

Tenancy Reform Industry Group (TRIG)

Final Report

Department for Environment, Food and Rural Affairs
Nobel House
17 Smith Square
London SW1P 3JR
Telephone 020 7238 6000
Website: www.defra.gov.uk

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Contents		Page
	Chairman's opening remarks	-
1	Executive summary	1
2	Background, terms of reference and government objectives	6
3	Guiding principles	8
4	Proposals for legislative reform	9
5	Proposals for fiscal reform	34
6	Proposals for a Code of Good Practice 50 within agricultural tenancies”	“diversification
7	Structural issues	65
	7.1 Introduction	65
	7.2 Tenant retirement	65
	7.3 New entrants	68
	7.4 County farms	70
	7.5 CAP review	71
8	Tenancy Reform Industry Group – future role	72

Appendices

Appendix I	Membership of TRIG	73
Appendix II	Response to the Economic Evaluation of the Agricultural Tenancies Act 1995 by Plymouth University	75
Appendix III	EU Retirement Scheme	79
Appendix IV	EU New Entrant Scheme	81
Appendix V	NFU New Entrant Advice Scheme	82
Appendix VI	Statistics on Country Council smallholdings	86

Chairman's opening remarks

Following a meeting in July 2002 with farming and land owning organisations to discuss tenancy issues in light of the report published by the Policy Commission on Food and Farming and the Plymouth University recommendations following the review of the Agricultural Tenancies Act 1995, Lord Whitty and The Rt. Hon. Alun Michael MP invited me to chair the newly constituted Tenancy Reform Industry Group. The Group met for the first time on 11th November 2002.

The composition of the Group will be found at Appendix I but all sectors of the farming industry have been represented together with the appropriate professional organisations, local government and an independent member. After seven meetings and the tasks undertaken by three Working Groups which considered in detail the proposals for legislative and fiscal reform and the framework for a code of good practice, the main Group unanimously agreed the package of measures detailed in this report.

The results reflect the hard work and commitment from all members of the Group and the support received from the Defra staff. In the space of just six months we addressed a wide range of issues surrounding the tenanted sector and produced what I believe to be a set of positive recommendations for Ministers to consider.

I wish to formally record my appreciation to all concerned.

A more detailed background as to why the Group was established, the Terms of Reference and the Government Objectives will be found at Section 2 of the report. The latter were clearly understood and accepted by the Group from the outset. The only request to Ministers for the brief to be varied was to ask that as well as "maintaining the area of let land" the Group's recommendations should seek to provide opportunities for the sector to expand.

JULIAN SAYERS

FRICS FAAV FRAGS FBIAC FIAgrM

Chairman

16 May 2003

1.0 Executive summary

Background

The Tenancy Reform Industry Group (TRIG) was convened to advise on measures that would assist the general health of the tenanted sector within the agricultural industry and in particular to encourage diversification.

The tenanted sector covers a third of the agricultural area of England and Wales. It provides an important framework for people to farm without being landowners, focusing simply on the business of farming itself. This allows a separation of the different needs and investment horizons of land ownership and business. As such, it also offers a potential means of entry into the industry for those without the capital needed to buy land. The flexibility of the sector is a key part of the ability of UK agriculture to respond to the economic pressures which it currently faces.

The landlord and tenant system had been in decline throughout the twentieth century for reasons including the legislative framework, the taxation treatment of let land together with, economic and structural issues. Until 1995, all tenancies were governed by legislation consolidated in the Agricultural Holdings Act 1986 (“AHA 1986”). From September 1995, the Agricultural Tenancies Act (“ATA 1995”) has provided that new tenancies will generally be Farm Business Tenancies (FBT’s), governed by a much more deregulated code of law. That change accompanied by a reform of the Inheritance Tax treatment of let farms has seen a reversal of the haemorrhaging from the sector as fresh land has come forward to be let.

Since that reform, the economic pressures on farming have grown, the 2001 outbreak of foot and mouth caused great difficulty and experience has been gained in the operation of the ATA 1995. The Policy Commission on Food and Farming included recommendations relating to the importance of the tenanted sector and Defra commissioned the University of Plymouth to undertake an economic evaluation of the ATA 1995.

In addressing its remit, TRIG identified several key principles:

- tenancy legislation can directly affect, positively as well as negatively, the availability of land to let and the operation of the tenanted sector.
- where possible non-legislative measures should be used to maintain confidence in the framework of the legislation taking into account the long-term nature of rural land management.
- the long-term view requires the need to provide flexibility for circumstances as yet unforeseen which are generally best delivered by greater freedom of contract with appropriate legislative safeguards.

- there should be a level playing field between tenancies and other means for delivering land management and the tax system should treat them equally so that decisions can be taken on practical and not artificial grounds.

1.1 Key recommendations

TRIG's key recommendations are summarised below. They form a package of often inter-relating measures and should be considered in that light. Each is explained by the supporting text within the report and TRIG has provided drafts for the major legislative and fiscal amendments. All the proposals have been prepared to meet the objectives set by Government and they have the unanimous support of TRIG's members.

Legislative measures

1.1.1 Greater flexibility for landlords and tenants to agree the rent review provisions for an FBT, whilst retaining the exclusion on upwards only review clauses. The present legislation imposes certain restrictions on the parties which can fetter and sometimes frustrate practical negotiations that could otherwise lead to new tenancies being granted.

1.1.2 An option for the end of tenancy compensation payable by a landlord to a tenant for improvements carried out under the provisions of the ATA 1995 to be capped at the outset. This will remove a barrier to consent being given for such works as presently the liability to pay compensation cannot be quantified by a landlord until the tenancy comes to an end.

1.1.3 Clarifying the circumstances whereby land, including buildings, can be added to a holding let under the provisions of the AHA 1986 without removing the tenant's rights under that Act. This will ensure flexibility where AHA 1986 tenancies are concerned, ease estate management and bring certainty to what in practice has proved a difficult matter. This should not be a means to increase the rate of agricultural property relief from Inheritance Tax.

1.1.4 Removing the upper limit of 24 months for the notice period required to terminate an FBT. This will allow the creation of longer term "rolling" tenancies with the associated flexibility.

1.1.5 Amending the livelihood "test" for succession to a tenancy under the AHA 1986 so that non farming income derived from a holding where landlord's consent has been granted for diversification. This will aid rather than count against an applicant.

1.1.6 Removing the specific arbitration provisions of the AHA 1986 and relying directly on the provisions of the Arbitration Act 1996 already which applies to disputes

concerning other businesses and letting regimes, including the ATA 1995 and affords greater flexibility to the parties.

1.1.7 Providing the industry with “model” clauses for the key issues that can be used to “mirror” the terms of an AHA 1986 tenancy within an agreement under the ATA 1995 to help tenants transfer between holdings in certain circumstances.

Fiscal measures

1.1.8 Extending the definition of agricultural property for Agricultural Property Relief from Inheritance Tax to include land on which diversification has taken place under the AHA 1986 or the ATA 1995. At present, a tenant’s diversification is likely to prejudice a landlord’s tax position thus giving the landlord a strong reason to refuse consent and thereby frustrate what may otherwise be a desirable venture.

1.1.9 Landlords to be given the option to defer the payment of Capital Gains Tax on gains which are used to improve the economic value of land let on an AHA 1986 or ATA 1995 tenancy and used by the tenant for business purposes. This proposal will encourage investment of fresh capital within the let sector, both in farming and diversified activities. By granting the deferral for the life of the tenancy, it will tend to encourage the longer letting of better equipped holdings.

1.1.10 Extension of the Business Asset Paper Relief from CGT to cover all land let for business purposes. The present rules discriminate against sole traders and partnerships by only recognising land let to companies which are less common in the farming industry. TRIG supports the broader measure which will achieve this as announced in the 2003 Budget.

1.1.11 For the purposes of the proposed Stamp Duty Land Tax all FBT’s grant for a period of more than ten years should be treated as ten year agreements. TRIG is very concerned that the new Tax as drafted will conflict with the other proposals contained in this report and discourage the letting of farms for longer terms and with dwellings and buildings as these will tend to make a tenancy subject to the Duty. Farmers will instead be encouraged to seek shorter and lesser tenancies despite the contrary being one of the Government’s objectives.

1.1.12 Other measures and actions are also proposed to reduce the tax system’s discrimination against the letting of rural land:

- a review of the scheduler system of Income Tax in this respect.
- a review of the interpretation of VAT treatment where a farm with dwellings is let for the prime purpose of agricultural business use.
- periods of land ownership for landlords and owner-occupiers to be aligned at two years for agricultural property relief from Inheritance Tax.

Code of Good Practice

1.1.13 TRIG proposes the introduction of a Code of Good Practice to assist landlords and tenants in the process of agreeing terms for diversification to take place on agricultural holdings. This is to be supported by an Ombudsman Scheme, which can be used where the parties fail to agree and a Ministerial statement confirming that legislation will be considered if the Code fails to meet the objectives. The aim is to provide a practical non-legislative means of encouraging diversification without incurring the risk of weakening confidence in the current law that could flow from retrospective legislation in this area.

This proposal is part of a wider package of measures to enable and encourage diversification by tenants including the extension of Agricultural Property Relief where tenants have diversified and the potential capping of compensation for improvements which overcome reasons for landlords to object to diversification.

Structural issues

1.1.14 The Government is asked to undertake research to ascertain why many tenants find themselves unable to retire identifying the size and nature of the problem.

1.1.15 Further consultation to take place regarding the proposed Defra Advice Pack for retiring farmers. This should be used in conjunction with competent advisers, bearing in mind the wide range of issues to be addressed ahead of retirement and the often limited resources of those involved.

1.1.16 The options for assisting those tenants who wish to retire to be considered when the Government is reviewing the England Rural Development Programme for 2006 onwards, including grant funding for re-training opportunities.

1.1.17 Consideration to be given by the Government to making use of EU measures to assist new entrants during the review of the England Rural Development Plan.

1.1.18 Government and the industry to support schemes to help new entrants including the advisory service as has been proposed by the NFU.

1.1.19 The introduction of a matching service to bring together those who wish to enter the industry and those with land available to let.

1.1.20 Steps to be taken by Defra to use its powers to encourage the maintenance of County Council Smallholding Estates wherever possible.

The members of TRIG trust there will be a continuing role for the Group as detailed within Section 8 of the report. Work will be required as the

recommendations are implemented and consideration will need to be given as to the impact of the CAP Mid-Term Review once the detail of the final measures are known.

2.0 Background, terms of reference and government objectives

2.1 Background

The Group was established following the publication of the “Report of the Policy Commission on the Future of Farming and Food” and “An Economic Evaluation of the Agricultural Tenancies Act 1995”. The Policy Commission made the following recommendations:

“We recommend that Defra, DTLR and the Treasury conduct a review of the tax position of FBTs to see how changes could encourage longer lets and sensible diversification.

The review should consider in particular whether a new form of reinvestment relief within Capital Gains Tax should be introduced to allow landlords to defer capital gains that are reinvested in improvements to let land under the ATA 1995 during the term of the tenancy.

The review should also consider whether land and buildings subject to an FBT, which is used for the purpose of any trade conducted by an unincorporated tenant, should qualify as a business asset for the purposes of Capital Gains Tax taper relief.”

“Concerns about the ability of tenants to diversify under the terms of tenancy legislation have also been raised with us as obstacles to business development. We recommend that, once Defra have the outcome of the Plymouth University study on FBTs, they should with relevant organisations, revisit the definition of “agriculture” within tenancy legislation. A broader definition for the purposes of legislation would be consistent with the multifunctional nature of farming we are moving towards.”

The Plymouth report looked specifically at the Agricultural Tenancies Act 1995 and made a series of seven recommendations all of which were carefully considered by the Group. The Group’s response to each will be found at Appendix II.

Whilst not all the conclusions and recommendations were accepted by the Group the Evaluation was considered to be a useful exercise. It was also one which provided clear evidence to support some of the Group’s proposals for legislative and fiscal reform.

2.2 Terms of reference from Defra Ministers

Defra Ministers asked the Group, in light of the Policy Commission and Plymouth University recommendations and in a manner that is consistent with the Government's objectives for the farming industry, the rural economy and the tenanted sector, to:

- establish an industry consensus or propose options for tenancy reform that can be recommended to Government.
- make the case for the removal of fiscal disincentives and the introduction of fiscal incentives which are broadly revenue neutral indicating why this is in the public interest.

2.3 Government objectives in relation to farming and tenancy issues

Defra Ministers asked the Group to work with Government to develop and, where the Government considers appropriate, implement tenancy reforms and confirmed the Government's objectives as:

- To promote sustainable, diverse, modern and adaptable farming.
- To strengthen the rural economy, particularly under-performing areas, to enhance opportunities for rural people, and to promote cohesive and sustainable communities through the creation of innovative, diverse and environmentally responsible farm based businesses.
- To ensure tenant farmers can:
 - diversify where this will improve the viability of their business;
 - and take steps to help enhance and protect the environment without fear of losing their tenancy or jeopardising succession rights.
- To ensure that holdings can be restructured without jeopardising a tenant's rights.
- To maintain an appropriate balance between landlord and tenant interests.
- To ensure that a variety of sustainable entry routes are available which provide an opportunity for new entrants to join and progress within the farming industry.
- To maintain the area of let land.
- To increase the area of land let under whole farm agreements.
- To maintain and improve flexibility within the rental market.
- To facilitate restructuring and the development of a diverse and sustainable farming industry.

3.0 Guiding principles

TRIG discussed the guiding principles that should underlie its deliberations, and sought to apply those to the consideration of the recommendations set out in this report.

Fundamental to these deliberations was the past history of the tenanted sector. Over a period of 20 years following the introduction of the Agriculture (Miscellaneous Provisions) Act 1976, the sector haemorrhaged land and holdings at the rate of some 50,000 acres a year. This loss led to a rethinking of agricultural tenancy legislation initially, through the 1984 Agricultural Holdings Act (consolidated by the AHA 1986) and later through the medium of the original TRIG, (1993-1995) to encompass greatly increased freedom of contract. This led to the 1995 Agricultural Tenancies Act.

The ATA 1995 has reversed the former outflow of land from the sector. In addition it has led to conditions where former owner-occupiers as well as traditional landlords are now adding to the supply of land to let.

3.1 The first fundamental principle that TRIG drew from this was that changes to tenancy legislation can significantly affect the availability of land to let.

3.2 The second principle was that delivery of objectives should be sought wherever possible by non-legislative means, as advice and incentives are much to be preferred to regulation. Delivering the right framework means that, for instance, tenant's diversification proposals are not frustrated by the adverse tax consequences they may mean for landlords, thereby making landlords part of the solution rather than being seen as part of the problem.

3.3 The third principle was to recognise that opportunities for changes to agricultural tenancy legislation seldom arise, and that TRIG should therefore take a long term view. Discussion on this point centred on the need for flexibility to enable farming businesses to adapt to future circumstances, which could not be foreseen. Many farm businesses already encompass a range of holdings held on different arrangements, and this was seen as the likely pattern of the future. TRIG felt flexibility was best delivered by increased freedom of contract.

3.4 The fourth principle was that policy should not distinguish between lettings and other vehicles for farm management. Historically, attempts to discriminate have produced results running counter to the Government's present objectives.

3.5 The fifth principle was that TRIG had to come to a unanimous solution, one that all sectors of the industry could support and help to deliver.

4.0 Proposals for legislative reform

4.1 Introduction

Following research undertaken for Defra by the University of Plymouth and published as 'An Economic Evaluation of the Agricultural Tenancies Act 1995' and the Report of the Policy Commission on the Future of Food and Farming, TRIG was asked to consider possible amendments to existing agricultural tenancy legislation to facilitate the key government objective of 'promoting sustainable, diverse, modern and adaptable farming'.

In doing so, TRIG was very mindful of the need to maintain and enhance confidence in the lettings sector among current and potential landlords, tenants and their advisers. Accordingly, TRIG has focussed on specific amendments to meet targeted objectives addressing well documented problems rather than proposing large-scale changes to both the Acts that govern agricultural tenancies namely the Agricultural Tenancies Act 1995 (the ATA1995) and the Agricultural Holdings Act 1986 (the AHA 1986). In this respect TRIG was keen to avoid proposing any unnecessary retrospective legislation.

TRIG acknowledged that the ATA 1995 is a relatively recent statute which, unlike the legislation now consolidated in the AHA 1986 has not had the benefit of many years of use by landlords, tenants or 'judicial' testing.

