AGRICULTURAL LAND TENURE:

ENVIRONMENTAL PRINCIPLES AND PRACTICE

JENNIFER M. BISHOP

THESIS SUBMITTED FOR THE DEGREE OF

DOCTOR OF PHILOSOPHY

DEPARTMENT OF LAW, UNIVERSITY OF WALES, ABERYSTWYTH

SEPTEMBER 1999
To Chris, Mark and Hugh, with my love.
ACKNOWLEDGEMENTS

Most importantly, I would like to thank Professor Chris Rodgers for his very patient and learned supervision of this project. It has not been easy working from such a distance, and yet he has always been available when needed and has been a stimulating source of advice and encouragement. I would also like to mention all the staff at Aberystwyth, in the Law Department and the library who have helped me to overcome the logistical difficulties of being registered in Wales whilst living in Birmingham and then Cambridge.

Secondly, I am much indebted to the National Trust for financial and other assistance, and, in particular for the completely open access I have had to their records and their staff. This has been invaluable. I would especially like to thank John Young and Roger Richardson for all their help on this project, and generally.

Many organisations and individuals have assisted in the Interview Survey, either by participating directly, or by assisting in the planning process. To all of these I offer my sincere thanks, and particularly to the farmers who were so accommodating when, in one region, deep snow disrupted my schedule. On my travels, I found plenty of time to admire the landscape, and the photographs in the thesis record some impressions of the farms visited.

Finally, I would like to thank my husband Chris for his enthusiasm and his good-natured and loving support, and all of the family and friends who have given me so much encouragement over what turned out to be a longer period than intended, thanks to the arrivals of our two wonderful sons, Mark and Hugh.

Cambridge, September 1999
DECLARATION AND STATEMENTS

DECLARATION

This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree.

Signed.................................................. (Jennifer M Bishop)  
Date.....................................................

STATEMENT 1

This thesis is the result of my own investigations, except where otherwise stated.

Other sources are acknowledged by footnotes giving explicit references. A bibliography is appended.

Signed.................................................. (Jennifer M Bishop)  
Date.....................................................

STATEMENT 2

I hereby give consent for my thesis, if accepted, to be available for photocopying and for inter-library loan, and for the title and summary to be made available to outside organisations.

Signed.................................................. (Jennifer M Bishop)  
Date.....................................................
SUMMARY

This thesis examines the influences of law and policy on the incorporation and implementation of conservation provisions in agricultural tenancy agreements, and the effect of the Agricultural Tenancies Act 1995 on the environmental management of tenanted farmland. It includes an analysis of qualitative empirical data collected by an extensive Interview Survey of tenant farmers, and of the executive staff, land agents and countryside wardens of landlord organisations.

Chapter 1 contains an overview of the historical and legislative background, a brief comparison with other jurisdictions and a literature review. This is followed by three technical chapters setting out the law and policy issues raised by i) the Agricultural Holdings Act 1986, ii) the Agricultural Tenancies Act 1995, and iii) EU and Government environmental incentive schemes.

A full methodology of the Interview Survey is included in Chapter 5, which also describes the composition and the characteristics of the final sample. The following three chapters give an account of the interview data with respect to i) the attitude of farmers towards conservation practice generally, ii) the operation of the landlord/tenant relationship in this context, and iii) the interaction of tenancy issues with Government incentive schemes.

Conclusions are then drawn in the final chapter, and recommendations made for law and policy change and the institution of good practice in the pursuit of environmental benefits on tenanted farmland and the conduct of the landlord/tenant relationship.
CONTENTS

Acknowledgements ................................................................................................................... iii
Declarations and Statements ........................................................................................................ iv
Summary .................................................................................................................................... v
Glossary of Terms ....................................................................................................................... 1

SECTION 1. LAND TENURE AND THE ENVIRONMENT: LAW AND POLICY

Chapter 1. Law and Policy - Background and General Framework

1.1 Introduction ...................................................................................................................... 3
1.2 The Objectives of the Research ....................................................................................... 5
1.3 Brief Methodology ........................................................................................................... 6
1.4 The Legislative Background ............................................................................................ 7
  1.4.1 The Historical Development of Statutory Intervention .......................................... 10
  1.4.2 Post-War Developments ......................................................................................... 12
  1.4.3 The Move towards Farm Business Tenancies ........................................................ 15
1.5 A Comparison with Other Jurisdictions ........................................................................ 18
  1.5.1 General .................................................................................................................... 18
  1.5.2 Northern Ireland ...................................................................................................... 18
  1.5.3 Scotland .................................................................................................................. 19
  1.5.4 Europe ..................................................................................................................... 20
  1.5.5 Outside Europe ....................................................................................................... 22
1.6 Current Trends towards Extensification ........................................................................ 23
1.7 Ownership as a Means of Protection ............................................................................. 26
1.8 Current Developments in Conservation Management ................................................... 27
1.9 Literature Review .......................................................................................................... 28
1.10 Conclusions .................................................................................................................. 32

Chapter 2. Law and Policy - The Constraints of the Agricultural Holdings Legislation

2.1 Introduction .................................................................................................................... 34
2.2 Security of Tenure ......................................................................................................... 36
  2.2.1 General .................................................................................................................... 36
  2.2.2 The Statutory Framework ....................................................................................... 37
  2.2.3 Alternatives to 1986 Act Tenancies ........................................................................ 39
    2.2.3.1 Grazing or Mowing Agreements ..................................................................... 39
    2.2.3.2 Gladstone v Bower Agreements ...................................................................... 41
    2.2.3.3 Ministry Leases and Licences .......................................................................... 42
    2.2.3.4 Share Farming ................................................................................................. 44
    2.2.3.5 Contract Farming ............................................................................................. 46
    2.2.3.6 Partnerships ...................................................................................................... 47
    2.2.3.7 In Hand Farming .............................................................................................. 48
    2.2.3.8 Management Agreements ................................................................................ 48
2.3 Notices to Quit ............................................................................................................... 52
2.4 Succession ...................................................................................................................... 56
2.5 Definition of Agriculture ............................................................................................... 59
2.6 Good Husbandry and Sound Estate Management ......................................................... 60
2.7 Conservation Covenants ............................................................................................... 66
2.8 Remedies for Breach of Covenant.......................... 69
2.9 Freedom of Cropping........................................... 71
2.10 Rent Review Provisions...................................... 73
2.11 Notices to Quit Part............................................. 75
2.12 Compensation for Improvements....................... 77
2.13 Fixed equipment.............................................. 78
2.14 Compensation for Dilapidations....................... 81
2.15 Unwritten or Inadequate Tenancy Agreements....... 82
2.16 The Arbitration Process and the Agricultural Land Tribunal... 82
2.17 Conclusions.................................................... 83

3.1 Introduction...................................................... 85
3.2 The Main Implications of the 1995 Act.................. 87
3.3 The Nature of Farm Business Tenancies................. 89
3.4 Short-termism................................................... 94
3.5 The Integration of Conservation and Tenancy Policies. 98
3.6 The Degree of Agricultural Use.......................... 102
3.7 Rent Levels...................................................... 105
3.8 Improvements and Compensation....................... 107
3.9 Repairs and Fixed Equipment............................ 110
3.10 Dispute Resolution........................................... 111
3.11 Conclusions.................................................... 112

Chapter 4. Law and Policy - EU and Government Instruments for Conservation
4.1 Introduction...................................................... 114
4.2 Contractual Measures......................................... 114
  4.2.1 Environmentally Sensitive Areas.................... 116
  4.2.2 Nitrate Sensitive Areas................................ 119
  4.2.3 Countryside Stewardship.............................. 123
  4.2.4 Tir Cymen and Tir Gofal............................... 125
  4.2.5 National Parks and Local Authority Management Agreements... 127
  4.2.6 Sites of Special Scientific Interest.................. 128
    4.2.6.1 Nature Reserves.................................. 128
    4.2.6.2 SSSIs.................................................. 128
    4.2.6.3 Refusal of Capital Grant........................ 129
  4.3 Precautionary Regulation.................................. 129
  4.4 Measures under the Common Agricultural Policy...... 132
  4.5 Organic Farming............................................. 134
  4.6 Set-Aside....................................................... 135
  4.7 Forestry Schemes............................................ 136
  4.8 Common Land................................................. 138
  4.9 Planning legislation......................................... 140
    4.9.1 Generally............................................... 140
    4.9.2 Listed Buildings and Conservation Areas...... 141
  4.10 Scheduled Ancient Monuments........................ 142
  4.11 Economic Measures......................................... 143
  4.12 Cross-Compliance........................................... 143
  4.13 Conclusions................................................... 144
Cont....
SECTION TWO. LAND TENURE AND THE ENVIRONMENT: THE PRACTICE

Chapter 5. Current Practice - The Methodology for the Interview Survey

5.1 Introduction - Aims and Objectives ......................................................... 147
5.2 Methodological Considerations ................................................................. 149
5.3 Detailed Methodology - Design and Sample ........................................... 151
  5.3.1 Type of Interview .......................................................................... 151
  5.3.2 Pilot Interviews ............................................................................ 153
  5.3.3 The Selection Process ................................................................. 154
5.4 The Composition of the Research Sample ............................................. 155
  5.4.1 The National Trust ................................................................. 157
  5.4.2 English Nature .................................................................... 159
  5.4.3 Countryside Council for Wales ................................................. 160
  5.4.4 RSPB ................................................................................. 161
  5.4.5 County Farms Estates ............................................................. 162
  5.4.6 National Park Authorities ......................................................... 163
  5.4.7 Ernest Cook Trust ................................................................. 165
  5.4.8 Chatsworth Estate ................................................................. 165
  5.4.9 Elan Valley Trust ................................................................. 165
  5.4.10 Other Landlords .................................................................. 167
    5.4.10.1 The Duchy of Lancaster .................................................. 167
    5.4.10.2 The Duchy of Cornwall .................................................. 168
    5.4.10.3 The Crown Estate ......................................................... 168
  5.4.11 Non-Landlord Organisations .................................................... 169
    5.4.11.1 Industry Bodies ......................................................... 169
    5.4.11.2 Conservation Bodies .................................................... 170
5.5 The Characteristics of the Research Sample ........................................... 171
  5.5.1 Details of the Holding and the Legal Arrangement ......................... 172
  5.5.2 Personal Characteristics of the Interviewee ..................................... 175
  5.5.3 The Organisation of the Farm Business ....................................... 179
  5.5.4 Government Conservation Schemes and Conservation Covenants 183
5.6 Detailed Methodology - the Analysis of the Qualitative Data ............... 184
  5.6.1 Background ........................................................................ 184
  5.6.2 A Detailed Description of the Analysis Process ............................ 186
5.7 Conclusions ....................................................................................... 187

Chapter 6. Current Practice - Conservation: Attitudes and Experience

6.1 Introduction - The Analysis of the Interview Data ................................ 189
6.2 Current Attitudes towards Conservation ............................................. 189
  6.2.1 Hobbies and Interests ................................................................ 189
  6.2.2 The Definition of Conservation ................................................ 192
    6.2.2.1 Stewardship/Sustainability ............................................ 193
    6.2.2.2 Good Husbandry ......................................................... 193
    6.2.2.3 A Balance .................................................................... 194
    6.2.2.4 Preservation ............................................................... 195
    6.2.2.5 The Narrow View ....................................................... 196
    6.2.2.6 Conservation in Society .............................................. 196
    6.2.2.7 Public Access ............................................................ 197
    6.2.2.8 Other Responses ......................................................... 197
  6.2.3 Conservation in Farming Methods .............................................. 198
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.2.3.1 Balancing Business with Conservation</td>
<td>198</td>
</tr>
<tr>
<td>6.2.3.2 Issues of Practicality</td>
<td>200</td>
</tr>
<tr>
<td>6.2.3.3 Voluntary Works and Self-interest</td>
<td>201</td>
</tr>
<tr>
<td>6.2.3.4 Financial Implications</td>
<td>202</td>
</tr>
<tr>
<td>6.2.3.5 Animal Welfare Issues</td>
<td>204</td>
</tr>
<tr>
<td>6.2.3.6 Expertise and Information</td>
<td>205</td>
</tr>
<tr>
<td>6.2.3.7 The Influence of Personal Attributes</td>
<td>206</td>
</tr>
<tr>
<td>6.3 The Impact of Land Tenure on Conservation Practice</td>
<td>206</td>
</tr>
<tr>
<td>6.3.1 The Effect of Succession Rights and Term Length</td>
<td>206</td>
</tr>
<tr>
<td>6.3.1.1 Succession Rights</td>
<td>207</td>
</tr>
<tr>
<td>6.3.1.2 Term Length</td>
<td>208</td>
</tr>
<tr>
<td>6.3.1.3 The Benefits of Short-Term Agreements</td>
<td>210</td>
</tr>
<tr>
<td>6.3.2 Conservation Provisions in the Tenancy Agreement</td>
<td>211</td>
</tr>
<tr>
<td>6.3.2.1 Generally</td>
<td>211</td>
</tr>
<tr>
<td>6.3.2.2 The Consultation Process</td>
<td>213</td>
</tr>
<tr>
<td>6.3.2.3 General Views and the Types of Restriction</td>
<td>215</td>
</tr>
<tr>
<td>6.3.2.4 Commercial Implications</td>
<td>216</td>
</tr>
<tr>
<td>6.3.2.5 Animal Welfare Issues</td>
<td>219</td>
</tr>
<tr>
<td>6.3.2.6 Expertise and Information</td>
<td></td>
</tr>
<tr>
<td>6.3.2.7 The Influence of Personal Attributes</td>
<td></td>
</tr>
<tr>
<td>6.3.1.1 Succession Rights</td>
<td></td>
</tr>
<tr>
<td>6.3.1.2 Term Length</td>
<td></td>
</tr>
<tr>
<td>6.3.1.3 The Benefits of Short-Term Agreements</td>
<td></td>
</tr>
<tr>
<td>6.3.2 Conservation Provisions in the Tenancy Agreement</td>
<td></td>
</tr>
<tr>
<td>6.3.2.1 Generally</td>
<td></td>
</tr>
<tr>
<td>6.3.2.2 The Consultation Process</td>
<td></td>
</tr>
<tr>
<td>6.3.2.3 General Views and the Types of Restriction</td>
<td></td>
</tr>
<tr>
<td>6.3.2.4 Commercial Implications</td>
<td></td>
</tr>
<tr>
<td>6.3.2.5 Animal Welfare Issues</td>
<td></td>
</tr>
<tr>
<td>6.3.2.6 Expertise and Information</td>
<td></td>
</tr>
<tr>
<td>6.3.2.7 The Influence of Personal Attributes</td>
<td></td>
</tr>
<tr>
<td>6.4 Conclusions</td>
<td></td>
</tr>
<tr>
<td>7.1 Introduction</td>
<td>222</td>
</tr>
<tr>
<td>7.2 The Choice of Tenant</td>
<td>222</td>
</tr>
<tr>
<td>7.3 The Landlord’s Objectives and Whole Farm Plans</td>
<td>223</td>
</tr>
<tr>
<td>7.3.1 The Landlord’s Objectives</td>
<td>223</td>
</tr>
<tr>
<td>7.3.2 Whole Farm Plans</td>
<td>225</td>
</tr>
<tr>
<td>7.4 The Tenancy Agreement</td>
<td>228</td>
</tr>
<tr>
<td>7.5 A Look at the Actual Documents</td>
<td>231</td>
</tr>
<tr>
<td>7.6 General Relationship and the Decision-Making Process</td>
<td>232</td>
</tr>
<tr>
<td>7.7 Conclusions</td>
<td>239</td>
</tr>
<tr>
<td>8.1 Introduction</td>
<td>240</td>
</tr>
<tr>
<td>8.2 Term Length</td>
<td>240</td>
</tr>
<tr>
<td>8.3 Leasehold Obligations and Government Schemes</td>
<td>241</td>
</tr>
<tr>
<td>8.4 Conservation Covenant Provisions in the 1986 Act</td>
<td>243</td>
</tr>
<tr>
<td>8.5 Tripartite Agreements</td>
<td>244</td>
</tr>
<tr>
<td>8.6 Changes in Occupation</td>
<td>245</td>
</tr>
<tr>
<td>8.7 Monitoring and Enforcement</td>
<td>247</td>
</tr>
<tr>
<td>8.8 Confidentiality and Information</td>
<td>247</td>
</tr>
<tr>
<td>8.9 Reasons for Entry (or not)</td>
<td>248</td>
</tr>
<tr>
<td>8.10 Flexibility</td>
<td>250</td>
</tr>
<tr>
<td>8.11 Practical Difficulties</td>
<td>252</td>
</tr>
<tr>
<td>8.11.1 Boundaries</td>
<td>252</td>
</tr>
<tr>
<td>8.11.2 Husbandry and Animal Welfare</td>
<td>252</td>
</tr>
<tr>
<td>8.11.3 Cultural Differences</td>
<td>254</td>
</tr>
<tr>
<td>8.11.4 The Need for Integration</td>
<td>255</td>
</tr>
<tr>
<td>8.11.5 What happens at the end of a scheme?</td>
<td>256</td>
</tr>
<tr>
<td>8.11.6 Accountability and Public Benefit</td>
<td>257</td>
</tr>
<tr>
<td>8.11.7 Financial Implications</td>
<td>258</td>
</tr>
</tbody>
</table>
SECTION 3. LAND TENURE AND THE ENVIRONMENT: CONCLUSIONS

Chapter 9. Conclusions and Recommendations

9.1 Introduction .................................................................................................................. 263
9.2 Legislative Effectiveness and Reform ......................................................................... 264
  9.2.1 The 1986 Act Régime ........................................................................................... 264
  9.2.2 1995 Act Régime .................................................................................................. 266
  9.2.3 Government Environmental Schemes ................................................................. 269
9.3 Good Practice ............................................................................................................... 272
  9.3.1 The Type of Legal Arrangement .......................................................................... 273
  9.3.2 The Type and Style of Documentation ................................................................. 274
  9.3.3 Conservation Covenants ....................................................................................... 275
  9.3.4 Negotiation and Relationships .............................................................................. 277
  9.3.5 Monitoring and Enforcement ................................................................................ 278
9.4 The Position of Tenancy Matters in the Wider Picture ............................................... 279
9.5 The Application of Principles to General Environmental Control .............................. 280
9.6 Final Conclusions ........................................................................................................ 280

SECTION 4. APPENDICES AND BIBLIOGRAPHY

Appendix 1. The Rules of Good Husbandry ..................................................................... 285
Appendix 2. Interview Schedule (Executive) ..................................................................... 287
Appendix 3. Letter 1 ............................................................................................................ 292
Appendix 4. Letter 2 ........................................................................................................... 294
Appendix 5. Letter 3 ............................................................................................................ 296
Appendix 6. List of Interviewees ........................................................................................ 299
Appendix 7. Interview Schedule (Farmers) ...................................................................... 303
Appendix 8. Interview schedule (Wardens/Land agents) ................................................ 309
Appendix 9. National Trust Standard Conservation Clause ........................................... 313
Appendix 10. Example Contents Page of a Farm and Environment Plan ....................... 316
Appendix 11. Recommendations ........................................................................................ 318
Bibliography ......................................................................................................................... 322
GLOSSARY OF TERMS

This is a glossary of the way in which various terms have been used in this thesis. The definitions are not intended to be over-technical, and often there are legitimate alternatives. The intention is to lay down a set of definitions at this stage that will enable the text of the thesis to be read without interruption or confusion.

Conservation:

We use conservation in its widest sense, to include the processes involved in the creation and protection of all aspects of the rural environment, that is, in accordance with Schedule 3 of the Agricultural Holdings Act 1986, flora or fauna, geological or physiological features, buildings or other objects of archaeological, architectural or historic interest and the natural beauty and amenity of the countryside and its enjoyment by the public.

Environment:

Similarly, environment is given an all-inclusive meaning in this project to take in all aspects of the rural environment, including non-tangible ones such as air and water quality.

Extensification:

We use extensification in a non-technical way, and without reference to any legal definitions unless specifically stated, to mean a move towards farming in a way that is less intensive of inputs in any respect.

Husbandry:

Good husbandry does have a legal definition (see Appendix 1), but husbandry is also used in a non-technical sense to refer to agricultural rather than environmental management practices.

Diversification:

The word diversification is used to refer to the introduction of any enterprise on a holding that is not purely agricultural. This may or may not include an environmental element.

Set-aside:

We often use set-aside as a non-specific generic term to include all those EU and Government policies that include an element of payment for ceasing agricultural production on an area of the holding.
CHAPTER 1

Law and Policy - Background and General Framework

1.1 Introduction

In England and Wales, the legal complexity associated with the institution and enforcement of covenants over land, and the inadequacy of other mechanisms for influencing rural land use and agricultural practices, make the outright acquisition of freehold ownership the most certain means of protecting land of conservation value. However, even when land is owned by an appropriate body, the constraints of the Agricultural Holdings legislation and other legal processes can hinder the effective management of agricultural land for conservation.

In September 1995, following a long period of consultation, the Agricultural Tenancies Act 1995 came into force. This reform had been driven by other objectives, primarily by the need to stimulate the letting market, but it provided an opportunity to review the role of land tenure law in promoting and facilitating conservation on tenanted farmland.

Although, in general, the tenanted sector for agricultural land has been declining over recent years\(^1\), conservation bodies, unaffected by purely economic considerations, have remained interested in mechanisms enabling third parties to manage their land. Of the land-owning conservation charities, the National Trust has the greatest number of agricultural holdings, over 700 in the form of whole farms, and a further 1300 arrangements for the letting of

\[^1\text{From 48.3\% of agricultural land in England in 1970 to 35.6\% in 1994 according to the June agricultural and horticultural census (Parliamentary Written Answer, 253 HC Debs., col. 850 (2 February 1995).}\]
blocks of land in one form or another. It also has considerable experience of managing this type of holding for the preservation of its important features. Indeed, it is under a statutory obligation to do so. Conservation prescriptions are routinely incorporated in its new agricultural lettings and, by agreement, in existing or succession tenancies. Other conservation charities with significant land holdings include the Royal Society for the Protection of Birds (RSPB) and the local Wildlife Trusts of the Royal Society for Nature Conservation (RSNC). English Nature, the Countryside Council for Wales and National Park authorities also own or lease large areas of farm land and, in addition, there are other charitable and non-charitable institutions with an interest in these matters, but with constitutional or financial constraints on their conservation activities. These include the water companies, the Crown Estate, the Ministry of Defence, the Church Commissioners and the County Councils. Private individuals are under no constitutional constraints but economic considerations certainly affect the extent to which conservation benefits are sought on their farmland.

All of these groups are now seeking effective mechanisms for securing their conservation and other objectives on agricultural land in the light of the 1995 Act. It will be important for what we might call the "conservation landlord" to explore the options available and to minimise the effect of the restrictions imposed by the legal framework. While looking at these issues, it will be possible to recognise the wider application of the principles involved to contractual

---

2 National Trust draft Agricultural Policy (September 1999).

3 The National Trust for Places of Historic Interest or Natural Beauty was established "for the purposes of promoting the permanent preservation for the benefit of the nation of lands and tenements (including buildings) of beauty or historic interest and as regards lands for the preservation (so far as practicable) of their natural aspect features and animal and plant life" (National Trust Act 1907 s.4).

4 See Ch 2, Section 2.4 for detail of the law of succession.

5 The Government agencies charged with wildlife protection in England and Wales respectively. See Schedule 7 Environmental Protection Act 1990.
arrangements in the field of environmental protection generally, and to land management agreements in particular.

1.2 The Objectives of the Research

It is the intention of this thesis to identify the constraints, both legislative and practical, which inhibit the effective management of agricultural tenanted land for conservation and to recommend means by which they might be overcome. This will include an assessment of the different types of arrangement and an examination of the best practice to be adopted in negotiation and management decision making. In the process, it is anticipated that various factors will emerge as being significant and which might inform the wider debate on the use of contractual measures to achieve environmental objectives.

Specifically, the following aspects will be considered:

- the current legislative framework and the constraints it imposes
- the recent reform and the opportunities arising as a result
- the types of legal arrangement best fitted to the achievement of effective conservation management on tenanted land
- the factors determining such effectiveness and the role of other influences
- the role of professional advice and legal documentation and the style and content of negotiations and agreements
- the nature of recurring disputes and uncertainties and the best means of minimisation and resolution
- the need to balance agricultural and environmental objectives and to maintain viable farm businesses on tenanted farms

- the many variables which affect the choice of arrangement and management prescriptions e.g. Government designations and available grant schemes, landscape and farm types, the significance of particular features, the circumstances of the tenant, financial considerations etc.

- the land management implications of short term arrangements and the relative effectiveness of prescriptions and incentives.

1.3 Brief Methodology

A literature search and general enquiry (by way of letter, telephone and interview) of appropriate bodies established a detailed overview of the current legal framework, the location of the most useful information and the prospect of co-operation. This was followed by a structured survey of the executive staff, tenant farmers and land managers of relevant organisations. The survey was primarily by way of interview, as this was thought likely to be more effective than a postal survey in these circumstances. However, some additional questionnaires were used, either by letter or telephone.

Although the focus of the research centred on National Trust tenants, licensees, land agents and other countryside managers, interviews were conducted with those from other organisations as well as with those within the National Trust. In addition, a cross-section of land types and arrangements was represented, as it is was expected that variations would occur where designations, farm size, landscape and personal circumstances differed. The number and distribution of interviewees was based on certain geographical areas. The selection of interviewees took place following discussions with the landlord organisations in
each case, but situations where relationships were difficult were not deliberately avoided. Lists were supplied of suitable candidates from which a random selection was made. In addition, attention was given to those arrangements, not necessarily in the chosen areas, which were known to be innovative, unusual or illustrative of a particular problem or success.

An analysis of the results of the Interview Survey enabled conclusions to be drawn from the data collected. These cannot be presented in a purely statistical format. Rather, a broader, more qualitative analysis, particularly suited to this type of data, produced detailed conclusions from the comments of the interviewees which are useful in identifying the need for reform and in formulating recommendations for future practice.

1.4 The Legislative Background

On 9th May 1995 the Agricultural Tenancies Act 1995 (the 1995 Act) received Royal Assent and it was effective from 1 September 1995. The Act did not affect agreements already in existence at that date, but introduced an ethos of freedom of contract for future agricultural tenancies. Statutory intervention was significantly reduced and there is no security of tenure under the 1995 Act. The legislation was promoted as enabling the effective enforcement of environmental and conservation covenants. Certainly, the emphasis in the 1995 Act on freedom of contract will allow greater flexibility in the setting up of innovative arrangements, although there may still be some legal problems with the institution and enforcement of conservation clauses in the new "farm business tenancies". These problems will be explored further below.

---

6E. g. by Earl Howe, Parliamentary Secretary for the Ministry of Agriculture, Fisheries and Food (MAFF) in the Second Reading Debate in the House of Lords (1995 IIL Debs., col. 529 (28 November 1994)). See also Sydenham and Mainwaring (1995) pp. 5-7 and 41-42.

7This is the phrase used to describe agricultural tenancies created under the 1995 Act.
The 1995 Act has now ensured that there will be very few new agricultural lettings governed by the Agricultural Holdings Act 1986 (the 1986 Act), but the old régime will continue to affect pre-existing tenancies, and those granted by way of succession to them, for many years to come. Security of tenure for life, sometimes with succession rights for two further generations, ensures that the turnover of agricultural tenancies is of necessity small, particularly for fully equipped holdings with a dwelling. To that extent, it is important still to consider the constraints imposed on conservation management by the 1986 Act, and this thesis does this to a considerable degree. In addition, the lessons learnt from the 1986 régime can inform the process of devising new arrangements that will secure effective management in the future.

Since the end of the last century, the aim of Government intervention has generally been to give stability and efficiency to the agricultural industry by ensuring continuity and fair treatment for farm tenants. The Agriculture Act 1947 (the 1947 Act) introduced the current regime of security of tenure for agricultural tenants, a security that was enhanced by the succession provisions in the Agriculture (Miscellaneous Provisions) Act 1976. Lord Hailsham's comments in the case of Johnson v Moreton show clearly the public policy elements of the statutory framework, emphasising the long-term nature of farming operations and the need to protect the weaker tenant from the perceived power of the landlord. The

8 See Ch. 3.
9 s.4 of that Act sets out the few occasions upon which a 1986 Act tenancy might arise after 1 September 1995.
10 See Note 12 below and Chapter 2, Section 2.4 for more detail on the statutory succession provisions.
11 The earliest relevant statute, the Agricultural Holdings (England) Act 1875, dealt with compensation for improvements and the treatment of fixtures.
12 Whereby close members of the tenant's family may succeed to the tenancy on two occasions provided that they are suitable and eligible. These rights subsist for all tenancies granted before the Agricultural Holdings Act 1984, when succession was abolished, but not retrospectively.
public policy justification for the legislation is also referred to by Bright and Gilbert (1995) where they point out that "Unlike the commercial sector where the lease provides the tenant with a place to carry out his livelihood, the thing leased in the agricultural sector is the tenant's very livelihood".14

As a result of this security of tenure, letting a farm on a full agricultural tenancy has not been an attractive proposition for landowners. Statutory provisions in the 1986 Act also deal with notices to quit, compensation, rent review, husbandry standards, and freedom of cropping and fixtures, and arbitration procedures are provided for in detail. In addition, favourable tax treatment of owner-occupied farmland has been a further disincentive to letting. In fact, this may have been the more important influence in the decline of the tenanted sector, although some changes have now been made in the Finance Act 1995 to alleviate this effect.15

For the conservation landowner, however, there have been further disadvantages that have discouraged the use of full agricultural tenancies. Where a piece of land is of particular sensitivity or environmental value, the consequences of having a secure tenant who persistently disregards requests to modify his or her farming practice could be especially severe. Environmental damage is not often easily remedied and the legal processes involved in enforcing obligations or obtaining possession are difficult and slow, thereby increasing the risk of further damage in the interim. For these reasons, conservation landowners, in the same way as others, have made use of Gladstone v Bower tenancies, Ministry approved lettings

13 [1978] 3 All ER 37 at pp. 48, 49.
14 At p. 585.
15 S. 155 permits 100% agricultural property relief in respect of land let on or after 1st September 1995.
16 In Gladstone v Bower [1960] 2 QB 384 the Court of Appeal held that a fixed term tenancy of more than 12 months but less than two years is not converted to an annual tenancy with security under ss. 2 and 3 of the 1986 Act. See Section 2.2.3.2 of Chapter 2 for more detail.
or licences\textsuperscript{17}, grazing or mowing agreements\textsuperscript{18} and even share farming and contracting arrangements to avoid secure tenancies. These latter two also permit a higher level of day to day influence over the management of the holding.

