholdings from the tenant reaching 65 to the tenant reaching state pensionable age (at present typically 67).

- **Arbitration appointments**: to amend AHA 1986 and ATA 1995 so a unilateral reference for the appointment of an arbitrator under either Act can now be made to the President of the CAAV (Central Association of Agricultural Valuers) or the Chair of the ALA (Agricultural Law Association) as well as the President of RICS (Royal Institution of Chartered Surveyors).

- **Third-party determination of rents**: to revise the drafting of the provisions of Section 12 of the AHA 1986 so that the timetable for the parties to appoint a third party (other than an arbitrator) to determine a rent on a final and binding basis, excluding arbitration, is now the same as for an arbitrator.

While those are the changes now made in the law, the Code looks more broadly at behaviour, encouraging positive and practical approaches to the changes, challenges and opportunities that we now face when the tenanted sector manages a third of our farmland.

2 General guidance

The steps detailed below are for a tenant wishing to submit a proposal to a landlord for consideration. While the Code does not override the statutory legislation of AHA 1986 and ATA 1995, the same procedure could be adopted, in some circumstances, by a tenant who has failed to seek consent in advance. Tenants should note however that this could constitute a breach of their tenancy agreement, and the landlord may have recourse to other remedies to undo any unconsented actions if an agreement cannot be reached.

The same steps outlined here could also be applied if a landlord were seeking a tenant's consent, and Annex 2 provides some examples of grounds on which a tenant may reasonably refuse.

Step 1: Early consultation

- Before approaching their landlord for consent, it is good practice for the tenant to check their position in putting a request to the landlord. For example, a tenant might feel on better ground if the rent paid is up to date and there are no pending statutory notices that remain to be resolved by the parties.

- The tenant is also advised to include the measures that are proposed to be taken to remedy any breach of the tenancy agreement.

- While such a proposal is likely to develop with considered thought by the parties, the tenant should approach the landlord at the earliest practical opportunity regarding it either orally or in writing, using the usual channels of communication. This may be a direct approach or via the landlord's agent. If the initial approach is oral, the proposal should be confirmed as soon as possible in writing. Where the 2021 Regulations might apply, it is advisable for AHA 1986 tenants to make a request in writing to fulfil the preliminary requirements of the 2021 Regulations.

- The parties and/or their agents should meet as soon as possible to discuss the proposal, particularly where this involves major projects or either has important issues for the legal interest in the holding of the landlord and/or tenant, or time pressures.

- During this process, the broad terms of the proposal should be explained, together with the potential implications and benefits for the landlord and the tenant.

- The landlord and tenant should agree what needs to be provided to support the tenant's proposal or request for consent. The extent of the submission to the landlord should, while providing all the information required to enable a decision to be taken, be proportionate to the proposal concerned.

- The landlord and tenant should seek to agree how matters relating to the costs of preparing and considering the detailed proposal are to be dealt with. Each party may bear their own cost but if the landlord needs to seek professional assistance that ultimately does not yield any significant financial benefit to the landlord, the tenant may be required to contribute towards the landlord's additional costs providing these are reasonable and necessary for considering and responding to the application, and depending on the scale of the scheme.

- Once agreed, the issue of costs should be confirmed in writing between the parties.

Step 2: Agreeing a timetable

- The parties should agree a realistic timescale for the preparation and measured consideration of the proposal, with sensible deadlines.

- The timescale needs to take account of any deadlines, such as applications for financial assistance schemes, grant funding or obtaining statutory and/or other consents from third parties, as well as any deadline to fulfil a statutory duty.

- The agreed timescale should be confirmed in writing between the parties.

Step 3: Preparing details of the tenant's proposal for consideration by the landlord

- The tenant should prepare a sound business case for the landlord to consider, the extent and nature of which will vary depending upon the proposal concerned.

  The information expected to form part of the tenant's business case should be proportionate. For example, a large diversification scheme would potentially require more detailed and extensive justification than a change of cropping.