4.2 Agricultural Tenancies Act 1995 – proposed amendments

The University of Plymouth's Report made the following recommendations for changes to the ATA 1995:

- Relaxing the agricultural and business conditions required for a FBT
- Relaxing the provisions concerning rent
- Relaxing the provisions concerning compensation
- Consideration to be given to amending Section 4 of the ATA 1995 in relation to extending existing agreements under the AHA 1986

4.2.1 Relaxing the agricultural and business conditions required for a FBT

TRIG gave detailed consideration to this proposal but concluded that the interaction of the 'business' with either the 'notice' or 'agricultural' conditions does provide sufficient

flexibility for the parties to use FBTs even for holdings that will be substantially diversified.

The ATA 1995 had been created with diversification in mind. TRIG felt that often its failure to be used for such purposes was a result of a lack of awareness and understanding of its uses rather than the Act being defective - a particular point highlighted within the University of Plymouth Report.

Furthermore, for wholly diversified enterprises – that is with no agricultural element – the greater flexibility afforded by the Landlord and Tenant Act 1954 would in any event be more appropriate rather than trying to alter the ATA 1995 to suit such circumstances. TRIG was particularly concerned that any further ‘blurring’ of the distinction between agricultural and non-agricultural tenancies may lead to difficulties in distinguishing between ATA 1995 tenancies and business tenancies governed by the Landlord and Tenant Act 1954 and so to loss of legal certainty for all involved.

Similarly, with regard to agri-environmental schemes, TRIG considered that the agricultural practices generally required to comply with such schemes meant that a FBT would almost always be an appropriate agreement. In practice it was thought that the issue would only arise where the majority of the holding was converted to an environmental use that did not involve agricultural management activity.

TRIG recommends that:

- the agriculture and business conditions for FBTs remain unaltered.

4.2.2 Relaxing the provisions concerning rent

TRIG agreed that the current restrictions on rent review formulae contained within section 9 of the ATA 1995 were unnecessary in principle and lead to needless complication in some practical cases. The parties should be given greater flexibility to agree their own arrangements. At present, there are restrictions on formulae which require or permit the exercise of judgement or discretion in relation to the determination of the rent of the holding.

TRIG considered that a relaxation in the rules governing rent review provisions would remove a major reason why some AHA 1986 tenants would not consider surrendering their ‘protected’ tenancies in exchange for better holdings let on FBTs. At present the rent payable via a FBT cannot easily be reviewed under the basis of the AHA 1986, so

detering AHA tenants from progressing to another farm with a FBT. TRIG did conclude however that the prohibition on upwards only rent reviews should remain.

Although TRIG believed that greater freedom of contract for rent reviews is appropriate, it was also concerned to ensure that parties who failed to agree their own arrangements had a statutory default procedure. As such the existing rent review procedures should apply to farm business tenancies unless the parties have agreed otherwise in writing.

Concern was expressed within TRIG that Section 12 of the ATA 1995 unreasonably limited opportunities for reviews to be determined other than by arbitration. At present, parties who have agreed in their tenancy agreement that rent reviews may be referred to a third party expert must again agree the same point after the service of the Section 10 review notice in order for arbitration not to be available – thereby allowing either party the opportunity to resile from their previous agreement. TRIG agreed that Section 12 should be amended to allow their agreement to be followed.

Finally, it was considered appropriate that the arbitrator (including any other person appointed to determine the rent) should be entitled to fix the rent by reference to all provisions within the tenancy agreement including those by reference to which the rent is to be determined. At present, Section 13(2) prohibits the arbitrator from considering rent review criteria previously agreed between the parties.

A detailed paper on this issue, together with proposed amendments to the relevant sections of the ATA 1995, forms Annex 1 to this section.

TRIG recommends that:

- Section 9 of the ATA 1995 is modified to apply Part II in every case except where the parties agree otherwise in writing, provided that no such agreement be permitted which would result in an upwards-only rent review provision.**
- the parties to an ATA 1995 tenancy are precluded from proceeding to arbitration under the statutory rules in cases where the agreement itself provides another mechanism for settling disputes as to the amount of the rent.**
- it should be open to an arbitrator to fix the rent by reference to all provisions of an agreement, including those by reference to which the rent is to be determined.**

4.2.3 Relaxing the provisions concerning compensation

TRIG agreed that the current compensation provisions under the ATA 1995 often provided a disincentive to landlords to give consent for tenant's improvements on a holding. As compensation for such improvements is not 'crystallised' and hence not valued until the end of the tenancy, landlords are faced with a liability that is unknown or, at best, difficult to quantify.

Although the University of Plymouth Report recommended the removal of all existing constraints in relation to compensation, TRIG has stopped short of recommending complete freedom of contract. TRIG considered that the practical problem that needed to be addressed was the inability of landlords to know the extent of their liability at the time the consent was provided.

Accordingly, it is proposed that compensation for tenant's contribution may be capped at the amount of the tenant's investment in making the improvement, if the parties agree in writing. Where the cap is to have effect it will be necessary for the amount of the tenant's investment to be agreed in advance as part of the process of the landlord giving consent.

A detailed paper on this issue, together with proposed amendments to the relevant sections of the ATA 1995 and illustrative examples, forms Annexe 1 to this section.

TRIG recommends that:

- **Sections 20 to 27 inclusive of the ATA 1995 are amended so as to allow parties to agree in writing that the level of compensation for tenant's contribution be capped at the amount of the tenant's contribution in making the improvement.**

- **the 'cap' agreed is subject to a minimum of the tenant's contribution (including his or her own labour) in the improvement.**

- **where the value added to the holding is less than the tenant's contribution the landlord will only have to pay the lesser amount.**

4.2.4 Amendments to Section 4(1)(f) – surrender and re-grant

TRIG acknowledged that Section 4(1)(f) and the doctrine of implied surrender and re-grant had caused confusion not only to landlords and tenants but also to their professional advisers ever since the ATA 1995 came into force.

Here the intention behind TRIG's proposed amendment is to remove the uncertainty caused by the drafting of the existing Section 4(1)(f). Whereas it was agreed before the passage of the ATA 1995 that the sub-clause was intended to save any minor variations to land comprised in existing AHA 1986 tenancies – whether conscious or inadvertent – the wording has caused such confusion in the minds of practitioners with the result that perceived risks are not taken in such matters or other unnecessarily complicated mechanisms are employed to achieve the result. Accordingly TRIG considers this matter must be clarified.

TRIG also considered whether there should be scope for existing parties to an AHA 1986 tenancy to agree to extend the provisions of the Act to 'new' land outside the existing holding – in circumstances not currently caught by Section 4(1)(f) - but falling short of enabling parties to exchange an entire AHA 1986 holding for a 'new' holding governed by the AHA 1986. At present such 'additions' would have to be effected by way of a FBT.

TRIG accepted there were some circumstances relating to the application of Section 4(1)(f) which caused misunderstanding and therefore the provisions of the section should be clarified. In particular TRIG had in mind the additions of land or indeed buildings to existing holdings. Typically in such situations the transaction costs of creating a FBT would outweigh any benefit to the parties of having the additional land. As such TRIG considered that in such circumstances the parties should be free to agree that the additional land should be governed by the provisions of the AHA 1986 even though technically the additional land caused the creation of a post 31st August 1995 agricultural tenancy.

TRIG agreed that the original AHA 1986 holding (specified to be the holding in existence immediately prior to the first application of the proposed new clause 4(1)(f)(ii)) must form a substantial part having regard to area or value (whichever is the more significant) of the 'new' holding. If this criterion was not satisfied then the tenancy would be a FBT. Thus, these provisions should not be used to move from one holding to another under the AHA 1986.

A detailed paper on this issue, together with proposed amendments to Section 4(1)(f) of the ATA 1995, forms Annex 3 to this section.

In order to protect the current fiscal arrangements TRIG agreed that a consequential amendment should be made to the Inheritance Tax Act 1984 in relation to Agricultural Property Relief conditional upon the Section 4(1)(f) proposal.

TRIG recommends that:

- the current **Section 4(1)(f)** of the **ATA 1995** is revised for the sake of clarity.
- an additional provision to be included within **Section 4(1)(f)** enabling existing parties to an **AHA 1986** tenancy, by mutual consent, to include additional land and buildings within their holding resulting in the 'new' holding being governed by the **AHA 1986** and on the same terms (*mutatis mutandis*) as the original tenancy.
- it would be necessary for the 'original' holding to form a substantial part of the 'new' holding' either by area or value (whichever is the more significant).
- a consequential amendment is made to the **Inheritance Tax Act 1984** in relation to **Agricultural Property Relief** attributable to tenancies arising out of the application of **Section 4(1)(f)** of the **ATA 1995**.

4.2.5 Amending Section 4(2) – succession by agreement

TRIG discussed perceived difficulties concerning successions by voluntary agreement under Section 4(2) of the ATA 1995 which meant that many retirement successions were needlessly pursued through the Agricultural Land Tribunal who ultimately 'rubber stamped' the application. TRIG considered that for the avoidance of doubt a relatively straightforward amendment to Section 4(2) would clarify this point.

TRIG recommends that:

- **Section 4(2)** of the **ATA 1995** is amended by deleting reference to '**Subsection (1)**'.

TRIG also considered a number of other legislative changes in addition to those flowing from the Plymouth report recommendations

4.2.6 Termination of farm business tenancies

TRIG discussed the possibility of reducing the notice period for terminating a FBT and it concluded that the current minimum period of 12 months was appropriate.

However, TRIG saw merit in removing the 24 month upper limit on notice periods thereby enabling the so-called 'rolling tenancy' to be used. If the parties agreed a five year notice period in a tenancy that otherwise operated from year to year they would know that there was at least 5 years before the tenancy could be determined. TRIG, aware of some endeavours to achieve this within the present law, considered that for certain landlords and tenants such agreements would be attractive.

TRIG recommends that:

- the 24 month upper limit on notice periods for ATA 1995 agreements is removed.**

4.2.7 Drafting a FBT to mirror the provisions of a AHA 1986 tenancy

Although not a legislative matter as such TRIG did discuss, primarily within the context of Section 4(1)(f) whether it was possible or indeed practical to draft a FBT in such terms as to effectively 'mirror' a tenancy under the AHA 1986. TRIG was satisfied that such an agreement could be produced assuming the TRIG recommendation regarding rent review arrangements was adopted. Such an FBT may be appropriate for those AHA 1986 tenants who wish to progress to a new holding on an estate but whose circumstances preclude the use of Section 4(1)(f) of the ATA 1995.

TRIG recommends that:

- drafts of the key clauses that could 'mirror' a tenancy under the AHA 1986 within a new FBT governed by the ATA 1995 are prepared for use by the farming industry.**

TRIG would however like to point out that such clauses are only intended as a guide – they will not be suitable in all cases and as such appropriate professional advice should be sought when considering their use within an agreement.

4.3 Agricultural Holdings Act 1986 – proposed amendments

AHA 1986 tenancies, by definition, continue to be in decline and accordingly TRIG agreed that the AHA 1986 should only be amended where it was absolutely necessary. However, TRIG did identify two areas in which practical amendments should be made to the AHA 1986 – namely the succession criteria and arbitration procedures.

4.3.1 Succession criteria – ‘livelihood’ test

In view of the importance of diversification to the agricultural and rural sector, TRIG considered that it would be inconsistent and illogical if greater access to diversification on a holding prejudiced applications to succeed to the tenancy of that holding.

TRIG considered that the introduction of the Code of Good Practice (see Section 6 of this Report) designed to encourage diversification within the agricultural sector would be greatly undermined if applicants to succeed to a diversified holding could not include earnings from approved diversification projects for the livelihood test.

Although the ‘commercial unit’ test within the AHA 1986 is inextricably linked to the ‘livelihood’ test, TRIG concluded that no amendment was necessary to the former.

A detailed paper on this issue, together with proposed amendments to the relevant sections of the AHA 1986, forms Annex 4 to this Section.

TRIG recommends that:

- the ‘livelihood’ test for both succession on death and retirement within the AHA 1986 (Sections 36(3)(a) and 50(2)(a) respectively) is amended such that income from other (non-agricultural) work carried out on the holding would be included within the test provided the landlord had provided consent to such diversification.

- no change is made to the ‘commercial unit’ test (Section 36(3)(b)).

4.3.2 Arbitration & dispute resolution procedures

TRIG concluded that the AHA 1986's procedures for arbitration were now antiquated and often, though unintentionally, promoted delay in the resolution of disputes. TRIG proposes the complete removal of the arbitration provisions within the AHA 1986 so that disputes are covered by the more modern and flexible Arbitration Act 1996. The greater flexibility offered by the Arbitration Act 1996 would enable the parties to an arbitration to be more in control of the process.

TRIG recommends that:

- **Schedule 11 of the AHA 1986 is removed in relation to arbitrations and replaced by the provisions of the Arbitration Act 1996.**

4.3.3 Changing the definition of 'agriculture'

Prior to TRIG's consideration of the issue there had been a considerable discussion of a broadening in the definition of 'agriculture' as contained within agricultural tenancy legislation. The principal motive for this proposal was the belief that such a change would give tenants greater freedom to diversify away from 'traditional' agricultural practices yet retain the agricultural status and associated protection of their holding.

On closer scrutiny, TRIG concluded that such a change was not only problematical from the point of view of establishing the new definition and the fresh areas of uncertainty it would create but also from the inextricable links between tenancy legislation, fiscal planning and rating definitions. No recognisable redefinition of "agriculture" could include all forms of diversification and the problems would have been redefined not removed.

Furthermore, TRIG considered that such a change in definition might not have the desired result since the meaning attributable to the terms and expressions contained within tenancy agreements would relate to the time when the agreement was entered into and not necessarily some subsequent change in legislative definitions.

TRIG has therefore concluded that it would not be appropriate to seek to redefine agriculture in this context. Instead there is a recommendation at Section 6 of this Report that access to diversification for tenants should be addressed in the first instance through the creation of Code of Good Practice supported by an Ombudsman Scheme, together with the use of fiscal measures at Section 5 and allowing a cap on compensation as detailed within Section 3.

4.0 Annex 1

Rent reviews under the Agricultural Tenancies Act 1995

This Annex considers the issues which were discussed by TRIG concerning rent reviews under the ATA 1995 which broadly fall into three categories:–

- The extent to which parties should be at liberty to agree their own arrangements for review of rent;
- The operation of an agreement by the parties in the contract of tenancy to appoint a third party to determine the rent otherwise than as arbitrator;
- The matters to which an arbitrator is required to give attention in making his assessment of the rent.

A. Rent review formulae

A.1. The limitations of the present provisions of Section 9 are causing demonstrable difficulties in practice and have led to adventurous and tortuous drafting in order to circumvent them, which has not been judicially tested and which is therefore uncertain in its application.

A.2 It is proposed that the parties should be able to make any agreement they wish in relation to the review of rent save that the prohibition of upwards-only rent reviews should remain. While this is laudable and in principle acceptable, it gives rise to another issue:

A.3 Section 9 disapplies Part II where its conditions are fulfilled. At present, those conditions provide for two circumstances which are reasonably straightforward to determine – albeit that parties in many cases find them unduly restrictive – but increasing the scope of available arrangements will also increase the scope for uncertainty, and it is therefore appropriate that the provisions of Part II should be made available as a statutory default to apply unless the agreement contains contrary provisions.

A.4 A relatively minor amendment to Section 9(b)(ii) would achieve the desired freedom.

B. Third party experts

B.1 A quirk of the present Section 12 precludes the parties from referring review of rent to an arbitrator where a reference to a third party acting “otherwise than as arbitrator” has been made following service of a notice under Section 10 and provides scope for abuse of an agreement previously made.

B.2 As a result parties who might have agreed within the terms of a tenancy that rent reviews be referred to a third party expert must again agree the same point after a Section 10 notice in order for arbitration not to be available. This is not only absurd on the face of it, but gives either party the opportunity to resile from the terms of an agreement, which would be contrary, if not to public policy, then to any reasonable view of fairness in dealings.

C. Matters which the arbitrator must consider

C.1 Where agreements provide for customised criteria to be considered in the fixing of a rent and the matter subsequently has to be arbitrated, Section 13(2) prohibits the arbitrator from considering those matters in reaching his conclusion. He must therefore fix an open market rent without reference to those criteria, which might be contrary to the parties’ wishes.

D. Implementation

D.1 It is proposed that these matters can be implemented by the following amendments to Part II:

D.1.1 Replace Section 9 with the following:

“This Part of this Act applies in relation to a farm business tenancy (subject to any agreement to the contrary, provided that any such agreement is void to the extent that it purports to review the rent by reference to a specified formula which precludes a reduction).”

This will both give the required freedom to agree a basis of review of the parties’ own choosing (subject to a prohibition on upwards-only reviews) and provide a statutory default mechanism where the agreement is silent.

D.1.2 Add an additional sub clause Section 12(c) to read:

“the agreement contains no provision for the appointment of any person (otherwise than as arbitrator) under such an agreement to determine the question of the rent on a basis agreed by the parties,”.

This will preclude parties who have agreed a reference to a third party expert from subsequently choosing instead to proceed to arbitration.