The attitude of the conservation landowner can, of course, be distinguished from that of other landowners, and the Agricultural Holdings legislation also causes problems for the \textit{tenant} who wishes to pursue conservation when the landowner is not sympathetic to such practices. In particular, participation in Government environmental incentive schemes and set-aside régimes has left some tenants vulnerable to claims of bad husbandry, notwithstanding the limited protection of clauses added to the legislation in 1984\textsuperscript{19}. This inconsistency and incompatibility between tenancy and incentive scheme issues is discussed further in Chapters 4 and 8\textsuperscript{20}. We go on now to look at the historical development of agricultural holdings legislation and its influence in the context of conservation management.

\textbf{1.4.1 The Historical Development of Statutory Intervention}

The first statutory intervention in the agricultural landlord/tenant relationship that was favourable to the tenant occurred in 1875. Prior to this, tenancies had been governed by the common law\textsuperscript{21}. So, normally, the parties would reach an agreement and the terms of the agreement would govern the relationship, unless they were unclear, or the agreement did not cover the point in question. In either of these cases a dispute would be decided according to

\textsuperscript{17} Under ss.2 or 5 of the 1986 Act. See Section 2.2.3.3 of Chapter 2 for more detail.

\textsuperscript{18} Under the exclusion in s.2(3)(a) of the 1986 Act. See 2.2.3.1 of Chapter 2 for more detail.

\textsuperscript{19} Paras. 9(2), 10(1)(d) and 11(2) of Part II of Schedule 3 of the 1986 Act. See Ch. 2, Section 2.7 for more detail.

\textsuperscript{20} See also Rodgers in Howarth and Rodgers (1992) pp.150-163.

\textsuperscript{21} Apart from a few incursions of statutes to assist a landlord, such as the Landlord and Tenant Act 1730, giving a right to claim double rent in specified circumstances if a tenant did not vacate premises when legally required to do so.
the established principles of the courts. These principles had developed over many years in the context of a feudal system, which often depended on widely varying local variations in custom. It would not be inaccurate to suggest that it generally favoured the interests of the landlord, and that the courts had used these occasions over the years to impose various overriding duties on an agricultural tenant. For example, a tenant should observe a standard of good and husbandlike management and cultivation of the land according to the custom of the country22 and should keep buildings wind and watertight23. There were no reciprocal implied duties imposed upon the landlord of an agricultural holding, and no implied rights or benefits enjoyed by the tenant other than those conferred by the tenancy agreement itself24.

In 1848, a committee was set up by Parliament to report on this admittedly unsatisfactory position. Specifically, it was to consider the desirability of granting to an agricultural tenant a guaranteed right of compensation for improvements at the end of a tenancy, but legislation on this matter did not reach the statute books until 1875, in the form of the Agricultural Holdings (England) Act 1875 (the 1875 Act). This introduced a form of compensation for improvements, which was based on that forming part of the Lincoln custom, and a limited right to remove fixtures. Also, for the first time, there would be a formal procedure for the resolution of disputes, with a right of appeal to the County Court. However, it was not until the Agricultural Holdings (England) Act 1883 that contracting out of these provisions was prohibited and, in the intervening years, the terms of the 1875 Act were routinely excluded from tenancy agreements by landlords. Recognition of the particular nature of agricultural operations was also apparent in this later Act in that the period of notice necessary for

22 Powley v Walker (1793) 5 Term Rep 373, Onslow v - (1809) 16 Ves 173, Horsefall v Mather ((1815) Holt NP 75. A review of these cases was conducted in the later case of Wedd v Porter [1916] 2 KB 91.

23 Auworth v Johnson (1832) C & P 239.
terminating an agricultural tenancy was extended from the usual six months to a period of one year, unless the parties agreed otherwise. Densham suggests that this provision contained the first germs of what later became security of tenure\textsuperscript{25}, although this assessment might be a little exaggerated, considering that it would be another sixty years before one would see fruition of this concept.

In the intervening period, the Agricultural Holdings Acts of 1890 and 1906 refined the arbitration procedures available where the tenancy agreement made inadequate provision, and added various of the statutory principles that we would recognise in today’s legislation, for example freedom of cropping, compensation for damage by game and compensation for disturbance. All these provisions were consolidated in the Agricultural Holdings Act 1908. However, further amendments in 1913, 1914 and 1920 necessitated further consolidation in 1923, bringing the law relating to compensation very much to the state in which it remained until our most recent legislative changes. It was then not until 1947 that major developments again took place, with the introduction of security of tenure.

1.4.2 Post-War Developments

Following the end of the Second World War in 1945, a preoccupation with self-sufficiency, after war-time fears of a blockade, fuelled discussions and then new legislation on the agricultural tenure system in the United Kingdom. In addition, the structure of farm support schemes and the taxation system simultaneously encouraged expansion and intensification. Whilst there had been statutory intervention in the landlord/tenant relationship since 1875\textsuperscript{26},

\textsuperscript{24} Other than the inadequate right of emblements (to hold over and take growing crops) - See Densham (1996) p.5.

\textsuperscript{25} Densham (1996) p.6.

\textsuperscript{26} See above.
the balance of power was still very much in the hands of the landlord until the granting of security of tenure to tenants by the mechanisms made available in the Agriculture Act 1947 (the 1947 Act). This Act also established the Agricultural Land Tribunals. Again, however, this legislation was soon repealed by an amending statute, the Agricultural Holdings Act 1948, and further changes were then made in 1949, 1954, 1963, 1968, 1976, 1958 and 1977. What was left of the 1947 Act, however, included the definitions of “good estate management” and “good husbandry” which later became very important in the conservation context.

The other very significant development in agricultural tenancy law came in 1976. The Labour Government of the time, in the Agricultural Holdings (Miscellaneous Provisions) Act of this year (the 1976 Act), introduced succession rights upon the death of a sitting tenant in favour of members of his or her close family, provided that they satisfied certain criteria. This could extend to two further generations, and clearly had major valuation implications for both landlord and tenant. The provisions relating to succession were abolished in the Agricultural Holdings Act 1984 (the 1984 Act) for all new tenancies, following the realisation that the rights were significantly inhibiting the letting market. They remain extant, however, for tenancies created between 1976 and 1984, although the rules were substantially amended in 1984 to include, among other things, a parallel right on retirement to encourage the efficient

---

27 Almost completely replaced the following year by the Agricultural Holdings Act 1948.

28 Agriculture (Miscellaneous Provisions) Acts of these dates.

29 Agriculture Act 1958.

30 Agricultural Holdings (Notices to Quit) Act 1977.

31 See later, in Chapter 2, Section 2.6.
running of businesses, a limitation on the area of land to which one might succeed and a tightening up of the criteria for eligibility\textsuperscript{32} to ensure farming competence.

The whole ethos of security of tenure and succession was a major point of debate during the passing of the Agricultural Tenancies Act 1995, and the implications of these factors for the environmental management of tenanted farmland will later be considered in detail\textsuperscript{33}.

Between the passing of the 1976 Act and the 1984 Act, and particularly in response to fears over the scale upon which financial institutions appeared to be acquiring and managing farmland, a Committee was appointed to make a detailed survey of trends in the ownership and management of agricultural land and to make recommendations for future legislation. The Northfield Report to the Committee of Inquiry into the Acquisition and Occupation of Agricultural Land\textsuperscript{34} was made in 1979. It showed that there was a startling reduction in the amount of tenanted farmland\textsuperscript{35} between 1908 and 1978 and made suggestions as to how to stem a projected further fall, expected to be exacerbated by the security of tenure and succession provisions of the Agricultural Holdings legislation. These suggestions included the institution of a new form of tenancy, without security of tenure, but with some sort of prior consent. The Committee also thought that it would be a good idea to have a code of guidance for agricultural landlords on those sorts of elements which might be desirable in a letting agreement, to update and possibly replace the rules of good husbandry and estate management set out in sections 10 and 11 of the Agriculture Act 1947.

\textsuperscript{32} The so-called commercial unit test and rules of eligibility and suitability.

\textsuperscript{33} See Chapter 2, Sections 2.2 and 2.4.

\textsuperscript{34} Cmnd 7599.

\textsuperscript{35} From 88\% to 43\%, with the true proportion of truly commercial lettings probably falling more realistically in the region of 35-40\%. See Rodgers (1998) p.1.
The 1984 Act was the result of these recommendations, tempered by negotiations between the industry bodies, notably the Country Landowners’ Association and the National Farmers’ Union. Effectively, the loss of new succession rights was traded for a revised statutory rent formula, and new non-secure Ministry lettings were introduced. However, the code of guidance idea was lost\(^\text{36}\).

The new rent formula was to be applied on arbitration where agreement could not be reached on a review. The open market valuation that had been used under the 1948 régime had resulted in high rents, reflecting the scarcity of new lettings brought about by the statutory rules on security and succession, and inflated “key” rents\(^\text{37}\). This formula was therefore replaced by the concept of setting a rent by reference to various factors, including the productive capacity of the holding and its related earning capacity. This change had the effect of setting realistic rents for sitting tenant farmers that were related to the actual productivity and profitability of the holding. However, assumptions were made during the process about the intensity of the agricultural operation, which had implications for the conservation of the important features of the holding, and these will be discussed in Chapter 2\(^\text{38}\).

### 1.4.3 The Move towards Farm Business Tenancies

Prior to 1995, the main statute governing agricultural tenancies was the Agricultural Holdings Act 1986. This was a major consolidating measure\(^\text{39}\) and brought together all the relevant provisions dictating the conduct of the landlord/tenant relationship. It has been the source of

---

\(^{36}\) This idea was revived, although perhaps not knowingly, during the passing of the Agricultural Tenancies Act 1995 and became real in the Guidance Notes prepared by an RICS working group.

\(^{37}\) That is, high rents offered on tender to secure a tenancy, which could be reduced later on review.

\(^{38}\) See Section 2.10.

\(^{39}\) Although it included some substantive amendments to correct outstanding anomalies in the existing legislation - not, though, the well known *Gladstone v Bower* loophole (See Chapter 2, Section 2.2.3.2 ).
many pieces of subordinate legislation concerning procedure and detail and, whilst it has been further amended\(^{40}\), remains important today as the statute which continues to affect tenancies which were in existence on 1 September 1995 or those which come into being as a result of succession to them. The law intervenes in the contractual relationship between the parties in six identified areas. These are essentially those of security of tenure, succession, compensation, provisions supplementing the contractual arrangement, provisions overriding the contractual arrangement and rent review and disputes procedure.

The changes made in 1984, following the Northfield Report, did not stem the decline in the lettings of agricultural land, although short-term arrangements without security of tenure\(^{41}\) remained popular. This decline continued to be the subject of heated debate among the industry organisations and, in particular, the lack of opportunities in the let sector for young new entrants became the cause of much concern. In 1991, as a result of the continued debate and in accordance with the philosophy of the Government of the time, a wide-ranging discussion paper was issued by the Ministry of Agriculture Fisheries and Food containing proposals for the deregulation and modification of the agricultural holdings régime\(^{42}\). The paper rested on three guiding principles:

that the legislation should be deregulated and simplified,

that the letting of land should be encouraged,

\(^{40}\) For example, by the Agricultural Holdings (Amendment) Act 1990, which dealt with the question of a tenant's security on non-agricultural diversification following the Court of Appeal ruling in *Bell v McCubbin* [1990] 1 QB 976.

\(^{41}\) For a description of these, see Chapter 2, Section 2.2

\(^{42}\) Agricultural Tenancy Law - Proposals for Reform (Joint Announcement by the Agricultural Departments, 12 February 1991) MAFF Release 45/91.
and that a framework should be provided which could accommodate change and allow the industry to respond to changes in policy and market conditions.

The vehicle thought best to foster these principles was a system essentially giving freedom to the landlord and the tenant to negotiate the terms and conditions which best suited their needs and circumstances. Whilst the régime in use for business tenancies was considered inappropriate, due to the often close relationship between the parties to an agricultural arrangement, various proposals removing the tightly drawn legislative structure of the Agricultural Holdings legislation were put forward for consultation in the bid to create what would be known as a Farm Business Tenancy.

In particular, the parties would be free to negotiate the length of the term of the tenancy, appropriate rent, notice and dispute resolution provisions, and suitable repair and management obligations, while some fallback regulation would be retained for compensation for improvements and the removal of fixtures and fittings. These proposals, with substantial changes brought about by a long, and sometimes difficult, period of debate and negotiation, have now become the Agricultural Tenancies Act 1995. The detailed provisions of the 1986 Act insofar as they affect environmental management are discussed fully in Chapter 2 of this thesis, and it is this subject and the subsequent effect of the 1995 Act on these matters, considered in Chapter 3, which form the core of this thesis. The discussion of the technical points raised in these chapters is illustrated and expanded in the treatment of the empirical interview survey, which is described and analysed in Chapters 5 to 8. Conclusions are drawn and recommendations made in Chapter 9.
1.5 A Comparison with Other Jurisdictions

1.5.1 General

This thesis deals only with the position in England and Wales, the legal régimes in Scotland and Northern Ireland being significantly different in some respects. However, some comparison is worthwhile. Similarly, it is worth looking briefly at some of the land tenure systems in place on the Continent, insofar as these jurisdictions too are affected by European environmental legislation and are considering the interplay between traditional patterns of letting, under their own legislative codes where in place, and the need to extensify to reduce production and satisfy the demand for environmental goods.

1.5.2 Northern Ireland

In Northern Ireland, the main vehicle for the letting of agricultural land is the conacre agreement. This is a short-term agreement, normally for eleven months, and running from 1st December in one year to the 31st October in the next. The annual break is to ensure that no greater legal rights accrue to the tenant, but in fact there is a culture of constant renewal, although the land might equally well be let to a different party each year. Lettings can be for a specified crop, for example potatoes, cereals or silage, and are usually arranged in the November of each year. Rents are characteristically high for conacre lettings.

The environmental implications of the conacre system are similar to those for the use of grazing licences in England and Wales, primarily connected to the short-term nature of the arrangements. The other significant factor is the division of holdings over the years into very small parcels, making the integration of management in a geographical area very problematic. This, and the conacre system are peculiar to the Northern Ireland situation.
1.5.3 Scotland

In Scotland, on the other hand, there is much similarity with the situation in England and Wales prior to the passing of the 1995 Act. There is, therefore, no equivalent to the freedom afforded by the farm business tenancy and lettings are still heavily prescribed by statute, namely the Agricultural Holdings (Scotland) Act 1991. The régime includes security of tenure, compensation for improvements, freedom of cropping and other provisions similar to those contained in the 1986 Act for England and Wales, although the succession provisions are more favourable to the tenant, allowing almost indefinite security of tenure subject to certain conditions being satisfied. There is little scope for the provision of conservation clauses in tenancy agreements, although there is provision in s.26(2) of the 1991 Act to protect tenants acting in compliance with the Control of Pollution Act 1974 from notices to quit based on bad husbandry. The same preoccupations exist with regard to good husbandry and sound estate management in Scotland as in England and Wales. The case of Cambusmore Estate Trustees v Little illustrated this, as the court considered the position where a tenant had leased the whole of a farm’s milk quota and was conducting negligible management of the holding.

As a result of the statutory constraints, full-blown agricultural lettings have become unpopular in Scotland. This was illustrated by research commissioned by the Royal Institution of Chartered Surveyors and conducted by the University of Aberdeen. It showed that, in a survey of just over 1000 landowners, 56% of let land was occupied under so-called

---

43 Agnew of Lochnaw (1996)

44 [1991] SLT (Land Ct) 33. Schedule 6 to the Agricultural Holdings (Scotland) Act 1948 allows no discretion to refuse a certificate of bad husbandry if the rules are prima facie broken.

45 This case is discussed in more detail in Ch 2, Section 2.6.

unconventional tenancies. Of these the most popular arrangement was the fixed term limited partnership\textsuperscript{47}, which constituted 41\% of new lettings since 1976, notwithstanding some doubts as to its legal standing and effects on taxation\textsuperscript{48}. The predominance of the limited partnership substantiated the claims made in research by McDermott in 1988\textsuperscript{49}. The main reason for this type of arrangement was stated to be the fact that it permitted recovery of possession at the end of the term. Following publication of this research, the political drive for legislation on the English model has intensified, although, as in England and Wales, agreement cannot be reached among the industry bodies as to the most appropriate developments\textsuperscript{50}.

1.5.4 Europe

In Europe, the public interest element of agricultural efficiency and the protection of family farms have meant that in almost all of the EU jurisdictions there is some state regulation of agricultural holdings. This varies in its extent, and in some instances in its intent\textsuperscript{51}, but there are several common threads that are also recognisable from the 1986 Act system in the UK\textsuperscript{52}. One of these is the concept of security of tenure, although this is more often achieved through the mechanism of a minimum term length than by the statutory conversion process known to

\textsuperscript{47} Whereby a tenancy is granted to a partnership consisting of the landowner as limited partner and the farmer as general partner, with the landowner contributing a (usually nominal) sum of capital to the business.

\textsuperscript{48} Walter (1993) p.3.

\textsuperscript{49} MacDermott (1988).

\textsuperscript{50} Although Agnew of Lochnaw (1996) suggests that, in a climate of agricultural surplus, it seems clear that the current policy "is not entirely apposite". p.5.

\textsuperscript{51} For example, in Denmark lettings of whole farms are rare and there is consequently little tenant protection, although holdings are tightly regulated for the purpose of protecting family farms. In Norway there is no regulation for lettings under 10 years, but longer leases need approval and there are certain rent controls.

\textsuperscript{52} Details of the different land tenure arrangements can be found in Grossman and Brussaard (1992) from which much of the material in this section is derived.
UK tenants\(^{53}\). In Belgium, an agricultural letting must last for at least 9 years, although this would roll on for a further 9 years (and so on indefinitely) unless a notice to quit is served in certain restricted circumstances. There is also a right of pre-emption for the tenant on a sale of the freehold, as there is in the Netherlands. France also has a minimum term of 9 years, while in Italy it is 15 years, and in the Netherlands 12 or 6 years depending on whether it is a fully equipped holding or bare land. In Germany, the system works slightly differently, in that a Tribunal has the power to extend a letting to 18 years (fully equipped) or 12 years (bare land)\(^{54}\).

With regard to the impact of tenancy systems on the environmental management of farmland, this varies to the extent that the member states have actually sought to implement EU environmental initiatives. Generally EU law has not much affected the traditional tenancy laws, and concepts of good husbandry and profitability govern the intensity of the farming. Often the freedom of the tenant to decide on the operation of the business impedes the landlord's involvement in the same way as it would have done under the 1986 Act system in the UK.

In Belgium, the tenant's freedom of husbandry is framed in terms of agricultural efficiency and exists only so long as he or she proves to be a good farmer and runs a business selling crops and cattle. The landlord has a right to expect the return of the holding in the state in which it was originally let. In France, while some amendments to the tenancy legislation have been made to facilitate diversification, bad husbandry can still be a legitimate statutory cause for termination. The measure of husbandry does, though, appear to be based on levels of income rather than damage to the holding. In Germany, also, the gauge to be used by the

\(^{53}\) See s.2 Agricultural Holdings Act 1986, and Rodgers (1998) Chapter 5, p.121 ff. See also Ch 2, Section 2.2.2.
Tribunal is the profitability of the farm when considering whether a tenant has conducted his or her business in an ordinary manner. Similar considerations apply in Italy, where under the Civil Code, and under the more traditional customary, almost feudal, regimes of *mezzadria* and *colonia parziaria*, the tenant must aspire to an efficient standard of production, having regard to the future productivity of the holding\(^{55}\).

In régimes such as these, where, as in the UK, agricultural productivity is the measure of acceptable management, the use of conservation provisions in tenancy agreements is bound to be rare. Indeed, in the Netherlands, as with others, it used to be difficult to insert what were seen as excessive obligations that did not fit into the agricultural framework, even where there was agreement between the parties. However, in 1987, an amendment to the governing legislation made provision for this eventuality, albeit upon the payment of compensation\(^{56}\). Similar provision exists in Germany, although there is little evidence that any holdings other than the State-owned ones are affected by such clauses.

1.5.5 *Outside Europe*

Outside Europe, it is beyond the scope of this thesis to consider jurisdictions not sharing some commonality with our own. However, it is interesting to note that in the USA, there is substantial freedom of contract for agricultural lettings, although there is some statutory regulation. Leases here tend to be very short term, often for one year, which might provide some insight into the patterns of management that might emerge under the 1995 Act in the UK. However, tenants must cultivate the holding in a husbandlike manner and not commit

---

\(^{54}\) See Grossman and Brussaard for details of the various jurisdictions.

\(^{55}\) Porru P. Ch 7 in Grossman and Brussaard.

\(^{56}\) See Brussaard in Grossman and Brussaard p.129.
waste and the tenant’s freedom of cropping can be overridden by clauses in the tenancy agreement. In the USA, there is also a prevalence of share cropping arrangements\textsuperscript{57}.

The effect of different land settlement patterns can be seen in both Canada and Australia. In the former, this has resulted in few tenancies coming into existence and the issue of landlord/tenant relations not being one that causes concern. What regulation that exists is dictated by Provincial statutes. In Australia, the huge areas of land involved in grazing schemes, and the difficulty of monitoring and enforcement, has meant that there are many leases in existence for very long terms with very little control. In theory, there is a system of reversion to the Crown if land is not properly exploited, but this is scarcely enforced. Similar obligations of good husbandry and management exist in New Zealand, where tenure issues have evolved out of the two very different cultures of the UK and Maori traditions.

1.6 Current Trends towards Extensification

The progress of agricultural tenancy legislation in the UK has reflected the general agricultural climate to a certain extent. For example, after the war the drive for efficiency and national self-sufficiency dictated that tenants should have as favourable a circumstance as possible to pursue their businesses. Similarly, the general trends of agricultural policy, both national and within the European Union, have reflected, or indeed, in some instances, created, the fluctuating fortunes of the industry and the need to deal alternatively with food shortage or surplus. Thus, the incentives that were recently available to farmers in the form of grants and support for expansion and intensification have now given way to initiatives intended to encourage extensification\textsuperscript{58} and environmental management.

\textsuperscript{57}Pedersen and Meyer (1995) and Hamilton (1984/5).

\textsuperscript{58}See Glossary of Terms.
One of the major influences on UK agricultural policy is the Common Agricultural Policy of the European Union. Originally this was intended to increase agricultural productivity, to ensure a fair standard of living for the agricultural community, to stabilise markets, to ensure the availability of supplies and to ensure that products reached the consumer at reasonable prices. Although there had been environmental initiatives prior to 1987, the Single European Act amended the Treaty of Rome to include new articles giving proper status to the role of environmental protection within the Community. Since then, various measures have been adopted by the Community, with the intention of making the CAP more environmentally acceptable. Most notable of these has been the framework Council Regulation 2328/91 on Improving the Efficiency of Agricultural Structures, which drew together various environmental initiatives and diversification incentives, triggered also by the need to reduce agricultural production in the member states.

The "greening" of the CAP was continued during the so-called McSharry reforms of 1992, when proposals were made to reduce overproduction in some sectors of the industry by the extension of livestock quotas and set-aside requirements, and reductions in guaranteed prices. In addition to the establishment of the Arable Area Payment Scheme by Council Regulation 1765/92, one of the most significant accompanying measures to these reforms was the "Agri-Environment Regulation", which member states were encouraged, if not obliged, to adopt.

59 Article 39, Treaty of Rome.

60 For example, Council Regulation 787/85 on Improving the Efficiency of Agricultural Structures, implemented in the UK by the designation of Environmentally Sensitive Areas with payments to farmers to encourage environmentally friendly and traditional farming practices.

61 Added to Article 130.


63 For the most comprehensive description of these reforms see Neville and Mordaunt (1993).

This offered Community co-financing for various initiatives that have been the impetus for a plethora of new Ministry administered schemes in the UK\textsuperscript{65}. In addition, environmental requirements have become a part of other support schemes in what have become known as “cross-compliance” measures, that is the dependence of support payments on compliance with specified minimum environmental obligations or standards of management. This principle is evident, for example, in both the set-aside regime for arable payments and the Hill Livestock Compensatory Scheme\textsuperscript{66}.

It is clear that, in view of pressure upon the CAP from international bodies concerned with the fairness of trade, and in particular the GATT negotiations, recommencing in 1999, the direction of the EU’s agricultural policy will continue to shift away from guaranteed prices for production and towards direct support for environmental benefits and rural regeneration. This is also apparent in the final proposals for Agenda 2000\textsuperscript{67} and is reflected now in Council Regulations 1257/99 and 1259/99\textsuperscript{68}. These changes will be reflected in UK policy initiatives, which are themselves partially driven by the perceived need to support those smaller farms in less productive areas. These are, in general, those with the landscapes and other features most noted for their environmental value.

\textsuperscript{65} These are referred to in more detail in Chapter 4.


\textsuperscript{67} Agenda 2000 For a Stronger and Wider Union Com (97) 2000 final, 15 July 1997.

\textsuperscript{68} On support for rural development (OJ L160/80) and a horizontal measure dealing with the modulation of support towards agri-environment measures (OJ L160/113) respectively.
1.7 Ownership as a Means of Protection

This thesis looks specifically at the issues affecting different land tenure arrangements for the management of these valuable areas of farmland for conservation. Each issue is considered in relation to the position before and after the 1995 Act, which has made important changes to the legislative control of agricultural lettings insofar as they affect conservation management, as well as in other respects. The research is not confined to arrangements for nature conservation, as many of the principles discussed could equally well apply to matters affecting the landscape, archaeology, public access and the general environmental well-being of the holding.

In England and Wales there is a tradition that land management for conservation should be carried out voluntarily by farmers and landowners, under a negotiated management agreement if necessary, and should not be imposed by Government regulation. This principle applies even in National Parks, which remain in private ownership, and also where land has been designated a Site of Special Scientific Interest (SSSI) under the Wildlife and Countryside Act 1981 (the 1981 Act) or an Environmentally Sensitive Area (ESA) under the Agriculture Act 1986. This adherence to the voluntary principle, coupled with the inadequacies of the legal system dealing with the setting up and enforcement of covenants and the weaknesses of other mechanisms intended to influence agricultural practices and rural land use, appears to make ownership a very attractive means of ensuring the protection of

---

69 See Glossary of Terms for a definition of conservation, as used in this project.


71 An account of the use of covenants for conservation is given by Hodge et al. (1993).
land of conservation value\textsuperscript{72}. It can also prove to be more cost effective for the Government agencies to provide grant aid to an established conservation body for purchase rather than for themselves to enter an expensive and indefinite management agreement based on the recommended profit foregone basis\textsuperscript{73}. However, even when it has been acquired by a conservation body, it is rarely sensible for agricultural land to be managed in hand, and, as we will see in Chapter 2, the effective management of such land can often be considerably impeded by the Agricultural Holdings legislation.

1.8 Current Developments in Conservation Management

Various parallels can be drawn between the land management structures being explored by conservation bodies on their tenanted land and developments in the content of management agreements used to implement environmental support schemes, such as Tir Cymen and Tir Gofal in Wales, Countryside Stewardship (now administered by MAFF) in England and even the Wildlife Enhancement Scheme and other agreements used by English Nature and the Countryside Council for Wales in Sites of Special Scientific Interest\textsuperscript{74}. There are two clear strands in these developments: a trend towards positive management obligations rather than mere restrictions on existing practices and a move towards a whole farm approach\textsuperscript{75}. These are both backed up by an increasing tendency for interested parties to undertake

\textsuperscript{72} See Colman et al. (1992) for a comparison of the effectiveness of the various mechanisms.

\textsuperscript{73} Set out in Dept. of Environment Circular No.4 of 1983 (HMSO) for SSSIs.

\textsuperscript{74} Rodgers and Bishop (1998).

\textsuperscript{75} That is the treatment of a holding as a whole, for land management purposes, rather than as a collection of disparate features, fields or sites.
environmental audits on farms\textsuperscript{76}, which then inform the preparation of management plans and contractual obligations.