  - For example, in a situation involving varying a user clause, it may be that a set of gross margins is adequate to support a change in the cropping or livestock system permitted by the existing tenancy agreement.

  - On the other hand, a major non-agricultural diversification project might require a full financial appraisal similar to that which might be submitted to a financial institution.

  Examples: financial appraisals, budgets, gross margins, cash flows, comparables, market research, supporting evidence, details of relevant skills, qualifications and training.

- The tenant should provide appropriate and proportionate proof that the project can be funded, assuming terms are agreed between the parties, from either the tenant's own resources, via a financial institution and/or potential funding from a financial assistance scheme or grant, with or without seeking a contribution from the landlord. In the case of financial assistance schemes the proposed application should be consistent with the eligibility rules.

  Where the proposal only affects the tenant's business, the justification required may be less than a proposal that would potentially have an effect on the landlord's freehold interest in the holding and/or the landlord's business.

  Examples: assets, reserves, retained profits, landlord's contribution, joint funding, applications, loans and schemes taking into account the terms thereof.

- The tenant should make reference to the extent to which the terms of the tenancy may require varying and the impact, if any, that this might have on the landlord's rights and reservations. In addition, the option to reverse any change to the terms might be considered if the scheme or project concerned is no longer being pursued, or if applications for funding are refused.

  Examples: user clauses, sub and alternative lettings, repair and other liabilities.

- The tenant should provide details of the consents to be sought from third parties and relevant compliance requirements that the tenant will need to meet before implementation of the proposal if approved by the landlord.

  Examples: planning permission, listed building consent, building regulations, fire regulations, environmental consents, public health approval.

- The tenant should detail any assignments, sub-lettings or joint ventures that may form part of the tenant's proposal, including the housing of any employees that

might result from the proposal. It should be noted that for certain proposals it may be appropriate for part of a holding to be taken out of an existing tenancy and let under a non-agricultural business tenancy governed by the Landlord and Tenant Act 1954 or a farm business tenancy under ATA 1995.

Examples: assured shorthold tenancies, licences, leases, limited liability partnerships, collaboration agreements with third parties.

- The tenant should consider proposals for the recording of any permanent works or, under ATA 1995, intangible advantages (see Section 15 ATA 1995), for example the grant of planning consent as tenant's improvements or tenant's fixtures, including compensation on termination where appropriate.

  Consider: provisions of AHA 1986 or ATA 1995 as appropriate.

- The tenant may need to consider proposals for any variations to the passing rent following agreement to the diversification and any future reviews with the landlord.

  Consider: provisions of AHA 1986 or ATA 1995, stepped rent, turnover rent, rent holiday as appropriate.

- The tenant must provide details of any financial or other implications that will or could burden the landlord if the tenancy is terminated before the expiry of a financial assistance scheme, particularly in the case of multi-annual, longer-term financial assistance scheme agreements.

  Consider: financial or other contractual commitments transferring to the landlord on termination of the tenancy.

Step 4: Landlord's consideration of the tenant's proposal

- The landlord should give careful consideration to the proposal, including all those matters set out in the tenant's submission as part of step 3.

- The landlord should request in writing any further information required if the tenant has not properly addressed the matters set out in step 3, providing this is reasonable and relevant to the proposal. For example, it may not be proportionate for the landlord to request a full set of the tenant's accounts if other information provides sufficient financial detail, or this is inappropriate in view of the nature and scale of the proposal or the other enterprises that those accounts might cover.

- After the landlord has given full consideration to the proposal, the landlord or the landlord's agent should prepare a written response to the tenant's proposal, confirming approval, proposing approval subject to specified conditions or refusing consent but giving reasons for doing so.

  Annex 1 sets out some grounds on which a landlord might consider withholding consent to a tenant's proposal or seek to impose conditions. Landlords should be mindful of the 2021 Regulations, which apply to certain proposals under AHA 1986 tenancies, where the tenant could refer the matter to arbitration – or they could jointly put it to third party determination. See more information on the 2021 Regulations in section 3 of the Code.