D.1.3 Consequential amendments will need to be made to Sections 28 and 29 to defeat the same mischief. Section 28 should be amended by deleting the words after “...*the determination of rent*” in paragraph (5)(a), to make clear that any matter to do with fixing rent is outside the scope of the Section.

D.1.4 An additional sub-section (3) should be added to Section 29 as follows:

“(3) This section does not apply where the provision referred to in paragraph (a) of sub-section (1) relates to the determination of the rent”

This will prevent either party taking advantage of sub-paragraph (1)(b)(ii) where the agreement contains a provision for a third party expert to determine the rent.

D.1.5 Remove from Section 13(2) the words:

“...but not those relating to criteria by reference to which any new rent is to be determined”.

This will allow an arbitrator to consider the parties’ own criteria as well as all others.

4.0 Annex 2

Agricultural Tenancies Act 1995

Sections 20 to 27 compensation for tenant's improvements

A. Under the existing ATA 1995 provisions, compensation for improvements is determined in accordance with Section 20 - 27 of the ATA 1995 and is to be assessed as the value added to the holding as a holding. The only exception is for improvements for which a benefit has been allowed or has been carried out as a condition of taking the tenancy at the outset. Under the ATA 1995 it is not possible to contract out of the compensation provisions.

B. The existing provisions have created a problem whereby landlords who permit tenants to make improvements have no way of determining in advance what the compensation payable at the end of the tenancy will be. Although capped at the value added to the holding, many landlords are not prepared to agree to any improvements being carried out on the holding, so that they are not in a position of having to write a blank cheque at the end of the term.

C. TRIG is proposing to introduce amendments to Section 20 to 27 to allow the level of compensation for tenant's improvements to be capped at the amount of the tenant's investment in making an improvement. The cap would provide the maximum level of compensation that would be payable in the event that the value added to the holding exceeded the amount of the tenant's investment. This would introduce certainty for landlords (and tenants), not as to what the level of compensation for an improvement will be, but that the compensation will not exceed a specified sum.

D. For the cap to have effect, it will be necessary for the amount of the tenant's investment to be agreed in advance, as part of the process of the landlord giving consent to the improvement being carried out. That will involve quantifying the amount of the different aspects of the tenant's investment net of any specific grant aid received by the tenant. This would include:

- Cost of materials (estimates/invoices)
- Contractor labour (estimates/invoices)
- Tenant's labour (agreed time at agreed hourly rate)
- Professional costs (architects/surveyors etc)
- Planning fees
- Any other costs directly applicable to the improvement

E. In the case of an improvement made in connection with the development of a separate business, it is possible that, in addition to the above, the amount of the tenant's investment will include an element of goodwill. In practice, that is only going to apply where a tenant is relocating an existing business onto the holding, as a start-up business will not have any goodwill.

F. If it is the intention that the goodwill of the separate business should remain on the holding at the termination of the tenancy and accrue for the benefit of the landlord or a new tenant, a separate amount would be attributed to it and be included within the total amount for the compensation cap (see examples A and B below)

Example A

Tenant's investment

	£
Buildings materials (invoice)	30,000
Contractors costs (invoice)	10,000
Own labour (agreed time x agreed rate)	5,500
Planning fees	200
Professional fees	2,000
Building Regulations	300
Goodwill	10,000
Total	58,000
<hr/>	
Value Added to the holding	30,000
Compensation	30,000

Example B

	£
Tenant's Investment (as Example A)	58,000
<hr/>	
Value Added to the holding	70,000
Compensation	58,000

G. It follows from the above that if a landlord is not prepared to give consent to an improvement without agreement at the outset as to what the maximum compensation will be the landlord will simply continue to withhold consent.

H. However, where there is a willingness to grant consent but a disagreement over the level of the limit on compensation, it is proposed to introduce a mechanism for determining the limit by reference to an independent expert whose decision on the limit of compensation would be binding.

I. The draft alternative clauses 20 to 28 below attempt to show how the ATA 1995 could be amended to implement these changes:

Amount of compensation

20.—(1) The amount of compensation payable to the tenant under section 16 of this Act in respect of any tenant's improvement shall be either

- (a) an amount equal to the increase attributable to the improvement in the value of the holding at the termination of the tenancy as land comprised in a tenancy, or
- (b) Subject to a written agreement at the time of the improvement, the lower of an amount calculated as under subsection (1)(a) or an amount which is at least the value of the initial investment by the tenant to include
 - (i) the tenant's own financial contribution to the improvement, and
 - (ii) the value of any labour, materials or fixed equipment supplied by the tenant and used for the improvement, and
 - (iii) the value of any intangible assets of the tenant used to create the improvement which remain attached to the holding.

(2) Except under Subsection (1)(b) where the landlord and the tenant have entered into an agreement in writing whereby any benefit is given or allowed to the tenant in consideration of the provision of a tenant's improvement, the amount of compensation otherwise payable in respect of that improvement shall be reduced by the proportion which the value of the benefit bears to the amount of the total cost of providing the improvement.

(3) Except under Subsection (1)(b) where a grant has been or will be made to the tenant out of public money in respect of a tenant's improvement, the amount of compensation otherwise payable in respect of that improvement shall be reduced by the proportion which the amount of the grant bears to the amount of the total cost of providing the improvement.

(4) Where a physical improvement which has been completed or a change of use which has been effected is authorised by any planning permission granted on an application made by the tenant, section 18 of this Act does not prevent any value attributable to the fact that the physical improvement or change of use is so authorised from being taken into account under this section in determining the amount of compensation payable in respect of the physical improvement or in respect of any intangible advantage obtained as a result of the change of use.

(5) This section does not apply where the tenant's improvement consists of planning permission.

21.—(1) The amount of compensation payable to the tenant under section 16 of this Act in respect of a tenant's improvement which consists of planning permission shall be either

- (a) an amount equal to the increase attributable to the fact that the relevant development is authorised by the planning permission in the value of the holding at the termination of the tenancy as land comprised in a tenancy, or
- (b) Subject to a written agreement at the time of the improvement, an amount calculated as under subsection (1)(a) no less than an amount equal to the increase attributable to the fact that the relevant development is authorised by the planning permission in the value of the holding at the time it is authorised as land comprised in a tenancy

(2) In subsection (1) above, "the relevant development" means the physical improvement or change of use specified in the landlord's consent under section 18 of this Act in accordance with subsection (1)(b) of that section.

(3) Where the landlord and the tenant have entered into an agreement in writing whereby any benefit is given or allowed to the tenant in consideration of the obtaining of planning permission by the tenant, the amount of compensation otherwise payable in respect of that permission shall be reduced by the proportion which the value of the benefit bears to the amount of the total cost of obtaining the permission.

22.—(1) Where the landlord and the tenant wish to enter into an agreement under Section 20(1)(b) of this Act or Section 21(1)(b) of this Act but fail to agree the limit on the compensation the parties may appoint an independent expert to determine the limit. If no independent expert can be agreed between the parties then either party may apply to the President of the RICS for the appointment of an independent expert by him.

(2) Any independent expert appointed under Subsection (1) shall determine the amount of any limit by reference to the provisions of Section 20(1)(b) of this Act for any improvement not including planning permission and Section 21(1)(b) of this Act for any improvement consisting of planning permission.

23.— (1) Any claim by the tenant under a farm business tenancy for compensation under section 16 of this Act shall, subject to the provisions of this section, be determined by arbitration under this section.

(2) No such claim for compensation shall be enforceable unless before the end of the period of two months beginning with the date of the termination of the tenancy the tenant has given notice in writing to his landlord of his intention to make the claim and of the nature of the claim.

(3) Where—

(a) the landlord and the tenant have not settled the claim by agreement in writing, and

(b) no arbitrator has been appointed under an agreement made since the notice under subsection (2) above was given,

either party may, after the end of the period of four months beginning with the date of the termination of the tenancy, apply to the President of the RICS for the appointment of an arbitrator by him.

(4) Where—

(a) an application under subsection (3) above relates wholly or partly to compensation in respect of a routine improvement (within the meaning of section 19 of this Act) which the tenant has provided or has begun to provide, and

(b) that application is made at the same time as an application under section 19(4) of this Act relating to the provision of that improvement, the President of the RICS shall appoint the same arbitrator on both applications and, if both applications are made by the same person, only one fee shall be payable by virtue of section 30(2) of this Act in respect of them.

(5) Where a tenant lawfully remains in occupation of part of the holding after the termination of a farm business tenancy, references in subsections (2) and (3) above to the termination of the tenancy shall, in the case of a claim relating to that part of the holding, be construed as references to the termination of the occupation.

Supplementary provisions with respect to compensation

24.—(1) Where the tenant under a farm business tenancy has remained in the holding during two or more such tenancies, he shall not be deprived of his right to compensation under section 16 of this Act by reason only that any tenant's improvement was provided during a tenancy other than the one at the termination of which he quits the holding.

(2) The landlord and tenant under a farm business tenancy may agree that the tenant is to be entitled to compensation under section 16 of this Act on the termination of the tenancy even though at that termination the tenant remains in the holding under a new tenancy.

(3) Where the landlord and the tenant have agreed as mentioned in subsection (2) above in relation to any tenancy ("the earlier tenancy"), the tenant shall not be entitled to compensation at the end of any subsequent tenancy in respect of any tenant's improvement provided during the earlier tenancy in relation to the land comprised in the earlier tenancy.

25.—(1) Where—

- (a) the landlord under a farm business tenancy resumes possession of part of the holding in pursuance of any provision of the tenancy, or
- (b) a person entitled to a severed part of the reversionary estate in a holding held under a farm business tenancy resumes possession of part of the holding by virtue of a notice to quit that part given to the tenant by virtue of section 140 of the [1925 c. 20.] Law of Property Act 1925,

the provisions of this Part of this Act shall, subject to subsections (2) and (3) below, apply to that part of the holding (in this section referred to as "the relevant part") as if it were a separate holding which the tenant had quitted in consequence of a notice to quit and, in a case falling within paragraph (b) above, as if the person resuming possession were the landlord of that separate holding.

(2) The amount of compensation payable to the tenant under section 16 of this Act in respect of any tenant's improvement provided for the relevant part by the tenant and not consisting of planning permission shall, subject to section 20(2) to (4) of this Act, be either

- (a) an amount equal to the increase attributable to the tenant's improvement in the value of the original holding on the termination date as land comprised in a tenancy, or
- (b) an attributable amount fixed under Section (20)(1)(b) of this Act

(3) The amount of compensation payable to the tenant under section 16 of this Act in respect of any tenant's improvement which consists of planning permission relating to the relevant part shall, subject to section 21(3) of this Act, be either

- (a) an amount equal to the increase attributable to the fact that the relevant development is authorised by the planning permission in the value of the original holding on the termination date as land comprised in a tenancy, or
- (b) an attributable amount fixed under Section (20)(1)(b) of this Act

(4) In a case falling within paragraph (a) or (b) of subsection (1) above, sections 20 and 21 of this Act shall apply on the termination of the tenancy, in relation to the land then comprised in the tenancy, as if the reference in subsection (1) of each of those sections to the holding were a reference to the original holding.

(5) In subsections (2) to (4) above—

"the original holding" means the land comprised in the farm business tenancy—

- (a) on the date when the landlord gave his consent under section 17 or 18 of this Act in relation to the tenant's improvement, or
- (b) where approval in relation to the tenant's improvement was given by an arbitrator, on the date on which that approval was given,

"the relevant development", in relation to any tenant's improvement which consists of planning permission, has the meaning given by section 21(2) of this Act, and

"the termination date" means the date on which possession of the relevant part was resumed.

26.—(1) Where the reversionary estate in the holding comprised in a farm business tenancy is for the time being vested in more than one person in several parts, the tenant shall be entitled, on quitting the entire holding, to require that any compensation payable to him under section 16 of this Act shall be determined as if the reversionary estate were not so severed.

(2) Where subsection (1) applies, the arbitrator shall, where necessary, apportion the amount awarded between the persons who for the purposes of this Part of this Act together constitute the landlord of the holding, and any additional costs of the award caused by the apportionment shall be directed by the arbitrator to be paid by those persons in such proportions as he shall determine.

27.—(1) In any case for which apart from this section the provisions of this Part of this Act provide for compensation, a tenant shall be entitled to compensation in accordance

with those provisions and not otherwise, and shall be so entitled notwithstanding any agreement to the contrary.

(2) Nothing in the provisions of this Part of this Act, apart from this section, shall be construed as disentitling a tenant to compensation in any case for which those provisions do not provide for compensation.

28. In this Part of this Act, unless the context otherwise requires—

"planning permission" has the meaning given by section 336(1) of the [1990 c. 8.] Town and Country Planning Act 1990;

"tenant's improvement", and references to the provision of such an improvement, have the meaning given by section 15 of this Act."

4.0 Annex 3

Agricultural Tenancies Act 1995

Proposed variation to S.4(1)(f)

A. TRIG considers that the following changes should be made to Section 4 of the ATA 1995 to give effect to its recommendations on surrender and re-grant:

“4 Agricultural Holdings Act 1986 not to apply in relation to new tenancies except in special cases

(1) The Agricultural Holdings Act 1986 (in this section referred to as ‘the AHA 1986’) shall not apply in relation to any tenancy beginning on or after 1st September 1995 (including any agreement to which section 2 of that Act would otherwise apply beginning on or after that date), except any tenancy of an agricultural holding which—

...

(f)

(i) arises between parties to an existing tenancy to which the AHA 1986 applies in circumstances where a variation to the tenancy takes effect at law as a replacement tenancy under the doctrine of implied surrender and re-grant

(ii) arises between parties to a tenancy existing at the date on which this clause (f) comes into force or commencing later under the provision of clauses (a) to (e) above and (in either case) to which the AHA 1986 applies (‘the principal tenancy’) in circumstances where—

(A) the parties have agreed in writing to surrender the principal tenancy or (as the case may be) any replacement of it granted under the provisions of this clause (f) (‘the old tenancy’) and replace it with a new tenancy (‘the new tenancy’) on the same terms as the old tenancy (*mutatis mutandis*) and

(B) the holding comprised in the old tenancy immediately before the first occasion on which this sub-clause (ii) is engaged in relation to it forms, when judged on the basis of area or value (whichever is the

more significant in the circumstances of the case), the whole or a substantial part of the holding comprised in the new tenancy

- and in any case to which sub-clause (ii) above applies all rights and liabilities between the parties under the tenancy agreements and the AHA 1986 arising during and on the termination of the old tenancy shall apply to the new tenancy as if the old tenancy had not been replaced by the new tenancy and but without prejudice to the generality of the foregoing—

(a) where Part IV of the AHA 1986 (succession on death or retirement of tenant) applied to the old tenancy it shall apply to the new tenancy as though it were the old tenancy

(b) Part V of the AHA 1986 (compensation on termination of tenancy) shall apply to the new tenancy as though it were the old tenancy

(c) any notices served by either party on the other relating to the old tenancy or matters arising under it shall have force under the new tenancy as though it were the old tenancy”

...

B. TRIG also concluded that the following consequential amendment should be made to the AHA 1986 so that the exercise of surrender and regrant does not unintentionally disrupt the existing rent review cycle:

“SCHEDULE 2

ARBITRATION OF RENT: PROVISIONS SUPPLEMENTAL TO SECTION 12

...

Frequency of arbitrations under section 12

4. ...

(2) ...

(d) the replacement of the tenancy under the provisions of section 4(1)(f) of the Agricultural Tenancies Act 1995

C. TRIG notes

C.1 The preamble to the section and the opening of sub-section (1) has been reproduced for ease of reference. Only clause (f) has been amended.

C.2 The intention behind the proposed amendment is to remove the uncertainty caused by the drafting of the existing Section 4(1)(f). Whereas it was agreed before the passage of the ATA 1995 that the sub-clause was intended to save any minor variations to land comprised in existing AHA 1986 tenancies – whether conscious or inadvertent – the wording has caused such confusion in the minds of practitioners that perceived risks are not taken in such matters and other unnecessarily complicated mechanics are employed to achieve the result.

C.3 TRIG proposes not only that inadvertent or purported variations which might only take effect under the doctrine of implied surrender and regrant should be saved, but also that parties to an existing AHA 1986 tenancy should be at liberty consciously to bring additional parcels of land under the same statutory regime as the existing holding by means of a conscious and express surrender and regrant, effected in writing and so that the holding comprised in the original tenancy (referring only to the agreement in force at the date on which this revision comes into effect, and not to any subsequent tenancies arising under Section 4(1)(f)(ii)) forms the whole or a substantial part of the new holding created by the new tenancy, and so that the new tenancy is on the same terms as the old save for any minor changes which may be necessary to give effect to the agreement.

