

Explanatory Memorandum to The Agricultural Tenancies (Requests for Landlord's Consent or Variation of Terms) (Wales) Regulations 2024

This Explanatory Memorandum has been prepared by the Climate Change and Rural Affairs Group and is laid before Senedd Cymru in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Agricultural Tenancies (Requests for Landlord's Consent or Variation of Terms) (Wales) Regulations 2024. I am satisfied that the benefits justify the likely costs.

Huw Irranca-Davies MS

Cabinet Secretary for Climate Change & Rural Affairs

18 July 2024

PART 1

1. Description

The Agricultural Tenancies (Requests for Landlord's Consent or Variation of Terms) (Wales) Regulations 2024 ("the Regulations") introduce a new dispute resolution process relating to a tenant's request for landlord's consent to an activity that is restricted by the terms of their tenancy agreement, or to a variation of the terms, so that the tenant can apply for and access financial support under the power of support provisions under the Agriculture (Wales) Act 2023 (the 2023 Act) and/or meet a statutory obligation.

2. Matters of special interest to the Legislation, Justice and Constitution Committee

None.

3. Legislative background

The Regulations are made pursuant to section 8A of the Agricultural Tenancies Act 1995.

Section 8A provides that Welsh Ministers may make provision through regulations to enable tenants to refer to arbitration requests for landlord's consent to activities that are restricted under the terms of their tenancy agreement or requests for a variation of terms, where that request relates to the tenant applying for financial assistance under the power of support provisions under the Agriculture (Wales) Act 2023 (the 2023 Act) or meeting a statutory obligation.

The Regulations are subject to the negative procedure.

4. Purpose and intended effect of the legislation

These Regulations introduce a new dispute resolution process relating to a tenant's request for landlord's consent to an activity that is restricted by the terms of their tenancy agreement, or to a variation of the terms, so that the tenant can apply for financial assistance under the 2023 Act or meet a statutory obligation. This is because many leases under the 1995 Act include standard restrictive clauses that prevent the tenant from undertaking activities which could change the fixed equipment or land use on the holding without the tenant first gaining the landlord's consent to the activity (e.g. erecting or altering buildings, investing in new fixed equipment, taking on other land or diversifying into non-agricultural activities such as environmental land management).

Many landlords and tenants work together effectively to negotiate and overcome issues relating to restrictive clauses without the need for recourse to dispute resolution. However, we understand this may not be the case for all tenancies and some tenants may find restrictive clauses present a constraint on their ability to develop a productive and viable business.

There are no general provisions in the 1995 Act which enable a tenant to challenge through dispute resolution a restrictive clause in their lease.

We want to ensure that tenants of 1995 Act agreements (FBTs) are not unreasonably prevented from accessing financial support under the 2023 Act or complying with statutory obligations. The new process would provide an incentive for tenants and landlords to come to a negotiated agreement to avoid the costs of dispute resolution, whilst providing a legislative backstop and a means of resolution for those tenants who cannot reach a reasonable agreement with their landlord.

5. Consultation

The Agriculture (Wales) White Paper set out Welsh Government's proposals to introduce new dispute resolution provisions for 1986 Act tenancies, and asked whether the proposals should be extended to FBTs. No clear pattern emerged, with conditional support appearing to be more prevalent amongst a small subset.

Those in favour of extending the provisions to Farm Business Tenancies (FBT) felt market conditions limit tenants' power and influence to renegotiate agreements. Whereas those opposed noted the flexibility of the FBT framework has resulted in fewer disputes, and felt any further change could undermine the law of contract and confidence in the let sector.

On balance, Welsh Government decided to proceed with an amendment to the 1986 Act only. However, some stakeholders continued to make strong representations to Welsh Government as the Bill progressed through the Senedd. Subsequent discussions suggested existing provisions within the Act do not, in practice, offer a comprehensive route to vary clauses in FBTs that extend beyond tenants' improvements, or which are the subject of a consent clause. As a result, some tenants may find their ability to vary restrictive clauses within their lease limited, particularly given their often weak negotiating position. This could then limit their ability to access financial support or comply with statutory obligations, thus risking financial loss and penalties.

Welsh Government conceded there could be a gap in provisions, albeit minimal, and amendment could remove ambiguity in the application of the current rules and be of benefit in a small number of cases without detrimental impacts elsewhere.