Step 5: Formal written agreement

- Once the parties are agreed, the terms should be confirmed in writing in an appropriate form, which should be prepared by a suitably qualified professional adviser.

- The documents should cover all the matters bearing on the tenancy.

- Where appropriate the agreement should include a waiver of the landlord's powers under Case B for this particular/specific proposal, together with any other rights that may detract from or negate the landlord's grant of the consent.

What if a landlord and tenant are unable to reach agreement on a proposal?

In circumstances where the tenant's occupation is subject to an ATA 1995 tenancy or the tenant's request **is not** subject to the 2021 Regulations under an AHA 1986 tenancy, if an agreement cannot be reached between the parties after the steps in the Code have been followed, there is no formal recourse to require a landlord to grant consent to a tenant's proposal.

A tenant may consider amending the proposal to address the landlord's reasons for refusal, but ultimately, except where the 2021 Regulations apply, a landlord's refusal cannot formally be reversed or challenged.

Annex 1 of the Code provides some examples of grounds on which, according to the context, a landlord might be reasonable in refusing consent, but these are purely illustrative. Other grounds might apply in some cases, and in others there might be no basis for reasonable refusal.

Where a tenant is unsure whether the 2021 Regulations apply in their situation, needs further guidance in referring a matter to arbitration (where it is available) or needs

assistance in revising a proposal to address the landlord's concerns, they should seek professional advice from an appropriate organisation or adviser.

Where it is a landlord seeking the tenant's consent for a proposal, there is no formal recourse to require a tenant to grant consent, regardless of what the proposal is or the tenancy type. Annex 2 of the Code provides some examples of grounds on which a tenant may be reasonable in withholding consent, but these are illustrative and not exhaustive.

3 Requests for landlord's consent or variation of terms under the 2021 Regulations

The 2021 Regulations apply, in England, to certain proposals from tenants of **AHA 1986 tenancies in England only**. Welsh regulations are expected in due course.

Where no agreement can be reached with the landlord, AHA 1986 tenants can refer requests for landlord's consent, or for varying the terms of the tenancy, to arbitration or third-party determination where the request is made either:

(a) **to enable access to relevant financial assistance** (as defined in Sections 1, 2(4) and 21 of the 2020 Act – see Annex 4), or

(b) **to comply with a statutory duty applicable to the tenant's use of the holding**.

Using the 2021 Regulations' procedures

Before using the provisions in the 2021 Regulations to refer a qualifying request to arbitration or third-party determination, the tenant must be up to date with their rent, they must have previously raised the request to the landlord in writing and the tenancy must not be subject to a valid notice to quit under Part 3 of Schedule 3, or Schedule 5, of the AHA 1986.

Once the tenant has complied with the above, but before a qualifying request can be referred to arbitration or third-party determination, the tenant has to serve a written notice on the landlord requesting the landlord's consent to the request or their consent to vary the relevant terms of the tenancy. The notice should detail the following:

- details of the request being made of the landlord

- a statement that the request is being made in relation to one of the qualifying purposes (i.e. enabling access to relevant financial assistance or enabling compliance with a statutory duty)
- where it is a request to vary tenancy terms, the proposed new terms and demonstration that the request is the minimum reasonably necessary to fulfil the purpose of accessing financial assistance or complying with a statutory duty
- where it is a request for the purpose of accessing financial assistance, a description of the activities the assistance will support and evidence that the tenant meets any relevant eligibility criteria
- a statement clarifying that the request can be referred to arbitration or third-party determination under the 2021 Regulations, in the absence of an agreement.

The landlord has 2 months within which to serve a counter-notice, which either:

- grants consent to the request
- grants consent but subject to conditions (set out in the same counter-notice), or
- refuses to grant consent.