C.4 Explicit reference to the doctrine of implied surrender and regrant makes the position in that respect clear and unambiguous, as well as catering for any changes in that doctrine which might arise from time to time.

C.5 The words after Section 4(1)(f)(ii) are intended to make it plain that in these circumstances any rights and liabilities of the parties arising under the principal tenancy, particularly but not exclusively those relating to succession and compensation, as well as the rent review and other timetables provided under the AHA 1986, should continue to apply uninterrupted by the express surrender and regrant.

C.6 The consequential amendment to paragraph 4(2) of Schedule 2 to the AHA 1986 is necessary to ensure that the grant of a tenancy under the new S.4(1)(f) does not restart the three-year rent review cycle under the AHA 1986.

4.0 Annex 4

Agricultural Holdings Act 1986

Succession and diversification – “livelihood” test and “commercial unit” test

A. TRIG has given extensive consideration to the question of tenancy succession on both death and retirement of the tenant and the interaction of the operation of law with diversification in the light of its terms of reference.

B. Present succession law (while amended in 1984 on broadly technical points) essentially dates from the very different world of 1976. Growing economic pressure for diversification can lead tenants (and more particularly potential successors) into business operations and structures which while protecting current viability, undermine prospects of succession. This may arise from so basic an action as the son taking a tractor to do contract work in the evenings to supplement his income. Very often, it is the younger members of the family who have the energy and skills to develop alternative businesses.

C. Well advised tenants and potential successors can often take steps to avoid this minefield but they can be caught by unanticipated events, such as an early death. Such routes involved structures that obscure business realities simply to meet legal tests: people should not be driven into contrivances. In current economic circumstances, there may simply be less financial flexibility for many to implement such schemes. Unadvised tenants can find that sensible economic decisions can defeat succession.

D. TRIG has identified the essential trap as lying in the present formulation of the livelihood test. This is one of three tests to determine whether an applicant is eligible to be a successor. In essence, this test asks whether the applicant has drawn his principal source of livelihood from his agricultural work on the holding or the unit including the holding for five of the previous seven years. The nub of the problem is the limitation to agricultural work.

E. The concern is to redraft this in such a way as to make the desired change without altering the balance between landlord and tenant in any other way, within the limits of intelligible and usable legal drafting.

F. TRIG proposes that this test be modernised to allow the applicant to count income drawn from non-agricultural work based on the holding permitted by a written

consent from the landlord. TRIG views this as consistent with the underlying logic of succession legislation as applied to contemporary and foreseeable circumstances.

G. There seems no defensible reason why the applicant should be able to invoke income from activities on the holding not permitted by the tenancy or subsequent consent. TRIG is elsewhere recommending legal, fiscal and procedural changes that remove disincentives to landlords to consent to encourage prudent diversification. This proposal is submitted within that context.

H. A possible draft for amending both Section 36(3)(a) (Succession on Death) and Section 50(2)(a) (Succession on Retirement) is to change the existing provisions as follows by adding (ii):

“in the seven years ending with the date of death, his only or principal source of livelihood throughout a continuous period of five years, or two or more discontinuous periods together amounting to not less than five years, derived from:

(i) his agricultural work on the holding or an agricultural unit of which the holding forms a part; and

(ii) his other work based on the holding and permitted by a written consent, user clause or licence by the landlord.”

I. TRIG has reviewed the other key test of eligibility, the commercial unit test. This seeks to establish whether the applicant has the secure occupation of sufficient other farmland to amount to a commercial unit, and so bar the applicant from enforcing succession against the interests of the landlord.

J. TRIG fully accepts that "what is sauce for the goose, should be sauce for the gander" and, just as the above proposal benefits the application for succession, so secure income from other equivalent diversification should count against it. After careful review of the possibility of extending the commercial unit test to non-agricultural income from other land, TRIG concluded that not only was this difficult to draft and highly questionable to operate in practice but that it was not necessary. The operation of the proposed reformulation of the livelihood test would still leave non-agricultural income based on land other than the holding counting against the applicant for that test. In brief, it contains its own limitation on what might otherwise be seen as a problem for landlords and upholds equity between landlord and tenant.

5.0 Proposals for fiscal reform

5.1 Introduction

Of the factors under direct Government control that have contributed to the century-long decline in the let sector, taxation is now the most important. The ATA 1995 has removed the major legal obstacles posed for landlords by the old law. Other parts of this report address outstanding problems in that Act, helping it to work more freely and considers some of the structural problems facing the sector. The present and prolonged harsh economics of farming has borne down on the obstacles to letting posed by farm structure and psychology. Many wish to retain ownership of land they can no longer farm viably and see letting as one potential means of doing this. Owners of small farms as well as large estates can be landlords. Those owners for whom the law was the key problem now have ready access to the tenancy market.

Taxation alone, with its archaic bias against letting, remains largely unreformed. It is of particular importance in a market where the great majority of owners who might let are private individuals, not corporations or institutions. Those owners for whom taxation is a key issue, whether by economic circumstance, psychology, age or otherwise, remain deterred from letting.

As individuals, agricultural landowners are acutely sensitive to the fiscal discrimination against the letting of land they have chosen to hold. Confronted by the issues of tenancy law (before 1995) and taxation, owners, farmers and their advisers evolved a variety of business structures offering alternatives to letting in answer to commercial and practical needs. For farmland, in contrast to shops, offices and factories, letting has become one end of a spectrum of arrangements between owners and farmers yet a tenancy is very often the simplest, cheapest and most transparent route which reflects business realities. Taxation has encouraged the growth and use of other arrangements because of its bias against letting. Many owners do not let because their tax position would be worse for doing that. In so far as they do let, capital taxation, in particular, provides reasons for letting for shorter terms than otherwise might be the case.

The current tax structure also hampers diversification. Taxation has over the years sought to recognise the particular circumstances of agriculture (small businesses often with a high capital commitment compared with income and which are vulnerable to major changes between years), offering reliefs which depend on agricultural use. These can be jeopardised by diversification into non-agricultural use which is perverse in the light of present policy encouraging other uses.

TRIG has reviewed these issues within its terms of reference and the following proposals are made to remove artificial obstacles to:

- the growth of and flexibility in the let sector
- diversification on the let farm

TRIG's terms of reference ask that such measures be broadly revenue neutral. TRIG does not have the means to quantify the revenue effects of its proposals but believes that the proposals made meet this test. Provided the reliefs proposed only benefit decisions taken after the date of their implementation (or perhaps announcement), the measures proposed simply remove fiscal discrimination against letting and the owner could usually obtain the reliefs by other routes. As an example, a landlord could retain his agricultural property relief on a let farm by resisting tenant's diversification though the outcome might be less satisfactory for all concerned, including the wider economy. If owners are driven by taxation considerations to avoid letting, they will use alternatives offering available reliefs - but these may be less satisfactory than the simple route of a tenancy, especially for smaller or new farmers looking for tenancies.

5.2 Inheritance tax and tenant's diversification

At present, a landlord's inheritance tax can be dramatically increased where a tenant on a predominantly agricultural holding diversifies into non-agricultural activity, giving a landlord a strong and rational reason to resist diversification which might otherwise be in everyone's interests. TRIG proposes that this be tackled so that one taxpayer's action does not alter another taxpayer's treatment

The Government's objectives for farming and the tenanted sector include:

- the strengthening of "the rural economy, particularly under-performing areas, to enhance opportunities for rural people, and to promote sustainable and cohesive rural communities through the creation of innovative, diverse environmentally responsible farm based businesses"
- ensuring that "tenant farmers can diversify where this will improve the viability of their business".
- encouraging diversification and tenant's participation where appropriate.

One significant, recognised and understandable obstacle to a tenant diversifying is its effect on his landlord's Inheritance Tax position. This lies in the curious and unfortunate point that where a tenant diversifies out of agriculture, it jeopardises or removes his landlord's entitlement to claim agricultural property relief (APR) – the inequitable situation that one taxpayer's economic activity affects another taxpayer's liability.

If the land were owner-occupied, Business Property Relief (BPR) would be available instead. However, landlords have no access to BPR. This gives landlords a natural,

personal and strong reason to resist consenting to tenants' diversification projects and even to try to take potential projects in-hand rather than let them. It is perverse for the tax system to so discourage opportunities for economic development but this flows from the way legislation has stood still when economic circumstances have changed.

The point arises under the Inheritance Tax Act 1984, with:

- its definition of agricultural property set out in Section 115(2)
- the requirement of Section 117 that the property be occupied for the purposes of agriculture.

While the underlying definition of agricultural property is itself old, legislation has progressively extended it as new issues have arisen:

- Section 115(4) defines the breeding and rearing of horses on a stud farm as "agriculture" and its buildings as "farm buildings" for APR.
- Section 154(2), (3) and (5) of the Finance Act 1995 included short rotation coppice as "agricultural land", its cultivation as "agriculture" and its buildings as "farm buildings" for APR
- Section 124C of the Inheritance Tax Act (inserted by the Finance Act 1997) ensures that any land within a habitat scheme shall be regarded as "agricultural land", its management as "agriculture" and its buildings as farm buildings for the purposes of APR.

TRIG recommends that:

- land (including buildings) let by the taxpayer under the AHA 1986 or the ATA 1995 be added directly to the definition of agricultural property for APR to the extent that it is used for business purposes (i.e. excluding, for example, ordinary residential sub lettings) under a consent from the landlord.

5.2.1 Amendment to the IHT Act 1984

The draft proposed below ensures that buildings and dwellings not subject to any diversification would remain subject to the character appropriate test. This would give no additional benefit to the landlord who will continue to receive his relief at the 50% or 100% rate, whichever would apply in the circumstances. However, it will offer

protection from the substantial disadvantages that would arise from the tenant diversifying and which could lead to preventative action. In short, the tenant's actions would no longer dictate the landlord's tax position.

The draft suggested below refers directly to the value transferred in order to limit the extension of relief to the interest in land that is subject to the tenancy (and not, for example, any sub-letting from the tenant to the landlord or a connected party).

It is intended that where the estate of the diversified tenant is taxable the position of that estate would be unchanged: APR would apply where it is agricultural and BPR where it is a business in hand while sub lettings by the tenant under general non-agricultural tenancy legislation would not normally be relieved. Thus, he is on the same footing as any other taxpayer in living with the consequences of his economic decisions.

This is offered as part of package of measures tackling the practical obstacles to diversification on tenanted land, alongside:

- the Code of Good Practice on Diversification, encouraging reasonable consideration of relevant matters
- the ability to agree a cap on compensation for tenant's improvements under the ATA 1995, so quantifying the landlord's maximum liability
- deferment relief from Capital Gains Tax so that gains can be reinvested to the economic benefit of a tenancy

To this end, TRIG proposes that the following new clause 124D should be added to the Inheritance Tax Act 1984:

“For the purposes of this Chapter, where the whole or part of any value transferred is attributable to an interest in land subject to a tenancy under the Agricultural Holdings Act 1986 or the Agricultural Tenancies Act 1995 and of which the transferor was at the date of transfer the landlord then:

- (a) where property is occupied for business purposes under a consent granted on or after (.. state date ..) to the tenant from the person who was the landlord at the date of that consent it shall be regarded as being occupied for the purposes of agriculture, and
- (b) in so far as property is regarded as being occupied for the purposes of agriculture under this section.
 - (i) is land it shall also be regarded as agricultural land or pasture, and

- (ii) is a building or dwelling it shall be regarded as a farm building, and
- (c) in so far as property that is deemed to be a farm dwelling under subsection (b) above is a building which is not a dwelling, it shall also be regarded as agricultural property within section 115(2) of this Act."

TRIG views this proposal as a very important key part of an interlocking package of measures promoting diversification within the tenanted sector. This specific measure removes a major disincentive for landlords to consent to diversification by tenants. TRIG's proposal to amend the rules for tenant's compensation under the ATA 1995 removes a difficulty over tenant's investment in the holding. The proposed deferment relief from CGT should encourage new landlord's capital to be invested, alongside the tenant's capital unlocked by the previous two measures. Greater flexibility on rent formulae under the ATA 1995 gives greater freedom to the parties to accommodate their circumstances. The proposed Code of Good Practice offers a framework in which this should happen. The importance of this IHT reform is that it removes the present fiscal jeopardy for the landlord which deters him from consenting to new uses in the first place.

That deterrence is the reason why TRIG believes this measure is one with minimal cost implications. The present structure sadly discourages landlords from permitting diversification – extending the relief in the way proposed allows them to consent to diversification without penalty. A relief that could be claimed anyway by the landlord (by not consenting to the diversification) becomes positive, not negative. The drafting proposal is written to assist future decisions and not reward past grants of consent. More widely, it removes an obstacle to the generation of rural economic activity and employment.

In considering the Government's tax objectives, this measure encourages employment opportunities by removing a fiscal impediment to new businesses. It promotes long term investment as many of the opportunities arise in buildings which now have no economic use without diversification – new economic opportunities will warrant investment in those buildings. The tax base is strengthened by encouraging new businesses and a broader base for the rural economy.

5.3 Deferment relief for capital improvements to let agricultural holdings

The Curry Report recommended a reinvestment relief deferring otherwise taxable gains which are reinvested to the benefit of let units. TRIG has explored this in more detail and proposes the creation of Deferment Relief from CGT to encourage investment by landlords in let units by providing that the tax on gains invested to the benefit of the

tenancy would in principle be deferred for the life of the tenancy. As well as encouraging the investment that might support business, diversified or otherwise on the unit it would tend to encourage longer lettings by deferring the tax for longer.

It would apply only to gains (all or part) that are liable to tax on a disposal (not the whole sale price). It could assist either single or joint investors provided they are the landlords of the unit in which the investment is made. The gains could be from the disposal of any asset, including investments. Historically, much of the investment in the rural economy has come from outside and there seems no good reason to limit its source.

The investment would have to be to improve the economic value of the holding, aiding a business for the tenant. Indeed, the deferment would cease where the investment ceased to be of business use. The definition is deliberately set broadly to enable all economically beneficial forms of development, whether in buildings, equipment, licences or other benefits to the holding whether agricultural or non-agricultural, whether in businesses the tenant might run personally, in partnership with others with skills or through a limited company for liability reasons, or offer for subletting. The object is to improve the capital base of the contribution of let agricultural holdings to the diversifying rural economy.

The value of the deferment would exist as long as the tenancy (though it may end earlier if the tenant no longer uses the improvements for any business or if the landlord dies within 7 years, an anti-avoidance provision, posing difficulties but following an Inheritance Tax rule). The deferment may be extended on the cessation of a tenancy where a further tenancy is granted to the same tenant (circumstances where this could be relaxed might be considered, perhaps a letting to a family member or business partner) on substantially the same terms

The title, Deferment Relief, is suggested as an honest explanation that the tax will still be due. However, by linking the deferment to the life of the tenancy, it creates a reason for both business investment and longer-term lettings.

TRIG recommends that:

- an agricultural landlord should be able to defer payment of Capital Gains Tax on any gains to the extent that they are used to make improvements that increase the economic value of land subject to a tenancy under the Agricultural Holdings Act 1986 or the Agricultural Tenancies Act 1995 which is used for the purposes of the tenant's business.

Amendment to the Taxation of Chargeable Gains Act 1992

5.3.1 To this end, TRIG proposes that the following new clause should be inserted into the Taxation of Chargeable Gains Act 1992:

- “(1) Subject to the following provisions of this section, deferment relief shall be available where:
- (a) a chargeable gain would (apart from this section) accrue to any person on a disposal of an asset; and
 - (b) that person is the landlord of an agricultural tenancy in the United Kingdom (“the agricultural tenancy”); and
 - (c) the whole or part of the chargeable gain that accrues is applied by that individual in making capital improvements to the agricultural tenancy during the qualifying period; and
 - (d) that individual makes a claim under this section in respect of the chargeable gains that so accrue.
- (2) Where deferment relief is available under this section the person making the claim shall be treated for the purposes of this Act as if the chargeable gains that so accrue be reduced by the smaller of:
- (a) the amount applied in making the capital improvements; and
 - (b) the amount of the chargeable gain;
- and this amount shall be known as the “deferred gain”.
- (3) The deferred gain shall become a chargeable gain during the earliest year in which any of the following events occur:
- (a) the agricultural tenancy ceases (unless a new tenancy is granted to the same tenant on substantially the same terms and for not less than the same period as the tenancy that has ceased); or
 - (b) the capital improvements are no longer used for the purposes of any business conducted by the tenant of the agricultural tenancy; or
 - (c) the death of the person making the claim for deferment relief unless this occurs more than 7 years after the date of the claim for deferment relief; or
 - (d) a disposal is made by the person making the claim of his interest in the land subject to the agricultural

tenancy, except a disposal to which any of sections 165, 242, 243 and 260 of this Act apply.