All of these, however, raise the difficult question of incorporation when one comes to draft a legally enforceable tenancy agreement or other management agreement\textsuperscript{77}. The process of environmental management is, of necessity, one that needs to be flexible and intuitive. The wording of binding covenants needs to be precise and clear, leaving no scope for misinterpretation. This dichotomy is one that continues to exercise those who practise in this field and leads to not a little frustration, as lawyers and conservation practitioners seek to find common ground. In the great majority of cases, of course, the wording of a document never becomes an issue. The parties communicate well and the spirit of the agreement is followed rather than the precise detail of the text. Nonetheless, the essential purpose of the legal document is to provide a clear and unambiguous framework for the conduct of the relationship and means need to be found to overcome the occasional conflict between the practical requirement for flexibility and the ultimate need for enforceability. These issues will be discussed further in discussions on the interview material later in this thesis.

1.9 Literature Review

The existing literature in this field is, on the whole divided into two generic types. That which has focussed on land tenure and farm tenancy issues, and that which has addressed the problems of incorporating environmental management practices into the current agricultural culture.

\textsuperscript{76} In this connection, while many organisations have conducted work on formulating suitable formats for such audits, the organisation known as LEAF has produced detailed documentation that is intended to provide guidance for self-motivated farmers and landowners.
There has been considerable comment over the years on the need for reform of the Agricultural Holdings régime, culminating in the passing of the 1995 Act. Many of the publications dealing with this have been produced by bodies representing particular sectors of the agricultural community, and have been in the form of pamphlets or press releases, often published in response to Government consultation exercises. For example, in 1991, following MAFF’s consultation paper on Agricultural Tenancy Reform78, detailed responses were put forward by the Country Landowners’ Association, the Tenant Farmers’ Association79, the Royal Institution of Chartered Surveyors, the Local Authority Valuers’ Association, the Central Association of Agricultural Valuers, the National Farmers’ Union, the Agricultural Law Association, and numerous institutions with a significant agricultural landholding, such as the Crown Estate and the Duchies of Cornwall and Lancaster, or a conservation interest, such as the Countryside Commission. However, other than the last mentioned80, very few of these organisations perceived the environment to be a significant factor in the debate, other than in the context of term length, where husbandry issues were marshalled as one of a group of reasons to retain secure longer term tenancies for the benefit of tenant farmers.

In addition to the above, there was a certain amount of academic comment on the process, and commissioned research, of which the most significant was the RICS sponsored report *Agricultural Land Tenure in England and Wales* by Winter et al. in 199081. This report based

---

77 We are talking here about the process of including in legally enforceable documents management prescriptions that have been prepared for a different purpose by those who are not trained in legal drafting.

78 See Note 42 above.

79 This followed the TFA’s own consultation paper entitled *The Rural Business Lease: A Modern Tenancy Reform Package* in 1990.

80 The Countryside Commission’s response was founded largely on the research conducted by Munton and Marsden, which is described further below.

81 Two earlier reports had been published by the RICS as a contribution to the debate: *Future Patterns of Land Ownership* in 1977 and *Contractual Relationships in Farming* in 1983.
its conclusions on a postal survey of farmers, which collected data on their landholdings and courted their opinions on a variety of issues related to the prospect of tenancy reform. It reviewed the use of what it called "unconventional lettings"\textsuperscript{82}, in use on a small but significant proportion of agricultural land, and attempted to assess the impact on land management practice of these short-term arrangements. In stating its objective of obtaining data to try to identify how different arrangements affect the management of land, as well as the number of agricultural lettings available, the report suggests that

> The basic underlying need of any particular set of occupancy arrangements is that they produce an agricultural industry responsive to the nation's requirements for both food production and acceptable standards of environmental management. Without knowledge of how the current arrangements, especially unconventional ones, influence management it is impossible to come to well considered judgements on the various suggestions for reform.\textsuperscript{83}

There is much material in the Winter report that has implications for this project. Reference will be made at appropriate points to the relevant parts of the text, and it is hoped that this current thesis will extend the debate on the effect of term length on farm management.

Other comments on land tenure and its implications for conservation management have been made by Hill and Gasson (1985), and by Rodgers (1992)\textsuperscript{84} in an examination of the role and effectiveness of management agreements for conservation. Cardwell in Rodgers (1996b) also looks at the issues in the wider context of diversification generally. More recently, the interplay between tenancy and conservation matters have been addressed by Bishop (1996) and (1997), Rodgers and Bishop (1998), Manley (1998) and (1999), Whitehead (RICS 1996),

\textsuperscript{82} I.e. the short term alternatives to full agricultural tenancies, set out in detail in Section 2.2.3 of Chapter 2.


\textsuperscript{84} p.150-163.
Whitehead et al. (MAFF 1997), and Whitehead et al. (1999). In addition, Munton and Marsden, in a report for the Countryside Commission and associated publications\(^{85}\), looked at the effect of occupancy change on landscape features. All of these raise issues that are explored further in this thesis.

Various reports and surveys have attempted to predict\(^{86}\) or report\(^{87}\) on the effect of the 1995 Act in England and Wales, and have discussed its possible application to Scotland\(^{88}\). While these do not explore the use of conservation provisions in detail, there is some reference to the use of particular management prescriptions in these publications, which will be examined as appropriate. In addition, the use of conservation covenants in its broadest sense had previously been explored in the Countryside Commission monograph *Covenants as a Conservation Mechanism*\(^{89}\). While much of this report is devoted to the use of covenants on freehold land, some comment is made on their effectiveness within the landlord/tenant relationship. Observations are made on the difficulties of monitoring and enforcement, and on the then current small-scale use of such mechanisms. Reference will be made to these passages as appropriate.

More general comment on the comparative effectiveness of different conservation mechanisms, the difficulty of implementing environmental initiatives on agricultural land, and the attitudes of farmers towards conservation can be found in reports by Colman et al. (1992), Hill et al. (1992) and RSPB (1996). Academic comment can also be found in papers by

---

\(^{85}\) Munton, Marsden and Eldon (1988), and Munton and Marsden (1991).

\(^{86}\) Kerr (1994).


\(^{88}\) Jackson and Stockdale (1995).

\(^{89}\) Hodge, Castle and Dwyer (1993). See also Castle and Hodge (1994).
MacCulloch and Reid (1993), Adams, Hodge and Bourn (1994), Whitby and Saunders (1996), and many others. While not specifically addressing the tenancy issues, this literature can be informative as to the wider implications of various attitudes and mechanisms to be found in existence. Particularly, assessments of other mechanisms can assist in predicting the effectiveness of measures taken within a tenancy arrangement and, for this reason, several of the MAFF monitoring reports on the socio-economic implications of ESAs90 were also examined.

Finally, for research into the purely legal aspects of agricultural tenancy law, the standard textbooks were used91. Whilst addressing the conservation aspects of the 1986 Act and the 1995 Act only indirectly, these provide the legal grounding from which informed comment may be made on the effectiveness of the legislative provision92. In addition, the accumulated decisions of the Agricultural Land Tribunal93 were examined to investigate the way in which the legislative rules have been applied, and to assess the influence of the decision-making process on environmental management. In particular, the interpretation in these decisions of the concept of good husbandry was explored, as this was felt to have a significant bearing on the cultural relationship between the farming community and the environmental lobby.

1.10 Conclusions

The following three Chapters of this thesis expand in detail on the legislative and other influences on the field of study. Chapters 5 to 8 then look at how these influences operate in

---

90 Environmentally Sensitive Area Reports of Monitoring 1992, Numbers 6, 7, 8, 9, and 10. MAFF.


92 Some such comment can be found in Bishop (1996).

93 From 1992 to 1996 (copies supplied by the Agricultural Law Association).
practice, by reviewing the material gathered in the Interview Survey for the research. An attempt to draw together a set of conclusions and recommendations is then made in the final Chapter.
CHAPTER 2

Law and Policy - The Constraints of the Agricultural Holdings Legislation

2.1 Introduction

Although, since the Agricultural Tenancies Act 1995, there will be very few new agricultural lettings granted that will be governed by the 1986 Act\(^1\), the old régime will continue to govern existing tenancies and those granted by way of succession for some considerable years to come. Therefore, it is important still to consider the constraints imposed on conservation management by the 1986 legislation. What has been learnt from the 1986 régime can influence the form of new arrangements, which will affect the quality of conservation management in the future. In the new and uncertain climate of freedom of contract for agricultural tenancies, the temptation to rely on familiar practices and tested wording in letting agreements will be strong, and identifying those areas where such reliance could lead to environmental damage will be important.

We have seen that, since the 1947 Act introduced the current régime of security of tenure for agricultural tenants, a security which was enhanced by the succession provisions brought in by the Labour Government in the 1976 Act, letting a farm on a full agricultural tenancy has become very much less popular. Indeed, as well as security of tenure, the whole ethos of the Agricultural Holdings legislation, with the exception of the abolition of succession for new tenancies by the Agricultural Holdings Act 1984, has been one of efficient agricultural production, encouraged by a régime of tenant protection. There have been provisions relating to rent review, compensation and fixtures, and other provisions designed to ensure that the

---

\(^1\) Section 4(1)(a)-(f) of the 1995 Act refers to the few occasions upon which a 1986 Act tenancy might arise after 1 September 1995.
tenant feels secure enough to invest in the land and farm efficiently. In addition, the favourable tax treatment of owner-occupied farmland has been a disincentive against tying it up for long periods within a tenancy arrangement. In fact, this latter may have been the more influential factor.

For the conservation landlord there have been other considerations that might have discouraged the use of a full tenancy where the piece of land in question is of particular sensitivity or environmental value. The consequences in these circumstances of having a secure tenant who persistently disregards attempts to modify his or her farming practice could be particularly severe. Environmental damage can be especially difficult to put right, and the legal remedies available to a landlord are notoriously cumbersome. The length of time necessary for any effective action to be taken also leaves the site at risk of further damage. For these reasons, conservation landlords, including the National Trust, have made use of a variety of different mechanisms to avoid a secure tenancy where the risks involved in such an arrangement have been high.

The position of the conservation landlord can be distinguished from that of other landlords, of course. Where a landlord is not mindful of conservation, the Agricultural Holdings legislation can also cause difficulties for the tenant who wishes to pursue conservation objectives. In particular, the advent of incentive schemes and set-aside régimes has reportedly left some tenants vulnerable to claims of bad husbandry, although there is some limited protection in the clauses inserted into Schedule 3 of what is now the 1986 Act in 1984. This protection, afforded to a tenant against a notice to quit, only applies where an agreement exists with the landlord that conservation practices should be followed, while not all the relevant incentive

---

2 For the legal implications of this, see later Section 2.6.
schemes require the consent of a landlord as a prerequisite of participation. The general incompatibility of these schemes with land tenure arrangements has been well documented\(^4\).

It has been widely pronounced that the freedom of contract made available by the 1995 Act will enhance opportunities for incorporating conservation objectives into farm letting agreements\(^5\) and will alleviate many of the problems set out above. This remains to be seen and is discussed in detail in the next chapter, but existing tenancies and succession tenancies are unaffected by the 1995 Act and will continue for some considerable time and so it is still pertinent to discuss the 1986 Act constraints in some detail here.

2.2 Security of Tenure

2.2.1 General

In the RICS Cirencester report by Winter\(^6\), and elsewhere\(^7\), it has been suggested that the length of secure tenancy which a tenant has may reflect itself directly in the quality of the land management during that tenancy. The rationale behind this appears to be that a tenant with the confidence brought by a longer term would feel both an emotional and economic commitment to the holding. This, in turn, would result in the taking of a long-term view of its husbandry, encouraging investment in its fixed equipment and boundary and landscape features. In addition to this, the Munton and Marsden study for the Countryside Commission\(^8\)

---

\(^3\) These provisions are dealt with in more detail at Section 2.7, and were originally contained in the 1984 Act.

\(^4\) For example by Rodgers in Howarth and Rodgers (1992)

\(^5\) Sydenham and Mainwaring (1995) at p.3 state that one of the four reasons for the introduction of the 1995 legislation was "to enable the effective enforcement of environmental and conservation covenants".


\(^7\) For example in Manley (1998).

\(^8\) Munton, Marsden and Eldon (1988)
suggested that the greatest landscape damage often occurs on a change of occupation. Where there is a trend towards shorter terms this would clearly tend to happen more often. All of these factors tend to show that conservationists would naturally welcome an arrangement where a tenant has a secure long-term interest.

However, whilst those involved in conservation acknowledge that a tenant’s feeling secure about his or her future on a holding is likely also to enhance the sense of ownership and responsibility for it, the prospect of a secure tenant causing environmental damage to features of importance can be a very significant influence on the choice of term length. This is explored in greater detail in relation to projected term lengths of farm business tenancies under the 1995 Act in the next chapter, but has also been much evident in choices made under the 1986 régime. Short terms, contrived by the use of leases with the Ministry’s consent, Gladstone v Bower agreements and grazing licences9 have all been widely used by the National Trust, the RSPB and English Nature to manage some of the most environmentally sensitive land, for example on the Ouse Washes in East Anglia and on the Somerset Levels.

2.2.2 The Statutory Framework

The basic mechanisms by which the 1986 régime operates to afford the security of tenure that these bodies feel obliged to exclude are twofold. First there are the conversion consequences of ss. 2 and 3 of the 1986 Act, and secondly the restrictions on notices to quit under Part III of the 1986 Act. Under s. 2, where any land is let for use as agricultural land for an interest less than a tenancy for year to year or any person is granted a licence to occupy land for use as agricultural land, in each case in circumstances which are such that if his interest were a tenancy from year to year he would in respect of that land be the tenant of an agricultural

---

9 See Section 2.2.3 for the technical details of these arrangements.
holding, the agreement shall take effect as if it were an agreement for the letting of land from year to year unless the agreement has the approval of the Minister before it is entered into. This section does not apply to agreements which are made in contemplation of the use of the land only for grazing or mowing (or both) during some specified period of the year or a subletting by a person whose own interest is one for less than an interest from year to year.10

Similarly, under s. 3, a tenancy of an agricultural holding for a term of two years or more shall, instead of terminating on the term date, continue as a tenancy from year to year unless it is properly terminated by a notice to quit, which will be subject to the restrictions set out below, or the tenant dies in the circumstances set out in s. 4.11 Under s. 5, the effects of s. 3 can be avoided for tenancies for a term of not less than two years, and not more than five years, by the obtaining of the Minister’s approval to the agreement pursuant to a joint application to him by the proposed landlord and tenant.

The effect of these sections is that it is almost impossible, without using the mechanism of a grazing or mowing licence for less than 12 months, a Gladstone v Bower agreement or a Ministry lease, to create a letting of agricultural land which does not become an annual tenancy with the full protection of the 1986 Act régime. The effect of statutory conversion will be that possession of land that is let cannot be obtained without compliance with the constraints of the notice to quit provisions.

10 S. 2(3) 1986 Act.

11 That is, that in a fixed term tenancy, the tenant dies before the term date and no notice effective to terminate the tenancy on the term date has been given under s. 3. If the death occurs more than a year before the term date, the tenancy will terminate on the term date. If the tenant dies less than a year before the term date, the tenancy will terminate on the first anniversary of the term date.
2.2.3 *Alternatives to 1986 Act Tenancies*

In addition to the short-term mechanisms mentioned above, there are also other means, not entailing possession of the holding, whereby the disadvantages of the 1986 legislation have been avoided. These include share and contract farming arrangements, partnerships, in hand arrangements and management agreements. The more common "unconventional" arrangements, together with these other options will now be explored from a conservation landlord's perspective.

In addition, there is statutory provision or general acceptance of rules which exclude from the conversion and continuation implications of s. 2 and 3 gratuitous licences\(^{12}\), tenancies granted to office holders of the landlord's business, and those arrangements which were in place before 1 March 1948 or granted by persons with limited interests.

### 2.2.3.1 Grazing or Mowing Agreements

Annual grazing or mowing licences had become a widely used tool for the landlord wishing to avoid the security of tenure provisions of the 1986 Act. The statutory exemption that allows this is contained in s. 2(3) of the 1986 Act (formerly the proviso to s. 2(1) of the 1948 Act). To qualify it is essential that the licence or tenancy must be both

i) made in the contemplation of the use only for grazing or mowing (or both); and

ii) during some specified period of the year.

The exclusion from conversion applies whether or not there is any express provision in the agreement.

---

These provisions have generated a large amount of debate and litigation over the years. Uncertainty has been a feature of a culture where agreements have often been unwritten, or, at best, short and unclear. The essential elements of the decided cases are as follows. First, the letting must have been made in contemplation of its use for grazing or mowing. Thus, the essential moment for evidential purposes is at completion of the agreement, whether or not the use subsequently changes. However, with written agreements, so long as an agreement is not contended to be a sham, no evidence extraneous to the document is permissible to show the intentions of the parties. The agreement document, provided that it is clear and unambiguous, should be taken on face value.

So, although a farmer may have been using land for arable cropping during the course of an agreement, unless the landlord can be shown to have been aware of and intended this use, the necessary mutual intention is not apparent to invalidate the agreement and trigger the conversion provisions of s. 2 of the 1986 Act. On the other hand, where a letting was made on condition that grazing did not take place during the months of March and April, while daffodils were in bloom, this was held to be outside the statutory exemption, as the landlord had in his contemplation a use other than mowing or grazing at the time of the letting.

The inclusion in the agreement of any acts of husbandry or maintenance which are not strictly necessary to the enjoyment of the land for mowing or grazing would also take the agreement outside the exclusion contained in s.2(3). So, for example, if the farmer is required to plough the land for husbandry reasons, this would convert the agreement to a protected annual tenancy, as ploughing is not consistent with the use of the land for grazing for a period of less

---


than a year\textsuperscript{16}. It is a frustration, too, to many conservation bodies with limited budgets that repair and maintenance clauses for fencing cannot legitimately be included in grazing agreements, as the investment is not consistent with such a short term arrangement. This frustration is particularly acute where the agreements are routinely renewed each year to the same parties, which is common practice and legitimate, so long as there is no agreed expectation that it should be so\textsuperscript{17}. Similarly, unless they are strictly ancillary to the use of the land for grazing or mowing, the inclusion of any buildings in the agreement would give rise to a statutory conversion\textsuperscript{18}.

The other element of the exemption which has been analysed in depth by the courts is the requirement that a grazing or mowing licence or lease must be for some specified period of the year, that is for no longer than 364 days. A period of exactly 364 days would satisfy this requirement\textsuperscript{19}, although one of 365 days, for example from 1 April to 31 March, would not\textsuperscript{20}. Where lettings are made for successive periods between the same parties, if the intention to do so is in evidence between the parties, then the exemption from conversion would not apply in this case either\textsuperscript{21}.

\textit{2.2.3.2 Gladstone v Bower Agreements}

Another mechanism that has been widely used by landlords wishing to avoid the security of tenure provisions for agricultural holdings is the so called \textit{Gladstone v Bower} tenancy. This

\textsuperscript{15} Brown v Tiernan [1993] 1 EGLR 11.

\textsuperscript{16} Lory v London Borough of Brent [1971] 1 All ER 1042.

\textsuperscript{17} Scene Estates Ltd v Amos [1957] 2 All ER 325 and Short Bros (Plant) Ltd v Edwards (1978) 249 EG 539.

\textsuperscript{18} Avon County Council v Clothier (1977) 75 LGR 344.

\textsuperscript{19} Reid v Dawson [1955] 1 QB 214.

\textsuperscript{20} Cox v Husk (1976) 239 EG 123.
genre is the product of a legislative loophole, which was judicially considered in the Court of Appeal\textsuperscript{22} and has not been plugged in subsequent legislation, although the opportunity has been apparent. The Court held that a fixed term letting for a period of more than 12 months, but for less than 2 years, was not caught by the conversion provisions of what has now become s. 2 of the 1986 Act. In view of this, and in spite of some fears that such a letting might fall outside of the legislative scheme altogether and thus be governed as a business tenancy by the Landlord and Tenant Act 1954, lettings for (say) 18 months had become commonplace. Fears over the status of such lettings were allayed by the decision of the Court of Appeal in \textit{EWP Ltd v Moore}\textsuperscript{23}, where it was held that they would indeed be considered agricultural holdings and not business tenancies, although not attracting the security of tenure protection\textsuperscript{24}.

\subsection*{2.2.3.3 Ministry Leases and Licences}

Other than with purported share farming, contract and partnership arrangements, the other means by which landlords have avoided the security of tenure implications of the 1986 Act régime is by using a so-called Ministry lease or licence. This is the common name given to those arrangements made under ss. 2 or 5 of the 1986 Act which have been awarded the consent of the Ministry of Agriculture Fisheries and Food (MAFF). There is an exception to the conversion provisions of s. 2 where, for lettings for an interest less than a tenancy from year to year and for licences of any length, the approval of the Minister has been obtained before the agreement has been entered into. Similarly, as stated above, the continuation provisions of s. 3 can be avoided for tenancies for a term of not less than two years and not

\begin{footnotesize}
\begin{enumerate}
\item Rutherford \textit{v} Maurer [1962] 1 QB 16, \textit{Scene Estate Ltd v Amos} (above).
\item [1960] 2 QB 384.
\item [1992] 2 EGLR 4.
\end{enumerate}
\end{footnotesize}
more than five years where, on a joint application by the parties, the Minister's approval has been obtained.

The grounds for which consent would be forthcoming were never set out in the legislation, but there was a joint MAFF/WOAD announcement entitled *Approval of Short-term Lettings and Licences*, issued on 10th August 1989, which itemised the situations intended to be covered by the concessions. These included the proposed redevelopment of a site and reorganisation and transitional arrangements such as the intended amalgamation or regrouping of holdings on an estate or the trying out of a new tenant before granting a full tenancy. Provision was also made for specialist cropping arrangements, allotments and operational requirements on Government or other land. These categories were not definitive, and every application was considered in the light of its individual circumstances. It is fair to say that consent was not usually difficult to obtain if at least the basis of one of the stated situations could be claimed.

The provisions for the granting of consent under s. 2 were somewhat less stringent than those for s. 5. There was no need for a joint application, and consent could be granted generally to named landlords, including government departments, and the particular terms and circumstances of the actual letting were not necessarily of interest to the Minister. However, it was essential that the terms of the consent were rigorously followed in the actual agreement reached. For example, where consent was granted for a licence, it was imperative that the arrangement did not grant *de facto* exclusive possession, as this would in fact take effect as a

24 That is, they would not be business tenancies attracting the protection of the Landlord and Tenant Act 1954.

25 This was set out in full in the 7th Edition of Scammell and Densham's *Law of Agricultural Holdings* pp.38-41.

26 *Finbow v The Air Ministry* [1963] 2 All ER 647.
tenancy and would thus be outside the terms of the consent. Neither could consents be activated retrospectively. This has led to some detailed consideration of the dates borne by consent documents and lettings agreements.

The provisions under s. 5 of the 1986 Act were introduced in the 1984 Act with the intention of relaxing the constraints of the statutory framework for short fixed-term tenancies where the circumstances seemed appropriate. The criteria for a s. 5 consent to be granted were that it would only be granted on a joint application, that there had to be a formal notification to the parties for it to take effect, and that the letting agreement had to be in writing with a statement showing that s. 3 was not to apply. The relevant case law also shows that it was imperative for the terms of the letting to accord exactly with the wording of the consent notification.

2.2.3.4 Share Farming

Share farming is a concept which has been widely used in Australia, New Zealand and North America for some time, although fears of creating security of tenure have meant that it has been slower to establish and more complex in its development in Britain. It has now been more positively explored here as an effective vehicle for land management. The essence of a share farming agreement is that it offers the parties the opportunity of sharing the risks and benefits of a farming enterprise accorded to a negotiated agreement, without the disadvantages, fiscal or practical, of creating either a tenancy or a partnership. However, as stated above, the agreement and the practice must be such that neither is created in fact, as


28 For example in Bedfordshire County Council v Clarke (1974) 230 EG 1587, where the two documents bore the same date and the resulting arrangement was held to be a protected tenancy.

well as on paper. This is usually achieved by a careful allocation of inputs and responsibilities, as well as the gross product.

The most usual type of arrangement is one where the landowner provides a farm with its fixed equipment and the farmer provides the labour and machinery. The costs of running the farm are shared, in whatever proportions are appropriate to the negotiated arrangement, and the gross product is also shared, usually in the same proportions. Often any livestock is held jointly, although sometimes the landowner retains ownership, as it might of standing crops, which helps counter any suggestion that the farmer has exclusive possession of the land. To avoid suggestions of partnership, with its joint and several liability, each party usually has its own bank account, and deals with its own Value Added Tax and Income Tax returns. The gross product, rather than the profit is shared, for the same reason.

The term of a share farming agreement can be flexible, and is often in the region of between three and ten years. This has overcome some of the problems of short-term planning which are encountered with grazing licences, Gladstone v Bower agreements and Ministry leases. It is also possible to build review procedures into the agreement to cater for changes in circumstances or policy. The advantage to a conservation landlord is that close involvement with the operation can be maintained and it may retain an important decision-making role, for example in whether a particular incentive scheme should be entered into. It may also retain responsibility for the repair and maintenance of features of importance and high conservation value.

---


31 The case of McCarthy v Bence [1990] 17 EG 78 appears to endorse the fact that a properly drafted and executed share milking arrangement did not confer exclusive possession, and therefore a secure tenancy, on the farmer. See also Slatter (1991) and Rodgers (1991).
The disadvantages to the landowner are that high degrees of staff time and managerial involvement and some of the risk will fall upon it, which might not be appropriate, depending on its responsibilities and resources. Unlike a contracting arrangement, there would be no regular outgoing on remuneration, though, which is to the landowner's advantage if the business is not doing well. A share farmer will also have more of an incentive to perform well if his or her remuneration is not fixed\(^\text{32}\). Finally, because in a share farming arrangement there is no need for exclusive possession of a set area of land, it is possible to enter an arrangement for one enterprise on a farm while making other arrangements for the management of the remainder, although problems can now occur in dairy enterprises because of the constraints of the milk quota system\(^\text{33}\).

2.2.3.5 Contract Farming

Some might say that share farming agreements are merely a form of contract farming. This is obviously true to the extent that a share farming agreement is merely a farming contract which is structured in a particular way, but we shall now look at more traditional contracts for services in the conservation context. Particularly we are concerned with the position where a whole holding or enterprise is farmed under this mechanism, rather than a single and clearly defined service performed. Such a contract can be effective for a conservation landlord looking for a high degree of control and, as long as precautions are taken as above to avoid any suggestion of a partnership or tenancy existing, there is a great deal of freedom to agree whatever terms are appropriate for the particular holding.

The financial disadvantage of a contract farming arrangement is that the landowner needs to commit itself to a regular outlay to the farmer, and often to variable costs, whether or not the

\(^{32}\text{Country Landowners' Association (1993).}\)

\(^{33}\text{CLA above.}\)
enterprise does well. Also, the incentive to the farmer may not be as great in these circumstances as when a share in the profits is at stake. Payments might be structured to provide an incentive to achieve various objectives, provided that the status of the arrangement is not prejudiced by there being so close a relationship to profit share that it suggests a partnership.

The appropriateness of contract farming clearly depends on the details of the site, the resources of the respective parties and the availability of suitable alternative mechanisms. It can be particularly useful in the management of areas where there is a high degree of public access, for example in historic parkland, where flexibility needs to be retained, or in areas of not such high conservation value where a fairly commercial approach can be taken. In suitable circumstances, the financial rewards can be significant, although this is rarely the main objective of the conservation landlord. There is no reason, though, why what is essentially a contract farming arrangement cannot be used in a situation where detailed environmental prescriptions need to be included. The National Trust have used such agreements for an arable area and to manage a dairy herd, both on a home farm where public access is high and management has to be tightly controlled.

2.2.3.6 Partnerships

It is unlikely that a legal partnership will be an appropriate mechanism for a conservation landlord, except in the rarest circumstances. The close relationship with a partner, involving joint risks and liabilities will not sit easily with a desire to retain flexibility and minimise risk. In addition, partnerships are expensive to administer and may cause tax complications as well as needing careful mechanisms to protect the status of any land used in the arrangement.
2.2.3.7 In Hand Farming

This option needs to be mentioned for the sake of completeness, but although it is not appropriate to dismiss it completely, it will also not be a common means for a conservation landowner to fulfil its objectives. An individual will have particular reasons for not wishing to manage land in hand. These are likely to be connected with personal inclination and expertise. For the institutional landowner, the reasons not to engage in farming in its own right are more likely to do with financial risk and implications for staffing and other resources. That is not to say that, in some limited circumstances, it might not be appropriate. For example, where the management implications are very seasonal and not agriculturally complex, as with some conservation grazing régimes on small areas, or where there are other strong reasons for managing a holding in a particular way, as with a demonstration farm, the keeping of management within the organisation may be the most effective option. Some organisations are using their own mobile flocks of sheep or goats, or herds of cattle or ponies to undertake sensitive grazing régimes, where the use of other more formal arrangements would be difficult.

2.2.3.8 Management Agreements

Management agreements are more often associated with schemes operated by non-landowning institutions, usually Government bodies or local authorities, to achieve management objectives on land in the ownership of another. These schemes are usually set up under statutory provision, contained, for example, in the Countryside Act 1968 with regard to SSSIs, the Wildlife and Countryside Act 1981 with regard to local authority agreements, the Agriculture Act 1986 with regard to Environmentally Sensitive Areas and the
Water Act 1989 (now the Water Resources Act 1991) with regard to Nitrate Sensitive Areas\textsuperscript{34}.