Within 4 months of serving the original formal notice to the landlord, the tenant can refer the matter to an arbitrator if the landlord:

- doesn't serve any counter-notice
- serves a counter-notice with consent subject to conditions that are deemed unacceptable, or
- serves a counter-notice refusing to grant consent.

Alternatively, landlord and tenant can jointly refer the matter to a third party for determination, typically as an expert, within the same 4 months.

Where the matter is referred to an arbitrator or to third-party determination, the arbitrator or third party may order the landlord to comply with the tenant's request or may make any other reasonable and just award/determination in the circumstances, having regard to all relevant matters, including:

- the tenant's quiet enjoyment of the holding
- the landlord's reversionary interest in the holding (the value of the holding when it is returned to the landlord)
- other property of the landlord and tenant
- evidence of the settled objectives of the landlord and tenant, and
- the desire to make the least change required to the tenancy that is reasonably necessary to achieve the request made.

The arbitrator or third party can also make awards/determinations in respect of:

- the payment of costs
- the timing of their award/determination taking effect
- where the request relates to financial assistance, conditions relating to a successful application, and
- restricting a tenant from referring the same request to arbitration/third-party determination again under the same tenancy.

They cannot vary the rent, which is left for the next review when the outcome of the proposal might be clearer.

It would be advisable for any tenant intending to refer a request to arbitration, or any landlord in receipt of a notice from a tenant (having refused consent), to seek independent professional advice.

4 The suitability test under the 2021 Regulations

Although outside the scope of the Code, Part 3 of the 2021 Regulations amends the suitability test for those applying to succeed to an AHA tenancy under the provisions of AHA 1986. These changes implement recommendations that have been made to Defra by the industry over recent years.

The recommendations of the July 2013 Future of Farming Review Report included making changes to the suitability test for applicants applying to succeed to AHA tenancies. Those recommendations included the repeal of the commercial unit test as an arbitrary impediment to economic efficiency and the need to raise the suitability standard for applicants to an appropriate professional level to demonstrate the requisite business and environmental skills for modern farming.

TRIG's detailed report in response to the *Future of Farming* recommendations was published later in the same year and called for a business competence test to replace the suitability test for succession, setting a deliberately higher standard. This was picked up by TRIG again in October 2017 in its report to Defra, which preceded the April 2019 consultation paper on further agricultural tenancy reform.

TRIG has been consistent in recommending that any new business competence test should be accompanied by the abolition of the commercial unit test and that the combined effect of doing so would be to 'widen the gate but raise the bar'. This is the background to the provisions in Part 3 of the 2021 Regulations. It is expected that landlords and tenants – and for contested cases the Tribunal – will be mindful that the intention of the new provisions is to require applicants to demonstrate a higher standard of business competence than has previously been required, and that their application must be assessed as if they were applying for a tenancy of the holding in an open competition.

The specific wording in the 2021 Regulations that raises the bar is at section 5 (2) which requires the Tribunal to be satisfied that:

> 'if the applicant had applied in an open competition for a tenancy of this holding, that is assumed to be available under the 1986 Act, a prudent and willing landlord could reasonably be expected to regard the applicant as among the candidates to whom they would be willing to grant the tenancy.'

The 2021 Regulations include two important disregards that would usually be important considerations in the context of an open competition for a tenancy: all offers as to rent and the age of the applicant. Those disregards are to remove factors that may otherwise have caused prejudice or unfairness to an applicant who is eligible to succeed but may not otherwise have been able to demonstrate suitability under the new test.

Many tenants will be familiar with the process of tendering in the open market for a new tenancy, and many landlords will be familiar with reviewing and assessing tenders from prospective tenants. From 1 September 2024, which is the date that Part 3 of the 2021 Regulations takes effect, it will be necessary to take a similar approach to a succession application. Applicants should be aware that the effect of the amended succession test will be that some applicants who would have been successful under the current test will not be successful under the new test. The three-year delay before the new test applies is to allow potential applicants and their advisers a reasonable period of time to consider and adjust to the requirements of the new test.