- (4) For the purposes of this section:
- (a) an agricultural tenancy is a tenancy granted under any of the following Acts:
- the Agricultural Holdings Act 1986
 - the Agricultural Tenancies Act 1995
- and such other legislation as may be prescribed by Treasury Order.
- (b) Capital improvements shall include anything that increases the economic value of the holding for the purposes of any business conducted by the tenant but shall exclude any amount otherwise allowed as a deduction under any of the income tax Schedules.
- (c) The qualifying period is a period beginning one year before and ending three years after the date of disposal that gave rise to the chargeable gains that have accrued for which deferment relief is claimed.
- (5) This section shall apply in respect of capital improvements made on or after [insert commencement date].”

This reform’s object is to “break down” the barrier to the supply of private capital which would encourage better economic use of rural let land. Encouraging the private sector to make more efficient ways to make profits is the key to producing jobs and economic opportunities on rural let holdings.. This proposed relief will not redirect private capital onto holdings if their profitability is not enhanced by it.

On 8th March 2002 the current Chancellor of the Exchequer said in The Times that the prosperity of disadvantaged sectors of the economy did not rest on “...more giro cheques but more business activity and economic activity...” The article went on to add that it was the Government’s responsibility to “...break down barriers...” that prevented new business activity, and establish a culture of rewarding entrepreneurship. The new clause, by encouraging a switch of capital resources that may otherwise have been held as passive investments, meets this stated objective. It removes an immediate penalty on such a switch of capital and the reinvestment of that capital that is designed to encourage further business activity on let holdings.

In terms of TRIG's remit, it is stressed that the operation of deferment relief, geared to the life of the tenancy and encouraging investment, would encourage longer tenancies and more equipped units than would otherwise be the case.

In the long run, the costs of deferment relief are negligible because it only defers the taxation of gains. Thus the effect is upon Exchequer revenue flows and not the amount. It is unlikely, therefore, that the cost of this measure would exceed the amount required for a stated figure in the Red Book.

Indeed, this is seen as a much cheaper route to deliver the benefits than possible alternatives such as an extension of roll-over relief. If this can encourage capital re-deployment without the need for hold-over then it is axiomatic that it is value for money.

5.4 Land let on agricultural tenancies to be classified as business assets for taper relief purposes

The Government has introduced taper relief as an important feature of CGT offering particular benefits to business assets. Where property, such as a farm, has been let to an unlisted trading company it has been classed as a business asset but, if let to an individual farmer or a partnership it has not normally received this beneficial treatment. TRIG welcomes the announcement in the 2003 Budget that this completely artificial distinction will be abolished for all sectors. This is, of particular concern to farming where the typical business structures are sole trader or partnership, rather than a company where the present rule is both a deterrent to letting at all and a distortion where land is let.

TRIG had completed its deliberations before the 2003 Budget and Finance Bill proposed that Capital Gains Tax business asset taper relief will be extended to property let to unincorporated traders for their business use for periods after 6th April 2004. On the basis of the following arguments, TRIG welcomes this proposal.

Recent taxation reforms include the creation of taper relief for Capital Gains Tax. It applies to individuals disposing of assets, not companies. In general terms, this has the effect of reducing the tax rate the longer the asset is held. A particularly beneficial taper providing swifter relief for business assets recognises the need for businesses to re-deploy capital in today's flexible and competitive environment. Progressive improvements to business asset taper relief have widened the gap between it and the taper relief available for non-business assets, making this a critical distinction for private owners.

Let property has not generally been treated as a business asset for this relief (unless the landlord is a co-tenant) save where it is let to an unlisted trading company which uses the land for the purposes of its trade. In the rural economy, this has created a curious fiscal distortion in making lettings to those tenants who trade through the medium of a company potentially more attractive than lettings to sole traders or

partnerships, which cover the great majority of farm businesses, while leaving full business asset taper available to those who farm or use other alternative arrangements rather than let their land.

The extension of business asset taper relief to property let to unincorporated traders will recognise the business realities of the countryside and remove a perverse distortion that operates against most potential tenants. TRIG proposed doing this, in amendments set out below. By recognising land subject to all tenancies let under either the AHA 1986 or the ATA 1995 which are granted after the commencement date as business assets. The tests for protection under both Acts include a business use provision. The Government's proposal would apply to all land, not just that used for agriculture.

TRIG recommends that:

- **Business asset taper relief from capital gains tax be added to all let land for business purposes irrespective of the business of the occupier.**

Amendment to the Taxation of Chargeable Gains Act 1992

5.4.1 TRIG has proposed the following amendments to the Taxation of Chargeable Gains Act 1992 (these proposals would be redundant if the Finance Bill's proposals on this account are implemented) :

“In para 5(2), Sch. A1, TCGA 1992 add the following sub-paragraph:

“(e) if, but only if, the asset is an interest in land subject to an agricultural tenancy granted on or after [commencement date], the purposes of any trade carried on by a tenant of that agricultural tenancy on the land subject to that agricultural tenancy”

In para 5(3), Sch. A1, TCGA 1992 add the following sub-paragraph:

“(f) if, but only if, the asset is an interest in land subject to an agricultural tenancy granted on or after [commencement date], the purposes of any trade carried on by a tenant of that agricultural tenancy on the land subject to that agricultural tenancy”

In para 5(4), Sch. A1, TCGA 1992 add the following sub-paragraph:

“(d) if, but only if, the asset is an interest in land subject to an agricultural tenancy granted on or after [commencement date], the purposes of any trade carried on by a tenant of that agricultural tenancy on the land subject to that agricultural tenancy”

In para 5(5)(b), Sch. A1, TCGA delete the “(c)” and replace by:

“(d)”

In Para 5, Schedule A1, TCGA 1992, insert at end:

“(6) For the purposes of this section an “agricultural tenancy” shall have the meaning given in [NEW CLAUSE] (4)(a).”

[This is intended to cross-refer to the definition used for deferment relief above.]”

The benefits of this change would include the removal of this fiscal barrier to letting to unincorporated tenants.

The current boundary between business and non-business assets, when applied to the rural let sector was not only difficult to justify but also created distortions that prevented further lettings. The proposed measure will promote fairness where the present boundary for business asset taper relief discriminates against the unincorporated tenant. It will often be larger farming businesses that are incorporated, so this measure would tend to remove a bias against the smaller enterprises which, according to Government statements, may produce more jobs and opportunities. TRIG also hopes that this measure would result in longer tenancies and to this end asks that its effects be reviewed after five years.

The Government's proposed reform, not being limited to agricultural lettings, would also tend to assist diversification as all land let to individuals for use in their businesses would qualify. It would thus apply to the letting of farm buildings for non-agricultural purposes.

5.5 Stamp duty

The proposals in the 2003 budget papers for stamp duty on leases were made after TRIG had completed its formal deliberations. However, TRIG had considered the proposals regarding leases in the consultation paper entitled, “Modernising Stamp Duty”, with great concern about their potential impact in deterring farmers from taking agricultural lettings, especially those for long terms, better equipped and larger units, so

running contrary to the thrust of TRIG's endeavours in addressing the Government's objectives.

Most measures proposed by TRIG seek to enlarge or improve the supply of potential tenancies. The present proposals for Stamp Duty Land Tax on leases threaten to reduce the demand for those tenancies to which the Tax would apply. Prospective tenants are likely to react to duty equivalent to several months rent either by not taking the tenancy at all or seeking a shorter term.

This effect will become more pronounced in the event of any upturn in farming's economic fortunes when rents might be expected to rise, so bringing more tenancies into the Stamp Duty net unless their terms are further shortened. TRIG considers that this is an apparently perverse state of affairs.

It is accepted that most FBTs are for shorter terms on bare land and so would not normally attract duty (equalising treatment with non-lease arrangements). However, these are often ancillary land and the letting of whole farms and the equipped units with a farmhouse and buildings that could form the core of a business will be affected by the present proposals. A large proportion of successions to tenancies under the AHA 1986 would also be affected as these are usually core equipped holdings.

The removal of the present series of rate "slabs" does remove current distortions among tenancies of differing lengths liable to Duty though creating a new and greater distortion around the £150,000 chargeable threshold. This distortion will only be magnified if rates of Duty on AHA 1986 and ATA 1995 Act tenancies ever rose above the proposed 1%.

With its terms of reference, TRIG remains concerned that the use of a net present value approach (capitalising the liability to pay rent (irrespective of rent review arrangements and other incidents of the tenancy), not the value of the asset of the tenancy) should not deter tenants from taking longer term tenancies where they are offered. Stamp Duty has been due on the start of a tenancy. At present, the rate applies only to the average annual rent, not to a larger capital sum. The proposed basis would tend to create a greater initial burden on the tenant who might otherwise be keen to take a longer tenancy (as many would encourage) as a sound basis for business development and investment.

The same points apply to tenancies with dwellings and other fixed equipment where this would tend to lead to a higher rent and so potential exposure to Stamp Duty.

While TRIG is directly concerned with matters in England and Wales, the new legislation in Scotland only allows tenancies of either five years or less or fifteen years

or more. The latter are officially encouraged for significant lettings but might now often carry a liability to Stamp Duty discouraging their use. Farmers will not be able to seek shorter terms and so may avoid lettings altogether.

TRIG understands that the Government is concerned about the use of special purpose vehicles as a means of reducing liability to Stamp Duty elsewhere in the economy and wants to encourage greater flexibility or variety in the length of leases. TRIG suggests that the policy concerns relating to agricultural lettings differ from these points: special purpose vehicles are not known and the policy bias is to encourage longer lettings to offer a sound basis for both agricultural and diversified businesses to invest and thrive. The present proposals work against the success of the measures advanced by TRIG in this report by adding to the costs of potential tenants at the very expensive moment of taking a farm.

TRIG suggests that there are sound reasons for Stamp Duty Land Tax to recognise the different circumstances of agricultural tenancies.

TRIG recommends that:

- for the purposes of assessing liability to the proposed Stamp Duty Land Tax all farm business tenancies let for terms longer than ten years be deemed to be ten-year tenancies.**

5.6 Further fiscal recommendations

5.6.1 Inheritance tax – tenancy variation

The 1995 reform was accompanied by the equalisation of the rate of Inheritance Tax for the Agricultural Property Relief of land let after the Agricultural Tenancies Act took effect in September 1995 with that for owner occupied land. This removed one important fiscal impediment for individuals not to let and has been an important part of the success of farm business tenancies. This rate also applies to new tenancies granted under the old law (such as succession lettings) as well as to farm business tenancies, so that landlords did not have this tax reason to resist tenancy succession.

This relief also applies to new AHA 1986 tenancies which arise from the legal doctrine of implied surrender and regrant. This is relevant where, for example, land is added to an old tenancy with the legal effect that a new tenancy of the whole has been created. TRIG is anxious that such lettings remain protected under the old law but does not see that this should be an opportunity to enlarge the rate of relief.

TRIG recommends that:

- where land is added to an old tenancy with the legal effect that a new tenancy of the whole has been created such cases retain the rate (usually 50%) that would apply to the previous tenancy for IHT purposes. Thus where a succession tenancy under the AHA 1986 commenced after 1st September 1995, the higher rate of relief would apply to any tenancy arising out of it by the operation of surrender and re-grant for IHT purposes.

To give effect to this recommendation TRIG suggests that in Section 116(2) of the Inheritance Tax 1984 insert the following immediately before the final semi-colon:

".. and for the purposes of this sub-section a tenancy shall not be regarded as beginning on or after 1st September 1995 where it is subject to the Agricultural Holdings Act 1986 by virtue of section 4(1)(f) of the Agricultural Tenancies Act 1995 except where the preceding tenancy commenced after that date."

5.6.2 Income tax and corporation tax - schedular system

These taxes use different sets of rules (Schedules) for different types of income. Rents are assessed under Schedule A, business income under Schedule D. Recent reforms have brought the methods of calculation more closely together but losses under Schedule A cannot be offset against profits under Schedule D. This is a particular issue where the landlord invests in diversification on a let unit or incurs borrowings for repairs and investment, making either the work or the letting unattractive in comparison with alternatives.

TRIG recommends that:

- a review of complications arising from the schedular system should be conducted with a view to reforms that would remove obstacles to letting and diversification.

5.6.3 VAT - partial exemption interpretation

VAT is not usually charged on rents but landlords can "opt to tax". This enables them to reclaim VAT on costs but requires them to charge it on rents (which almost all farmers can, in turn, reclaim). However, in the UK dwellings are generally exempt from VAT. Thus, a fully equipped farm is treated as partially exempt with a complex treatment based on VAT applying only to the non-residential parts but with an apportionment of

overheads. A recent European Court of Justice case, Card Protection Plan, held that for financial services, it was the prime purpose of the activity that should be used to determine whether the whole transaction was liable for VAT or not.

TRIG recommends that:

- a review of this position be undertaken so that where the purpose of the letting is for agricultural use and the dwelling is ancillary to that, the whole be liable for VAT, with VAT due on the whole rent and reclaimable on all relevant costs.

TRIG is not seeking a change in the law but a review of its interpretation and application in the light of the Card Protection Plan case, simplifying the taxpayer's position.

5.6.4 Inheritance tax - distortion of qualifying periods

An owner-occupier can benefit from Agricultural Property Relief when he has owned the farm for two years. A landlord has to own the farm for seven years. Not only is this a significant difference, with letting being the poorer option but it also creates problems where agricultural estates are being restructured.

TRIG recommends that:

- the periods of ownership for landlords and owner – occupiers be aligned at two years for simplicity and to avoid distortion.

5.7 Monitoring and review

The fiscal proposals recommended in this Report result from considerable discussion within TRIG in the light of the experience of those involved. In a number of areas, they interlock not only with each other but also with other recommendations in this Report. It is anticipated that, if implemented, conditions for the agricultural tenanted sector would be substantially improved.

Nonetheless, the consequences of all policies should be reviewed to establish their effectiveness, unforeseen benefits or problems or the effects of changing external circumstances. TRIG recommends that this should be done once the proposals have been implemented for five years. It is unlikely that either Defra's Annual Survey of Tenanted Land or the Central Association of Agricultural Valuers' Tenanted Farms

Survey would clearly illustrate the specific consequences of individual measures. Such a review would need to be undertaken separately from these and draw on the experience of those knowledgeable in the sector as well as on available statistics.

6.0 Proposals for a Code of Good Practice “diversification within agricultural tenancies”

6.1 Introduction

The Government's objectives for farming and tenancy issues included in the terms of reference for TRIG state that tenant farmers should be able "without fear of losing their tenancy or jeopardising succession rights" to "diversify where this will improve the viability of their business" and "take steps to enhance and protect the environment". Ministers have made it clear that they wish to see tenants have a greater ability than they otherwise enjoy at present to consider farm diversification and entry into agri-environment schemes.

TRIG considered the interplay between the overriding objectives set by Ministers for the group, that of increasing the area of let land and the desire to provide tenants with a greater ability to diversify. However, TRIG was unable to identify clear evidence of the extent to which tenants' were unable to diversify sufficiently to recommend a fundamental, legislative challenge to existing user clauses. TRIG preferred the non-legislative solution of a Code of Good Practice combined with other fiscal and legislative measures proposed in the Report which bear upon landlords' practical concerns about diversification. If practical experience of the operation of the Code of Good Practice alongside the other measures demonstrates the issue to be a significant one for which the Code of Good Practice proves inadequate, then legislation should be considered

Other proposals cover the matter of protecting succession rights where tenants have diversified with the written approval of their landlord. This section deals with the tenant's wish to diversify into non agricultural uses on let holdings where the legislative framework or the terms of the tenancy restrict the tenant to agricultural uses (or even specified agricultural uses) only. The recent Court of Appeal case, *Jewell v McGowan*¹, demonstrates how rigidly agricultural user clauses can be applied.

6.2 Possible legislative changes

Before coming to its conclusion TRIG considered two possible legislative approaches to the issue of tenant diversification.

One proposal that was considered was to amend the current definition of agriculture within agricultural tenancy legislation. The intention was to widen the possible uses of land permitted under tenancy legislation but not to amend the definition of agriculture with respect to planning or rating legislation. However, a number of significant problems were encountered in examining this proposal.

¹ *Jewell v McGowan and another*, Court of Appeal [2002] Civ 145. EGLR Volume 3 2002 pp 87 - 92

First, there was a concern that user clauses within tenancy agreements which stipulated agriculture only provisions would be interpreted against the background of what was intended by the parties at the time the tenancy was drawn up rather than by the altered definition within the legislation. Even if this was capable of being surmounted there was major concern about the degree to which the retrospective nature of this change would unsettle the market in let land and lead to a decline in the size of the let sector.

Second, by limiting the changes to the definitions contained within tenancy legislation there was concern that this would create anomalies where rating and planning rules used very different definitions of agriculture.