Part 2 - Regulatory Impact Assessment

1. Options

Option 1 – Do Nothing

Maintaining the status quo was considered. Without recourse to this dispute resolution mechanism some tenants may be unreasonably prevented from complying with statutory obligations, risking financial penalties for the tenant and impacting on our ability to deliver against our key strategic objectives e.g. in relation to public health issues associated with agricultural emissions.

Option 2 – Do Minimum

A potential alternative to making legally binding regulations would be for Welsh Ministers to issue non-statutory guidance.

This would mean Welsh Ministers issuing guidance on resolving disputes which would not be underpinned by a statutory instrument.

Option 3 - Make new regulations that would introduce a new dispute resolution mechanism

The regulations would enable FBT tenants to refer to dispute resolution any clause in their lease which restricts their ability to access financial support under the Agriculture (Wales) Act 2023 or comply with a statutory obligation.

The details of the dispute resolution mechanism have been developed in consultation with stakeholders.

2. Costs and benefits

The Agricultural Tenancies Act 1995 applies to most tenancy agreements entered into on or after 1 September 1995. These are known as 'Farm Business Tenancies'.

According to Rural Payments Wales administrative data there were 3,300 BPS claimants with FBT leases covering approximately 148,300 hectares of land in 2021. This is equivalent to approximately 20% of BPS claimants and 12% of total BPS claimed area.

Option 1: Do Nothing

This option would maintain the status quo or business as usual. This is the baseline against which the relative costs and benefits of the alternative option is assessed.

Some stakeholders, particularly those identifying with tenants, are of the view there may be an increase in the number of disputes arising between tenants and landlords resulting from transition from the Basic Payment Scheme to future support for farmers. Without recourse to dispute resolution in these circumstances, some tenants may find themselves restricted from accessing financial support under

the Agriculture (Wales) Act 2023 and complying with statutory obligations, potentially impacting upon the financial position of the business and impacting to some extent on our ability to deliver against our key strategic objectives in relation to the climate emergency and 'net zero' ambition, public health issues associated with agricultural emissions and reversing the decline in biodiversity.

Option 2: Do Minimum

Under this option, the Welsh Government would produce and publish non-statutory guidance aimed at helping tenants, landlords and their advisers take a positive and practical approach to reviewing and agreeing requests to vary agricultural tenancy agreements. The guidance would build on the Tenancy Reform Industry Group (TRIG) [Code of Good Practice for projects, schemes or works requiring landlord's consent in agricultural tenancies](#). Parties are unlikely to be immediately familiar with this Code, therefore there are not expected to be any additional familiarisation costs.

There would be a one-off cost to Welsh Government, which is estimated to be approximately £3,500. This would be met from Welsh Government departmental budgets.

Staff Grade	Staff cost ¹	Daily Rate (£) (divided by 220)	Days	Sub-total (£)
Deputy Director	£120,174	546	0.5	£273
Legal services, Grade 7	£86,731	394	2	£788
Policy lead, Higher Executive Officer	£52,774	£240	10	£2,340
TOTAL				£3,460

1. Welsh Government average staff cost figures for 2022-23. Figures include on-costs.

Option 3: Make new regulations that would introduce a new dispute resolution mechanism.

This option will enable FBT tenants to refer to dispute resolution requests for landlords' consent to an activity that is restricted by the terms of their tenancy, or to a variation of the terms, where no agreement in respect of the request has been reached with the landlord. The request must be made for the specified purpose of complying with a statutory obligation or accessing financial assistance under the 2023 Act.

Supporting tenants, who may otherwise have been restricted, to bring their farm up to compliance, and access financial assistance will help improve the financial position of the business, whilst securing the delivery of public goods. This will have benefits for the rural economy whilst helping deliver on several Welsh Government's key strategic aims in relation to the climate emergency and 'net

zero' ambition, public health issues associated with agricultural emissions and reversing the decline in biodiversity.

Where agreement cannot be reached, disputes can be referred to an independent arbitrator or third-party expert (where both parties agree). The regulations contain conditions that ensure a fair and balanced approach is taken between tenants and landlords' interests.

The regulations may increase the total number of disputes that arise. For each new case there will be a cost to business that may be borne either by the landlord, the tenant or both (depending on the nature of the case).

There will be time costs to each individual, however this will vary on a case-by-case basis. The undisclosed nature of many negotiations and disputes that have arisen between agricultural tenants and landowners to date make it impossible to identify the true number and associated costs. It is also impossible to know the exact number of new disputes that will arise because of this provision and quantification risks excessive misjudgement.