As this kind of management agreement becomes more widely used, experience and knowledge about their effectiveness has accumulated and has led to some new developments in recent years. Of particular note was the \textit{whole farm plan} approach adopted in the experimental Tir Cymen scheme administered by the Countryside Council for Wales. This signaled a policy development, begun with the ESA schemes, away from the rather negative process of compensating farmers for not carrying out damaging operations\textsuperscript{35} in favour of a system which looks at the whole holding and takes a positive and integrated approach towards planning the most appropriate management scheme to achieve the maximum environmental benefit.

There is now a movement among some conservation landlords to see whether this positive, integrated approach can be transposed into their letting arrangements, so that, rather than relying on negative restrictive clauses which may be difficult to monitor or enforce, they might encourage a third party to achieve conservation objectives by a combination of prescription and incentive. This might be by an arrangement ancillary to a tenancy agreement or standing on its own, in which case the normal rules of contract would apply together with the risks set out above in relation to contract farming.

It is true that traditional restrictions on management in tenancy agreements have often been reflected in a substantial reduction in the rent payable for a holding\textsuperscript{36}. However, it is thought

\textsuperscript{34} See later, Ch. 4.

\textsuperscript{35} This is the basis upon which an agreement would be offered under s.28 of the Wildlife and Countryside Act 1981 for SSSIs.

\textsuperscript{36} The National Trust estimated that, in 1992, it forfeited a total of well over £100,000 in lost rental for the imposition of conservation covenants in its agricultural leases (Hearn).
that, whether or not this continues to be the case for basic conservation prescriptions set out in the tenancy agreement, an additional detailed agreement, collateral to the tenancy agreement and linked to what we might call a *farm and environment plan*[^37] prepared particularly for that holding might be more effective.

The farm and environment plan would identify a series of detailed objectives and management instructions and a further system of payments could be linked into their achievement and observance. The easy remedy for non-compliance would then be the withholding of further payments under the scheme, thus overcoming the difficulties of enforcing detailed conservation covenants, although the problem of effective monitoring remains. This problem is compounded by the fact that some of the management instructions contained in the plan might not be sufficiently precise to be legally interpreted for the purpose of arbitration, should this be necessary. This is a similar problem to that identified with the incorporation of compliance with the Ministry's various Codes of Good Agricultural Practice[^38] into enforceable legal documents and has no easy solution.

A controversial suggestion might be that, in most cases, the legal enforceability of such detailed prescriptions in a document may be a secondary consideration, particularly if the relationship between the parties is good. In the very few cases where enforcement action might be required, it might be difficult, but in the majority of cases the detailed plan will be welcomed by the tenant for personal reasons and adhered to through a sense of commitment. In the event of the relationship breaking down, the main tenancy agreement and the remedies available under it provide the necessary legal control. This raises the larger question of what rôle the legal agreement takes in the achievement of this type of management and how much

[^37]: An example of what the contents page of such a plan might look like is annexed at Appendix 10.

more important might be the selection of the tenant and the well-being of the relationship between the parties\(^\text{39}\).

The separation of the detailed management obligations from the main tenancy agreement also has the advantage of distancing compliance with the obligations from the rental structure under the tenancy. This avoids the possibility that the financial arrangement of the letting might fall foul of the penal rent prohibition contained in s.24 of the 1986 Act. This section was inserted in the legislation to combat the practice of landlords inserting into tenancy agreements clauses obliging tenants to pay a penalty if they committed a breach of certain provisions within the agreement, for example any prohibition on the ploughing up of permanent pasture. It might have been feared that the management agreement structure outlined above might indirectly have been contrary to s.24, but it seems that the mechanism of positive payment, albeit withdrawable, for positive management does not fall within the scope of a provision designed to address the payment of penalties for default. This is particularly so where the agreement is separate from the tenancy agreement, albeit collateral to it.

The rôle of management agreement type arrangements within the landlord/tenant relationship is beginning to be explored and, as conservation landlords continue to seek ways of achieving their objectives, it seems that their importance will increase. Certainly, they are in accord with the body of thought which does not believe that conservation objectives can be achieved by compulsion, instead being of the opinion that the most effective method of receiving environmental benefits is by offering sufficient financial incentive to farmers to produce

\(^{39}\) See later, Ch. 7.
certain services\textsuperscript{40}. Indeed, the Countryside Commission, while continuing its support for measures of regulation and cross-compliance emphasises the need for payment schemes "to encourage managers to provide public environmental benefits which they cannot provide commercially, and which could not reasonably be expected as part of good husbandry". It also emphasises the importance of setting clear objectives and specified "products" for which payment should be made, rather than detailing management prescriptions for certain areas\textsuperscript{41}. This approach has been tested in the Countryside Stewardship Scheme and by the Countryside Council for Wales in Tir Cymen.

The Countryside Commission's recommendations were directed towards publicly funded schemes but might equally well be adopted by the conservation landlord in its own management agreements. The shape and form of management agreements will continue to evolve as these principles are explored. Their use by conservation landlords will once again depend very much on the resources available to them, not just financial (although this may be offset to a certain extent by being able to charge a full market rent on the main letting), but also the considerable amount of staff time and expertise required to set up such agreements and to assist the tenant with their implementation.

2.3 Notices to Quit

The notice to quit provisions of the 1986 Act are contained in Part III. Essentially, possession of an agricultural holding which is held on an annual tenancy subject to the 1986 Act (including one converted under the provisions of ss. 2 and 3) can only be obtained by the service of a notice to quit giving at least 12 months' notice terminating on the term date of the

\textsuperscript{40} See the CLA scheme for Environmental and Land Management Services in Enterprise in the Rural Environment (CLA (1989)) and Hodge (1991).

\textsuperscript{41} Countryside Commission report Paying for a Beautiful Countryside (1993)
tenancy. A contested notice to quit may not operate unless the consent of the Agricultural Land Tribunal is obtained or unless one or more of the Cases set out in Schedule 3 of the 1986 Act can be made out. Even where one of these Cases is relied on, there is no guarantee that the matter will not be referred to arbitration or challenged under the common law for ambiguity or fraud, notwithstanding the fact that the tenant has no right to serve a counter-notice per se as would be the case if an unqualified notice had been served.

Where an unqualified notice to quit has been given, the tenant may serve a counter-notice not later than one month from receipt. This will bring into operation the provisions of s. 26 of the 1986 Act, which provide that the landlord may not now gain possession unless the consent of the Tribunal is obtained. The landlord’s application to the Tribunal must be made within one month of receipt of the counter-notice and the Tribunal must then be satisfied that one of the grounds set out in s. 27 of the 1986 Act is made out. In addition, and as a separate issue, the Tribunal may not grant consent if it appears to them that, in all the circumstances, a fair and reasonable landlord would not insist on possession.

There are six grounds available to a landlord under s. 27(3). These are

(a) that the carrying out of the purpose for which the landlord proposes to terminate the tenancy is desirable in the interests of good husbandry as respects the land to which the notice relates, treated as a separate unit;

(b) that the carrying out of the purpose is desirable in the interests of sound estate management of the estate of which the land to which the notice relates forms part or which that land constitutes;

42 s.25 1986 Act, subject to the exceptions set out in s.25(2).

43 Cases A, B, D or E. That is, where notice has been served on the basis that alternative accommodation is available for a retiring smallholder, that the holding is required for a non-agricultural use for which planning permission has been obtained or is not required, that the tenant has not complied with a notice to pay rent or a notice to remedy a breach of the tenancy, or that a irremediable breach had occurred to the landlord’s detriment.

44 s.26 1986 Act.
(c) that the carrying out of the purpose is desirable for the purpose of agricultural research, education, experiment or demonstration, or for the purposes of the enactments relating to smallholdings;

(d) that the carrying out of the purpose is desirable for the purposes of the enactments relating to allotments;

(e) that greater hardship would be caused by withholding than by giving consent to the operation of the notice;

(f) that the landlord proposes to terminate the tenancy for the purpose of the land's being used for a use, other than for agriculture, not falling within Case B\(^46\).

The Tribunal may grant consent subject to such conditions as seem necessary to ensure that the stated purpose is carried out, and have the power to later vary or revoke conditions if circumstances change\(^47\).

While the grounds set out in paragraphs (c), (d) and (f) are relatively straightforward, there has been a substantial amount of case law generated by the wording of the other three grounds. It is now established that for (a) to apply, the landlord must prove, not only that the tenant is a bad farmer, but that, ignoring the effect of any proposed amalgamation\(^48\), the future husbandry proposed for the holding on its own would be better\(^49\). Under paragraph (b), however, it would be legitimate to consider the farming of the holding in the context of the landlord's other land, as it is the management of his or her whole estate which falls to be considered\(^50\). A more detailed look at the practical conservation implications of these two grounds is undertaken later in the chapter\(^51\).

\(^{45}\) s. 27(2).

\(^{46}\) This ground is, therefore, confined to where planning permission would not be required.

\(^{47}\) S. 27 (4) and (5).


\(^{50}\) Evans v Roper [1960] 2 All ER 507.
While the interpretation of the phrases “fair and reasonable landlord” in s. 27(2) and “greater hardship” in s. 27(3)(e) has been the source of much debate, a detailed review of the developments is not considered to be appropriate here, as the impact on environmental management is slight. Suffice to say that both phrases are open to the Tribunal’s discretion given all the circumstances of each case.

On the other hand, discussion of the rules governing notices to quit part of a holding, which are contained in s. 31 of the 1986 Act, does hold some relevance for environmental management, and these rules will be examined under a separate heading. In essence, in the absence of a clause in the tenancy agreement which permits it, a notice to quit part is not valid under common law. However, it is permitted under the 1986 Act régime for certain specified purposes.

Under the 1995 Act there will be no security of tenure provisions, nor will there be any restrictions on term length. It will be very interesting to see what lengths of term are chosen by conservation landlords in the future in view of the difficulties outlined above. Some discussion of the stated intentions of various bodies is contained in the Chapter 5. Particularly interesting will be the response of landlords to the inadequacies of forfeiture as a remedy for breach of covenant, once the notice to quit provisions no longer apply, which will no doubt be reflected in the type of terms being granted. It is expected that, where longer terms are risked, there will be break clauses inserted in the leases to ensure control and flexibility.

51 At Section 2.6.

2.4 Succession

In addition to the impact of security of tenure, since 1976 there has also been the question of succession to address. Under Part IV of the 1986 Act, by virtue of a provision introduced in the 1976 Act by the Labour Government of the time, close relations of an agricultural tenant were given the right to succeed to a tenancy on the same terms as their predecessor, subject to their proving their eligibility and suitability for the role. Whilst for tenants this further enhanced the security which enabled them to take a long-term view of the management of the holding, it provided further cause for concern among those conservation landlords who were concerned to ensure that their land was managed in the most appropriate way. For, even if an original tenant were to be sympathetic to the aims of the landlord, there could be no guarantee that any successor would share that view and would tailor his or her management accordingly.

Indeed, it might be believed that the younger generation would be more inclined towards technology than their elders and, if this is the case, then one would expect a degree of intensification on a succession, particularly where the terms of the tenancy agreement and the statutory régime provide no restraint, or further encourage it. This could result in any conservation benefits achieved with the original tenant being lost following a succession. There would also be no opportunity to update the terms of the tenancy agreement to take account of increased conservation knowledge about the holding or changing priorities. The succession tenancy takes effect on identical terms to the previous one, unless amended by the Agricultural Land Tribunal in the succession process.

Any other amendments can be made by agreement only, although an application for succession often affords a good opportunity for the negotiation of revised terms or the reorganisation of an estate. In practice, this happens frequently. The prospective tenant makes
an initial application for succession, the landowner makes a routine application for consent to
the notice to quit which he or she has served under Case G of Schedule 3 Part I of the 1986
Act, and the parties then negotiate a revised agreement including new conservation
prescriptions, perhaps in return for a beneficial reorganisation of the holding. The National
Trust frequently follows this route and the recent total reorganisation of the holdings on some
of its estates is a good example of this53.

Whilst there is no provision for succession under the 1995 Act, for many years the succession
provisions of the 1986 Act régime will continue to be important. Although the 1984 Act
abolished succession for tenancies created on or after 12 July 198454 in an attempt to
stimulate the letting market, there were saving provisions55 to ensure that tenancies granted
by a tribunal or by agreement as a result of a succession claim would continue to attract the
full right to a second succession. Tenancies granted by agreement and containing a clause
specifying that the succession provisions would continue to apply would also be legitimate.
This would facilitate reorganisations on an estate. Tenants taking a new tenancy, under
whatever circumstances, of the same holding or a substantial part of it would also continue to
have succession rights. In addition, the 1984 Act introduced succession rights on retirement,
as well as on death, for these existing tenancies, to encourage the passing on of farms to
aspiring young farmers.

S. 4(1)(b)-(d) of the 1995 Act specifies that any tenancy granted by a tribunal or by
agreement after 1st September 1995 as a result of a succession claim or in circumstances

53 Personal communication.
54 S. 34(1) 1984 Act.
55 S. 34(1)(b) ibid.
where the tenant would have had a right to succession\textsuperscript{56} will continue to be governed by the 1986 Act. This will ensure that tenants remain open to suggestions of reorganisation, although there is reputed to be considerable fear over the potential loss of rights in these circumstances and there has been considerable discussion of the real effect of this section\textsuperscript{57}.

A succession claim on death or retirement by a close relative\textsuperscript{58} of the previous tenant will only be successful if the applicant satisfies both the eligibility\textsuperscript{59} and the suitability\textsuperscript{60} criteria set out in the 1986 Act. Part of the eligibility test refers to the applicant's only or principal source of livelihood having been derived from his agricultural work on the holding or on an agricultural unit of which the holding forms part, and to his not being the occupier of any other commercial unit of agricultural land. This could be of concern to a prospective successor if a holding is substantially given over to conservation, or possibly set-aside, management, in that the agricultural nature of his or her work on the holding might be called into question, thus affecting eligibility. Similarly, the receipt of substantial monies under environmental management agreements rather than from agricultural produce might be a complicating factor. The arbitrary effect of the Units of Production Order\textsuperscript{61}, by which calculations are made as to the productive capacity of a holding, is embedded in an agricultural context, and the fact that payments received under Government management agreements are not relevant to the acknowledged commercial unit test is a good example of the lack of integration of environmental criteria into mainstream agricultural legislation, and

\textsuperscript{56}See s.(4)(2).
\textsuperscript{57}See Rodgers (1998) at para. 3.28 and Sydenham and Mainwaring (1995) at p.23..
\textsuperscript{58}Defined in ss.35(2) and 49(3) 1986 Act.
\textsuperscript{59}Ss.36(3) and 50(2) 1986 Act.
\textsuperscript{60}Ss.39 and 53 1986 Act.
\textsuperscript{61}Agricultural Holdings (Units of Production) Order 1998, SI 1998/2025.
the primacy of the agricultural imperative in policy issues. It is suggested that these are all matters that should be borne in mind in any decisions over the management of tenanted holdings where a possible succession is at risk.

2.5 Definition of Agriculture

The definition of agriculture, dating from 1947, and governing the interpretation of what constitutes an agricultural holding under s.1 of the 1986 Act, was originally set out in the 1947 Act and is included in what is now s.96(1) of the 1986 Act. It is as follows:

"agriculture" includes horticulture, fruit growing, seed growing, dairy farming and livestock breeding and keeping, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of farmland for woodlands where that use is ancillary to the farming of land for other agricultural purposes and "agricultural" shall be construed accordingly;

It is widely accepted that the definition is now outdated and incomplete, allowing no scope for environmental management, diversification or the new commercial crops which are becoming popular. The definition can be seen to be flexible enough to include many activities that are not explicitly mentioned. However, confusion has arisen over the treatment of horses\textsuperscript{62}, arable cropping\textsuperscript{63}, the growing of biomass\textsuperscript{64} and many other activities. There is also often doubt as to whether a conservation letting is agricultural or not. It is clear, however, that, whilst agricultural land must be used for agriculture for the purposes of a trade or business to be protected under the 1986 Act\textsuperscript{65}, that business need not be agricultural\textsuperscript{66}. A


\textsuperscript{63} But cf. the growing of crops for the testing of weedkillers. See Dow Agrochemicals Ltd. v EA Lane (North Lynn) Ltd. [1965] EGD 195.

\textsuperscript{64} Though not yet in the courts.

\textsuperscript{65} S. 1(4) 1986 Act.

\textsuperscript{66} McClinton v McFall (1974) 232 EG 707.
letting to a conservation body for (say) grazing, therefore, as opposed to a letting to a private individual on a completely non-commercial basis, would appear to qualify on the grounds that the activity is agricultural, and an unincorporated organisation, whether or not it is profit-making, is likely to be considered a commercial entity for this purpose.

The definition of agriculture was not amended for the purposes of the 1995 Act, although there was vigorous debate over whether it should be redefined in the Bill, with the Tenant Farmers' Association proposing amendments and the Agricultural Law Association and others commenting on these. There are other statutory régimes that include definitions of agriculture, including planning and rating legislation. This has been given as a reason for not changing one instance of definition, for fear of causing complications in the interpretation of others. This interrelationship with other definitions is important but it does seem that, while decisions made about interpretation for one purpose might inform later interpretations for other purposes, the individual statutory schemes do stand separately and need not depend on each other. Scrase discusses the problems with the definition in the planning context and many of the same arguments can apply to the agricultural holdings régime.

2.6 Good Husbandry and Sound Estate Management

One of the most significantly inhibiting factors in the successful enforcement of conservation objectives in agricultural tenancies is the current definition of good husbandry and its role in the statutory régime. The whole structure of the legislation now contained in the 1986 Act was premised on the promotion of what was known as good husbandry. The critical thing about the concept of good husbandry is that, although it had its origins in custom and the

67 See further in Ch. 3, Section 3.6.

common law, its meaning was crystallised for all statutory purposes by the wording adopted in s.11 of the 1947 Act. This definition remains effective today notwithstanding the fact that the agricultural climate is much changed and agricultural practices and policy differ greatly from those in effect shortly after the Second World War, when there was a national preoccupation with agricultural self-sufficiency.

In essence, according to the rules encapsulated in s.11, a tenant must maintain on the holding a reasonable standard of efficient production, having regard to the character and situation of the holding, the standard of management of the landlord and “other relevant circumstances”. In addition, the holding must be kept in such a state that such a standard of production might be maintainable in the future. This is an obligation not imposed by the common law, which implies a less stringent standard, mentioned below, which is now overridden by the statutory provision. Particular matters which may be taken into account in assessing whether a tenant is complying with the statutory standard include the proper cultivation and fertilisation of permanent pasture and arable land, the control of weeds, insects and other pests, proper stocking levels and necessary works of maintenance.

It is clear that a tenant pursuing conservation objectives might be in breach of these rules, whether or not his or her farming practices have been adopted in pursuance of a management agreement with a third party or not. For example, livestock numbers may not be at an optimum agricultural level, weed and pest levels may be high, and water management may be

---

69 See Appendix 1.

70 s.11(2) 1947 Act

71 For example, in an Environmentally Sensitive Area under the Agriculture Act 1986 or on a Site of Special Scientific Interest under s.15 of the Countryside Act 1968.
tailored to conservation rather than agricultural needs. Rodgers\textsuperscript{72} and Cardwell\textsuperscript{73} both consider this dilemma, the latter particularly in the context of set-aside. The case of \textit{Cambusmore Estates v Little}\textsuperscript{74} illustrates well the agricultural context in which the definition will be construed, by showing that, even where there is an activity producing economic benefits taking place on the land (in this case the leasing of milk quota), this would not be considered sufficient to satisfy the need for \textit{husbandry} being exercised. This would appear to raise questions over the more passive forms of set-aside, for example\textsuperscript{75}.

Unless there is a specific covenant in the tenancy agreement prescribing adherence to the rules of good husbandry, there is no specific obligation to comply with them. However, there are several circumstances in which reference to these long established criteria may become relevant in the statutory process and impose an indirect obligation on the tenant to observe the rules. Some of these circumstances are connected with the serving of notices to quit by the landlord, another with the claiming by the landlord of compensation for dilapidations on the termination of the tenancy. All of them provide a powerful disincentive for the tenant from farming in an environmentally beneficial manner, unless there is an explicit understanding with the landlord.

A breach of the rules of good husbandry would make a tenant vulnerable to a landowner seeking a certificate of bad husbandry from the Agricultural Land Tribunal prior to pursuing a notice to quit under Case C of Schedule 3 of the 1986 Act. In addition, if there is a special

\textsuperscript{72} In Howarth and Rodgers (1992) p. 155 ff.
\textsuperscript{73} [1992] Conv. 180.
\textsuperscript{74} 1991 SLT (Land Ct) 33.
\textsuperscript{75} See Cardwell in Rodgers (1996) p.208-212.
covenant in the tenancy agreement to comply with the 1947 rules, a breach would enable a landowner to proceed under Cases D and E for remediable or irremediable breach of covenant respectively.

Even where no Case is specified in a notice to quit, the Agricultural Land Tribunal may give its consent to the operation of the notice where it is satisfied that such action would be in the interests of good husbandry or sound estate management. And, finally, at the end of a tenancy, a landowner is entitled to seek compensation from the tenant for dilapidations to the extent that these are caused by the tenant not fulfilling his or her obligations under the rules of good husbandry. The public policy justification for these provisions is referred to by Bright and Gilbert (1995) when they point out that "the way the premises are left in the commercial sector has only a minimal effect on the reletting value, whilst bad farming methods can leave the farmland almost irremediably worthless if not corrected".

The concept of sound estate management in the context of consents to notices to quit is somewhat wider than the definition of good estate management provided by s.10 (and referred to in s.11(3)) of the 1947 Act and involves consideration of the landowner's whole estate. Some have wondered whether the landowner's conservation objectives could be relevant under this head in a way that they are not under that of good husbandry, although this is considered unlikely in the light of the general ethos and tone of other Tribunal decisions. Densham considers that the broader (rather than just agricultural) wellbeing of the

76 In practice there almost certainly would be in private agreements by non-conservation landlords.

77 See above for the operation of notices to quit and below for sound estate management.

78 S.71(1) 1986 Act.

79 At p.584.
holding might here be relevant, perhaps in the context of a non-agricultural use\textsuperscript{80}. Rodgers\textsuperscript{81} discusses this aspect in the context of sustainability, but implies that the concept would be interpreted by reference to agricultural rather than conservation criteria. The National Trust were arguing the matter in an unreported farm succession case with a Case G notice to quit on the Isle of Wight but the matter was settled before the Tribunal was given a chance to air its opinion.

The common law standard of husbandry, namely to use and cultivate the land in a good and husbandlike manner according to the custom of the country and to keep the buildings wind and watertight, was established in 1793 in the case of Powley v Walker\textsuperscript{82}. The custom of the country is to be construed in accordance with the well-established husbandry practices of the area in which the holding is situated. There is no obligation to leave the holding in as good a condition as it was found nor, indeed, to leave the land in a clean and proper condition at the end of the tenancy. However, this common law standard has generally been made redundant in the light of the detailed provisions of s.11 of the 1947 Act. It could, though, become relevant again under the 1995 Act, in view of the fact that the common law and custom will apply to all farm business tenancies unless they are explicitly excluded by or inconsistent with the terms of the tenancy agreement. In practice, it is expected that most parties will include explicit provision for husbandry matters because of the uncertainties involved in properly defining the common law standards.

It is clear that the operation of the rules of good husbandry inhibits the effective management for conservation of many tenanted holdings. It seems, though, that this is more likely to

\textsuperscript{80} Densham (1996) p. 169.
\textsuperscript{82} (1793) 5 Term Rep 373.
occur where the landlord is unsympathetic to conservation management and the tenant feels constrained from following a conservation or diversification initiative than where environmental protection is a prime objective of the letting which the landowner seeks to secure. Nonetheless, the conflict between the rules and the current initiatives towards extensification and diversification\textsuperscript{83} are obvious and are perhaps the most significant legacy of the 1947 philosophy\textsuperscript{84}. Densham suggests that the interpretation of the rules (and the definition of sound estate management) should now take place in a new light:

Until recently it has been assumed as axiomatic that it is in the interests of good husbandry that greater and greater productivity should be achieved on all land in agricultural use. Now that nearly all agricultural commodities are over-produced and there are statutory restraints and quotas which restrict productivity, good husbandry and higher productivity are no longer synonymous. It may well in the current climate be in the interests of good husbandry to farm in such a way as not necessarily to achieve maximum output.\textsuperscript{85}

A review of all Agricultural Land Tribunal decisions between 1977 and 1996 relating to certificates of bad husbandry and notices to quit showed that the Tribunal's interpretation of the concepts of good husbandry and sound estate management were heavily prescribed by an overlying gloss of purely agricultural culture. Matters for which evidence was sought included efficient drainage, the effective control of weeds, the use of artificial fertilizers to maintain sufficient fertility, an open attitude to modernisation, the maintenance of hedges, walls and fences and the good repair of buildings. All of these have the potential to compromise the environmental value of a holding.

\textsuperscript{83} See Glossary of Terms for both of these concepts.

\textsuperscript{84} Namely, of efficient production and self-sufficiency

\textsuperscript{85} Densham (1996) p.167 and, for sound estate management, p.168.
All parties, including the National Farmers' Union in its response to the Ministry's consultation\textsuperscript{86} on the proposed 1995 Act, appeared to be agreed that the rules of good husbandry should be redefined to encompass management practices which do not necessarily maximise production and efficiency. There was much debate on this matter throughout the passage of the Bill, as there was on the definition of agriculture. However, the Government policy, bolstered by the agreement between the industry bodies, remained stolidly to resist any attempts to incorporate amendments that might affect existing tenancies. They argued that the 1947 rules would only be relevant for the new farm business tenancies if they were specifically incorporated into the tenancy agreement and that revision of husbandry standards was a matter for individual negotiation and professional guidance. How this is likely to be dealt with now that the 1995 Act is in force will be explored in the next chapter.

2.7 Conservation Covenants

To a limited extent, the problem of inconsistency between conservation objectives and the rules of good husbandry has been addressed by the inclusion in the 1986 Act of the provision contained in paragraph 9(2) of Part II of Schedule 3. This provision was originally included in s.6 of the 1984 Act, before it was consolidated in the 1986 Act, after extensive lobbying on behalf of the National Trust and others concerned by the conflict between the two concepts. The final provision is, however, slightly different in emphasis and considerably less significant in conservation terms than the amendments originally sought. In essence it protects a tenant from possession proceedings on husbandry grounds or breach of covenant where there is an agreement between him or her and the landowner, either in the tenancy agreement or any other agreement, which indicates (in whatever terms) that its object is the furtherance of the conservation of flora and fauna or features of geological or physiological

\textsuperscript{86} See Note 41 above.
interest, the protection of buildings or other objects of architectural or historic interest, or the conservation and enhancement of the natural beauty or amenity of the countryside or the promotion of its enjoyment by the public. It does this by stating that where a certificate of bad husbandry is sought, any practice adopted as a result of any such clause must be disregarded. However, this provision only applies if a specific agreement is in existence particularly for conservation purposes. A tripartite management agreement to which the landlord is a signatory to evidence its consent would clearly satisfy this requirement. A point to note, however, is that the agreement does not necessarily have to be in writing which can lead to confusion and dispute if a tenant alleges that an oral agreement exists but evidence of its existence is scant.

Densham\(^{87}\) is rather dismissive of the use of this type of covenant (although this opinion originates in the 1989 edition of his work and has not been revised), stating that

In practice, such provisions are never found in any standard form or other regularly encountered tenancy agreements. The statutory provisions would appear to have been inserted so as to satisfy the currently fashionable conservationist political lobby and to have little, if any, practical effect except possibly in the future, if tenancies on such terms are ever granted.

Indeed, although some landowners, notably the National Trust\(^{88}\), some water companies and county councils or National Park authorities are now using conservation covenants routinely in their tenancy agreements, they do remain rare in lettings by individuals and those

\[^{87}\text{Densham (1998) p.200.}\]

\[^{88}\text{See Appendix 9 for the National Trust's standard conservation clause, originally drafted in 1986.}\]
institutions which do not have a conservation brief. But their use is increasing rapidly and the clauses in Schedule 3 also come into effect where the conservation agreement is free-standing i.e. one made other than in the tenancy agreement itself. The proliferation of incentive and other environmental management schemes make these clauses vitally important now for tenants and landowners alike. It is essential for a tenant to obtain explicit protection by obtaining the agreement of the landlord to even ad hoc conservation arrangements.

In addition to the protection afforded to the tenant under paragraph 9(2), the status of conservation covenants is enhanced by the terms of paragraphs 10(1)(d) and 11(2) of Schedule 3. These provide that, where a notice to quit is sought under Case D or Case E, a conservation covenant shall not be held to be a term that is inconsistent with the rules of good husbandry and therefore unenforceable by this route. Rather than protect the tenant, these latter provisions are of benefit to a landlord wishing to enforce such covenants, notwithstanding the fact that they would not usually fall within the terms of the rules of good husbandry. However, there do not seem to be any reported instances of such conservation covenants being enforced through the notice to quit procedure. The complexities of the Tribunal procedure and the considerable doubt over the ultimate enforceability of conservation covenants are likely to make enforcement by this method an unattractive option. The practical use and experience of conservation covenants will be explored further in Chapter 6.