Third, it was difficult to draw up a definition on the one hand that was sufficiently flexible without creating circumstances where it would be open to abuse whilst ensuring on the other hand that it did not create restrictions of a different nature if it was drawn too narrowly. The present definition has been interpreted by case law and a new definition would create new uncertainty. Ultimately it is the issue of diversification itself that needs to be tackled.

In view of these problems, TRIG agreed that it was not feasible to meet the stated objective by a change in the statutory definition of agriculture within tenancy legislation.

During the period of TRIG's consideration of matters relating to farm diversification, proposals for changes to tenancy legislation in Scotland were being discussed by the Scottish Parliament. Those proposals, which are now law, give tenants the right to appeal against any refusal by a landlord to consent for non-agricultural activities. Landlords have only limited and defined grounds to object.

TRIG considered whether it would be appropriate to have a similar change in the legislation covering tenancies in England and Wales. However, a number of significant problems were encountered on this issue as well.

First, there was again concern about the degree to which the retrospective nature of this change would unsettle the market in let land and lead to a decline in the size of the let sector without an attempt to deal with the matter by a non-legislative route.

Second, there was a concern that the Scottish proposals were tainted given the association with the pre-emptive right to buy in Scotland and that the application of the diversification proposals given the background may be unsettling to the market in let land in England and Wales. Even if this concern could have been assuaged there was also the concern that the Scottish proposals were untried. In the circumstances TRIG concluded that it was inappropriate to introduce similar changes to the legislation in England and Wales at this stage.

Third, whilst it was generally agreed that the Scottish proposals might cover a greater number of activities on let land, there was a genuine concern that the proposals would in themselves restrict the scope for parties to a tenancy agreement to consider a wider range of possible activities and vehicles for the granting of consent.

Fourth, TRIG concluded that all non-legislative options should be explored in the hope that legislation on the subject would be unnecessary.

6.3 Code of Good Practice

In light of the problems associated with implementing legislative change and some concern that there continues to be a lack of clear evidence of the nature and extent of the problem, TRIG concluded that the matter of diversification within farm tenancies should be handled by the formulation of a Code of Good Practice.

TRIG recommends that:

- the matter of diversification within farm tenancies is handled by the formulation of a Code of Good Practice.**

- to ensure that the Code of Good Practice has authority it should be backed by an Ombudsman scheme, free at the point of use, to which disputes can be referred when they cannot be settled between the parties. The Ombudsman should have authority to adjudicate on the reasonableness of the proposal or objections, giving a non-binding decision to the parties. It will be primarily evidence from the Ombudsman that will be used to determine whether or not the Code of Good Practice is delivering the required change in attitude.**

- Ministers should give a very clear and unambiguous commitment to consider legislation if the Code of Good Practice does not provide an adequate mechanism for resolving potential disputes between landlords and tenants when considering proposals for farm diversification. If, after a period of years, it can be shown that tenants have a legitimate problem with landlords who consistently thwart reasonable diversification plans or impose unrealistic conditions then legislation should be considered to extend the tenant's statutory right to appeal against a landlord's unreasonable refusal to grant consent for the diversified activity.**

The Code of Good Practice is intended to promote better communication between landlords and tenants in relation to proposals presented by tenants for diversification into non-agricultural activities. Landlords will be encouraged to give serious and measured consideration to diversification proposals made in accordance with the Code of Good Practice and tenants will be given clear guidance on the preparation and

presentation of applications for consent given to landlords. A clear understanding on what is required from both parties should reduce disputes.

Pending a decision from Ministers, TRIG has not prepared a draft Code of Good Practice but has considered the elements which would need to be included so that a Code of Good Practice could then be drafted if Ministers give their support.

6.3.1 Elements of the Code of Good Practice

The Code of Good Practice would apply to proposals regarding the following issues:

- User clauses within the tenancy agreement (including those relating to sub letting and the erection of or the alteration to buildings).
- Tenant's entry into agri-environment schemes.
- Diversification by the tenant into agriculturally related activities.
- Diversification by the tenant into non-agricultural activities.

The Code of Good Practice should draw the attention of the parties to the following areas.

- The need for early consultation - initial consultation between the parties could be conducted either orally or in writing but it should be used to set out the broad terms of the proposal and the implications for both the landlord and the tenant. At this stage parties should agree how matters such as costs for preparing and considering the proposal will be dealt with.
- The agreement of realistic time scales - the parties should ensure to allow sufficient time for the preparation and measured consideration of the tenant's proposals. The time scales should take into account any deadlines for applications to schemes or grant awarding bodies and for any necessary planning consents. For example, within the Rural Enterprise Scheme some options require planning consent to have been obtained before an application for funding is submitted.

The tenant's proposal should include the following:

- A sound business case.
- Proof of funding.

- Reference to the terms of the tenancy and any landlords rights and reservations.
- Whether the terms of the tenancy need to be varied.
- The need for planning consents or other statutory requirements.
- Details of any proposed assignment, subletting or joint ventures.
- Implications for investment decisions and compensation.
- Rent review considerations.

The landlord's consideration should include the following:

- All matters on the tenant's checklist.
- The need for additional information (this must be reasonable, for example, the landlord should not request a full set of the tenant's accounts if other information provides sufficient financial detail).
- Proposals for variations or counter suggestions.
- A landlord's response in writing.

Following the submissions there should be a meeting between the parties with or without professional advisers.

When parties are ready to agree, there must be a formal written agreement for future reference. It must cover the terms of consent and refer to all relevant matters which bear on the tenancy or the parties to the tenancy. Where appropriate landlords should also waive their right to serve a Case B Notice to Quit if planning consents are necessary.

6.3.2 Grounds for objection

Notwithstanding that the tenant may have properly prepared a well thought out application, the landlord may still have reasonable grounds upon which to object to the tenant's proposal. The following list (a fuller explanation is provided at Annex 1 to this section) represents TRIG's view of the grounds that a landlord could rely upon:

- Where the project in the reasonable opinion of the landlord would substantially interfere with his quiet enjoyment of his retained rights over the land.
- Where the proposal, in the reasonable opinion of the landlord, is not considered viable.
- 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 belonging to the landlord.

- The proposal would cause the landlord to suffer undue hardship.
- Where the implementation of such a proposal would result in the holding ceasing to be agricultural in nature.
- 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.
- Where the tenant has failed to comply with the Code of Good Practice.
- Where an application is not materially different to a previously unsuccessful application.

Landlords should also be able to propose reasonable conditions where they are otherwise happy with the tenant's proposal. The grounds for such conditions are explained in Annex 1 to this section.

The main focus for the Code of Good Practice is to deal with tenants' proposals for diversification but there may be circumstances where landlords might wish to suggest alternative activities to farm tenants which are currently unavailable due to the tenancy agreement or the legislation which governs it. In the same way that landlords are allowed reasonable grounds to object to tenants' proposals, tenants should likewise be able to use reasonable grounds to object to landlords' proposals. The following list (a fuller explanation is provided at Annex 2 to this section) represents TRIG's view of the grounds on which a tenant could rely:

- Where the activity would prejudice the tenant's rights under the tenancy.
- Where the activity would lessen the tenant's ability to earn income from the holding.
- Where the activity is contrary to an established plan for the existing or future use of the holding.
- Where the activity would lessen the tenant's quiet enjoyment of the holding.
- Where the activity requires skills, capital or other factors not available to the tenant.
- Where the activity would cause the tenant to suffer undue hardship.
- Where the activity, in the reasonable opinion of the tenant, is not considered viable.
- Where the implementation of a proposal from the landlord would result in the holding ceasing to be agricultural in nature.
- Where the landlord is in material breach of the existing tenancy agreement and the matter has been brought to the attention of the landlord prior to the submission of the landlord's proposal.
- Where the landlord has failed to comply with the Code of Good Practice.

- Where a proposal is not materially different to a previous unsuccessful proposal.

Tenants should also be able to propose reasonable conditions where they are otherwise happy with the landlord's proposal. The grounds for such conditions are explained in Annex 2 to this section.

6.3.3 The Ombudsman

Where there is a failure to agree either party would be able to refer the dispute to an Ombudsman who would provide a non-binding decision on the matter. Each side should be given sufficient opportunity to present their case. The following procedure should be followed:

- The landlord or tenant submits to the Ombudsman an outline proposal on a standard document which is copied to the other party. This should set out the reasons why the Ombudsman should consider the case.
- The Ombudsman would decide if he were able to accept the case and would seek from the other party confirmation that he was content for the case to be considered by the Ombudsman. Assuming the case falls within the Ombudsman's jurisdiction, he would ask each party to submit their full arguments within a specified time scale to exchange cross copies with each other. Each party should then have the opportunity to comment on the other party's arguments within an agreed time scale. The Ombudsman should have the option of requesting further information, carrying out a site visit and seeking technical or legal advice. There would not be a formal hearing. Following the Ombudsman's deliberations, he would deliver a decision either for or against the proposal.

In cases where the applicant failed to provide sufficient information within the time scale given by the Ombudsman, the case would be closed. However, if the responding party fails to provide the required information, the Ombudsman would in those circumstances continue his deliberations and reach a decision. The Ombudsman, except in the most extreme circumstances, should not allow the parties to have an extension of time given that most of the information should already be available if the Code of Good Practice has been followed.

The Ombudsman's decision should be available to both parties. A summary of the number of cases, type of application and number of landlords involved should be publicly available. There should be a record of the number of cases where either party failed to co-operate.

Until Ministers have given their approval for the proposal, TRIG is unable to identify who might be the most appropriate people to take on the role of an Ombudsman. Also, until

the level of potential case load is known, it is impossible to say whether we will need only one or a number of Ombudsmen.

However, as far as the attributes of potential candidates is concerned, TRIG believes they should have similar attributes to those who are currently on the Lord Chancellor's Panel of Arbitrators. They should be active Chartered Surveyors and members of the RICS Rural Faculty or fellows of the CAAV with a minimum of 10 years relevant experience. They should have detailed knowledge of agricultural tenancy legislation and have relevant experience in dealing with case work. Training would also need to be provided.

6.3.4 Monitoring the Code of Good Practice

There should be an annual report containing details of the number, nature and findings of individual cases without identifying the parties to the dispute. A full review of the system and the reports of the Ombudsman should be carried out after five years when ministers should consider whether or not legislation in this area is necessary.

6.3.5 Advantages of a Code of Good Practice

TRIG believes that the Code of Good Practice will have a number of advantages and concludes that it will:

- be relatively quick to implement and does not have the lead-in time that primary or secondary legislation has.
- retain confidence in the lettings market
- provide tenants with a greater confidence to consider discussing proposals for diversification with their landlords.
- encourage diversification proposals to be better researched
- encourage landlords to give serious consideration to diversification proposals
- promote greater communication between the parties which may have beneficial 'knock-on' effects to other aspects of the landlord/tenant relationship
- be more responsive to future changes in the agriculture sector

6.0 Annex 1

Landlords' grounds to withhold consent for a tenant's diversification proposal

Under the Code of Good Practice the landlord could be justified in withholding consent where one or more of the following grounds could be demonstrated:

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

This ground covers projects that may interfere with the landlord's retained rights, for example shooting or fishing rights. Clearly proposed diversification into, say, visitor activities on land where the sporting rights are highly valued might be a reasonable ground for refusal.

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

Many ill-considered plans are tested by owner-occupiers, and later abandoned. It is to the advantage of the tenant if he is able to test his proposal against the experience and skills of the landlord. The ground would encompass cases where:

- the landlord reasonably believes (taking into account the information provided by the tenant in his business plan and supporting documentation) that the proposals would not provide an adequate return to justify investment (by either party),
- the tenant has not demonstrated that he has adequate resources to promote and deliver the project,
- proposed changes to the holding (or part thereof) would in practice be beyond the obvious means of the tenant to reinstate.

It is for the tenant to prove that his calculations within his application are reasonable.

Furthermore 'viable' in this context would not only relate to financial viability but also to matters concerning whether the tenant had the appropriate competence or skills to carry out the proposal effectively.

3. 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 belonging to the landlord.

To include situations where the granting of the landlord's consent would amount to either a derogation from grant or indeed where consent would result in the landlord being guilty of a breach of the covenant for quiet enjoyment in relation to another one of his tenants or occupiers.

This might be where the tenant's proposal directly affects the business of one (or more) of the other tenants of the landlord – for example an application for consent to enable a tenant to convert some buildings for B & B or holiday lets when such conversion would interfere with another tenant's identical business, for which the landlord had already provided consent.

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 interest. Clearly in such a case other grounds may also be pleaded such as Ground 4 – hardship.

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

'Hardship' in this sense would include fiscal as well as financial. The issue of loss of tax reliefs by the landlord in the event that the diversification proposal was implemented would fall within this ground. It is to be noted that the TRIG recommendations in respect of fiscal matters will be important in reducing the number of cases where this may apply.

5. Where the implementation of such a proposal would result in the holding ceasing to be agricultural in nature.

The Code of Good Practice is only intended to apply to agricultural tenancies and therefore it would be inappropriate for the Code of Good Practice to be used to such an extent that the holding would no longer be agricultural in nature. However a series of consents may be provided. The landlord may subsequently refuse consent to a virtually identical prior consent on the grounds that the proposal was a 'step too far'.

The over-riding test for this ground would be whether the granting of the consent would result in the tenancy falling outside the provisions of the agricultural tenancy legislation governing the tenancy i.e. either the ATA 1995 or the AHA 1986.

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.

The landlord must have the right to object to a diversification proposal where the tenant is already failing to honour the provisions of the tenancy agreement.

However the landlord would only be able to rely on this ground, in the context of the Code of Good Practice, where the breach had been notified to the tenant in writing prior to the submission of the application for consent to the landlord or as soon as is reasonably practicable after the landlord becomes aware of the breach if the breach occurs after the application for consent has been submitted.

7. Where the tenant has failed to comply with the Code of Good Practice.

This particularly applies to supplying appropriate information to the Landlord in connection with the application for consent.

Given that the Code of Good Practice would specify a strict procedure for the application for consent it is only right that the tenant (who may ultimately refer the matter to the Ombudsman) adhere strictly to the Code of Good Practice - although the Ombudsman should retain some discretion (only to be exercised in exceptional circumstances and not as matter as of course) to extend such time periods.

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

Once an application for consent has been made, there should be a restriction upon a further application to the Ombudsman within a fixed period based upon a proposal substantially the same as the 'failed' one – save where the subsequent application incorporates all the amendments proposed by the Ombudsman on a previous occasion.

The Ombudsman could rule on such a situation at the outset of an application - a question on the pro-forma application could deal with this issue

The imposition of reasonable conditions

There will be occasions when landlords wish to impose conditions (particularly of a practical nature – such as signage, appearance, etc) which may not satisfy one of the grounds under the Code of Good Practice for opposing consent but which are still nevertheless reasonable to impose. In such a circumstance, the onus should be upon the tenant to prove the unreasonableness of the condition rather than the landlord to prove that such a condition is reasonable.

Similarly, there is the issue of the costs to the landlord in considering the application by the tenant. Clearly both sides may incur professional costs during the application procedure. Although the tenant will have budgeted for his own costs of applying for consent, the landlord may be forced to seek professional assistance to a matter which ultimately may not yield him any financial benefit. Accordingly, in some complex applications for consent, it may be reasonable for the landlord to impose a condition on the tenant requiring him to contribute to the landlord's costs of considering the application.

6.0 Annex 2

Tenant's grounds for objecting to a landlord's proposal for change of use

Under the Code of Good Practice the tenant could be justified in objecting to a landlord's suggestion for change of use where one or more of the following grounds is demonstrated.

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

Depending on the nature of the activity involved it may result in either a deliberate or inadvertent, fundamental change to the tenancy agreement. Deliberate changes would include the migration to 1954 Landlord Tenant Act Agreements, changing from 1986 Agricultural Holdings Act tenancies to FBTs and the imposition of residential tenancies on dwellings. However, it might also include other changes, which may reduce the tenant's rights including loss of succession, changes in repairing obligations and further landlord's reserved rights. If these form part of a landlord's proposal, then the tenant should be allowed to object.

Whilst not necessarily forming a requirement of the landlord, there will be circumstances where a proposal would inadvertently alter the tenant's rights in some or all of the ways noted above. Tenants should be able to object 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 have the result of reducing the tenant's ability to earn income from the holding. This would also include proposals where the tenant is unable to finance start-up costs including any period of reduced income whilst 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.

This would allow tenants to object where they themselves have prepared or are relying upon an existing plan for the management of the holding within the bounds of the rights and responsibilities available to them under the tenancy agreement. Tenants should be able to object to any suggestion from the landlord which 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 object to a landlord's proposal where it is clear to the tenant that his 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 object to landlord's proposals where they would be required to employ particular skills or capital which they do not have available and which could 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 can not 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.