Landlords and tenants will note that, in other respects, the provisions of Part 3 of the 2021 Regulations are similar to those of the current suitability test. Those are set out at sub-paragraphs (a) to (e) of Section 5 (2) and are as follows:

(a) 'the person's likely capability and capacity to farm the holding commercially, with or without other land, taking into account the need for high standards of

efficient production and care for the environment in relation to managing that holding

(b) the person's experience, training and skills in agriculture and business management

(c) the person's financial standing and their character

(d) the character, situation and condition of the holding

(e) the terms of the tenancy.'

Applicants and landlords will be familiar with the process of addressing the matters at (b) to (e) above but, in the context of the abolition of the commercial unit test, there may be some uncertainty around the need to meet the test set out at (a).

It will be noted that the requirement to demonstrate that the holding will be farmed commercially remains an important element of the test but, to add clarity and avoid argument over whether the holding is, of itself, capable of being commercially farmed – i.e. because it is too small an area of land – (a) above makes it clear that if the applicant is farming the holding together with other land, the test applies in the context of the whole of the applicant's farming business and not just to the holding in isolation.

Annex 1: Landlord's grounds for withholding consent for a tenant's proposal

A Requests under the 2021 Regulations

Where the 2021 Regulations do apply, if a landlord refuses to grant consent or agree to a variation of the terms of the tenancy, the tenant may refer the request to arbitration, so when in receipt of a proposal that falls under the 2021 Regulations, landlords should be mindful of whether their reasons for refusal are consistent with the considerations required of an arbitrator (or, if jointly referred, a third party) under the 2021 Regulations (see section 3 of the Code).

The landlord's reasons for refusal in respect of such requests could include, but are not necessarily limited to, those examples set out in B below.

B Requests outside of the 2021 Regulations

In situations where the 2021 Regulations **do not** apply, the matter cannot ordinarily be taken to dispute resolution by the tenant. However, for statutory duties, the landlord and tenant may need to seek advice on whether Section 11 of AHA 1986 applies (*Provision of fixed equipment necessary to comply with statutory requirements*) – with the possible effect of requiring the landlord to provide, alter or repair the relevant fixed equipment.

The Code suggests the following as examples of reasonable grounds on which a landlord may withhold consent, according to the case and context.

1. Where the implementation of the proposal would be detrimental to the sound management of the estate of which the land consists or forms part, or other land and property belonging to the landlord.

This includes situations where the granting of the landlord's consent would result in the landlord being in breach of a covenant for quiet enjoyment or other covenants in relation to other tenants, occupiers or interested parties.

This might be where the tenant's proposal directly affects the business or investment of one or more of the landlord and other tenants.

Similarly, the landlord could rely upon this ground to refuse consent where the implementation of the proposal would be detrimental to the landlord's own business interests. Clearly in such a case other grounds may also be relevant, such as Ground 4 below.

2. Where the project, in the reasonable opinion of the landlord, would substantially interfere with the quiet enjoyment of retained rights over the land.

This covers diversification that, for example, may impact on sporting rights or where a proposal involves attracting visitors in a way that might interfere with the landlord's interest.

3. Where the proposal, in the reasonable opinion of the landlord, is not considered viable.

This ground encompasses, for example, cases where:

- the landlord reasonably believes (taking into account the information provided by the tenant in the business plan and supporting documentation) that the proposals

would not provide an adequate return to the point where it could prejudice the landlord's interests, or

- the tenant has not demonstrated the ability or resources to promote, deliver and manage the project, or
- proposed changes to the holding (or part thereof) would in practice be beyond the obvious means of the tenant to reinstate.

4. The proposal would cause the landlord to suffer undue hardship.

For example, it has effects on the landlord's own business or sporting rights, or the issue of loss of tax reliefs by the landlord in the event that a diversification proposal made valuable land non-agricultural.

5. Where insufficient consideration has been given to the issues where implementation of the proposal would result in all or part of the holding ceasing to be under the AHA 1986 or ATA 1995.