However, we anticipate the proposal will only impact a small subset of the FBT sector. We expect in most instances the new process will provide an incentive for tenants and landlords to come to a negotiated agreement to avoid the costs of dispute resolution, and the proposed amendment encourages prior negotiation. The provisions will only be relied upon as a last resort by a very small minority who cannot reach negotiated agreements.

It is anticipated the regulations may give rise to no more than five to ten new disputes per annum (less than 1% of FBT agreements). necessitating the appointment of arbitrators. Industry experts advise, most disputes (99%) are settled without the need for full arbitration, with only 1% going through the entire process. This would equate to at most one dispute going to full arbitration per annum.

Arbitrators may be appointed directly by the parties concerned where they can reach agreement on who that should be, or failing agreement, a person appointed by the Agricultural Law Association (ALA), Central Association of Agricultural Valuers (CAAV) or the Royal Institution of Chartered Surveyors (RICS). The Agricultural Holdings (Fee) Regulations 1996 currently sets the appointment fee at £195.

Advice from CAAV estimates the average cost of full arbitration is approximately £25,000. This includes the cost of an arbitrator's time and associated fees for legal representation.

Costs are reduced where arbitrators are appointed but agreement reached between parties without the need for full arbitration. CAAV estimate this to be in the region of £15,000 per case, mainly through avoided legal fees.

Expert determination is a cheaper and quicker alternative to arbitration. Rather than parties presenting their case to an arbitrator appointed on a unilateral reference,

they agree to appoint a third party who should have expertise in the issue over which there is disagreement. This person reviews the evidence and decides how to settle the dispute. The decision is binding and can only be appealed or challenged in exceptional circumstances. The process usually takes three to six months and is estimated to cost £5,000 on average according to TRIG's assessment in 2014 to inform the Deregulation Act 2015. This will have risen to approximately £6,700 based on the Bank of England's inflation calculator¹.

Based on data from the Office for National Statistics (ONS)' Annual Survey of Hours and Earnings (2023), the average cost per hour of a farmer's time is £14.95 (average for all employees in the agriculture, forestry and fishing industry, excluding overtime pay). Identifiable time in disputes could reasonably be estimated at 15 hours of tenant time. Taking into account 30% on costs, this equates to approximately £290 per dispute. At the higher end of the scale, industry experts advise compulsory purchase assessments often now see farmer time at £35/hour. Including 30% on costs, this would equate to approximately £680 per dispute. The same range of costs is assumed for landlord time on the basis the majority of landlords are private owners, rather than traditional institutions or Local Authorities. Identifiable landlord time could reasonably be estimated at 5 hours dispute, making the range of costs £100-£230 per dispute.

There will also likely be minor administrative costs to Welsh Government associated with communicating the changes through channels such as Gwlad and existing networks. It is assumed there will be no familiarisation cost to arbitrators or experts as they will already be familiar with the changes in England.

Based on the above assumption, we estimate the total cost to business to be between £82.9k and £169k per annum from implementation through secondary legislation as set in Table 1. Exact costs will differ depending on the number and nature of disputes that arise.

¹ [Inflation calculator | Bank of England](#)

Table 1: Estimated costs

		Number of cases	
Type	Range of costs per case	Scenario with assumed negotiated cases	Scenario with assumed expert determined cases
Full arbitration	£25,000	1	1
Negotiated	£15,000	9	0
Expert determination	£6,700	0	9
Tenant time	£290 - 680	10	10
Landlord time	£100-230	10	10
TOTAL		£169,100	£90,500

For some, the costs and time required to go through the process could deter individuals and businesses from utilising the provisions. Only those who perceive the likely benefits to be greater than the costs will consider arbitration as a viable option. However, we anticipate the provisions will act as an incentive for tenants and landlords to come to a negotiated agreement to avoid the costs of dispute resolution, whilst providing a legislative backstop to those who cannot reach a reasonable agreement.

On balance, this option is deemed to provide a fair and proportionate approach. It limits the circumstances in which tenants may seek to overturn restrictive clauses in their leases and ensures a balanced approach is taken to the interests of both landlords and tenants. Whilst there is some cost to business, this is anticipated to be minimal as the main benefit of the regulations will be to incentivise tenants and landlords to come to a negotiated agreement.

3. Competition Assessment

These Regulations are not expected to impact on levels of competition in Wales or the competitiveness of Welsh businesses.

4. Post implementation review

The impact of the regulations will be monitored through ongoing engagement with stakeholders.