---

89 Although Whitehead, Errington and Millard (MAFF 1997) found that 19% of the farm business tenancies covered in their survey included provisions largely concerning environmental conservation.
2.8 Remedies for Breach of Covenant

As suggested above, the presumed difficulty of enforcement is a hindrance to the effective use of conservation covenants in agricultural tenancy agreements, leading to the use of those mechanisms available for the granting of shorter terms\(^{90}\) where particularly sensitive sites are involved. The remedies available for the breach of a tenancy agreement that is governed by the 1986 Act are firstly the notice to quit provisions of the Act, secondly forfeiture (where there is a fixed term), and thirdly an action for damages or an injunction. All of these have difficulties as a means of preventing environmental damage as opposed to seeking redress afterwards and, even afterwards, the problems of valuing environmental damage are well documented\(^{91}\).

Of the notice to quit Cases, Case C (good husbandry), Case D (remediable breach) and Case E (irremediable breach) might be relevant for problems relating to environmental damage. However, we have seen above the limitations regarding the 1947 definition of good husbandry, and the effectiveness of Case D is restricted by the need to serve a preliminary notice to remedy the breach complained of \(^{92}\). A conservationist would argue that, in many cases, a breach of covenant involving, for example, the destruction of valuable long-established habitat should be considered an irremediable breach. However, there is no guarantee that this would necessarily be accepted. In the eyes of some, the features necessary for the particular ecosystem could be recreated without long term loss of value. The scientific evidence necessary to suggest otherwise might be difficult to marshal. There is an inherent

---

\(^{90}\) See above 2.2.3 for detail on these arrangements.

\(^{91}\) For a good introduction to the different theories being applied, see Bromley (1995) Pt V p.540.

\(^{92}\) Sch. 3 Part I 1986 Act.
problem in defining what is irremediable and establishing a point of reference to decide whether, or to what degree, a breach is remedied or not.

Where there is a fixed term tenancy the alternative remedy of forfeiture during the term could be considered. Indeed, where a fixed term has more than two years to run this would be the only option available. For forfeiture to be available, however, there needs to be an appropriate enabling clause in the tenancy agreement and, since the case of *Parry v Million Pigs Ltd*\(^3\), it is necessary for this clause to necessitate the serving of at least one month's notice before proceeding with forfeiture in order to allow the offending tenant time to submit a claim for compensation for improvements under s.64 of the 1986 Act.

The main reason for the uncertainty over whether forfeiture would be an effective remedy in this situation centres around the fact that the tenant has the right, under s.146 of the Law of Property Act 1925, to seek relief from the court against an application for forfeiture. In view of the fact that forfeiture has been rarely used in agricultural lettings over the years because of the stricter and more clearly defined remedies available under the notice to quit provisions of the 1986 Act\(^4\), the prospect of success for an tenant’s application for relief is not certain. However, it is likely that, where an instance of environmental damage occurs in what is essentially an agricultural letting, the balance of the value placed upon the tenant’s livelihood as against the landlord’s conservation objectives is likely to fall in favour of the tenant.

This same imbalance could be assumed for applications for the operation of a notice to quit under the 1986 Act or for an injunction, which is in essence a discretionary remedy, although in severe or persistent instances of deliberate damage this might be the most effective means

\(^3\) (1981) 260 EG 281.

\(^4\) See Densham (1996) on this p.231.
of preventing further injury to the site. Where it has been impossible to prevent the damage from occurring, an action for damages might be taken, although this would not be much consolation, other than as a warning for the future, once features of value have been destroyed. Also, with this remedy, the persistent problem of valuation raises its head. The traditional manner of valuation for compensation and damages in agricultural matters has been the reduction in value of the freehold interest in the holding. However, this might legitimately be believed to be negligible in financial terms where the damage is to some environmental feature of the land, particularly where, as a result of such damage, the agricultural value of the land has actually been increased.

None of these remedies has been definitively tested for the circumstances envisaged. Because of the legal uncertainties, problems are normally resolved by a process of negotiation and trading off for fear of an unsatisfactory result in proceedings. The cost and time necessitated by litigation is a further incentive to settle matters by agreement.

2.9 Freedom of Cropping

Another principle with a long history which affects the conservation management of agricultural land is that of the tenant's freedom of cropping and stocking. This was first established by statute by the Agricultural Holdings Act 1906 and is now incorporated in ss.14 and 15 of the 1986 Act. The statutory provisions override agreed restrictions in some circumstances. Particularly, a tenant may refer clauses that specify the retention of a certain area of the holding as permanent pasture to arbitration. In giving an opinion on whether such an area should be reduced, an arbitrator must consider whether a reduction would be "expedient in order to secure the full and efficient farming of the holding"\(^95\). The arbitrator

\(^{95}\)s.14(2) 1986 Act.
may then order that the tenancy agreement should be modified as to the area of permanent pasture and the system of cropping, although he may also specify that, where the area of permanent pasture is to be reduced, the tenant must reinstate up to an equivalent area on quitting the holding\textsuperscript{96}. This last provision is of little recompense to a landowner wishing to protect ancient pastures, the ecosystems of which are easily destroyed and rarely recoverable.

The tenant's freedom is further enhanced in respect of his or her choice of cropping system and produce disposal on arable land. Although the tenant must arrange to return to the holding the full manurial equivalent of all crops removed from the holding beyond the custom of the country or the terms of the tenancy agreement, in other respects the tenant has the right, without incurring any penalty, forfeiture or liability, to adopt whatever system of cropping he or she chooses as long as the holding is protected from injury or deterioration\textsuperscript{97}. However, restrictions must be complied with in the last year of the term or after a notice to quit is received. It is true that a landlord has the right to seek an injunction and obtain compensation if exercise of the freedom causes damage to the holding, but again, the wording of the provisions is couched, as with good husbandry, in terms of efficiency and a landlord is unlikely to have a remedy for the breach of a conservation term, adherence to which could itself be said to cause deterioration or injury to the productive capacity of the holding. Indeed, in an unreported case of the Agricultural Land Tribunal in 1965, an agreement restricting the use of land to sheep grazing and hay making only was overridden on the ground that it restricted the tenant's freedom of cropping\textsuperscript{98}.

\textsuperscript{96}s. 14(4) and (5) 1986 Act.

\textsuperscript{97}s. 15 1986 Act.

\textsuperscript{98} Sheffield Waterworks v Battye ALT (1965).
2.10 Rent Review Provisions

The rent review provisions of the 1986 Act are clearly linked to the productive capacity of the holding. In addition, there are restrictions on penal rents by virtue of s.24 of the 1986 Act which could inhibit a conservation landlord's attempts to enforce management prescriptions by means of a pay-back scheme. Either the landlord or the tenant can initiate a rent review, but, failing agreement, the matter will be referred to arbitration where the arbitrator has detailed guidelines on how to assess the new rent. These guidelines were first introduced by the 1984 Act and, disposing of the concept of a pure open market rent, set out what evidence should be taken into account in deciding the rent properly payable for that holding.

The arbitrator may start from the open market position, namely the rent reasonably to be expected from a prudent and willing tenant to a prudent and willing landlord, but must take into account all relevant factors, including in every case, the terms of the tenancy, the character and situation of the holding, its productive and related earning capacities and the current level of rents for comparable lettings. The critical factor here is that the rent formula takes into account not the actual productivity or profitability of the holding but the holding's potential were it to be in the hands of a competent tenant practising a system of farming suitable to the holding, and the earnings which a reasonably competent tenant could expect to make from practising such a system. There is thus no incentive for a tenant, in the usual course of events, to slacken his or her level of production for environmental benefits, for fear of high rent levels continuing to be applied according to the potential of the holding. This

---

99 See discussion on management agreements above, Section 2.2.3.8.

100 Now s.12 and Schedule 2 of the 1986 Act.
tendency will be reinforced in that farm business tenancy rents will tend to inflate the rents obtainable on 1986 Act holdings on review.  

On the other hand, it seems that, although the arbitrator must assume that the primary activity on the holding is agricultural production, in practice he or she may take into account, as a relevant factor, all other sources of income, so that if participation in an environmental scheme generated any income, the landlord would see the benefit of this in the rental level for the holding. In the case of Trustees of J W Childers v Anker Morritt LJ decided that the existence of a management agreement, as a form of offset against the restrictions placed on land by an SSSI designation, could be a relevant factor in an arbitration, although it would be for an arbitrator to decide how much weight should be afforded to it. However, the difficulty for the landlord in obtaining the relevant information to benefit from any increased income, without recourse to arbitration, is an additional hurdle to overcome.

The problems set out above and the complexity generated by having to deal with each case on its particular facts using formulae not drafted to address the situation in hand would have been sufficient reason to have covered this aspect explicitly in the 1995 Act, although as actually drafted it advocates valuation on the basis of open market value as a fall-back.

---


102 See Enfield Borough Council v Pott [1990]34 EG 60.


104 Which are a matter of public knowledge, being registered as a local land charge.

105 Muir Watt and Moss (1998) at p.5.

106 Rodgers, in Howarth and Rodgers (1992) discusses these aspects in detail on pp. 160-163, but prior to the above case.
provision only, allowing the parties to agree their own rent formulae\textsuperscript{107}. These formulae must, however, satisfy the criteria set out in s. 9(b)(ii) of the 1995 Act. Again, the implications of the new rent régime and the intended drafting policies of potential landlords will be examined in the next chapter.

2.11 Notices to Quit Part

One mechanism that has been frequently used to rescue threatened or very sensitive areas is the taking back of that part of the holding to manage it in hand. This is usually only achieved by agreement, often with an appropriate trade off. There is statutory provision for this in the 1986 Act, but it is necessary to have one of the specified reasons for repossession set out in s.31 before being able to serve a successful notice to quit. In addition, short notice is permissible in certain situations where speed is necessary and where explicit provision has been made in the tenancy agreement\textsuperscript{108}, making this an attractive option. These short notice provisions have been abandoned in the 1995 Act. Although it will be possible explicitly to include clauses permitting a notice to quit part, it will be necessary to give the full period of notice in accordance with s.7(1) of the 1995 Act.

Tree planting\textsuperscript{109} is often specified as the proposed use for an area taken back in this way and the mechanism works well for this type of situation where a genuinely non-agricultural use is intended. It often permits the most effective use of available grant money where the eligibility of the tenant and the landlord and need for investment are factors. However, it is not a satisfactory mechanism for other conservation objectives where the desired

\textsuperscript{107}s. 9 1995 Act.

\textsuperscript{108}s.25(2)(b) 1986 Act.

\textsuperscript{109}S. 31 (2) (e).
management is a modest amendment to its existing use and there is no genuinely non-agricultural purpose proposed.

A note of caution might be added here as to the drafting of mechanisms designed to protect a landlord's conservation interest. It is probable that any clause which in effect is an agreement to surrender a part of the holding at a future date on the happening of a certain event or breach, which is perhaps included in the guise of a forfeiture clause\textsuperscript{110}, or to permit a notice to quit part, is likely to be void as being counter to public policy. It is also possible that a surrender and re-grant may be implied, with all its implications as to the possible loss of security of tenure and change of régime\textsuperscript{111}, if a variation of a tenancy is agreed which substantially alters the extent or nature of the holding\textsuperscript{112}.

However, it is not now so fashionable to take parts of the holding back in hand, in view of the \textit{whole farm} approach towards land management now being taken by many conservation bodies. It is recognised that the most economic and efficient way for sensitive areas to be managed is often as part of a working farm, perhaps with the farmer claiming payments under an Environmentally Sensitive Area management agreement or Countryside Stewardship, Tir Cymen/Tir Gofal or other agreement. This is certainly the view held on some of the National Trust's estates, where it is more common now to \textit{include} a sensitive area within the tenancy agreement, but to have a separate arrangement or conservation covenant for the management of the sensitive area with attendant financial benefits for the farmer.

\textsuperscript{110} For forfeiture generally, see later in the chapter.

\textsuperscript{111} I.e. to that under the 1995 Act.

\textsuperscript{112} See Rodgers (1998) for a review of the circumstances in which this may occur, and at p.43 as to the saving provisions in s.4 of the 1995 Act.
2.12 Compensation for Improvements

The tenant of an agricultural holding may, at present, obtain compensation at the end of the tenancy for certain improvements made to the holding during the currency of the tenancy\textsuperscript{113}. The type of long-term improvement for which this is possible is set out in Schedule 7 of the 1986 Act. Unless a work of improvement is on this list, there is little incentive for a tenant to invest capital in the holding, except that some improvements may also be classed fixtures and be removable at the end of the tenancy under the provisions of s.10 of the 1986 Act\textsuperscript{114}. The classes of improvements set out in Schedule 7 are mostly agricultural in nature and a tenant investing in capital works to stimulate the conservation value of the holding would not necessarily be able to take advantage of these provisions.

In addition, the level of compensation is calculated by reference to the amount equal to the increase, attributable to the improvement, in the value of the holding \textit{as a holding}, having regard to its character and situation, and the average requirements of tenants reasonably skilled in husbandry\textsuperscript{115}. It seems, therefore, that even where an improvement falls within one of the categories set out in Schedule 7, the extent of compensation available is limited to the agricultural value of the improvement only. In addition to the above limitations, the tenant must receive the consent of the landlord to all improvements set out in Part 1 of Schedule 7 and either the consent of the landlord or the Agricultural Land Tribunal for those in Part 2 of the Schedule before being able to obtain compensation\textsuperscript{116}.

\textsuperscript{113} s.64 1986 Act.
\textsuperscript{114} See below.
\textsuperscript{115} s.66(1) 1986 Act.
\textsuperscript{116} s.67 1986 Act.
Although the current agricultural emphasis in the rules on improvements might cause problems for tenants who wish to invest money for conservation or diversification projects but have unsympathetic landlords, it should be noted that the rules also reduce a landlord's control over the activities of a tenant to the extent that a tenant may apply to the Tribunal for consent to carry out an improvement in Part 2 of Schedule 7 where the landlord's consent is not forthcoming. Many of the improvements listed in that Part could be damaging to the environmental well-being of the holding, for example the reclaiming of land, the making of roads, improvement of watercourses and land drainage. Similar considerations apply to the short-term improvements set out in Schedule 8 of the 1986 Act, for which the landlord's consent is not required117. A landlord may also be obliged at the end of a tenancy to pay compensation to a tenant for those matters known as tenant right under s.65(1) and Schedule 8 Part 2, namely the value to an incoming tenant of growing crop, previous acts of husbandry and residual fertility of the soil, among other things.

2.13 Fixed equipment

As mentioned above, a structure erected by a tenant, and not being the subject of compensation as an improvement, might be removable by the tenant at the end of a tenancy provided that he or she follows the statutory procedure set out in s.10 of the 1986 Act for serving notice on the landlord of the intention to do so. This is unlikely to be of concern to a conservation landlord on conservation grounds, if it had no hand in the design and siting of the structure, but the structure might be of significant value to the holding and influence the likelihood of its being re-let successfully. Also, the landlord might find itself needing to expend resources in replacing it if it is removed. In either of these cases the landlord might exercise its right to purchase the fixture. It should be said, however, that the obligations on

117s.64 1986 Act.
the tenant to have paid all rent due and to have complied in all respects with the repairing
obligations under the lease\textsuperscript{118} are difficult to satisfy if challenged in detail. It also seems
possible that contracting out of s.10 remains possible, although this seems inequitable and
contrary to the public policy of encouraging tenants to invest in fixed equipment\textsuperscript{119}.

One feature of the statutory rules on fixed equipment which might be of concern to a
conservation landlord is the provision relating to redundant equipment which is set out in Part
3 of the Schedule to the Model Clause regulations dealing with repair and maintenance
responsibility for fixed equipment\textsuperscript{120}. By this procedure an arbitrator can declare a fixture
redundant to the needs of the holding and thus relieve the parties of their obligations under
the Model Clauses. Once again, the factors which an arbitrator should take into account are
related to good estate management, and to the character and situation of the holding and the
average requirements of tenants reasonably skilled in agriculture\textsuperscript{121}. The result of this is,
that, unless specific reference to the feature is included in the tenancy agreement, a tenant
could be relieved of responsibility to maintain it notwithstanding the fact that it might be of
considerable historic or landscape importance.

Finally, a provision which came under much scrutiny following the bringing into force of the
Control of Pollution (Silage, Slurry and Fuel Oil) Regulations 1991\textsuperscript{122} was s. 11 of the 1986
Act, which deals with the provision of fixed equipment necessary to comply with statutory
requirements. A tenant may apply to the tribunal for a direction that a landlord should

\textsuperscript{118}s.10(3) 1986 Act.

\textsuperscript{119}\textit{Premier Dairies v Garlick} [1920] 2 Ch 17.

\textsuperscript{120}The Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations 1973 made under what is now s.7 of the 1986 Act and amended in 1988.

\textsuperscript{121}Sched. Pt III, para. 13 (2).

\textsuperscript{122}SI 1991/324.
provide, alter or repair fixed equipment that is necessary to comply with requirements imposed by or under any enactment. The tribunal will grant such a direction if they are satisfied that it is reasonable for the tenant to be carrying out a particular agricultural activity on the holding\textsuperscript{123}, that the equipment or the repairs or modifications are necessary to comply with the requirements\textsuperscript{124}, and that the activity has been carried out for at least three years on the holding or that starting it does not constitute or form part of a substantial alteration of the type of farming carried out on the holding\textsuperscript{125}. In assessing the reasonableness of the application and the making of any direction, the measures to be used are again those of good husbandry and good estate management. The tenant may complete the works and charge the reasonable cost of it from the landlord\textsuperscript{126}, and in assessing this cost, the amount of any Government grant should be deducted\textsuperscript{127}.

There was a view that this provision could appropriately be used to secure the effluent management schemes that were required by the 1991 Regulations. There was some doubt as to who was primarily responsible (and thus in danger of prosecution) under the Regulations where there was a tenanted holding, for their wording was not wholly clear, referring to the person in custody or control of the potentially polluting matter. It is thought that the tenant would in most cases be responsible, but each case is dependent on its circumstances and the terms of the tenancy (particularly the repair clauses), and the Tribunal was not empowered to make a direction under s.11 where the landlord was himself statutorily responsible. Thus, in many cases, the parties negotiated a compromise for the provision of facilities, with grants

\textsuperscript{123} S.11(1) 1986 Act.
\textsuperscript{124} S.11(2) 1986 Act.
\textsuperscript{125} S.11(3) 1986 Act.
\textsuperscript{126} S.11(6) 1986 Act.
obtained and the remaining cost being shared. It is not known whether any applications were made to the Tribunal.

2.14 Compensation for Dilapidations

Whilst the landlord might fear having to pay compensation for inappropriate improvements, the tenant's parallel fear is that the landlord might have a claim for dilapidations should the tenant choose to pursue conservation objectives to the extent that the fertility or agricultural productivity of the holding might be impaired\(^{128}\). We have seen above the relationship of dilapidations claims to the definition of good husbandry. There is once again an over-emphasis on agricultural efficiency which does not integrate well with other policy initiatives such as the set-aside schemes and other extensification measures under management agreements or otherwise. There are two particular effects of the dilapidations rules which act to the detriment of effective conservation management.

The first of these is that the very existence of the rules deters many tenants from participating in environmental schemes, particularly without the consent or greater involvement of their landlord. The second is that, in fear of a substantial claim for dilapidations at the end of a tenancy, a tenant might be tempted to carry out hasty and inappropriate repair and maintenance works that might damage habitats or ill-benefit traditional landscape features. Examples of this kind of work would include the clearing and dredging of watercourses, the erection of inappropriate fencing or repairs to vernacular buildings which do not use traditional materials and techniques. Vernacular features also bring a problem of valuation in dilapidations claims. While redundant vernacular buildings and other features might have

\(^{127}\) S.11(8) 1986 Act.

\(^{128}\) Under s.71 1986 Act.
little or no agricultural value to the holding, they might be of high value to a landowner interested in conservation.

Although it is clear that some remedy must be retained for the landlord to deal with detrimental neglect, the divorcing of dilapidations claims from the traditional definition of good husbandry is essential, and the flexibility to deal with this has been built in to the 1995 Act. Of course, the most effective vehicle for finding a course of action which is acceptable to both parties will always be a close and co-operative relationship between landlord and tenant, as it is with many of the areas of potential conflict outlined in this chapter.

2.15 Unwritten or Inadequate Tenancy Agreements

Under s. 6 of the 1986 Act, where there is not in force a written tenancy agreement embodying all the terms of the tenancy (including the Model Clauses), or a written tenancy does not include all the matters set out in Schedule 1 of the Act, then either party can request the other to enter into a written agreement specifying all the relevant matters. If the request is not complied with, then an application for arbitration may be made. The matters set out in Schedule 1 are those that might be expected in a traditional tenancy agreement. There is no provision for securing conservation covenants, which could be of concern to a conservation landlord inheriting an oral arrangement, or to a tenant wanting to secure assurance before entering a programme of extensification that the landlord would not seek to take action for breach of husbandry standards.

2.16 The Arbitration Process and the Agricultural Land Tribunal

Underlying many of the above concerns is the very ethos and nature of the arbitration and Agricultural Land Tribunal decision-making apparatus. So strong is the tradition of
encouraging high agricultural production and optimum efficiency that, even where the mechanisms are ostensibly built in to the statutory régime to protect the environment, for example in the terms of Schedule 3 of the 1986, it is suspected that the decision makers might not be flexible enough to take an innovative view on this type of matter. The extent to which this problem will erode under the 1995 Act régime will be interesting to observe. In theory the freedom of contract which is built in to the Act should make the consideration of objectives other than purely agricultural ones more straightforward, but in practice the relevant personnel will be the same, and old attitudes might prevail.

An examination of Tribunal decisions\textsuperscript{129} relating to certificates of bad husbandry and notices to quit between 1990 and 1996 shows that concepts were viewed by the Tribunal very much in a traditional agricultural context and this is unlikely to change with any speed, while the two panel members for each Tribunal are selected by the National Farmers' Union and the Country Landowners' Association. Similarly, arbitrators for agricultural holdings matters are usually appointed by the agreement of the parties or from a panel of valuers, chartered surveyors and land agents with agricultural, but not necessarily any environmental, expertise.

2.17 Conclusions

This analysis of the situation under the 1986 Act régime has shown that there were considerable constraints for those concerned with conservation management of tenanted farmland. For landlords wishing to avoid these constraints, there was available a suite of alternative arrangements, each of which had its own advantages and disadvantages. With the advent of the 1995 Act, the need for these alternatives will diminish, and new arrangements

\textsuperscript{129} See above.
will evolve. In the following Chapter we will examine the new régime in detail, and consider whether it will provide environmental benefits for tenanted farmland.
CHAPTER 3

Law and Policy - The Effect of the Agricultural Tenancies Act 1995

3.1 Introduction

During the negotiations and debate which gave rise to the Agricultural Tenancies Act 1995 (the 1995 Act), it was suggested by its proponents that the new legislation would have a beneficial effect on both the rural economy and the rural environment. Although the consultation documents circulated by the Ministry of Agriculture, Fisheries and Food had not explicitly referred to the environment, Earl Howe, the Parliamentary Secretary for the Ministry of Agriculture, Fisheries and Food stated in the House of Lords that the Bill would allow new tenancies to incorporate more in the way of environmental activities and that this was to be welcomed. However, this observation was made only in response to challenges that the Bill contained too little reference to the concept of sustainability and the environment in general and others were suggesting that the short-termism generated by an ethos of freedom of contract would have a detrimental effect on the countryside.

---

1 A. Sydenham and N. Mainwaring in Farm Business Tenancies - Agricultural Tenancies Act 1995 (Jordans 1995) describe these as having been second and third respectively in a list of reasons for reform.


3 599 HL Debs., col. 529, Second Reading Debate. Others also highlighted this aspect. See, for example, The Earl of Courtown at col. 515 ibid. and Sydenham and Mainwaring op. cit. p. 42.

4 See, for example, Lord Elis-Thomas at col. 506 and Viscount Hampden at col. 520 of the Second Reading Debate.

5 Lord Carter at col. 492 and Lord Geraint at col. 522 ibid.
The question of how the new Act will affect economic diversification is outside the scope of this thesis and is dealt with elsewhere⁶. This chapter will look at whether conservation and environmental protection, which can themselves be seen as a particular form of diversification, will be well served by the new framework⁷. Recently, there has been a marked change in the direction of agricultural policy, at both a national and a European level. Diversification into other activities has been encouraged by various policy initiatives⁸, and such encouragement is now equally directed towards less intensive farming methods and environmentally sensitive land management through a variety of measures, many generated in response to EU initiatives⁹. Some initiatives have the protection of the environment as their primary or only objective. Others are driven by other aims, for example the limiting of food production, but are intended to produce ancillary environmental benefits. Reform of the farm tenancy legislation by the 1995 Act can be seen as one element of this broad policy shift, intended to encourage more flexible farming systems with a variety of public benefits. This can be contrasted with the legislative climate following the Second World War, when there was a preoccupation with efficient food production and agricultural self-sufficiency¹⁰.

A product of this post-war preoccupation was the legislation, that is now consolidated in the 1986 Act¹¹, the governing legislation for all farm lettings prior to 1 September 1995. This has at its core the principle that, in the interest of efficient agriculture, a tenant farmer should be protected from any undue influence over the farming system by the owner of the holding, to

---

⁶ Rodgers (1996a).
⁷ See Bishop (1996) for an earlier analysis of these issues.
⁸ See detailed footnote in M. Cardwell Legal Issues of Alternative Land Use, Ch. 9 of Rodgers (1996b) p.196.
⁹ See Ch. 1, Section 1.6.
¹⁰ Described by Bright (1995) at p.446.
¹¹ Initially the Agriculture Act 1947.
the extent that, with few exceptions, and provided that a basic standard of husbandry is maintained, considerable security of tenure and freedom of cropping is available to farmers governed by this régime. As we saw in the previous Chapter, many aspects of this statutory provision are now considered to be inconsistent with environmentally sound land management, and could potentially cause legal difficulties for landlords and tenants wishing to undertake conservation works\textsuperscript{12}. Some of these problems may have been alleviated by the 1995 Act. However, the 1995 Act may itself give rise to other problems of a different, if related, nature.

3.2 The Main Implications of the 1995 Act

There are two areas in which the 1995 Act will have an effect on environmental land management. The first of these is on land owned or managed by individuals with a committed interest in maintaining their land for its conservation interest or by conservation bodies. Within this category would fall land belonging to the National Trust, other conservation charities\textsuperscript{13}, the statutory conservation agencies, National Park authorities and, to the extent that their conservation objectives are not compromised by constitutional or financial constraints, land owned by local authorities, some private estates, and institutions such as the Church Commissioners, the Crown and the Ministry of Defence. The other area of impact is in what we might call the wider countryside, where the conservation interest of tenanted agricultural land across the country might be affected as a side effect of the general economic influences generated by the Act’s free market emphasis, and the processes triggered by it.

\textsuperscript{12} See also Bishop (1997), originally presented at the Anglo-American Agricultural Law Symposium, Oxford, 18 September 1995, for a detailed discussion of these issues.

\textsuperscript{13} For an assessment of the role of trusts and charities in the conservation field see Dwyer and Hodge (1996).
For the conservation landowner, the main advantage brought by the 1995 Act is the flexibility afforded by the principles of deregulation and freedom of contract (modified only slightly by statutory controls on notice, rent and compensation), which are essential features of the new legislation. This flexibility will be exploited in the choosing of term lengths and in the types of obligations and responsibilities to be incorporated in farm business tenancies. The absence of security of tenure and succession rights and the relaxation of statutory rules on freedom of cropping, good husbandry and repair clauses will enable the parties to decide on the most appropriate management regime for each holding.

Provided that the business and notice or agriculture conditions of the 1995 Act are complied with, this could be designed to ensure first and foremost that the conservation value of the holding is protected. For example, clauses relating to the provision of public access, the maintenance of sensitive habitats, the repair of historic or vernacular features, and the protection of water resources may be incorporated as appropriate. Term lengths may be chosen that reflect the fact that objectives and management prescriptions need to evolve with experience and the development of knowledge, and break clauses may be included to give the parties regular opportunities for review. Where there is genuinely non-exclusive possession it is probable that annual grazing licences will continue to be a useful conservation tool, the administrative burden of annual renewal being offset by their flexibility.

---

14 *Farm business tenancy* is the name given by the 1995 Act to an agricultural letting.

15 See Ch. 2.

16 Set out in s.1 of the 1995 Act. The business conditions are that all or part of the land comprised in the tenancy is farmed for the purposes of a trade or business and that, since the beginning of the tenancy, all or part of the land so comprised has been so farmed (s.1(2)). The agriculture condition is that, having regard to the terms of the tenancy, the use of the land comprised in the tenancy, the nature of any commercial activities carried out on that land, and any other relevant circumstances, the character of the tenancy is primarily or wholly agricultural (s.1(3)). See Section 3.6 for more detail.
In the wider tenanted countryside, however, it seems that the most important implication will be the effect on farm management practices of the loss of security of tenure, and of short term lengths, which appear to be an emerging trend since the 1995 Act came into being\textsuperscript{17}. It is difficult to know whether this will be a continuing pattern, as it is clear that, in the early years of the new régime, many lettings will be replacing existing short-term arrangements which had been put in place to avoid security of tenure, or in anticipation of the new régime. However, it seems clear that, notwithstanding the evidence that traditional and institutional landowners are offering terms of 10 to 25 years on equipped holdings\textsuperscript{18}, it is most likely that many bare land lettings will be for short periods\textsuperscript{19}, and to established farmers seeking to spread their costs and maximise the benefits of the current support schemes.

3.3 The Nature of Farm Business Tenancies

The whole arena in which agricultural lettings will now take place has changed with the Agricultural Tenancies Act 1995 to one of far less statutory regulation. However, the central principle of freedom of contract between the parties is tempered by statutory provision in a few essential areas.