If the result of a good proposal was such that it took all or part of the holding out of the agricultural tenancy legislation (for instance, if no part was used for agriculture as part of a trade or business), the parties might have much to consider in terms of how to deliver the project and handle the interests of both.

On a more limited basis, a landlord may subsequently refuse consent for a virtually identical proposal or a new proposal on the grounds that the proposal is a 'step too far'.

6. Where the tenant is in material breach of the existing tenancy agreement and the matter has been brought to the attention of the tenant prior to the submission of a proposal for diversification.

In cases where the tenant is failing to honour the terms of the tenancy agreement, the landlord would expect any breaches to be addressed before considering the granting of a consent.

7. Where the tenant has failed to adhere to the Code.

This particularly applies to supplying appropriate information under the Code to the landlord in connection with the application for consent.

8. Where an application is not materially different from a previously unsuccessful application.

Tenants are advised against submitting proposals that have already been subject to discussions between the parties if those proposals are largely unchanged from their original version, except in circumstances where a change in legislation requires the tenant to fulfil a statutory duty that did not apply at the time of the previous proposal, or the tenant has addressed a specific reason for refusal to the satisfaction of the landlord.

This list of examples is not exhaustive and there may be other reasonable grounds on which consent is refused; however, without any reasonable grounds there is a risk of upsetting the working relationship with the tenant and future discussions on other proposals (from either party), and therefore landlords should carefully consider their reasons for refusal and be prepared to explain them clearly to the tenant.

Annex 2: Tenant's grounds for withholding consent for a landlord's proposal

The following are some examples of situations in which a tenant may be justified in withholding consent for a landlord's request for a change of use or diversification.

1. Where the activity would prejudice the tenant's rights.

Depending on the nature of the activity involved, it may result in either a deliberate or inadvertent fundamental change to the tenancy agreement, including a change that means it becomes governed by a different statutory code. Deliberate changes would include the migration to a lease under the *Landlord and Tenant Act* 1954 and other business tenancy legislation, changing from an AHA 1986 tenancy to an ATA 1995 tenancy and the imposition of residential tenancies on dwellings. However, it might also include other changes that may reduce the tenant's rights, including loss of succession, changes in repairing obligations and further landlord's reserved rights.

While not necessarily forming a requirement of the landlord, there will be circumstances in which a proposal might inadvertently alter the tenant's rights in some or all of the ways noted above. It would be reasonable for a tenant to withhold consent where they reasonably believe their rights would be prejudiced.

2. Where the activity would lessen the tenant's ability to earn income from the holding.

Tenants should not be under an obligation to accept a landlord's suggested change of use if it would result in the tenant's ability to earn income from the holding being reduced. This would also include proposals where the tenant is unable to finance start-up costs, including any period of reduced income while the new enterprise is being established.

3. Where the activity is contrary to an established plan for the existing or future viable use of the holding.

Tenants have rights and responsibilities, and may have developed an existing plan for the management of the holding within the bounds of the tenancy agreement. Tenants should be able to withhold consent for any suggestion from the landlord that is contrary to those plans.

4. Where the activity would lessen the tenant's quiet enjoyment of the holding.

An implied covenant of all tenancy agreements is that the tenant is allowed the quiet enjoyment of the holding. Tenants should be able to withhold consent for a landlord's proposal where it is clear to the tenant that the tenant's quiet enjoyment of the holding would be jeopardised.

5. Where the activity requires skills, capital or other factors not available to the tenant.

Tenants should be able to withhold consent for a landlord's proposal where they would be required to employ particular skills or capital that they do not have available, and which would only be obtained at an unreasonable cost to the tenant. For example, a tenant should not be required to accept a landlord's proposal for a farm to be used as an educational facility if the tenant does not have or cannot reasonably access the necessary manpower, communication skills or finance to upgrade facilities that would be necessary.

6. Where the activity would cause the tenant to suffer undue hardship.

While this will be measured mainly in financial terms, there may be other factors in terms of the impact upon the tenant's family that should be taken into account.