Whilst this will be measured mainly in financial terms, there may be other factors in terms of the impact upon the tenant's family which 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 his proposal against the experience and skills of the tenant. In this respect, the tenant could object if he 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 of Good Practice is only intended to apply to agricultural tenancies and therefore it would be inappropriate for the Code of Good Practice 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 prior to the submission of a proposal for diversification.

The tenant must have the right to object to a landlord's proposal where a landlord is already failing to honour the provisions of the tenancy agreement (e.g. repairs, quiet enjoyment and provision of fixed equipment). The tenant would only be able to rely on this ground if the breach had been notified to the landlord in writing prior to the submission of the landlord's proposal or as soon as is reasonably practicable after the tenant became aware of the breach if occurring after submission of the landlord's proposal.

10. Where the landlord has failed to comply with the Code of Good Practice.

This will relate particularly to the amount and nature of information provided by the landlord through the Code of Good Practice process.

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

Landlords should be unable to propose changes which have already been subject to analysis under the Code of Good Practice if those proposals are largely unchanged from their original versions.

The imposition of reasonable conditions

As well as being able to object to a landlord's proposal, a tenant may wish to accept it with conditions. It will be for landlords in these circumstances to prove the unreasonableness of such conditions rather than for the tenant to prove that the conditions are reasonable.

Where tenants are required to incur professional costs in consideration of a proposal from the landlord, it may be reasonable for the tenant to impose a condition on the landlord requiring him to contribute in whole or in part to the tenant's costs of considering the proposal.

7.0 Structural issues

7.1 Introduction

Alongside the legislative and fiscal framework within which agricultural tenancies operate, the terms of reference for TRIG required a review of the structural issues which either impact upon or are impacted themselves by the landlord/tenant systems in agriculture. TRIG has focused on four main areas:

- Tenant retirement
- New entrants
- County Council smallholding estates
- Mid term review of the Common Agricultural Policy

7.2 Tenant retirement

A large body of anecdotal evidence exists of increasing problems being faced by farm tenants who wish to retire from the industry but are unable to do so. Income and capital bases on many tenanted holdings have declined markedly in recent years. Poor pension provision and a lack of alternative accommodation also exacerbate this situation. Given the imprecise nature of the available evidence, the number of tenants who find themselves in this position is difficult to assess. TRIG estimates that there might be as many as 2000 individual tenants involved farming between 200,000 and 300,000 acres on mainly fully equipped holdings. The potential impact on restructuring of an exodus of this level would be highly significant as the amount of land involved outstrips the area of land transferred by public sale in an average year.

EU enabling legislation² allows Member States to introduce retirement schemes suitable for their individual circumstances but within strict limits. Appendix III provides details of the rules involved. TRIG recognises that some of the legislative restrictions (in particular the rules on age limits and after use conditions) mean that the present EU scheme is not ideal for UK conditions. However, TRIG also believes that a properly designed retirement scheme could do much to facilitate those who are prevented from leaving the industry by economic circumstances.

² Chapter IV of the EU Council Regulation 1257/99 of 17 May 1999 (the Rural Development Regulation).

7.2.1 UK Government policy

TRIG is disappointed that the Government has not pursued its earlier enthusiasm for a retirement scheme. It had made a commitment to help those parts of the country most affected by Foot and Mouth Disease with, amongst other things, an early retirement scheme. However, it remains accepted within government and elsewhere that there must be further restructuring of agricultural units meaning that it will be necessary for a number of farmers to leave the industry.

The Rural Enterprise Scheme (RES) recognises the need to develop and improve the agricultural infrastructure. The scheme aims at providing targeted assistance to support the development of more sustainable, diversified, enterprising rural communities to assist their regeneration and adjustment to the new demands of the rural economy. TRIG believes that RES could offer assistance on retirement within these objectives.

Such assistance could foster multiple benefits. These include:

- the provision of an exit with dignity for individual producers caught in a "debt trap" and no longer able to farm economically,
- enabling released land and other productive assets to be re-deployed and used more efficiently, and
- enabling those remaining in the industry to handle better commercial challenges and the opportunities of growth which lie ahead in the wider rural economy.

7.2.2 Advice pack

Whilst recognising some of the difficulties, the Curry Commission fell short of advocating the introduction of a full-blown retirement scheme. Instead, it proposed that DEFRA should develop a supporting pack of advice for farmers considering retirement. DEFRA is now in the process of developing this pack. TRIG felt that, while it might be useful to have a comprehensive pack of advice, its beneficial impact will be limited to those whose financial position and access to alternative accommodation allow them to make informed choices for their future. The pack will do little to assist those identified as needing the most help.

Notwithstanding these general criticisms, even where the use of the pack could be beneficial, TRIG believes it is important that individual farmers are guided through the pack by a professional adviser and are not left to find their own way through the information provided. Professional support should be an essential component in the considerations of those preparing the pack.

7.2.3 Housing

This is a particular problem for farm tenants wishing to retire. A large number of tenants will not be in a position to identify a dwelling to which they could go on their retirement. However, where tenancies are being surrendered to landlords, there may be a way of

providing an incentive to those landlords to let tenants remain in their houses or in other dwellings on the estate on favourable terms. The incentive could come in the form of a Capital Gains Tax relief on some or all of the realised gain from the tenancy surrender or, perhaps, on the future disposal of the relevant dwelling.

7.2.4 Re-training

Some tenant farmers will leave the industry before a normal retirement age. They will have gained many valuable skills in running their own businesses and will have the potential to play a key role in the rural economy, providing those skills can be re-focused. TRIG understands it is intended that the Government's retirement pack will cover skill analysis and re-employment but it must also ensure to include advice on direct access to grant funded training. It should be a priority to identify funding for this training to ensure it is widely available to all who need to leave the industry, particularly those with minimal financial resources.

TRIG recommends that:

- the Government should initiate research as to the number of farmers who find themselves unable to retire and the reasons for this. Evidence of the size and nature of the problem is essential.**
- the Advice Pack for retiring farmers will be of limited benefit if it is not used in conjunction with competent advisers. At the very least, the information provided should give individuals clear guidance as to when professional help is essential. TRIG would like the opportunity to comment on a draft of the pack before it is used in the field.**
- in light of the conclusions of the research referred to above, the Government should consider what it might need to do to alleviate any problems that are discovered. This may involve direct measures or the refocusing of current initiatives on benefits, housing, debt relief and taxation. The possible inclusion of retirement options within the Rural Enterprise Scheme should be considered when the scheme is reviewed in 2006.**
- the Government should ensure that all current grant funding opportunities for re-training are fully explored in order that individuals leaving farming can maximise the use of these resources.**

7.3 New entrants

Closely related to matters of retirement are issues associated with new entrants. When the Agricultural Tenancies Act 1995 was conceived, one of three principal objectives was to “increase the opportunities for new entrants”. This was in recognition of the fact that the agricultural sector must have an inflow of new entrants to ensure its long-term success and that the tenanted sector had a major role to play in bringing them in. Whilst TRIG noted the increase in opportunities provided by the increase in lettings post 1995, of which perhaps 9% had gone to new entrants, the economic evaluation of the ATA 1995 carried out by the University of Plymouth in 2002 concluded that the level of encouragement provided to new entrants had been disappointing. New entrants bring to the industry new ideas, new skills, a willingness to approach problems with new solutions, and sometimes new capital. It is important that they are offered greater support and encouragement. In doing this, TRIG notes that not all new entrants are young but many enter the industry with experience of other sectors.

TRIG has concluded that it would be difficult to amend the legislation of the ATA 1995 to promote lettings specifically to new entrants without either prejudicing the wider flexibility and use of the ATA 1995 or being over-complicated, both outcomes being detrimental to the longer term success of new entrants. However TRIG agreed that the overall framework should aim to deliver a significant number of longer-term and whole farm lettings, which are seen as important in providing new entrants with a better chance of success. TRIG believes that the wider package of measures it is proposing (and in particular the fiscal and county farms recommendations) will do much to improve the supply of farms available to let and the lengths of term being offered by landlords. The specific impact on new entrants will have to be examined in the context of a future review of all the measures being proposed by TRIG.

7.3.1 Scheme for new entrants

As with retirement, there is EU enabling legislation³ allowing member states to introduce schemes to encourage young, new entrants (but not new entrants over 40). The main provisions are set out in Appendix IV. A study by CEJA (Conseil Européen des Jeunes Agriculteurs) has shown that currently the UK is the only Member State that has not taken advantage of these powers. In this respect young, new entrants in the UK are at a disadvantage to those in other member states.

A recent study⁴ in Northern Ireland into the potential benefits of a new entrants scheme concluded that “the option to assist young people set up in farming yields real economic benefits”. It recommended that serious consideration be given to establishing a subsidised loan scheme for new entrants in Northern Ireland.

³ Articles 7 and 8 of Council Regulation (EC) No 1257/1999

⁴ "An economic study of Farmer Early Retirement and New Entrant Schemes for Northern Ireland" (Queens University, 2002) commissioned by the Northern Ireland Assembly

TRIG believes that new entrants, young or otherwise, in the UK should have access to appropriate support schemes for new entrants equal to that for new, young entrants in other parts of the EU.

7.3.2 New Entrants Advice Service (NEAS)

TRIG notes that the National Farmers Union has provided the government with detailed plans on how new farmers and growers can forge a positive career in the industry. A summary of this proposal is contained in Appendix V. In brief, it envisages the introduction of a dedicated support scheme providing both business advice and a mentoring service to those thinking of entering the industry. Its aim would be to maximise the key decision-making skills to make new entrants successful entrepreneurs with advice on budgets, cropping, stocking levels and IT as well as an annual health-check of the business. A network of "mentors" could be set up, drawing on the expertise of local farmers to provide moral support and practical guidance. It is envisaged that the scheme could be financed through an extension of the existing Government-funded Farm Business Advisory Scheme. TRIG believes that there is much of merit in this proposal and commends it to the Government.

7.3.3 New entrants matching service

The report of the Curry Commission recommended the establishment of a "matching service" to bring together new entrants with retiring farmers who do not have identified successors. Whilst the Curry Commission was clearly considering opportunities that could be provided by retiring owner occupiers, TRIG believes that it could be extended to include opportunities from potential landlords. It is, however, important to learn from a previous attempt's limited success. The Rural Starters Register run by the TFA, CLA and NFYFC in the late 1990's was forced to close due to lack of available opportunities from landlords coupled with a lack of good quality potential entrants. These issues must be overcome if a new scheme is to succeed. The proposal for the NEAS would do much to deal with at least the second of those issues.

TRIG has noted that Wales YFC has already initiated a matching service in conjunction with the Welsh Assembly. This was initiated by creating a "database of opportunity" where young people could register an interest in finding an opportunity in the agricultural industry. The intention is to roll out the scheme this summer by producing information and advice packs and then starting to match the new entrants with farmers and opportunities. TRIG concluded that any scheme introduced in England should draw on experience gained in Wales.

Having examined the issues impacting upon new entrants TRIG concluded that there are no appropriate legal or fiscal changes restricted solely to new entrants into agriculture that it could recommend.

TRIG recommends that:

- the Government should consider making use of EU enabling rules to introduce schemes to help new entrants in the forthcoming review of the England Rural Development Plan.**
- the Government and the Industry should support the introduction of a New Entrants Advisory Service as proposed by the NFU.**
- a matching service is introduced to bring together new entrants and those with land available to farm drawing on the experience of Wales YFC working in conjunction with the Welsh Assembly.**

The range of letting opportunities available in a fully flexible system should include a significant number of longer-term and whole farm lettings. TRIG believes that the wider package of measures it is proposing will do much to improve the supply of farms available to let and the lengths of term being offered by landlords. The specific impact on new entrants will have to be examined in the context of a future review of all the measures being proposed by TRIG.

7.4 County Council smallholdings

Collectively, County Council Smallholdings are a significant force in the agricultural lettings sector. Appendix VI contains statistical information highlighting the importance of the service. The recent Plymouth University evaluation of the ATA 1995 concluded that they played a major role in bringing new entrants into farming. TRIG agrees and, in addition, recognises the importance of County farms in offering wider opportunities and benefits to the public, including delivery of agri-environmental measures and public access.

The introduction of the ATA 1995 has enabled County farms to become more flexible and better able to deliver their objectives and some estates have managed this process positively.

Section 39 of the Agriculture Act 1970 requires Smallholdings Authorities to "make it their general aim, to provide opportunities for persons to be farmers in their own account by letting holdings to them". TRIG recognises that there is ambiguity as to whether or not this imposes a duty and notes the view held by Defra (which cannot provide the interpretation of the law the courts can) that it probably falls short of providing a specific duty. However, although this is no longer enforced by Defra, Smallholdings Authorities are obliged by Sections 41 to 43 of the Act to seek the approval of the Secretary of State for any plans to reorganise their estates.

TRIG accepts that each authority is legally responsible for the ownership, management and policy direction of its estate. However, as democratic bodies facing regular elections, it can sometimes be difficult for estate managers on county council estates to plan for the medium to long term. There are also concerns about wider financial pressures and the lack of co-ordinated policy towards these estates.

TRIG recommends that:

- Defra should in respect of County Council Smallholdings use the powers available to it within Sections 38 to 43 of Part III of the 1970 Agriculture Act both to scrutinise plans for Estate re-organisation and disposal and to require Authorities to account fully for the future management strategies for their Estates. The criterion for such scrutiny should be to assess how the plans will help the estate to meet the objectives of Part III of the 1970 Agriculture Act and supporting legislation.**
- there would be merit in investigating the potential for greater networking and collaboration in the management of County Council Smallholding Estates.**

7.5 Mid term review of the Common Agricultural Policy

During the period of TRIG's deliberations the European Commission published its proposals for further reform of the Common Agricultural Policy. These are continuing to be developed in Brussels. If enacted, these proposals will have far reaching implications for the future of agriculture in this country and may have significant landlord/tenant implications especially in the transition to a new regime. TRIG believes that it would be inappropriate to comment on the proposals until there is a clearer picture of how they are to be introduced. TRIG wishes to have an opportunity to consider the package of measures that emerges from the negotiations in the Council of Ministers in light of the landlord/tenant issues that may arise.

8.0 Tenancy Reform Industry Group – future role

TRIG suggests that following the publication of this report, the Group's work should continue in the following areas:

- Monitoring progress of the proposed legislative reforms if supported by Ministers and responding to any amendments which may be proposed prior to formal adoption in each case.
- Monitoring progress of the proposed fiscal reforms if supported by Ministers and the Treasury and responding to any amendments which may be proposed prior to formal adoption in each case.
- Preparing the key clauses that could “mirror” a tenancy under the AHA 1986 within a new FBT governed by the ATA 1995.
- Preparing the detailed Code of Good Practice for Diversification within Agricultural Tenancies if the initial proposal is approved by Ministers.
- Working with Defra in response to the proposals put forward to aid Tenant Retirement including consultation on the proposed Advice Pack.
- Consulting with Defra as the CAP Mid Term Review proposals emerge in more detail with a view to ensuring the new measures do not adversely affect the tenanted sector.
- Working with Defra to develop existing surveys and future research to monitor the state of the tenanted sector and in particular the TRIG recommendations which are adopted.
- Acting as a cross industry sounding board as and when required to deal with issues which arise concerning the tenanted sector.

APPENDIX 1

MEMBERSHIP OF TRIG

Julian Sayers – Chairman

Robert Pick – National Farmers Union (until 17 February 2003)

Peter Crozier – “ “ “ (after 17 February 2003)

Ruth Lamb – “ “ “ “ (until 28 February 2003)

Andrew Opie – “ “ “ (after 28 February 2003)

Barrie Jones – Farmers Union of Wales

Reg Haydon – Tenant Farmers Association

George Dunn – “ “ “

Neil Mainwaring – Country Land and Business Association

Oliver Harwood – “ “ “ “ “

Duncan Sigournay – “ “ “ “ “

Neil Cameron – National Federation of Young Farmers Clubs

Sarah Palmer – “ “ “ “ “ “

Charles Coats – Association of Chief Estate Surveyors and Property Managers

Jeremy Moody – Central Association of Agricultural Valuers

Geoff Whittaker – Agricultural Law Association

Mark Sanders – Royal Institution of Chartered Surveyors

Marcus Brown – Local Government Association

Marie Skinner – Independent Member / Rural Affairs Forum

Defra Representatives:

Lindsay Harris Geoff Webdale

Judith Marsden Dermot McInerney

Martin Nesbit John Osmond

Graham Cory

Membership of Legislative Working Group:

Julian Sayers – Chairman
Charles Coats
George Dunn
Oliver Harwood
Barrie Jones
Duncan Sigournay

Ruth Lamb
Jeremy Moody
Mark Sayers
Marcus Brown
Geoff Whittaker

Membership of Fiscal Working Group:

Julian Sayers – Chairman
Charles Coats
George Dunn
Barrie Jones
Jeremy Moody
Adrian Baird (CLA)

Marcus Brown
Mark Sanders
Duncan Sigournay
Geoff Whittaker
Terry Donaldson (NFU)
Graham Smith (ALA)

Membership of Code of Practice Working Group:

Julian Sayers – Chairman
Jeremy Moody
Mark Sanders
Robert Madge (NFU)

George Dunn
Andrew Opie
Duncan Sigournay

APPENDIX II

Response to “An Economic Evaluation of the Agricultural Tenancies Act 1995”.