As stated, one of the primary aims of the new legislation was to facilitate the diversification of enterprises carried out on tenanted agricultural holdings. To this end, the 1995 Act envisages the situation where a tenancy is governed by the agricultural régime, even where the use of the land in question is not wholly agricultural at the start of the tenancy, or at a

\textsuperscript{17} The average term of FBTs has been found to be 3 years 7 months (Whitehead, RICS 1996) and 4 years (CAAV 1996 Annual Tenanted Farm Survey). 55 % of FBTs surveyed in 1997 had a term of 2 years or less (MAFF 1997) and in a different survey (CAAV 1998), 50 % were for between 2 and 5 years.

\textsuperscript{18} See reports on the Executive Interviews in Ch. 5.

\textsuperscript{19} That is for less than 5 years.
later stage. A tenancy will be a farm business tenancy under the 1995 Act if it is granted on or after 1 September 1995 and meets the business condition set out in the Act and either the agriculture condition or the notice conditions.\(^{20}\)

These conditions are set out in ss. 1(2)-(4) and are explored more fully in the context of the requisite degree of agricultural use later in this chapter. In essence, the business conditions are that all or part of the land comprised in the tenancy is farmed for the purposes of a trade or business, and that all or part must have been so farmed since the commencement of the tenancy.\(^{21}\) The agriculture condition states that, having regard to the nature of any commercial activities carried out on the land, and any other relevant circumstances, the nature of the tenancy must be wholly or primarily agricultural,\(^{22}\) while the notice condition permits the serving of notice by the parties at the beginning of the tenancy specifying that the tenancy shall remain a farm business tenancy even where the use of the land ceases at a later date to be primarily agricultural.\(^{23}\)

The notice condition can, however, only legitimately be used where, at the beginning of the tenancy, having regard to the terms of the tenancy and any other relevant circumstances, the character of the tenancy was primarily or wholly agricultural. There is no prescribed form for the notices, but they must be in writing and be given by each party to the other on or before the day on which a tenancy is created. The provision is intended to cover the position where any significant diversification takes place after the commencement of the tenancy, so that, even if the agricultural nature of the letting is lost, the tenancy will continue to be governed

\(^{20}\) S. 1(1).
\(^{21}\) S. 1(2).
\(^{22}\) S. 1(3).
\(^{23}\) S. 1(4).
by the 1995 Act. These provisions are of critical importance in the context of the environmental management of agricultural land, where the purposes of a letting may not be clear-cut and land management practices may vary from season to season.

Under the 1986 Act, a series of cases on non-agricultural use have been decided on their particular facts, leading to a degree of uncertainty as to what would be necessary to ensure that a tenancy remained under the auspices of the 1986 Act rather than falling within the business tenancy régime governed by the Landlord and Tenant Act 1954\(^24\). The test to be applied in that case was whether the use to which the holding was being put was substantially agricultural. So it can be seen that the 1995 Act has effectively reversed the whole balance of the applicable test. Under the 1995 Act it is still essential, however, that at the beginning of a letting the character of the tenancy is primarily or wholly agricultural, even to comply with the notice conditions. This factor will often become an issue on the re-letting of a holding, which may originally have been let as a farm business tenancy, but where substantial diversification (e.g. environmental management) has taken place. In any event, this will continue to be an important consideration in deciding the appropriate régime under which to let land where the agricultural management of it is subservient to another purpose\(^25\).

Where there is doubt as to the future use of a holding, and it is important to the landlord that the letting remains agricultural, it will be important to include in the tenancy a clause prohibiting non-agricultural use. This will provide protection in any later dispute, as any use

\(^24\) See, for example, Lord Monson v Bound [1954] 3 All ER 228, Wetherall v Smith [1980] 2 All ER 530, and Short v Greeves [1988] 1 EGLR 1. And see Ch. 2, Section 2.5 and Cardwell (1992), and Rodgers (1988) and (1996a) for a more detailed review of the case-law.

\(^25\) It is possible to obtain a court order effectively contracting out of the security of tenure provisions of Part II of the Landlord and Tenant Act 1954, but this must be done before the tenancy starts, and cannot be attempted at a later stage (s. 38 1954 Act). This mechanism has been used under the 1986 Act régime for the letting of small nature reserves.
carried out in contravention of this clause will be disregarded for the purpose of assessing whether a tenancy complies with the business or agriculture conditions of the 1995 Act\textsuperscript{26}.

Doubts over the status of a letting might also occur where, either explicitly, or by operation of law, a surrender and re-grant takes place. An implied surrender and re-grant often occurs where a variation to the terms of a tenancy, which is more than minimal, is agreed between the parties. In this case, as with explicit cases, the situation where a new tenancy comes into being by a surrender and re-grant is covered by s. 3 of the 1995 Act. This section deems that there is no need to serve fresh notices under the notice conditions, provided that the tenant is the same, the notice conditions were satisfied in respect of the old tenancy and the terms of the tenancy remain substantially the same other than small changes in area or a shorter fixed term has been agreed. In all other cases the parties will need to ensure that fresh notices are served. Tenancies where conservation is an important objective are often varied in this way to facilitate the management of sensitive sites and careful attention to these provisions will therefore be a necessary part of negotiations.

While there is no security of tenure or minimum term length under the 1995 Act, there are statutory constraints on the serving of notices to quit, designed to protect tenants from disruption of the seasonal cycle of farming. These are contained in ss. 5-7 of the 1995 Act and essentially provide that the parties must receive at least 12 months, but less than 24 months written notice to quit. This is so even for a fixed term of over 2 years, which will otherwise continue from year to year, unless terminated in accordance with the notice requirements\textsuperscript{27}, and notwithstanding any contrary agreement\textsuperscript{28}. Similar provision is made for

\textsuperscript{26} S. 1(8) 1995 Act.
\textsuperscript{27} S. 5(1) 1995 Act.
\textsuperscript{28} S. 5(4).
the serving of notices to quit the whole or part of a holding in pursuance of an explicit term in a tenancy agreement.\textsuperscript{29}

However, provided that these time constraints are complied with, and the notice is clear and valid at common law, it need not be default based and there is no action available to a tenant to challenge it. On the other hand, for default based notices to quit during fixed terms, a landlord does not have the certainty of the statutory notice to quit procedure under the 1986 Act, and must rely on common law remedies. These may not guarantee possession because of a tenant's right to apply for relief against forfeiture.\textsuperscript{30} For a conservation landlord, this again is an important feature of the new legislation, as the swift enforcement of covenants in a lease may be essential in order to prevent environmental damage. The 1995 legislation does nothing to ensure that this is any more possible. In fact, its effect is quite the reverse.

Other than the above, there are minimal statutory provisions in the 1995 Act which cover the setting of rents\textsuperscript{31}, the removal of fixtures\textsuperscript{32} and compensation for improvements at the end of a tenancy\textsuperscript{33}, and the resolution of disputes\textsuperscript{34}. These will be discussed as they are relevant in the context of environmental protection in the following pages. In essence, though, statutory intervention is a fraction of what it was under the 1986 Act régime, and thus the explicit

\textsuperscript{29} S. 7.

\textsuperscript{30} See Ch 2, Section 2.8.

\textsuperscript{31} Ss. 9 and 10.

\textsuperscript{32} S. 8.

\textsuperscript{33} Ss. 15-25.

\textsuperscript{34} Ss. 28-31.
terms of the tenancy agreement and the operation of the common law will assume a more significant role for post-1995 agricultural lettings\textsuperscript{35}.

### 3.4 Short-termism

It is difficult to establish with any certainty what the pattern of lettings has been so far under the 1995 Act, or what it is likely to be\textsuperscript{36}. Most surveys can at best acquire information from a small sample, normally contacted through a professional organisation, and particular problems arise with attempts to compare lettings taking place under the 1995 Act with those occurring in 1994, for the impending prospect of new legislation will itself have had a significant effect on management decisions during that period. Many landowners will have been making use of contracting or share farming agreements or will have made short term lettings, using the unsatisfactory legal arrangements available under the 1986 Act regime\textsuperscript{37}, while they assessed the implications of the new legislation and made appropriate business decisions.

In addition, many short-term lettings are not advertised or recorded and it is difficult to separate out the effect of other influences on letting trends. For example, the general agricultural climate and the structure of subsidy payments were, during the critical period following the passing of the Act, favourable to most sectors of the farming industry and rents were high, reflecting the strong demand for land. The position is also distorted by the

\textsuperscript{35} The rôle of the common law in the 1995 Act régime is particularly well set out in Muir Watt and Moss (1998)

\textsuperscript{36} Although some have tried, and various surveys are emerging. See, for example, Kerr (RICS 1994) and the RICS, MAFF and CAAV surveys referred to in Note 17 above.

\textsuperscript{37} For example, lettings for more than 12 months but less than 2 years following the Court of Appeal ruling in Gladstone v Bower [1960] 2 QB 384, or lettings or licences approved by MAFF under ss. 2 or 5 of the 1986 Act. For further detail see Ch. 2.
simultaneous lifting of inheritance tax disadvantages for let land by the Finance Act 1995\(^{38}\), although there are still other disincentives in the treatment of let land for income tax, capital gains tax and value added tax purposes. Certainly Cardwell is sceptical about the widespread use of longer terms for environmental reasons, notwithstanding the perceived benefits:

> Unlike fiscal considerations, environmental issues inevitably require a long-term approach to the farming activities. However, unless there are substantial incentives, there is a strong possibility that few landowners will attach such emphasis to the protection of the environment as to forego the perceived flexibility and tax benefits conferred by short-term agreements\(^{39}\)

Whilst it must be true that term lengths under the 1995 Act will be shorter than the lifetime interests held under the 1986 Act regime, it is also true that many very short-term arrangements will be replaced by longer terms, even if break clauses are inserted to ensure flexibility. The legal difficulties in setting up *Gladstone v Bower* tenancies, Ministry lettings and grazing arrangements have been well documented\(^{40}\), but they have nonetheless been widely used. For some farming situations they have proved to be a valuable tool in themselves and not merely as an avoidance mechanism, but on the whole they have not been an entirely suitable mechanism. So, it could be argued, and has been very strongly\(^{41}\), that, if the Act does the job envisaged for it by the Government, namely to stimulate the letting market, there will be more tenancies under the new régime and term lengths will generally be longer. However, whatever term lengths become accepted as the norm, tenants under a farm business tenancy will not have any succession rights\(^{42}\), and will not have a tenancy which

---

\(^{38}\) S. 155. 100% agricultural property relief will be allowed for land let on or after 1 September 1995.

\(^{39}\) Cardwell (1993) p.150.

\(^{40}\) See, for example, Densham (1989) (7th Ed.) Chs. 2 and 3 and Rodgers (1998) Ch. 5. Also, Cardwell (1993).

\(^{41}\) See Kerr (1994).

\(^{42}\) Governed by Part IV of the 1986 Act, and see Chapter 2 above.
endures for their lifetime, or indeed, for more than, say, 25 years at the most. This in itself might affect attitudes to the holding as much as, say, whether the term is for 2 years or for 10 years.

It is clearly important to establish whether farm management practices are significantly different under short-term lettings. It was widely assumed in debates over the new legislation that investment levels and husbandry standards would be reduced for short-term arrangements, and that farmers would take what they could from land held on a short term, without consideration for its long-term well-being. However, it appears that these assumptions were usually made in the context of arguments that a minimum term length should be prescribed by the new Act and, while not suggesting that the concerns about environmental degradation were not sincerely expressed, it would not be unreasonable to suggest that the issue would not have received so much attention had it not so well served the broader argument that a minimum term should be adopted in the new legislation.

A 1990 RICS report on agricultural land tenure and the extent of unconventional short term letting arrangements states that

The implications for farm management of unconventional tenancies are, in the main, negative. There is a temptation for the occupier to economise on long-term management practices and to seek ways of maximising short term gain. On both environmental and agricultural grounds, there are large question marks against the long term sustainability of some of the practices encouraged by short term arrangements. On the other hand, some unconventional tenures do prevent the kinds of abrupt disjunctures that can occur on the sale of the freehold. Thus, for

---

43 See, for example, Elfyn Llwyd (Meirionnydd Nant Conwy) at col. 6, Alan Williams (Carmarthen) at col. 12 and Martyn Jones (Clwyd South-West) at col. 28 of HC Debs Standing Committee A 21 February 1995.

44 This was perhaps the most contentious issue in the negotiations between industry bodies leading up to the 1995 Act, with various institutions, most notably the Farmers' Union of Wales, arguing strongly for a minimum term.
example, hedges may be neglected under grass keep arrangements but they are less likely to be grubbed out as might occur with a change of ownership.\textsuperscript{45}

These observations were based on findings that stocking rates, grazing patterns and the application and composition of fertilisers differed between grass keep land and other land held on a more secure basis, although farmers often initially suggested that there was no difference in the way that they farmed the two areas. The report also points out the fact that the development of long-term management strategies encompassing agricultural, silvicultural and environmental objectives is highly unlikely on land held for a short term\textsuperscript{46}. Interestingly, there appeared to be no consistency in short-term grass keep arrangements over who undertook responsibility for hedges and fences, although often the only maintenance was of a rudimentary nature to prevent the straying of stock. The comments in the latter part of the paragraph quoted above are consistent with the view that, in addition to the effects of short-term lettings on the farm environment, major changes in occupancy are often the times when landscape features are under threat\textsuperscript{47}. If the letting market becomes more fluid under the 1995 Act, these changes in occupation will become more frequent.

However, the RICS report recognises that the implications of term length for farm management are complex and that further work is necessary on these aspects. Indeed, conservationists themselves are not agreed that long terms are universally desirable. The view was expressed in the Interview Survey for this project that, whilst on a commercial letting there probably is short-termism, it is not perceived as a big problem for conservationists if an eye is kept on the long-term management plan for a site. In fact the small areas involved tend

\textsuperscript{45} Winter et al. (RICS 1990), pp. 55.

\textsuperscript{46} p.57-8 ibid.

\textsuperscript{47} Munton and Marsden (1991).
to encourage conservationists themselves to have too short-term a view, as they become preoccupied with management prescriptions and wanting immediate benefit for particular species\textsuperscript{48}. The coming to an end of short-term arrangements also affords an opportunity for the landlord to review the arrangement and make any necessary changes.

It is also important to identify other possible influences on management practices, particularly the effect of high rent levels. Where a high rent is demanded for a short bare land letting, as seems to be the current trend, it is likely that a farmer will be forced to farm intensively to ensure profitability. This will be especially true for new young entrants with a weak capital base who may be tempted to over-stretch themselves in an attempt to get a foothold on the industry ladder.

### 3.5 The Integration of Conservation and Tenancy Policies

An issue related to term length is that of compatibility between land tenure arrangements and Government environmental schemes such as Countryside Stewardship or Tir Cymen\textsuperscript{49}, Environmentally Sensitive Areas (ESAs)\textsuperscript{50}, or the schemes set up under the EU Agri-Environment Regulation\textsuperscript{51}. There is little consistency between these schemes, but typically a negotiated management agreement runs for a minimum of five years\textsuperscript{52} and the governing

---

\textsuperscript{48} Executive Interviews, English Nature.

\textsuperscript{49} Schemes administered originally by the Countryside Commission and the Countryside Council for Wales respectively under their experimental powers. The Countryside Stewardship scheme has now been taken over by MAFF and will be expanded to become the main scheme available in areas outside ESAs in accordance with proposals contained in the Rural White Paper (\textit{Rural England} (HMSO 1995, Cmd. 3016)), p.111. Tir Cymen has now been replaced by the Tir Gofal scheme which is available across the whole of Wales.

\textsuperscript{50} Designated under s. 18 of the Agriculture Act 1986.

\textsuperscript{51} O.J. 1992, L215/85. All the above schemes are discussed in more detail in Ch 4.

\textsuperscript{52} For example, Countryside Stewardship and Tir Cymen agreements generally run for 10 years, as do new ESA agreements. Agreements under MAFF’s Habitat Improvement Scheme might have a term of 20 years and those under the Moorland Scheme only 5 years.
legislation contains an obligation on a tenant farmer either to notify or to obtain the consent of the landowner before entering the scheme\textsuperscript{53}.

Where a tenant had a lifetime interest under the 1986 Act, the relevant agencies for the schemes were prepared to enter an agreement with the tenant alone, as he or she had sufficient interest in the land to ensure compliance with the scheme for the duration of the management agreement. If, as suggested above, term lengths under the 1995 Act tend to be shorter, then more complex tri-partite arrangements will have to be entered, or the agency will have to deal direct with the landowner, who will then want to pass on the obligations under the agreement to the tenant in the tenancy document\textsuperscript{54}.

The effect of this is uncertain. The motivations of landowners will differ from those of farmers. Some, particularly those living on or near the holding, might be keen to pursue environmental gains on their land if the financial incentives are sufficient. Others, particularly institutional and private landowners holding land purely for investment, will seek the most flexible and profitable arrangements, ensuring the ability to secure possession at short notice, whilst showing little interest in how the land is managed. These might be reluctant to entertain any scheme that, in their eyes, might damage the long-term agricultural productivity of the land.

Where a farmer does enter into an environmental scheme, the compatibility of the obligations under the scheme with the contents of the tenancy agreement will continue to be an issue. As seen in the previous Chapter, the conflict between environmental objectives and the rules of

\textsuperscript{53}For example, in Nitrate Sensitive Areas (governed now by the Nitrate Sensitive Areas Regulations 1994 and the Nitrate Sensitive Areas (Amendment) Regulations 1995) the landowner's consent is required, while for ESA schemes notification only is sufficient. Advice on the landlord/tenant relationship is given for SSSIs in ministerial guidance (DoE Circular 4/83).
good husbandry\(^5^5\) and the fear of claims for dilapidations have been a disincentive to tenant farmers from entering extensification schemes, unless they have had the explicit agreement of the landowner\(^5^6\). Where a scheme required, for example, a reduction in stocking levels, or the cessation of fertiliser and pesticide use or further drainage, the tenant might be exposed to an application by the landowner to the Agricultural Land Tribunal for a certificate of bad husbandry, giving grounds for a notice to quit\(^5^7\). In addition, most 1986 Act tenancy agreements have an express covenant to comply with the rules of good husbandry. A breach of this covenant could lead directly to a notice to quit under either Case D or Case E for remediable or irremediable breach of covenant respectively. Even if no case were specified in a notice to quit, the Agricultural Land Tribunal might nonetheless give its consent to its operation if it is satisfied that this would be in the interests of good husbandry. A landowner could also seek compensation for dilapidations on the termination of a tenancy to the extent that the deterioration in the state of the holding is due to the tenant’s not fulfilling his or her obligations under the rules of good husbandry. In practice, there is little evidence that these sanctions have been, or are likely to be, exercised, but, as seen in Chapter 2, the legal framework is in place to constitute a real threat in theory.

Under the 1995 Act there will be no implied inclusion of any husbandry standard in farm business tenancies. Nor will there be automatic provision for compensation for dilapidations.

\(^{54}\) There are implications here also for less-intensive farming schemes promoted by other bodies, such as LEAF, and farm assurance schemes for primary food products, such as those described by Manley and Baines (1999).

\(^{55}\) Set out in s.11 Agriculture Act 1947 and relating to the measures to be taken by a tenant to maintain a reasonable standard of efficient production.

\(^{56}\) Paragraph 9(2) of Schedule 3 of the 1986 Act states that any practice undertaken in pursuit of such agreement should be disregarded for the purpose of assessing whether a certificate of bad husbandry (see below) should be given.

\(^{57}\) Under Case C of Schedule 3 of the 1986 Act. It seems from Cambusmore Estate Trustees v Little (1991) SLT (Land Court) 33 that a Tribunal has no discretion whether to grant a certificate if the rules are held to be broken; it must do so.
Instead, the parties will be able to include obligations, which are appropriate to the holding and the type of management envisaged. Where environmental schemes are likely to be entered into, this can be taken into account in the tenancy agreement and expressly covered. Indeed, there will rarely be a farm business tenancy for which the inclusion of the 1947 rules of good husbandry will be entirely appropriate, and amended versions or completely new codes of management practice are likely to be devised. There may, however, be a loyalty to the familiarity of traditional formulae until practitioners feel comfortable with the new flexibility. In practice, most farm business tenancies do simply incorporate the rules unamended. This would appear to expose a tenant to an action for breach of covenant if his or her practices are not in accordance with the rules.

In addition, where the landowner wishes particular conservation works or practices to be carried out, regardless of whether or not any Government scheme is entered into, specific conservation covenants may now be added to the tenancy agreement. These will be enforceable in the same way as any other obligation under the tenancy. Under the 1986 Act régime, there was always some doubt as to whether covenants to achieve conservation rather than agricultural objectives might not in the last resort be held to be counter to public policy to the extent that they were not compatible with the rules of good husbandry. Special provision was made for conservation covenants by Schedule 3 of the 1986 Act to counterbalance this view. For the purposes of notices to quit under Cases D or E of the Schedule, such a covenant would not be held to be a term which is inconsistent with the rules.

---

58 The RICS Guidance Note on the 1995 Agricultural Tenancies Act recommends these changes at p.34.

59 Whitehead et al. (MAFF, 1997).

60 Originally included in the Agricultural Holdings Act 1984. Explicit provision for tenants entering Nitrate Sensitive Area agreements was included in the Water Act 1989 (now consolidated).
Such provision has not been necessary in the 1995 Act, where the statutory régime does not preclude works or practices that do not maximise agricultural efficiency.

Where appropriate, however, and particularly where such covenants go beyond what might be considered responsible and sustainable farm management, and where they might inhibit the profit making capacity of the farm, a suitable reduction in the rent will no doubt be sought. Where payments are received under a Government scheme, on the other hand, they may legitimately be taken into account in the calculation of rent, as they could under the 1986 Act régime\textsuperscript{61}.

The use in practice of conservation covenants will be explored in the analysis of the Interview Survey data in Chapters 6 to 8. In addition, some recommendations as to the most effective means of implementing them under the 1995 Act régime will be made in Chapter 9.

3.6 The Degree of Agricultural Use

One aspect of the 1995 Act régime that has been extensively discussed\textsuperscript{62} is the extent to which the wording of the legislation permits the use of land within a farm business tenancy for non agricultural purposes. This will, of course, be relevant for the management of land of high nature conservation value, where the primary purpose of the management will be to maintain the conservation interest, even where the main tool for this is the use of agricultural practices such as grazing and mowing. The criteria set out in the 1995 Act are that the tenancy should satisfy the business conditions and either the agriculture condition or the notice conditions set out in s.1. The business conditions are \textit{that all or part of the land}

\textsuperscript{61} See \textit{Trustees of JW Childers Will Trust v Anker} [1996] 01 EG 102 CA.

comprised in the tenancy is farmed for the purposes of a trade or business and that, since the beginning of the tenancy, all or part of the land so comprised has been so farmed\(^{63}\). The part of the land so farmed could vary throughout the tenancy, so that, for example, rotational management would seem to be legitimate provided that it constituted farming and was done in the course of a business.

It is clear from earlier case law that the business would not necessarily have to be agricultural in nature\(^{64}\). Also, it is possible that, as for the business tenancy régime of the Landlord and Tenant Act 1954 (the 1954 Act), any activity carried out by a body of persons whether corporate or incorporate will be considered to be carried out for the purposes of a business\(^{65}\). Although there is no express provision to this effect in the 1995 Act, as there is in the 1954 Act, if this were to apply for farm business tenancies, lettings to conservation bodies as well as those by them could legitimately fall within the agricultural régime. It does not seem that it would be necessary for the activity to generate a profit\(^{66}\).

A more difficult question is whether those forms of management, which are less active, may constitute what is meant by farming. This has been discussed elsewhere in the context of set-aside\(^{67}\), particularly where the type of set-aside scheme is focused on environmental objectives rather than the restraint of agricultural production. The same arguments may be applied to natural habitat regeneration projects, for example, although most conservation schemes do involve a degree of grazing or vegetation management through mowing, cutting

\(^{63}\) s.1(2) Agricultural Tenancies Act 1995.

\(^{64}\) See Rutherford v Maurer [1962] 1 QB 16 CA and Dow Agrochemicals v Lane (E.A.) (North Lynn) (1965) 192 EG 737.

\(^{65}\) s.23(2) Landlord and Tenant Act 1954.

\(^{66}\) Rael-Brook Ltd v Minister of Housing and Local Government [1967] 2 QB 65.

or other control. Most commentators seem agreed that *farmed* is likely to be held by the courts to have a wider definition than *agriculture*. The definition in s.38(2) links the two concepts by stating that references to the *farming* of land include references to the carrying on in relation to land of *any agricultural activity*. However, there will be considerable uncertainty over its precise interpretation in the absence of any authoritative ruling as to its meaning.

Assuming that a tenancy satisfies the business conditions, it is then necessary to show that it also satisfies either the agriculture condition or the notice conditions set out in s.1(4) of the 1995 Act. Where there is a question mark over the degree of agricultural use which will take place on a holding, most well informed landowners will rely on the exchange of notices under the notice conditions to ensure that the tenancy remains a farm business tenancy. However, where this is not done, it does seem that conservation objectives would not necessarily prevent a tenancy from satisfying the agriculture condition. It is the *character of the tenancy* which must be primarily or wholly agricultural, and not the use of the land as a whole, the reasons for which it is held, or the end product of the agricultural activity intended by the landowner. So, for example, where a tenancy is entered into for the controlled grazing of a nature reserve to encourage certain flora or fauna, the nature of the tenancy might still be agricultural on the basis that the tenant is a working farmer producing food, and the tenancy agreement prohibits non-agricultural use and is confined to the business of grazing stock.

As ever, the nature of a tenancy in this type of situation will depend on the facts in each case. In some cases it might be appropriate to consider a 1954 Act business tenancy, perhaps with a court order excluding security, where the degree of agricultural use is in doubt. In other cases, particularly where there is significant management control by the landowner and a high

---

degree of public or other access, which calls into question the existence of exclusive possession, it might be quite legitimate to continue to use the vehicle of a grazing licence to achieve conservation objectives. In other cases, a farm business tenancy might be entirely appropriate, notwithstanding the wider objectives of the landowner and the tenant, and the flexibility afforded by the 1995 Act merely allows the term length and management prescriptions to be designed to suit the holding and the conservation aims of the landowner.

3.7 Rent Levels

Whilst it is difficult to comment with any precision on the effect of the new régime on rent levels in the agricultural sector, it would seem that, at the time of this research, high rents were being achieved for farm business tenancies in the then current market. This has various implications for conservation management. Unless a farm business tenancy contains a clause complying with the provisions of s.9 of the 1995 Act, the rent formula to be applied on arbitration is related to the open market. The concepts of productive capacity and related earning capacity have not been carried over from the 1986 Act regime and, in consequence, rent levels for farm business tenancies will squarely reflect the influence of supply and demand in the locality of the holding. These may vary for many external reasons unrelated to the introduction of farm business tenancies and, at the time of the research, there was no doubt that rent levels were reflecting the healthy state of the farming economy for most sectors. At present, they are falling significantly, reflecting a widespread decline in the fortunes of the agricultural sector.

As a result of this unpredictability, particularly on bare land holdings let on short terms, and on small livestock farms where investment in quota has been necessary, tenant farmers are
under severe pressure to maximise profitability in order to meet their outgoings. This inevitably leads to intensification of farming methods in most cases and the degradation of the environment as a result. In addition, new entrants to the industry may be tempted to overstretch themselves simply to acquire a holding of any sort and to equip it. This further aggravates financial pressure and leaves little time and few resources for conservation practices. It also means that a new generation of farmers, in addition to having expectations for a generally higher standard of living than their parents, may be acclimatising themselves to intensive farming methods, notwithstanding generally greater awareness and knowledge about conservation.

Only where appropriate Government schemes are available to enhance profitability might these farmers be persuaded to entertain the concept of environmental management. But it seems that Government schemes can themselves unbalance the market and increase rent levels. For example, it is sometimes claimed that hill farmers who receive through ESA schemes very large sums to reduce their stocking levels on sensitive uplands are using this money to purchase grazing elsewhere upon which to feed the stock removed from the hills, thus disturbing local market trends.

Conservation landowners find that a tenant who tenders the highest rent rarely shows, in practice, the most sympathy for the environment. He or she cannot afford to. Many conservation bodies, even on lettings where the management prescriptions do not warrant it, have shown a willingness to forfeit the highest tender in the hope of finding a tenant who is sympathetic to their aims, who is realistic about the capacity of the holding, and who is not under such financial pressure that he or she cannot afford to farm in a considerate and

69 s. 13(2) 1995 Act
sustainable way. For smaller holdings this might mean the increasing incidence of part-time farmers.

3.8 Improvements and Compensation

The 1995 Act régime for improvements is set out in Part III of the Act. This is significantly different from that contained in the 1986 Act. Broadly, a tenant is entitled to compensation for all tenant’s improvements, namely physical improvements and intangible advantages, which have been provided at his or her own effort or expense, which are attached to the holding and for which the landowner has given written consent in advance of the tenant’s starting the improvement. In addition, the tenant is entitled to apply for arbitration if such consent is refused or delayed or is subject to unacceptable conditions. Retrospective consent may be given only for so-called routine improvements, that is, inter alia, those acts of husbandry that might have been called tenant right under the 1986 Act régime. The relevant provisions do not suggest that an improvement must be agricultural to qualify for compensation, but it must have added value to the holding as land comprised in a tenancy, that is in the context of the holding being let. This would imply that any improvement that

70 This would be compatible with the findings of the Farmer Interviews showing the number of farmers with other incomes, depicted in Ch 5, Table 17.