7. Where the activity in the reasonable opinion of the tenant is not considered viable.

It would be to the landlord's advantage to test the landlord's proposal against the experience and skills of the tenant. In this respect, the tenant could withhold consent if the tenant believes that the landlord's proposal would not provide an adequate return to justify investment by either party. The tenant may also have knowledge of the holding to suggest possible areas of conflict between the landlord's proposal and what the holding has available.

8. Where the implementation of a proposal from the landlord would result in the holding ceasing to be agricultural in nature.

The Code is only intended to apply to agricultural tenancies, and therefore it would be inappropriate for the Code to be used to such an extent that the holding would no longer be agricultural in nature.

9. Where the landlord is in material breach of the existing tenancy agreement and the matter has been brought to the attention of the landlord by the tenant prior to the submission of a proposal for diversification.

The tenant may reasonably withhold consent for the landlord's proposal where the landlord is already failing to honour the provisions of the tenancy agreement (e.g. repairs, quiet enjoyment or provision of fixed equipment) and this materially affects the tenant's interest.

10. Where the landlord has failed to comply with the Code.

This particularly applies to supplying appropriate information under the Code to the tenant in connection with the application for consent.

11. Where a proposal is not materially different from a previously unsuccessful proposal.

Landlords are advised against submitting proposals that have already been subject to discussions between the parties if those proposals are largely unchanged from their original version, except in circumstances where a change in legislation requires the landlord to fulfil a statutory duty that did not apply at the time of the previous proposal, or the landlord has addressed a specific reason for refusal to the satisfaction of the tenant.

This list of examples is not exhaustive and there may be other reasonable grounds on which consent is refused; however, without any reasonable grounds there is a risk of upsetting the working relationship with the landlord and future discussions on other proposals from either party. Therefore, tenants should carefully consider their reasons for refusal and be prepared to explain them clearly to the landlord.

Annex 3: Alternative dispute resolution

Where the parties have failed to reach agreement on the tenant's proposal, and where the proposal falls outside of the procedures in the 2021 Regulations (or the tenant wishes not to refer the matter to an arbitrator under the 2021 Regulations), the parties may consider alternative dispute resolution – and particularly mediation – as a means by which the parties may seek to arrive at an agreement.

The following organisations offer arbitrators, mediators and expert determiners with specialist knowledge of the rural and agricultural sector, and in particular agricultural holdings legislation.

Agricultural Law Association Dispute Resolution

Office 1, The Stackyard, Bulwick, Northamptonshire, NN17 3DY

www.aladisputeresolution.co.uk

enquiries@aladisputeresolution.co.uk

Central Association of Agricultural Valuers

Harts Barn Farmhouse, Monmouth Road, Longhope, Gloucestershire, GL17 0QD

www.caav.org.uk/about-caav/dispute-resolution

enquire@caav.org.uk

Royal Institution of Chartered Surveyors

RICS Dispute Resolution Service, 55 Colmore Row, Birmingham, B3 2AA

www.rics.org/drs

drs@rics.org

Annex 4: Sections 1, 2(4) and 21, Agriculture Act 2020

Section 1

1 Secretary of State's powers to give financial assistance

(1) The Secretary of State may give financial assistance for or in connection with any one or more of the following purposes—

(a) managing land or water in a way that protects or improves the environment;

(b) supporting public access to and enjoyment of the countryside, farmland or woodland and better understanding of the environment;

(c) managing land or water in a way that maintains, restores or enhances cultural or natural heritage;

(d) managing land, water or livestock in a way that mitigates or adapts to climate change;

(e) managing land or water in a way that prevents, reduces or protects from environmental hazards;

(f) protecting or improving the health or welfare of livestock;

(g) conserving native livestock, native equines or genetic resources relating to any such animal;

(h) protecting or improving the health of plants;

(i) conserving plants grown or used in carrying on an agricultural, horticultural or forestry activity, their wild relatives or genetic resources relating to any such plant;

(j) protecting or improving the quality of soil.