TRIG carefully considered each of the seven recommendations contained in the Evaluation and reached the following conclusions.

Plymouth Recommendation 1 - FBTs are the principal mechanism for letting rural property but their use is constrained by the agriculture and business conditions. This particularly limits their use with wholly or substantially diversified or conservation activities and this conflicts with trends in the rural economy and the rising importance of these activities in rural land management. We consider this to be an unnecessary restriction on the use of FBTs. We recommend serious consideration be given to relaxing the agricultural requirement and removing the business condition from the legislation which would then enable it to accommodate a much wider range of non residential activity on rural land and buildings.

1.1 Whilst accepting the need to enable a wide range of activities to take place on agricultural holdings, TRIG concluded that by relaxing the agricultural requirement and removing the business condition for ATA1995 lettings the legislation would no longer fulfil the primary objectives of being the framework for the occupation of agricultural holdings as opposed to any other form of letting which might be covered by other legislation. TRIG feared creating uncertainty as to which code of law would cover any particular letting, especially where substantial diversification had happened.

1.2 It was not felt appropriate to amend the definition of agriculture given the range of activities which now take place on farms varying from agri-environment schemes to completely non- agricultural ventures such as the letting of buildings for commercial use. It was, therefore, felt more appropriate to establish a Code of Good Practice for Diversification within Agricultural Tenancies which would encourage landlords and tenants to agree terms for such activities which could then take place within the existing legislation for both FBT's and AHA 1986 agreements.

1.3 The issue of environmental of schemes was also given careful consideration in the context of the Plymouth recommendation and it was felt there were only a limited number of circumstances where there would be no agricultural or business element. Such schemes nearly always involve some land management at the very least as part of a wider business. TRIG was not convinced that where there is no business element, an FBT is the right vehicle. If there was genuinely neither of these elements then the activity would fall outside the ATA 1995 but be covered by other legislation.

Plymouth Recommendation 2 - The provisions of the ATA in respect of rent and compensation fail to allow the freedom of contract that is conspicuous

throughout much of the rest of the legislation. This inhibits those parties who wish to create bespoke agreements on rent or achieve certainty over compensation. Whilst the current default mechanisms should remain in place we recommend amendment of the legislation to remove the current constraints on parties' freedom to agree terms in respect of rent and compensation for tenants'.

2.1 In responding to the issue of rent reviews, TRIG is recommending a change to the existing legislation based on freedom of contract except that the bar on upwards only provisions is retained. The existing fallback arrangements contained within the ATA 1995 should remain in place.

2.2 On the question of tenant's improvements, TRIG considered the main problem within the ATA 1995 was the open-ended nature of the landlord's liability which was preventing consent being granted in some cases. The recommendation is, therefore, to allow the capping of the sum due to a tenant which, calculated on what the tenant has brought to the improvement, is to be agreed before any work so that a landlord could always quantify the maximum level of compensation due to a tenant any one time.

Plymouth Recommendation 3 - Whilst concern has been expressed over the position of new entrants we do not see how the ATA can be effectively amended to improve matters. Consequently we do not recommend any changes to the ATA legislation specifically targeted at encouraging new entrants. We suggest that supplementary means to assist new entrants are investigated if this remains an important objective of government policy.

3.1 TRIG agreed with this conclusion but this report does contain specific recommendations which will should assist new entrants if implemented but do not involve specific targeted legislative or fiscal reforms.

Plymouth Recommendation 4 - There are fiscal disincentives to letting land whether under the AHA or ATA legislation. For both established and potential new landowners amendment to the tax regime may remove some of the limitations on the restructuring of the rural economy. Consequently we recommend that consideration should be given to targeted fiscal amendments within strictly defined areas.

4.1 TRIG agreed with this conclusion and has spent a considerable amount of time both within the main Group and via the Fiscal Working Group considering a package of measures which are detailed within the report for fiscal measures to help achieve the Ministers' objectives.

Plymouth Recommendation 5 - There remain concerns about the impact of Section 4 of the ATA, both the extent to which it may inhibit some parties

from extending existing agreements and its unintended impact on certain succession cases under the Agricultural Holdings Act. We recommend that DEFRA review these specific areas to consider the extent to which amendment of Section 4 of the ATA 1995 may be required.

5.1 The issue was identified by TRIG and a number of options were carefully considered to overcome the problems which have arisen surrounding Section 4 since the introduction of the ATA 1995 as it has been applied and interpreted in practice.

5.2 After lengthy discussions, recommendations have been made within the package of proposed legislative reforms to ensure that land (the definition of which includes buildings, dwellings and fixed equipment) can be added to an existing AHA 1986 agreement without creating a new FBT, providing the original holding is a substantial part of the holding.

Plymouth Recommendation 6 - FBTs are an important land management tool particularly in a changing rural economy. However their usefulness may be undermined by lack of awareness and understanding. We recommend that Defra seeks to promote the awareness of the use of FBTs across England and Wales and the necessity for prospective tenants to understand fully the content of agreements that they are entering into.

6.1 This point was taken on board by TRIG and, if the Group's recommendations are accepted and implemented, all the member organisations have agreed to promote both the opportunities offered by FBT's and the other measures being proposed within their respective memberships.

6.2 This promotion will hopefully be supported by Defra but direct "member" engagement is felt to be the most productive means of ensuring that both farmers and landowners understand the framework of by the ATA 1995 as strengthened and made more flexible by TRIG's recommendations.

Plymouth Recommendation 7 - Information from three main sources – the Annual June Census, the Annual Survey of Tenanted Land and the CAAV's Annual Tenanted Farms Survey – provide useful information for monitoring the impact of the Agricultural Tenancies Act (1995) on a routine basis. However, our study has identified a small number of deficiencies in the available information which we believe could be remedied through minor modification to these surveys. We therefore recommend that DEFRA should review the information routinely available to monitor the operation of the ATA 1995 with a view to remedying and deficiencies and incorporating further improvements in a cost-effective manner.

7.1 The need for clear information as to the continuing effectiveness of the ATA 1995 and, in particular, the effects of TRIG's recommendations was supported by the Group.

7.2 TRIG hope to be consulted further on this matter in the light of the decisions taken in the light of its recommendations. In principle, the Group proposes that the existing surveys including those conducted by DEFRA and the CAAV are reviewed and enhanced to further measure the effectiveness of the ATA 1995. TRIG recognises that the CAAV has already responded to the Plymouth University recommendation.

7.3 In addition, another report along the lines of the Plymouth University Evaluation will be required in a few years' time to assess how effective the implementation of the TRIG recommendations has been.

APPENDIX III

EU Retirement Scheme

1. The enabling legislation for an early retirement scheme is contained within Chapter IV of the EU Council Regulation 1257/99 of 17 May 1999 (the Rural Development Regulation). The objectives for any scheme under this chapter are as follows:

- To provide an income for elderly farmers who decide to stop farming.
- To encourage the replacement of such elderly farmers by farmers able to improve, where necessary, the economic viability of the remaining agricultural holdings.
- To reassign agricultural land to non-agricultural uses where it cannot be farmed under satisfactory conditions of economic viability.

2. Eligibility requires that each participant meet the following criteria:

- Stops all commercial farming (although there can be non-commercial farming and the retention of the use of any buildings).
- Is over 55 and less than normal retirement age.
- Has practised farming for 10 years preceding participation.

3. There are also certain conditions attached to the use of the land after joining the scheme. Where the land is transferred to another producer it must be shown that the economic viability of the whole of that producer's holding has been improved and that the producer undertakes to practice farming on the holding for at least 5 years. Any non-agricultural use must be compatible with protection or improvement of the environment.

4. In return for participation eligible farmers could receive a maximum of Euro 15,000 per year with a maximum overall payment of Euro 150,000. This money would be available over a maximum period of 15 years and not beyond the 75th birthday of participants.

5. Commission Regulation EC No 1750/99 of 23 July 1999 lays down some further detailed rules. They are as follows:

- Where participation is by a partnership, company or other multiple, overall support is limited to the amount provided for one individual.

- Any non-commercial farming activity continued by the participant is not eligible for support under the Common Agricultural Policy.
- Tenants can participate by releasing land to owners provided that the lease is terminated and the requirements relating to the after-use conditions are met either if the land is to be continued in agriculture or non-agricultural use.

6. Land released through participation may be included in a re-parcelling operation or in exchange of parcels. Member States can also make provision for land to be taken in charge by a body which reassigns it at a later date to individuals who satisfy the after-use conditions.

APPENDIX IV

EU New Entrant Scheme

Article 8 of Council Regulation (EC) No 1257/1999

1. This allows Member States to offer young people, setting up in farming, a maximum grant of EUR 25,000 as a single premium and a further potential EUR 25,000 as an interest subsidy on loans taken to cover the costs arising from establishment. The Commission can permit the granting of additional State aid exceeding these limits up to a maximum of EUR 25,000 where justified by the very high costs of setting-up in the region concerned.

Article 7 of Council Regulation (EC) No 1257/1999

2. This allows Member States to co-finance investment in agricultural holdings. The total amount of support is limited to a maximum of 40 per cent (50 per cent in less favoured areas) of the undertaken investment. Where young farmers undertake the investment the maximum is 45 per cent (55 per cent in less favoured areas).

APPENDIX V

Summary of NFU proposals for a New Entrant Advisory Scheme

1.0 Background

1.1 There is widespread support to encourage and help newcomers to the industry, to ensure the long-term health of the industry. It has been recognised that the acquisition of good business skills and land management will be vital for those wishing to survive in agriculture. At the same time the average age of farmers continues to rise, suggesting that either there are problems of opportunities for new entrants or that they simply do not want to join the industry. We need to give the next generation of farmers the skills to enter the industry and demonstrate that it is one worth joining.

1.2 Two recent reports have considered the issue as follows:

- Curry Commission Report and Recommendations - *Recommendation 48 & 49 - Promotion of alternative entry methods, such as share farming or contract farming is encouraged. Innovations such as work-to-rent (whereby partnerships are formed between existing tenants who want to leave the business and new entrants) have potential. (49) Government should sponsor the NFU to create and manage a matching service to bring together new entrants with retiring farmers who do not have identified successors.*
- DEFRA Economic Evaluation of Agricultural Tenancies Act 1995 - *Recommendation 3 - Whilst concern has been expressed over the position for new entrants we do not see how the ATA can be effectively amended to improve matters. Consequently we do not recommend any changes to the ATA legislation specifically targeting at encouraging new entrants. We suggest that supplementary means to assist new entrants be investigated if this remains an important objective of Government policy.*

1.3 Many European states already operate new entrants schemes. These are operated through their rural development plans and include soft loans and grants. The maximum grant allowed is Euro 25,000 with another Euro 25,000 in areas where start up costs are exceptionally high.

NFU proposals

1.4 The NFU proposals are for a dedicated support scheme for new entrants to help with the key decision making skills that are necessary to make them successful businessmen. We believe this is a more appropriate and cost effective scheme for our industry rather than simply giving entrants a grant. The scheme would be available to both tenants and owner-occupiers.

2.0 Who is a new entrant?

2.1 This is a difficult question and we feel that the only solution is to use the definition in the European Rural Development Plan Regulations. This states that aid can be offered on the following conditions:

- The farmer is under 40 years of age,
- The farmer possess adequate occupational skill and competence
- The farmer is setting up on an agricultural holding for the first time
- As regards the holding economic viability can be demonstrated, and compliance with minimum standards regarding the environment, hygiene and animal welfare
- the farmers is established as head of the holding

These are operated through their rural development plans and include soft loans and grants. The maximum grant allowed is Euro 25,000 with another Euro 25,000 in areas where start up cost is exceptionally high.

2.2 We would refine the scheme with DEFRA as necessary. One issue we have already identified is that of those using contract farming as a route into the industry, but would possibly not qualify as they are not setting up their own holding. Curry supported the use of contract farming and stated “We would encourage the promotion of alternative entry methods, such as share farming or contract farming”.

3.0 The Scheme

3.1 We would like to see two elements within the Scheme. One to one support with a business adviser and a mentoring scheme.

3.2 We feel the Scheme should be accommodated within the Farm Business Advisory Scheme, but as a separate entity. The NEAS would assist new entrants in preparing budgets or a tender for landlords or banks. The advice would help them budget and plan cropping, livestock and stocking levels, agri-environment schemes, business training, IT, health and safety, diversification, quota purchasing or leasing etc.

3.3 Once a new entrant had taken on a farm we would like to see the NEAS continue to provide advice and support for at least three and preferably five years. This would monitor the above issues and include advice on budget and cash flow reviews, farm and management accounts, machinery costs, agri-environment schemes, health & safety, welfare schemes and assurance schemes. The Scheme would provide an annual health check and review of the business.

3.4. We also feel there is merit in setting up a mentoring scheme to support new entrants from within the farming community. This would offer participants practical, local advice from established farmers. There are already similar projects that involve mentoring operating at present and are successfully helping groups of farmers help themselves. The NFU with its extensive membership is in an excellent position to help establish a network with DEFRA. The initiative of self-help and mentoring is one that has received encouragement from DEFRA.

4.0 Costing

4.1 There is little information on the number of new entrants joining the industry or numbers on how many succeed and fail. We have had to make some major assumptions in estimating the numbers of new entrants and therefore the potential cost.

4.2 The European Parliament report says that 7.6% of farmers in Europe are young Farmers. The age limit of 18-40 has been applied as “young farmer”. There are 178,000 holdings in England – assuming 7.6% of these are young farmers = 13,670 young farmers. If we break that down further and assume that 1/22 enter each year (from the 18-40 age range) that equates to about 620 per year.

4.3 The CAAV survey shows that 147 new entrants took on FBT's and 109 people succeeded to AHA tenancies (although only 12 were considered as new entrants). This gives a total of 256. Tenants make up between a quarter and a third of the farming population. Therefore multiplying this figure up equates to a potential of about 600 applications.

4.4. These figures seem very much at the top of the likely range. It would seem probable that many new entrants would not meet the conditions set down in paragraph 1.1, above. As we know from our structural data, there are an increasing number of extremely small farms, where the new entrant might not have appropriate technical qualifications and the holding would probably be classified as non-viable.

4.5. Assuming all of the 600 applicable do enter the scheme, which is unlikely, the maximum cost would be £2.4m pa. This is based on the applicants receiving the initial three days of advice and a further day for each of their first five years. The cost of advice is based on the Farm Business Advisory Service estimates.

4.6 We have not estimated the cost of setting up a mentoring system, but it is designed to be a less formal support group and should not be too expensive. There would be additional costs for the promotion of the scheme.

5.0 Funding

5.1 We consider an extension to the FBAS scheme would be the most appropriate. This service is already set up to deliver advice; they have a network of advisers and links into other schemes such as Inside UK Enterprise demonstration farms. FBAS is funded directly by the Government which would mean this scheme would not need to compete with other initiatives in the RDP's. We would prefer this route to considering an application to the Vocational Training Scheme or the Rural Enterprise Scheme.

5.2 We feel there may be an opportunity for funding from the European training fund Objective 3 and we are investigating this, particularly with regard to funding the mentoring scheme.

APPENDIX VI

Statistics on County Council smallholdings

There are 32 English Counties, 15 English Unitary Councils and 16 Welsh Councils providing County Council Smallholdings. The following statistics on County Council Smallholdings are derived from the "County Farms and Rural Estates Statistics 2001/2002" report from the Chartered Institute of Public Finance and Accountancy.

Total area	311,305 acres
Number of holdings	4,684
Average size of holding	66 acres
New tenancies granted	194 (4.1% of total)
Tenancies surrendered	311 (6.6% of total)
Genuine new entrants	70
Jobs (direct and indirect) sustained	10,500
Average rent	£75,40 per acre
Capital expenditure	£4.16m (10.5% of receipts)
Gross capital receipts	£39.5m
Net operational surplus	£12.28m (£39.69 / acre)
Repair & maintenance expenditure	£5.77m (26% of rent roll)

Three-year trends (1999 – 2002)

Total Area	Reduction of 7,558 acres (2.4 %)
Number of Farms	Reduction of 202
Tenancies Granted	678
Tenancies Terminated	1,120
Average Rent	1.5% reduction
Capital Receipts	£116.7m
Capital Reinvestment	£11.5m (10% of receipts)