71 ss.15-17 of the 1995 Act.

72 But not where the proposed improvement is the obtaining of a planning permission (ss.18(1)(a) and 19(1)(a)).

73 s.19(1) of the 1995 Act.

74 s.19(2) of the 1995 Act. Routine improvement is defined in s.19(10)(b) as any tenant’s improvement which is a physical improvement made in the normal course of farming the holding or any part of the holding, and does not consist of fixed equipment or an improvement to fixed equipment, but does not include any improvement whose provision is prohibited by the terms of the tenancy.

75 s.20(1) of the 1995 Act.
might make a holding difficult to re-let, for example by being too specific to a non-agricultural activity, would not be eligible.

Under the 1986 Act régime tenants were inhibited from carrying out non-agricultural improvements, as they might not be included in the lists in Schedules 7 and 8 of the 1986 Act, which set out those improvements for which compensation would be payable. Even if an improvement was included on these lists, the compensation payable would be limited to an amount equal to the increase attributable to the improvement in the value of the agricultural holding as a holding, having regard to the character of the holding and the average requirements of tenants reasonably skilled in husbandry. The omission of such agricultural phraseology from the 1995 Act removes the general disincentive from carrying out conservation improvements, but compensation is still dependent on there being a quantifiable added value to the holding in the context of its being let again. Some conservation improvements might in fact decrease the value of the farm in purely financial terms.

It is possible that some environmental benefits may become the subject of compensation to the extent that they fall within the definition of an intangible advantage. It has been suggested that environmental designations or the benefit of management agreements might come within the definition, but the advantage must have been acquired at the tenant’s effort or expense and be attached to the holding. Most designations are imposed upon, not courted by, the farmer, and management agreements, while they may be entered on the tenant’s initiative, do not tend to run with the land, each scheme having its own way of dealing with a

76 s.66(1) of the 1986 Act.
77 As referred to in s.15(b) 1995 Act.
change of occupation\textsuperscript{79}. At the most, an agreement might be binding on a successor to the tenant's interest (e.g. an assignee) but would not bind the landowner taking possession on a notice to quit or surrender, or a new tenant taking a fresh tenancy agreement. It does seem, though, that milk quota acquired by the tenant might qualify for compensation\textsuperscript{80} and it is possible that other quotas, subsidies and premiums might in the future attach themselves to a holding rather than being personal to the farmer as at present. The normal considerations about the landowner's consent and valuation would also apply to these types of improvement.

There are two areas of concern to conservation landowners in the new provisions. Firstly, the question of whether sufficient control may be exercised over the carrying out of what may be inappropriate improvements. And secondly, whether they might have to pay compensation for improvements carried out, notwithstanding the fact that the improvements may have reduced the conservation value of the holding. The new legislation does not guarantee that these situations will not arise. However, an arbitrator will be required to consider whether, having regard to the terms of the tenancy and any other relevant circumstances (including the circumstances of the tenant and the landlord), it is reasonable for the tenant to provide the tenant's improvement\textsuperscript{81}. Therefore, some protection might be afforded to a conservation landlord by setting out in the agreement the particular purposes and intentions of the landowner in relation to the holding, and the circumstances in which consent might be granted or withheld. This will provide a context for the exercise of the arbitrator's judgement, which is not purely agricultural. Alternatively, in a short-term agreement for a sensitive site, a

\textsuperscript{79} See Ch 4.

\textsuperscript{80} Following the decision in Faulks v Faulks [1992] 15 EG 82, and Harries v Barclays Bank [1997] 2 EGLR 14 CA

\textsuperscript{81} s.19(5) of the 1995 Act.
complete prohibition on improvements could be inserted. This could, nonetheless, be challenged at arbitration but is unlikely to be overturned if it appears reasonable.

3.9 Repairs and Fixed Equipment

The 1995 Act effects a much simpler régime for the treatment of repairs. No longer will there be Model Repair Clauses to influence the distribution of responsibility, and contractual terms can be freely agreed imposing the most appropriate regime. There is no equivalent to the obligation imposed on a landowner by s.11 of the 1986 Act to provide fixed equipment on the holding to comply with a statutory obligation. This will have implications in connection with, for example, the provision of waste handling facilities to comply with the Control of Pollution (Silage, Slurry and Agricultural Fuel Oil) Regulations 1991. Nor is there any provision for automatic compensation for dilapidations. Specific provision will need to be made for this in the tenancy agreement if it is felt to be applicable to the bargain negotiated between the parties. In addition, in most cases, a tenant will automatically be able to remove fixtures, which he or she has provided during the tenancy, so long as any damage is made good. It is not possible to contract out of this provision. The effect of all these provisions is that a more appropriate régime can be instituted for the repair and provision of all fixed equipment, including that of particular conservation interest, such as vernacular buildings or historic landscape features.

One additional aspect of the 1986 Act régime that might have been of concern to a conservation landowner has also been removed. This is the provision relating to redundant

---

82 The Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations 1973 made under what is now s.7 of the 1986 Act and amended in 1988. See below.

83 SI 1991 No. 324.

84 s.8 of the 1995 Act.
equipment, which is set out in Part 3 of the Schedule to the Model Repair Clause regulations dealing with responsibility for the repair and maintenance of fixed equipment. By this procedure an arbitrator could declare a fixture redundant to the needs of the holding and thus relieve the parties of their obligations under the Model Clauses. As with other parts of the legislation, the factors which an arbitrator should take into account are related to sound estate management and good husbandry and to the character and situation of the holding. The result of this was that, unless specific reference to the feature was included in the tenancy agreement, a tenant could be relieved of responsibility to maintain it notwithstanding the fact that it might be of considerable historic or landscape importance. There is no equivalent provision in the 1995 Act and explicit provision can therefore be made for the repair and maintenance of important features.

3.10 Dispute Resolution

Some comment was passed in the previous chapter as to the nature and constitution of the Agricultural Land Tribunal and the arbitration system under the 1986 Act. Under the 1995 Act the statutory provision for dispute resolution is significantly changed, in a way that, in time, may have implications for the broader management of agricultural land. Other than for the determination of rent following a statutory review notice and for consent to and compensation for improvements, the 1995 Act permits the parties to decide on the form of any dispute resolution procedure. This leaves the way open for some form of alternative dispute resolution to be chosen in addition to the paths of arbitration or recourse to the courts. Where no alternative is specified in the 1995 Act or in the agreement, disputes arising under the terms of a farm business tenancy, by virtue of its terms or under the common law or

85 See above.
custom, will be determined by arbitration\textsuperscript{86}. However, such arbitration will be governed by the Arbitration Acts 1950-1996, as with other régimes, and no particular procedure specifically tailored to agricultural situations\textsuperscript{87} will be triggered.

Some commentators have suggested that, in practice, arbitrators are likely to follow similar practices as have grown up under the 1986 Act\textsuperscript{88}. Certainly, the pool of arbitrators is likely to remain the same under both régimes, either as chosen by the parties or appointed by the President of the RICS. In theory, though, the lack of a detailed statutory code for arbitrators and the courts may lead to more flexibility in the resolving of disputes. Whether this will in time lead to a less rigidly agricultural culture remains to be seen.

3.11 Conclusions

For some considerable time the rigours of the 1986 Act régime will remain with us, governing those tenancies which were already in place on 1 September 1995, and any which take place under the succession provisions of the old legislation. For new lettings - farm business tenancies - the 1995 Act will solve some problems for conservation, but create others. It is certainly true that conservation landowners, such as the National Trust, will seek to take advantage of the new flexibility afforded by the new régime by extending the use of conservation provisions in tenancy agreement documents and by entering more innovative arrangements with their tenants for the sustainable use of its farmland. The extent to which this can be done, from a legal point of view, will now be dependent upon the nature of the remedies available for breach of the agreement rather than upon the rigidities of an over-

\textsuperscript{86} S. 28 1995 Act.

\textsuperscript{87} Such as that contained in Schedule 11 of the 1986 Act.

regulatory statutory régime. The uncertainties of the general law of forfeiture, with the possibility of tenant's relief, and the problems involved in valuing environmental damage or restoring sensitive features will have to be confronted on the few occasions when problems are encountered.

Where statutory rules do apply, for example in the determination of rents and the awarding of compensation, a critical factor will be the future attitude of arbitrators who have long presided over a régime in which agricultural efficiency has been the touchstone. For the majority of lettings, though, the ability to choose term lengths and management régimes that suit the holding and the parties will be a more significant development in the interest of sustainable farming on sensitive areas. The conduct of the landlord/tenant relationship and the maintenance of good channels for education and communication are also recognised to be important factors in the process.

Uncertainty remains, however, as to how the 1995 Act will affect conservation practice in the wider countryside. The impact of inevitably shorter terms and the loss of tenant's security has yet to be effectively assessed, and this task will be made more difficult by the influence of other significant factors, such as fluctuations in the general agricultural climate, and European and national policy initiatives towards diversification and extensification. Here too, though, the flexible opportunities introduced by the 1995 Act, and the gradual development of new approaches to drafting and management, could bring real environmental benefits.
CHAPTER 4

Law and Policy - EU and Government Instruments for Conservation

4.1 Introduction

In order to consider fully the way in which agricultural tenancy arrangements inter-relate with the other elements which contribute to the regulation of agricultural activity in the countryside and with the management agreements and other contractual obligations set up under environmental incentive schemes, it is necessary to examine first the development and current status of these other instruments in some detail. An attempt has been made to categorise the different instruments under the following headings. However, some have elements of several different control models as their components, and necessarily cross categorical boundaries.

An examination will also be undertaken in Chapter 8 of the extent to which contact with these regulatory tools affects a tenant farmer's experience of environmental management and his or her relationship with the landlord of the holding.

4.2 Contractual Measures

As we have seen, the implementation of environmental policy on agricultural land in the UK is based on the principle that farmers and landowners should not be obliged to comply with environmental rules and regulations, but that they should have the opportunity, with suitable incentives, to enter into optional schemes to enhance the environmental value of their holdings – the so-called voluntary principle. This has been widely criticised as inhibiting the
effective implementation of policy initiatives\textsuperscript{1}, but, with few exceptions, remains the predominant philosophy in Government thinking. As a result of this, the main tool in the conservation agencies’ toolbox is the contractual management agreement. This approach has been underwritten by the residual role played by the general law of Town and Country Planning, particularly with regard to Sites of Special Scientific Interest and developments in National Parks and areas of outstanding natural beauty, by virtue of the Conservation (Natural Habitats &c) Regulations 1994\textsuperscript{2} and Planning Policy Guidance Note 9 in respect of the former and the Town and Country Planning (General Permitted Development) Order 1995\textsuperscript{3} in respect of the latter.

Management agreements are available to farmers and landowners under an increasing number of schemes, administered by several different agencies under various statutory powers. The contractual relationship between the farmer and the relevant agency can have important implications for the conduct of the landlord/tenant relationship on a rented holding, and some of these will be considered below. We will first look at the different schemes and their administration. Some are available only in specified designated areas, while others are available across England and/or Wales, provided that the holding in question complies with the criteria set out for entry into the particular scheme.

\footnotesize

\textsuperscript{2} SI 1994/1478.

\textsuperscript{3} SI 1995/418.
4.2.1 Environmentally Sensitive Areas

Authorised by s.18 of the Agriculture Act 1986, as amended by the Agriculture Act 1986 (Amendment) Regulations 1994⁴, the first Environmentally Sensitive Areas (ESAs) were designated in 1987. The Environmentally Sensitive Areas Scheme was introduced to take advantage of joint European funding made available under EC Council Regulation 787/85 on Improving the Efficiency of Agricultural Structures. Article 19(1) of this Regulation provides that member states may establish national schemes for the introduction or continued use of agricultural production practices compatible with the requirements of conserving the natural habitat ensuring an adequate income for farmers within designated environmentally sensitive areas, which should be of recognised importance from an ecological or landscape point of view⁵. The zonal ESA programmes set up under the EC Agricultural Structures Regulation have now been subsumed into agri-environmental measures established under the EC “Agri-Environment Regulation” ⁶, for which more generous co-financing is available. Following the agreement of the Agri-Environment Regulation as one of the accompanying measures in the reform of the Common Agricultural Policy in 1992, an expansion in the number of ESAs in the United Kingdom has taken place. As regards take-up, in 1997 there were 9201 agreements in place, covering an area of 469121 hectares⁷.

Farmers in the scheme must undertake to farm in such a way as to preserve or improve their environment and in particular, no further intensification of agricultural production should occur and the stock density and level of intensity of agricultural production should be

---

⁴ SI 1994 No 249
⁵ Article 19(2).
⁶ EC Council Regulation 2078/92.
compatible with the specific needs of the area concerned. In addition, the UK implementing provision, the Agriculture Act 1986, also allows designation to take account of the archaeological, architectural and historic interest of the area.

Each ESA is set up under a distinct Designation Order and is administered by the local offices of the Ministry of Agriculture Fisheries and Food or Welsh Office Agriculture Department. The terms of the agreements available in each ESA are specified in the statutory instrument designating the area, and each management agreement must include the detailed terms provided for. Management agreements were originally available for periods of five years, but are now normally available only for a ten-year period, with an option for review after five years. Payments are calculated on a hectare basis and made annually. Some ESAs have different tiers of management obligation for which different payment levels apply. Additional payments are available for the extension of public access to the land and for capital works that would enhance the environmental value of the area, for example for the planting of hedges and the restoration of ponds. Any person who has responsibility for, and control over, the farming of the holding and who can ensure that the conditions of the agreement are met, is eligible for the scheme. The land must also be used for, or as part of, an agricultural business. This would not preclude part-time holdings if they are operating as a bona fide business. In some ESAs, the whole holding must be entered into the scheme for the farmer to be eligible for payments.

Clearly, the eligible party on any holding might be an owner/occupier or a tenant, but where the term of the agreement is for 10 years, a tenant would need to be assured of a sufficient

---

8 Article 19(3).

9 See also Environmentally Sensitive Areas (England) Designation Order (Amendment) Regulations 1996 SI No 3104.
tenancy term length to enable the obligations to be met. In some cases, a joint agreement would be appropriate, and, where a grass keep arrangement is in place, it is more likely to be appropriate for the owner to be the contracting party, although evidence suggests that this has not always happened, particularly where annual arrangements have been by custom continuously renewed without formality\textsuperscript{10}. Additional problems arise where the responsibility for particular features such as woodland or vernacular walls and buildings is not clearly defined or is split between the parties. This again would suggest the need for a joint agreement. In any event, tenants are required to notify their landlords before entering an agreement, although their consent is not normally required (except in the case of tenants of the Crown, Duchies of Cornwall and Lancaster or Government Departments) unless a Conservation Plan for capital works has been agreed as part of the ESA agreement.

The Ministry will record details of the agreement in the Local Land Charges Register. In some instances it may be that terms of the tenancy agreement may prevent the effective compliance by a tenant of the terms of an ESA agreement. The theoretical interrelationship between the two, and the place of conservation covenants has been discussed above\textsuperscript{11} and the practical implications will be explored further below. Problems can also arise where there is a change in occupation during the existence of an ESA agreement, as with other schemes, and this also will be discussed further below.

The ESA scheme has recently been the subject of a wide-sweeping evaluation by the House of Commons Agriculture Committee\textsuperscript{12}. It has also been the subject of considerable academic

\textsuperscript{10} Personal comment and experience.

\textsuperscript{11} See Chapters 2 and 3.

\textsuperscript{12} Environmentally Sensitive Areas and Other Schemes under the Agri-Environmental Regulation, 2nd Report, Session 1996-97, HC 45-1, London HMSO.
comment\textsuperscript{13} as well as regular monitoring and evaluation reports carried out under the terms of the Agriculture Act 1986\textsuperscript{14}. Whilst there appear to have been some problems concerning the process and extent of designation and the detailed application of some of the management prescriptions, take up has been high in most Areas and environmental benefits appear to have been secured. However, some concern has been shown over the very high proportion of entrants who confine themselves to Tier 1 of the relevant schemes, thus not securing any significant changes in management. Targets have now been set by MAFF to improve the uptake for the higher tiers\textsuperscript{15}.

\textbf{4.2.2 Nitrate Sensitive Areas}

Nitrate Sensitive Areas\textsuperscript{16} were originally introduced under the Water Act 1989\textsuperscript{17}, which permitted designation where the relevant Minister (i.e. the Secretary of State for Wales or the Minister of Agriculture, Fisheries and Food) considered it appropriate to prevent or control the entry of nitrate into controlled waters as a result of, or anything done in connection with, the use of land for agricultural purposes. Ten pilot scheme Nitrate Sensitive Areas\textsuperscript{18} have now been augmented by the designation of a further twenty-two across the country under the Nitrate Sensitive Areas Regulations 1994\textsuperscript{19}. As with Environmentally Sensitive Areas

\textsuperscript{13} Hawke and Kovaleva (1998) include a review of this comment in their evaluation on pp. 98-100.

\textsuperscript{14} S. 18(8) requires Agriculture Ministers to keep the effects of designation under review and, from time to time, to publish information about those effects.

\textsuperscript{15} \textit{Response of the Government to the 2\textsuperscript{nd} Report (1996-97) from the Agriculture Committee 1997, Cm 3707, London, HMSO, para. 30.}

\textsuperscript{16} For a comprehensive, if a little dated, examination of law and policy in the area of agricultural pollution, see Howarth in Howarth and Rodgers (1992) at p.52 ff.

\textsuperscript{17} s.112 and Schedule 11. These provisions are now consolidated in the Water Resources Act 1991, s.94.

\textsuperscript{18} Set up under the Nitrate Sensitive Areas (Designation) Order 1990, SI 1990 No.1013, as amended.

\textsuperscript{19} SI 1994 No. 1729 (as amended).
(above), the more recent development of NSA policy has been influenced by the introduction of the EC Agri-Environment Regulation\textsuperscript{20}, although the original initiative was triggered by the need to implement the earlier Drinking Water Directive\textsuperscript{21}, and then the proposed Nitates Directive\textsuperscript{22}.

Interestingly, the Water Act provisions provided not only for voluntary management agreements to be entered into with farmers and landowners, but also contained fall-back powers to introduce compulsory measures, with or without compensation. Presumably these were included to ensure full compliance with the EU legislation and it is noteworthy that the same approach has not been taken with nature conservation legislation under the Habitats Directive\textsuperscript{23}. In addition, there is very specific provision for positive management measures to be included in both management agreements and any compulsory order made under the water protection legislation. This is in tune with current moves towards positive, whole farm management.

NSA management agreements made under the 1994 Regulations are intended to reduce the leaching of nitrates into water sources. They run for 5 years and payments are made under three options: i) the Premium Arable Scheme, involving conversion to pasture, ii) the Premium Grass Scheme for existing intensive grassland, and iii) the Basic Scheme for reduced fertiliser application to continuing arable crops. Management agreements also contain general environmental obligations relating to the conservation of important landscape or historical features. Regular monitoring is undertaken to quantify the effects of participation

\textsuperscript{20} Regulation (EEC) 2078/92.

\textsuperscript{21} Directive 80/778/EEC.

\textsuperscript{22} Which came into being as Directive 91/676/EEC.
in the scheme. By October 1998, 28241 hectares were included in NSA agreements, representing 73 different farmers and 80% of the eligible area. However, most of these agreements were concluded under the Basic Scheme option. Funding for new agreements was withdrawn at the end of 1998 as a result of the Government’s Comprehensive Spending Review, but it is intended that the benefits gained under the scheme should be protected by other means, probably by encouraging farmers to continue their improved practices under another agri-environment scheme.

Latterly, UK policy has been extended in accordance with the EC Nitrates Directive by the creation of 68 Nitrate Vulnerable Zones. These cover a total of 608000 hectares, and were finally designated in December 1998. Compulsory restrictions on the application of fertilisers and manures apply throughout the Zones and, as the required prescriptions are intended to represent good agricultural practices, no compensation is payable to the landowners or farmers involved. This is one of the few examples in UK land use policy where a compulsory, rather than a voluntary approach has been applied and was the subject of considerable debate at its inception, due to a perceived threat to property rights.

One aspect of the Water Act legislation which is of direct importance to the question of landlord/tenant relationships, and thus this thesis, is the explicit inclusion of provision in the statutes for tenant protection in the event of a breach of tenancy agreement occurring as a result of participation in an NSA scheme. This is now contained in Paragraph 43 of Schedule 1 to the Water Consolidation (Consequential Provisions) Act 1991. This provision operates in much the same way as the saving provisions for conservation covenants in tenancy.

---

23 Directive 92/43/EEC, implemented in the UK by the Conservation (Natural Habitats, etc.) Regulations 1994 SI 1994 No. 2716.
24 www.maff.gov.uk/environ/envsch
agreements that are contained in Schedule 3 of the 1986 Act. In addition, unlike the provisions of ESA legislation, and perhaps because of the perceived more serious implications for the capital value of the land in an NSA agreement, the landlord’s consent must be obtained before a tenant may enter into the scheme. The combination of these two provisions ensures greater certainty for the tenant under this regime than for any other environmental scheme involving extensification of production.

The operation of the NSA pilot schemes has been examined in some detail, from a socio-legal point of view by Elworthy. Her conclusions are that the Nitrate Sensitive Area legislation provides a real opportunity for effective environmental action, but that the voluntary nature of the main part of the scheme undermines its true potential. She reports widely on the resentment felt by farmers over the nitrates issue, and the manifestation of this sentiment has increased over the compulsory introduction of Nitrate Vulnerable Zones. She is sceptical about the effectiveness of the designation of particularly sensitive areas as a policy tool and considers that this may be counterproductive, in that those outside designated areas may feel exempt from the need to consider the policy issues at stake. This is so notwithstanding the issuing by MAFF of the Codes of Practice referred to below in an attempt to stimulate environmentally responsible farming methods. With regard to the landlord/tenant question, she relates continued tension between the parties on water issues, as on others. She highlighted an intangible class division, but felt that different attitudes were reflected by concerns about income and about land values, which were carried over into discussions about

25 91/676/EEC.

26 See Ch 2, Section 2.7 above.


28 S. Elworthy (1994).
the treatment of management agreement payments on rent review. Similarly, the capital investment necessary to comply with waste storage requirements had also become an issue. This element is examined further above in Chapters 2 and 3 and below in the section on precautionary regulations.

It should be noted that, in the Interview Surveys which formed part of this research, few of the subject holdings were found to be in either Nitrate Sensitive Areas or in proposed Nitrate Vulnerable Zones, and so little empirical data is available as a result of this project on the operation of these schemes on tenanted farmland. However, the application of the data to environmental management in general ensures that it is relevant to this debate, as to others.

4.2.3 Countryside Stewardship

This scheme was set up in 1991, under the experimental powers available to the Countryside Commission, to explore the possibility of initiating management agreements of a broad conservation nature with farmers and others, on the basis of a menu of options from which they could choose those most applicable to their holdings. These would include prescriptions designed to protect, but particularly to enhance and improve the landscape and the nature conservation, archaeological or historical value of the land and the provision of greater access for the public to enjoy these things. The lack of any stringently designated areas permitted very local initiatives to be pursued, although various target areas were singled out in order to make the best use of the budget. The ethos intended to be projected was one of positive management, even to the extent of the creation of new habitat or landscape features.

29 The targeted areas included seven English landscape types. These were lowland heath; chalk and limestone grassland; waterside, coastal, upland, and historic meadow; pasture in the Culm grasslands, old orchards in Hereford and Worcester; countryside around towns; and community forests.
Agreements normally ran for 10 years and annual payments were made on a standard basis depending on the benefits offered. One of the significant features of the scheme was that eligibility was not limited to those running an agricultural business on their land, so that conservation organisations, and even local authorities were known to have benefited from payments. One of the other interesting features of the scheme is the fact that applicants have to present to the project workers details of the proposed scheme for each holding, regardless of whether it falls within any kind of designated area, so that resources are allocated on a subjective, discretionary basis according to the perceived environmental benefits being offered. This is very different from the procedure in, say, an ESA, where, provided that certain clear criteria are met, farmers have a right to be automatically accepted into the scheme.

On 1st April 1996, under the Countryside Stewardship Regulations 1996, the scheme was transferred to the administration of MAFF. It has now been expanded and is seen as one of the main MAFF environmental schemes alongside ESAs. At the end of 1998, 143055 hectares under 8614 agreements were participant in the scheme. Certainly, in the Farmer Interview Survey, this was one of the schemes with which the farmers were most familiar. The Countryside Stewardship Scheme is widely considered to be effective in achieving its

30 The stated priorities in this context include those agreements which involve a significant change in management, an increase in public enjoyment or a tendency towards the whole farm approach.

31 This feature has now been applied to the Welsh scheme Tir Gofal. Potter (1998) also discusses the principles involved.

32 SI 1996 No. 695 (as amended by Nos. 1481 and 3123).

33 It is probable that, in the near future, this scheme will be amalgamated with other MAFF schemes, such as the Countryside Access Scheme and the Habitat and Moorland Schemes.

34 www.maff.gov.uk/environment/envsch
objectives\textsuperscript{35}. This seems mainly to be attributable to its flexibility, both geographical and in terms of the prescriptions and payments available, and to its local nature. It has recently been extended by the introduction of the Arable Stewardship Scheme in pilot areas of East Anglia.

4.2.4 Tir Cymen and Tir Gofal

The Countryside Council for Wales instituted in 1992 a scheme known as Tir Cymen, which was intended to explore the whole farm, positive approach to conservation management agreements in Wales. This was done under the same experimental powers as those assigned to the Countryside Commission, and which were transferred together with all other aspects of the Commission's administration in Wales to CCW under the Environmental Protection Act 1990\textsuperscript{36}. The scheme was available in the three pilot areas of Merioneth, Dinefwr and the Gower Peninsula. Tir Cymen has generally been held to be an effective means of achieving broad environmental objectives on a variety of holdings, and the scope of the scheme was set to be extended, subject to the availability of funding. In a recent review of the operation of agri-environment schemes in Wales\textsuperscript{37}, the success of the scheme was acknowledged, and the Welsh Office made public its intention to introduce an integrated countrywide scheme based on its best aspects. This has now taken place with the introduction of Tir Gofal.

Agreements under Tir Cymen were available to the occupants of all registered holdings in the pilot areas, and agreements were entered into for periods of 10 years. The agreements implemented whole farm management plans intended to maintain and enhance areas of landscape and conservation value. The emphasis was on positive land management and the

\textsuperscript{35} See for example Environmentally Sensitive Areas and Other Schemes under the Agri-Environmental Regulation, 2nd Report, Session 1996-97, HC 45-1, London HMSO, para. 45.

\textsuperscript{36} Part VII, ss.131 ff, and Sch.9.

provision of new opportunities for the quiet enjoyment of any benefits gained. Payments were made per hectare for compliance with an agreed code of practice, and capital payments were available for certain conservation works and new access routes. In 1997 there were 732 agreements covering an area of 73400 hectares, which represented approximately 39 % of the eligible land in the three pilot areas.\footnote{38 See Hawke and Kovaleva (1998).}

Tir Gofal agreements became available in April 1999. It is a scheme that operates under the EU agri-environment provisions\footnote{39 See below.} and applies to the whole of Wales, replacing Tir Cymen, the ESA schemes and all other agri-environment schemes. It will be understood that, at the time of the Interview Survey for this research, the relevant schemes in Wales were Tir Cymen and ESA schemes. However, a brief explanation of Tir Gofal is merited here, not least as it is seen by many as a model of integration that might be later applied across the UK. It has a distinctly \textit{whole farm} nature and encompasses all environmental benefits on participant farms, including public access. Specifically, it includes four elements:

\begin{enumerate}
\item \textbf{land management} - mandatory compliance with a whole farm section and site specific prescriptions
\item \textbf{creating new permissive access} - voluntary options for linear or open access
\item \textbf{capital works} - special payments made to support work needed to manage habitats or provide access
\item \textbf{training for farmers} - courses on habitat management and practical skills.
\end{enumerate}
The agreements will run for 10 years, with a 5-year break clause and the minimum size of holding will be 3 hectares. Applicants will be selected according to the degree of environmental benefit that they offer, and, to this extent, the acceptance of schemes will therefore be discretionary.

4.2.5 National Parks and Local Authority Management Agreements

By virtue of section 39 of the Wildlife and Countryside Act 1981, county and local planning authorities, including the National Park Authorities where appropriate, have the power to enter into management agreements for the purpose of conserving or enhancing the natural beauty or amenity of the land which is both in the countryside and within their jurisdiction or of promoting its enjoyment by the public. These agreements can be entered into with any person having an interest in the land concerned and irrespective of whether the land has been designated under any other scheme. Agreements can be for a specific or indefinite term, and are usually expressed to be binding on successors. Section 44 of the 1981 Act also permits the making of capital payments to farmers in the pursuit of the above purposes. In addition, a section 39 agreement might come into being following the objection by the National Park Authority to a Government grant being made under another scheme, although, as with section 15 agreements in SSSIs this has now become less pertinent. As with SSSI agreements, the compensatory payments necessary under this procedure have also proved to be unduly expensive.

The use of these agreements is geographically mixed and clearly constrained by local authority finances, but in some areas has been widespread, particularly to encourage farm management schemes in the Peak District National Park, in areas where SSSI or ESA
schemes are not available or appropriate. A section 39 agreement can impose restrictions, for example on cultivation methods, agricultural use, or the exercise of rights over the land, and may also require positive agricultural or forestry works. In fact the trend here, as elsewhere, is now towards incentives for positive management.