(2) The Secretary of State may also give financial assistance for or in connection with either or both of the following purposes—

(a) starting, or improving the productivity of, an agricultural, horticultural or forestry activity;

(b) supporting ancillary activities carried on, or to be carried on, by or for a producer.

(3) Financial assistance may only be given in relation to England.

(4) In framing any financial assistance scheme, the Secretary of State must have regard to the need to encourage the production of food by producers in England and its production by them in an environmentally sustainable way.

(5) For the purposes of this section—

'ancillary activities' means selling, marketing, preparing, packaging, processing or distributing products deriving from an agricultural, horticultural or forestry activity;

'better understanding of the environment' includes better understanding of agroecology;

'conserving' includes restoring or enhancing –

(a) a population of a relevant species;

(b) in the case of animals or plants in the wild, a habitat;

'cultural or natural heritage' includes uplands and other landscapes;

'improving productivity', in relation to carrying on an activity, includes—

(a) improving the quality of any products deriving from the activity, and

(b) improving the efficiency of the activity in terms of the resources used in, or in connection with, it;

'livestock' includes any creature kept for the production of food, drink, oils, fibres or leathers, or for the purpose of its use in the farming of land;

'producer' means a person who carries on, or is to carry on, an agricultural, horticultural or forestry activity.

(6) In this Chapter—

'financial assistance' means financial assistance under this section;

'financial assistance scheme' means a scheme for giving financial assistance made by the Secretary of State.

Section 2

2 Financial assistance: forms, conditions, delegation and publication of information

(1) Financial assistance may be given by way of grant, loan or guarantee or in any other form.

(2) Financial assistance may be given subject to such conditions as the Secretary of State considers appropriate.

(3) The conditions may (among other things) include provision under which the financial assistance is to be repaid or otherwise made good (with or without interest).

(4) **Financial assistance may be given to the maker or operator of a third party scheme in connection with expenditure involved in establishing or operating the scheme (including the provision of financial support).**

(5) In subsection (4) 'third party scheme' means a scheme for giving financial support for any one or more of the purposes in section 1(1) and (2) which is not made by the Secretary of State.

(6) The Secretary of State may delegate functions relating to the giving of financial assistance to any other person.

(7) Functions delegated under subsection (6) may include—

(a) the giving of guidance;

(b) the exercise of a discretion.

(8) The Secretary of State may by regulations make provision for or in connection with requiring the Secretary of State or another person to publish specified information about financial assistance which has been given.

(9) Information which may be specified includes information about—

(a) the recipient of the financial assistance;

(b) the amount of the financial assistance;

(c) the purpose for which the financial assistance was given.

(10) Regulations under subsection (8) are subject to affirmative resolution procedure.

(11) In this section 'specified' means specified by regulations under subsection (8)

Section 21

21 Exceptional market conditions: powers available to Secretary of State

(1) This section applies during the period for which a declaration under section 20 has effect.

(2) The Secretary of State may give, or agree to give, financial assistance to agricultural producers in England whose incomes are being, or are likely to be, adversely affected by the exceptional market conditions described in the declaration.

(3) The Secretary of State may also make such use as the Secretary of State considers appropriate of any available powers under retained direct EU legislation which provides for the operation of public intervention and aid for private storage mechanisms, in response to a declaration under section 20.

(4) Financial assistance under subsection (2) may be given by way of grant, loan or guarantee or in any other form.

(5) The financial assistance may be given subject to such conditions as the Secretary of State considers appropriate.

(6) The conditions may (among other things) include provision under which the financial assistance is to be repaid or otherwise made good (with or without interest).

(7) Nothing in subsection (1) or (2) prevents the Secretary of State from giving, or agreeing to give, financial assistance under subsection (2)—

(a) after the end of the period for which the declaration has effect, but

(b) in response to an application duly made during that period.