### 4.2.6 Sites of Special Scientific Interest

The notification and management of SSSIs is undertaken by English Nature and the Countryside Council for Wales in England and Wales respectively. They have the power to enter management agreements under three separate provisions:

#### 4.2.6.1 Nature Reserves

If English Nature or CCW consider it to be in the national interest that land should be managed as a Nature Reserve, then s.16 of the National Parks and Access to the Countryside Act 1949 enables them to conclude an agreement with the owner, lessee, or occupier of the site. These agreements are intended to limit the exercise of legal rights over the land and may include conditions relating to the management of the land, the doing of works and payment arrangements for each of these. Where a suitable agreement cannot be concluded, or is breached, there is a power of compulsory purchase available, by virtue of sections 17 and 18 of the 1949 Act.

#### 4.2.6.2 SSSIs

Section 15 of the Countryside Act 1968 gives the power to English Nature and CCW to enter into an agreement with the owner, lessee, or occupier of land that is either within or adjacent to a notified SSSI. Following the passing of the Wildlife and Countryside Act 1981, this

---

40 See Lomas (1994) on the Peak District's Farm Conservation Scheme and Farm and Countryside Service.

41 S. 15 amended by Environmental Protection Act 1990, s.132 and Sched. 9, para. 4(2)(a).
will usually occur when the owner or occupier of an SSSI has given a notification of his intention to carry out operations likely to damage the conservation interest for which the site was notified. However, an agreement may be concluded at any time, and particularly as part of a drive towards positive management agreements, English Nature and CCW are now more likely to take other opportunities or to initiate an offer of a positive agreement, finances permitting\(^\text{42}\). This trend is most obvious in the establishment of English Nature's Wildlife Enhancement Scheme, in which agreements are typically available for periods of three to five years under a nationally publicised programme following a successful pilot scheme. The Scheme now represents the largest single head of expenditure in English Nature's management agreement budget\(^\text{43}\).

4.2.6.3 Refusal of Capital Grant

If a farmer has applied for a grant under the Agriculture Act 1970 and has been refused on conservation grounds following objections from English Nature or CCW, the farmer can, in some circumstances compel them to offer a management agreement under s.32 of the 1981 Act. Such an agreement must make provision for restrictions on the activities in respect of which the grant has been refused and for payments in consideration\(^\text{44}\). Because of changes in agricultural policy, these provisions are no longer used.

4.3 Precautionary Regulation

Several activities on farms are governed by statutory instruments regulating particular agricultural operations that have been identified as being harmful to the environment.

\(^{42}\) For a very detailed review of the use of management agreements in SSSIs generally, see Rodgers and Bishop (1998).

\(^{43}\) Rodgers and Bishop ibid. p. 12.

\(^{44}\) S. 32 and s.41 1981 Act.
Examples of these are the burning of crop residues\textsuperscript{45}, the use of pesticides\textsuperscript{46}, and damage to hedgerows\textsuperscript{47}. In addition, farmers are subject to all general provisions relating to pollution control and other matters. The implications of these regulations are usually dealt with in a tenancy agreement by a standard clause requiring a tenant to comply with all statutes and statutory instruments.

The provision of capital improvements in connection with pollution control became a greater issue with the introduction in 1991 of the Control of Pollution (Silage, Slurry and Fuel Oil) Regulations 1991\textsuperscript{48}. Whilst other waste control measures hold few implications for landlords of agricultural holdings, affecting only the producer or handler of the waste, the capital works required to bring installations up to the explicit standards required by these regulations, and the fact that notice to comply could be served on the person in control or custody of the installation, ensured that many a dispute has arisen over the split in expenditure for the necessary works. Moreover, the presence in 1986 Act tenancies of the provisions of s.11 of the 1986 Act, permitting the tenant to require the landlord to provide fixed equipment required by statutory provision, added to the equation, notwithstanding the fact that some grant aid was often available for this kind of work under the Farm and Conservation Grant Scheme until recently.

Generally, participants in the Farmer Interview Survey were not forthcoming about the incidence of pollution incidents on their holdings. The presence of the 1989 Regulations and real criminal offences under the Water Resources Act 1991 and the threat of an action for

\textsuperscript{45} SI 1993/1366.


\textsuperscript{47} SI 1997/1160.

\textsuperscript{48} SI 1991 No. 324.
statutory nuisance under the Environmental Protection Act 1990 gave them the apprehension that pollution occurrences were perceived by the regulatory authorities as more serious than other types of conservation transgressions. Therefore, while widely condemning practices which led to pollution risks, few were prepared to offer an opinion on the situation on their own holdings or to express a view on the practicality of adhering to the controls. Very few had had risk assessment or waste management plans prepared by ADAS, although it appeared that this was as much a reflection on the perceived level of competence displayed by ADAS officials as on whether they were considered a good idea or not. It was clear, however, that such assessments were seen as the “thin end of the wedge” in terms of liability and expenditure, and, as with other kinds of environmental assessments, there was the feeling that once “these people” were allowed access to the holding, all kinds of unwelcome and unforeseen consequences might arise

Questions of practicality were raised perhaps more than anywhere in the context of the Codes of Practice. Here we refer to those published by MAFF for the Protection of Water, Air and Soil, published in 1991, 1992 and 1993 respectively. There are others of a different standing published by the Department of the Environment on the Agricultural Use of Sludge (1996) and by the Health and Safety Executive on the Safe Use of Pesticides (1990). Even where these were known of, they were not widely read or understood. The sheer volume of information contained in each one was considered to be a bar on their effective use as a management tool, and, while the recommendations were sometimes recognised as being useful guides, the implications of full implementation were clearly seen as too onerous for

49 Farmer Interview 44.
50 Hawke and Kovaleva (1998) provide a good account of the operation of Codes of Practice at p.241.
51 See Manley and Baines (1999).
serious consideration by more than a few of the most committed farmers. This was so even
where active encouragement was being given by a landlord. Whilst most farmers are no
doubt ignorant of the fact that breach of the Codes is no longer a criminal offence52, abiding
by them to the point of incurring expense or inconvenience is certainly not seen as a priority
in most cases. Comments on these Codes may also come to apply to a Code for wildlife and
the landscape, believed to be in draft and review stage at MAFF53.

4.4 Measures under the Common Agricultural Policy

As part of the UK’s implementation of the so-called Agri-Environment Regulation54, the
Ministry of Agriculture set up various new environmental schemes and extended others in
1994 and 1995. These included the Habitat Scheme, the Moorland Scheme, the Organic Aid
Scheme55, a Countryside Access Scheme56 relating to public access to appropriate land within
the set aside regime, and extensions to the ESA and NSA Schemes. Each of these has a
different mechanism for ensuring compliance with the terms of the arrangement, but the
Habitat Scheme and the Moorland Scheme rely on the management agreement method, for 20
years and 5 years respectively.

The Moorland Scheme, which is designed to assist farmers to reduce their stocking rates in
upland Less Favoured Areas not forming part of an ESA, has had a notoriously bad rate of
take-up. In the first year, it is said that only 13 agreements were completed, involving the

52 See generally Howarth in Howarth and Rodgers 1992 at p.60 ff.
53 See Manley and Baines (1999) (no page numbers).
54 See above, Ch 1.
55 See under separate heading below.
56 It is not intended to describe this scheme in detail. Take up has been poor and it is unlikely to survive in its
present form, particularly in view of the Government’s recent announcement promising primary legislation to
address the dilemma of access in the countryside.
removal of a mere 3900 ewes from damaged moorland. Since then, the number of completed agreements has remained low, in spite of improvements to the payments offered. This poor response has been attributed to the conflict with the headage payments available under the Ewe Premium support scheme and the Hill Farming Compensation arrangements. Cross-compliance measures have now been applied to the support arrangements, which might alleviate some of the grazing pressure on the uplands.57

Agreements under the Habitat Scheme have been available to farmers in several different targeted habitats. In England, these have been, i) land formerly set aside under the original 5 year set aside scheme58, to safeguard any environmental benefits which may have accrued there, ii) water fringes59, and iii) saltmarsh areas60. In Wales, different habitat types have been targeted. These are species rich grassland, water fringe, the coastal belt and broad-leafed woodland61. In all of these schemes payments are made annually. By the year covering 1997 and 1998, 431 agreements had been completed, covering a total area of 7115 hectares62. The comparatively small take up has been attributed to the fact that payment levels are low and farmers reluctant to withdraw production from their land for a period of 20 years63. However,

57 See later under separate heading.
58 Habitat (Former Set Aside) Regulations 1994 SI 1994/1292. This option was terminated for new agreements from July 1997.
60 Habitat (Salt Marsh) Regulations 1994 SI 1994/1293.
61 SI 1994/3099, 3100, 3101 and 3102.
62 www.maff.gov.uk/environ/envsch
the 20 year period is specified in the EC legislation and is likely to remain standard under this scheme\textsuperscript{64}.

Because of the low numbers involved in taking up these schemes, very few examples of any of these MAFF agri-environment schemes were encountered in the Farmer Interview Survey undertaken for this research, but clearly the same considerations would apply as for other management agreement régime to a certain extent, in that the legal complexities would be similar. In particular, the 20 year term length of the management agreements would accentuate some of the problems discussed in Chapters 2 and 3 in connection with short-term agreements.

4.5 Organic Farming

Several of the participants in the Farmer Interview Survey were farming organically, or were in the process of converting to an organic system. Clearly, they had particular views and preoccupations, but some of the same principles would apply to their farming systems, in connection with the landlord/tenant relationship, as might apply to other extensified systems. In the event, however, it seemed that the organic project on a holding had often been undertaken with the involvement and encouragement of the landlord, and thus the strictly legal position was unlikely to be tested.

The Government supports organic farming with a range of measures, the first of which is the Organic Aid Scheme, which was part of the 1994/5 agri-environment package (above). This is a voluntary scheme to enable farmers to convert and to market their produce. It also invests in research and on supporting the monitoring of organic produce through the setting of

labelling and other standards and the work of the UK Register of Organic Food Standards, which includes reference to environmental requirements for organic farms. MAFF also encourages organic farmers to take full advantage of other generally available schemes, for example by building set-aside considerations into their conversion or fallow rotation plans, and particularly, it was seen that the organic farmers in the interview sample had often found that Countryside Stewardship projects were suitably compatible with their objectives.

4.6 Set-Aside

Under the 1992 review of the CAP, a target was set to reduce agricultural subsidies for cereals by 30% in 3 years. However, in order to compensate farmers for any loss in income, a support scheme was set up\(^{65}\), based on the area of cereals grown and dependent on the compulsory set-aside of certain areas. This Arable Area Payments Scheme is now in place in the UK\(^{66}\) and has largely replaced earlier set-aside policies, which were predominantly voluntary in character. In order to qualify for compensatory payments, producers are required to set aside a predetermined percentage of their arable land. However, the land must be managed so that it can be returned to production and the environmental benefits of the scheme are therefore limited and the policy has been much criticised on this basis\(^{67}\). Plans are now being made under the Agenda 2000 proposals to address some of these.

Some concessions have been made in view of this criticism and, while so called rotational set-aside still offers limited benefits for wildlife, the option of flexible (non-rotational) set-aside, where the same piece of land may be set aside for several years, does offer some scope

\(^{65}\) Under EC Regulation 1765/92, OJ L181 1.7.92.


\(^{67}\) For example by Hawke (1997) and Neve and Putwain (1997).
for developing habitats and the protection of landscape features. Farmers are also paid on the whole area of their holdings, not just the farmed areas, so there is no incentive for the removal of trees, hedgerows, coppices and ponds to maximise areas under cultivation. Certain bird-friendly practices are also encouraged by the new régime, and the agri-environment Countryside Access Scheme, mentioned above, is also available to ensure that the public can benefit from any increased environmental dividend.

Set-aside, because of its compulsory element, clearly has a considerable impact on farmers growing any sizeable area of cereals, and this was reflected in the responses of the interviewed farmers in the research sample. A variety of views were expressed, but again, the implications for the landlord/tenant relationship were similar to those for other forms of extensification. Particularly, for 1986 Act tenancies, the good husbandry implications and breach of covenant fears discussed in Chapter 2 are acute in this context. Cardwell gives a good account of these issues in the context of what he refers to as the more passive management régimes in the collection of essays edited by Rodgers.

4.7 Forestry Schemes

Whilst, in many respects, the management of timber resources and woodland is beyond the scope of this research, there are some issues which impact directly on the relationship between an agricultural tenant and his or her landlord. These arise mainly out of the long tradition that timber should be reserved out of an agricultural letting. This means that eligibility for grant aid and the legal responsibility for management of trees and forests may be vested in different parties and confusion, or at least complications, may arise in the conduct of the relationship. Similarly, and particularly with unfenced woodland or
freestanding trees, management issues arising as part of a whole farm conservation plan, for example grazing régimes, can be difficult to resolve.

In addition to these considerations, the provision of grant aid for forestry works is itself administered by different bodies and is greatly influenced by tax and other considerations which are unrelated to beneficial conservation management. The main vehicle now for the public funding of forestry management on farmland is the Farm Woodland Premium Scheme$^{69}$. This is administered by MAFF and, since 1992 and the CAP reform measures, has replaced the Farm Woodland Scheme$^{70}$. To qualify for funding under the Farm Woodland Premium Scheme, the forestry project must be part of an agricultural business and must have the approval of Forestry Enterprise (the relevant arm of the old Forestry Commission), which also, of course, administers its own Woodland Grant Scheme. The Woodland Grant Scheme provides funding for the establishment of new plantings and a single application is made under both schemes and a single approval received.

Advice on forestry matters is provided by the Farm and Rural Conservation Agency, if required, and woodland may also now legitimately be established on set-aside land. The grant régimes typically run over a period of 10 to 15 years depending on the type of trees planted, with annual payments for management made throughout this time. The total commitment can extend to 20 or 30 years. Therefore, the same considerations over term length and changes of occupation apply to these arrangements as to other environmental grant schemes. In view of the reservation issue as well, perhaps here more than anywhere, communication and co-operation between landlord and tenant is critical to the success of any project.

---


$^{69}$ Revised 1st April 1997.
4.8 Common Land

The subject of the laws covering common land is complex and it is not appropriate to cover it in detail in this thesis\textsuperscript{71}. However, there are certain aspects of common land law and practice which directly affect the effectiveness of conservation measures taken on tenanted farms which abut onto common land or which have common rights attached.

It is often presumed that common land does not have an identifiable owner and that somehow it is owned by the public, who have rights of access and other rights over it. Alternatively, it is believed to belong to the commoners themselves. Neither of these perceptions is true. Most commons have an identifiable owner, known as the owner of the soil, and the public has rights over only a few regulated commons. The rights of commoners are usually clearly defined, and are exercisable only within those limits and to the extent that they do not infringe upon the rights of other commoners or the owner of the soil. There is a register of ownership and rights for each common, set up under the Commons Registration Act 1965 and administered by the County Councils.

Common rights are part of a legal grouping of rights, sometimes linked to land but not consisting of its ownership, known as incorporeal hereditaments. Most are in the nature of \textit{profits à prendre}, which are rights to take from the land of another person some part of the soil or minerals under it, or some of its natural produce or the wild animals upon it. The most frequent right of common is that of grazing, but other rights might include the right to remove firewood, bracken, turf, fish or acorns or some other item.

\textsuperscript{70} It is administered under the auspices of EC Regulation 2080/92 on forestry measures in agriculture.

\textsuperscript{71} The authoritative text on commons legislation is Gadsden (1988).
There are complicated rules about the extent to which a right of common is annexed to the land (if any) for the benefit of which the right is said to exist. The degree of annexation is generally dependent on the history of the origin of the right. It is more likely than not that a right will be attached to a neighbouring holding (the dominant land). Even then, there are different types of rights within this category (appendant and appurtenant\textsuperscript{72} rights), with different rules governing their treatment.

During the registration process following the 1965 Act, many farmers grossly inflated the number of grazing rights to which they were entitled. This, together with the effect of headage payments under the Hill Livestock Compensation Scheme, has meant that many upland commons are heavily overgrazed. In addition, the overstocking has meant that the traditional patterns of wintering stock on the in-bye land have broken down and farmers are wanting to feed their sheep on the common throughout the winter, not giving the vegetation time to recover between each grazing season\textsuperscript{73}.

The problems of setting up any kind of \textit{whole farm} approach, where land forming an integral part of the agricultural business is governed by a completely different legal régime dependent on the co-operation of an often diverse and non-cohesive group of other people (the commoners having rights over any common), can be extremely difficult. Some of these problems are documented elsewhere in the context of setting up management agreements under SSSI or ESA schemes\textsuperscript{74} and the problems of common land management were a frequent cause of concern to the farmers in the interview samples for this project, particularly

\textsuperscript{72}The nature of rights appurtenant has recently been clarified in the Court of Appeal case \textit{Bettison v Longton} 11 March 1999.

\textsuperscript{73}The case of \textit{White v Taylor No 2} [1968 I All ER 1015 suggests that the right to feed stock on the common can only have arisen by prescription as ancillary to grazing rights. Each case will depend on its facts.

in upland areas where shared grazing was a very significant factor in the structure of the local agricultural community. Other confusions arose where the landlord of a holding also owned the soil of the relevant common and the nature of rights was not clearly defined, being enjoyed by virtue of the landlord/tenant relationship and strictly not having been registrable under the 1965 Act. Practical examples of difficulties caused by the legal status of common land will be examined in the later chapters dealing with the empirical research data.

4.9 Planning legislation

4.9.1 Generally

We have discussed above the residual role played by the Town and Country Planning legislation in the control of various activities on farmland designated for its nature conservation value. In general, however, agriculture itself is not greatly inhibited by planning restrictions, with most of its activities not requiring planning permission, and some building and engineering operations being given automatic permission, subject to certain conditions, by the Town and Country Planning (General Permitted Development) Order 1995\(^7\).\(^5\)

Although planning matters were mentioned by farmers who were interviewed for this project, the incidence of planning matters did not form a significant part of the landlord/tenant relationship. Where they were mentioned, it was normally in the context of applications for new buildings, or alterations to existing ones. In these cases a certain amount of frustration was evident with the system in general. This was caused by the need to obtain permission of any sort, let alone finance, and the length of time taken by landlords and local planning authorities to reach decisions over proposed developments.

\(^7\) SI 1995/418.
Difficulties are often compounded by the fact that many of the buildings in question were listed, or were situated in National Parks or other sensitive areas and thus needed to comply with more stringent aesthetic criteria than would be necessary for a bare utilitarian farm building. These aspects are dealt with in the sections on improvements in Chapters 2 and 3 and it is not intended to deal here with any detailed appraisal of the Town and Country Planning legislation.

4.9.2 Listed Buildings and Conservation Areas

One area of planning legislation that is of particular interest in this context is the way in which listed buildings are protected. This is interesting because of the differing way in which this has been undertaken when compared with the protection of other important conservation sites, most notably Sites of Special Scientific Interest. With these, as we have seen above, the essence of the arrangements is founded on the voluntary principle, with a very modest backing by a criminal code. With listed buildings, however, there is no compensation for the limitations imposed by the listing, and immediate criminal liability for breach of any of the conditions attached to ownership. The rules are set out in the Planning (Listed Buildings and Conservation Areas) Act 1990 Part I. The scheme is administered in England by English Heritage and in Wales by Cadw and, by the start of 1998, over 500000 buildings had been listed.

Conservation Areas are designated under ss. 69 and 70 in Part II of the 1990 Act. Designation entails duties for the local planning authority to pay “special attention … to the desirability of preserving or enhancing the character or appearance of the area” in considering any planning

---

76 For a detailed appraisal of the law affecting these, see Mynors (1999).

77 Although grants may be available to assist with urgent repairs.
applications in the area\textsuperscript{78}. Buildings in conservation areas, whether or not they are listed, receive much the same protection as listed buildings\textsuperscript{79}, and in addition there are controls on the demolition of buildings and on works to trees. Further advice is given in Regulations and Circulars.

4.10 Scheduled Ancient Monuments\textsuperscript{80}

One other régime of interest is that applying to the protection of ancient monuments and important archaeological sites. Although dealt with under a different legal framework, there are similarities between this and the system examined above in connection with listed buildings. Essentially, there is a listing process that brings with it no offer of compensation and significant restrictions on a landowner's freedom in connection with a scheduled site. Breach of any of the conditions of the scheduling process can result in immediate criminal responsibility. The law is contained in the Ancient Monuments and Archaeological Areas Act 1979. Consent is required for any works to a scheduled monument and it is a criminal offence to damage it or proceed with works without consent. English Heritage has the power to purchase or to enter into a guardianship agreement with the owner of the most important monuments and can give grants for urgent repairs.

If an area is designated an Area of Archaeological Importance, any development needs to specifically notified to English Heritage, which may choose to conduct investigations before permitting works to go ahead. The owner must provide access to the site and may have to pay for the survey. Non-compliance with the above constitutes a criminal offence, as does the use of a metal detector in an Area.

\textsuperscript{78} S. 72 1990 Act.

\textsuperscript{79} Ss. 74 and 75 1990 Act.
4.11 Economic Measures

A review of instruments used to protect the rural environment would not be complete without a mention of economic and fiscal measures, although the detail of these is beyond the scope of this project. Hawke and Kovaleva (1998) include a short overview of the policy issues and refer to various publications that examine the effectiveness of market incentives in the pursuit of sustainable agriculture. In particular they refer to the cost-effectiveness of this approach and its conformity with the polluter pays principle, as well as its ability to internalise external environmental costs. However, the difficulties inherent in the valuation of environmental costs and benefits become apparent here too, necessary as this is to a proper evaluation of cost-effectiveness.

Intensive agriculture involves considerable external costs and presents particularly difficult questions arising out of its need to use natural resources. There are also inherent difficulties in the monitoring and enforcement of measures. It is thought that, in these circumstances a combination of policy instruments will usually be the most effective. In the EU, problems of marrying economic instruments with a commitment to competition, and a concern to avoid negative impacts on employment and low income groups, have meant that few instruments have been put in place.

4.12 Cross-Compliance

Similarly, although there is much discussion over its implementation, there are few examples as yet of cross-compliance measures in practice. Cross-compliance is the concept of attaching

---

80 Again, see Mynors (1999) for more detail.

81 At p 13 ff.

environmental conditions to the receipt of subsidy payments under other régimes. In the UK, examples can be found in the structure of the livestock support schemes and in set-aside management. For example, prescriptions are in place in the Hill Livestock Compensatory Scheme to prevent overgrazing in the uplands and in the Arable Area Payments Regulations 1996\textsuperscript{83} to introduce environmental management prescriptions that are generally negative in essence\textsuperscript{84}. Otherwise, in spite of unequivocal support for the principle in the Agenda 2000 proposals and the most recent Council Regulations, further incidences are yet to emerge\textsuperscript{85}.

4.13 Conclusions

This review of the current instruments in place in the UK for the pursuit of environmental objectives has highlighted one of the main policy weaknesses; that is the sheer number and diversity of measures in the Government’s portfolio. It is not surprising, then, to find in the Farmer Interview Survey\textsuperscript{86} that there is considerable confusion among farmers as to which, if any, policies and schemes are applicable to their situation, and as to the best means to take advantage of them. Add to this the use of conservation covenants and management agreement documents by their landlords and the complexity begins to overwhelm all but the most informed of the agricultural community. Calls for integration are many\textsuperscript{87}, and indeed, some of the most recent schemes, for example Tir Gofal in Wales and the Scottish Countryside

\textsuperscript{83} Schedule 2, Pt B of SI 1996/3142


\textsuperscript{85} See Potter (1998) for a review of experience in the USA of conservation compliance legislation.

\textsuperscript{86} See Chs 6 and 8.

\textsuperscript{87} See Rodgers in Howarth and Rodgers (1992) and Rodgers and Bishop (1998).
Premium Scheme, have begun to address the issue\textsuperscript{88}. However, there is much progress still to be made.

SECTION TWO

LAND TENURE AND THE ENVIRONMENT: THE PRACTICE
CHAPTER 5

Current Practice - The Methodology for the Interview Survey

5.1 Introduction - Aims and Objectives

As stated in Chapter 1, this thesis aims to identify the constraints, both legislative and practical, which inhibit the effective management of agricultural tenanted land for conservation and to recommend means by which they might be overcome. As a complement to an analysis of the relevant legislation, therefore, extensive empirical research was carried out into the operation of the law in practice. For this purpose it was felt necessary to examine existing landlord tenant relationships where conservation of environmental features was a factor in the arrangement. It was intended that this should throw some light on the effectiveness of different types of arrangement and provide some indications of the best practice to be adopted in negotiation and management decision making by landlords and tenants. In the process, various factors were identified as being significant to the wider debate on the use of contractual measures to achieve environmental objectives.

The empirical research had the following components:

- Initial in-depth interviews with senior staff members of selected institutions thought likely to have an interest in the research - the Executive Interviews\(^1\)

- In-depth interviews with 50 tenant farmers - the Farmer Interviews\(^2\)

\(^1\) Subsequently referred to by description of the organisation where appropriate.

\(^2\) Subsequently referred to by numbers F1-50.
• In-depth interviews with the wardens and land agents (if appropriate) who represented the landlord in the relationship with those tenants - the Warden/Land Agent Interviews.

• Scrutiny of the tenancy agreements and other legal documentation (where available) for each of the tenancies in question - the Document Review.

The Executive Interviews were intended to gain an insight into the policies and operation of each landlord organisation, and to evaluate the significance of the landlords' motivation on the use of contractual conservation mechanisms. Following on from this, the Farmer Interviews and the Warden/Land Agent Interviews were designed to explore the experiences and perceptions of those directly involved in conservation management, and to relate these to the stated objectives of the parties. Viewing the actual documentation used to achieve these objectives gave an opportunity to assess its role and effectiveness in the process.

Each of the participants in the Farmer Interviews and Warden/Land Agent Interviews was promised anonymity and assured that any details which would permit their identity to be known would be treated with the utmost confidentiality. They are referred to in the research analysis by numbers alone.

In the analysis of the interview data in Chapters 6 to 8, the relevant comments of the participants are incorporated into the main text as indirect speech. The numbers of the interviews in which the comments were made, or selected examples in each instance, are included as footnotes. This method of reporting the data has been adopted to minimise

---

3 Subsequently referred to by numbers W1-50 or L1-50 as appropriate. These numbers relate to the corresponding Farmer Interview numbers, or the first of these where a general point rather than a holding-specific point was being made by a warden or land agent who held responsibility for more than one of the holdings, which was often the case. There was not a corresponding Warden/Land Agent Interview for every Farmer Interview. In several cases the appropriate individual did not exist, or was unavailable.

4 For administrative reasons, or reasons of confidentiality, these were often not made available to the researcher.
disruption to the narrative text, whilst enabling the researcher to cross-refer to the primary source, that is the full transcript of the interview, if necessary.

5.2 Methodological Considerations

The data collected for this research was primarily of a qualitative nature. There was a socio-legal focus on process rather than a pursuit of statistical analysis and formal academic outcomes. Because of this, it was felt to be important to investigate the direct experience of respondents rather than their general views or those of the researcher. It was decided that the methodology best used to achieve this should be based on structured in-depth interviews, typed interview transcripts, and detailed analysis using a process of categorisation, sorting, and review. The depth, flexibility and adaptability of this way of working was felt to be most likely to produce the kind of data needed to achieve the aims and objectives of the research project. The limitations of this approach are explored below. It is widely recognised that, while an in-depth exploration of qualitative data is likely to be more productive than a more rigid approach, the process of analysis is more complex. For this study it was important that the response rate from the interviewees was high and that the research agenda was flexible enough to explore any new directions which the interviews might take.

The main limitation of this type of research method is that it is not possible to provide foolproof theories of causality or valid generalisations, in view of the size of the research sample and the subjectivities brought into this kind of interview process. In addition, statistical analysis will not be appropriate for the data produced by this method, apart from in a purely descriptive way to outline the characteristics of the component members of the interview sample. No scientific exposition of the relationship of certain facts to others can be
attempted, and the measurability of the data and the conclusions of the researcher are more difficult to demonstrate in an environment where the interview situation itself has an influence on the data produced. However, for this study, where tenant farmers were to be the subject of the interview process, it was felt that the benefits of a face to face in-depth interview methodology justified the use of the method, in the interest of obtaining the quality of data required.

As Oppenheim\(^6\) pointed out, generally, the longer, the more difficult, and the more open ended the question schedule is, the more we should prefer to use interviews, rather than a written or telephone questionnaire. It is important to recognise, however, that this type of data is more \emph{constructed} than collected, or, at least, that the process is for the researcher more a collection of \emph{ideas} rather than of data in the sense that the word is commonly understood\(^7\). The researcher's intuition and insight clearly have a role in the analysis of this material, to an extent which is difficult to describe. This has been recognised increasingly by researchers in social policy in recent years, and has become accepted as a valuable research process in itself\(^8\) as long as its limitations are recognised and the researcher does not purport to attribute to the material properties which are not appropriate, for example causal links which cannot be borne out by the size and method of selection of the interview sample.

The core criteria for testing the value of the data must be its \emph{reliability}, that is whether the collection process has been consistently applied, and its \emph{validity}, that is whether the results measure what the researcher set out to measure in a way that is appropriate. Where an

\(^5\) See, for example, Bell (1993) Ch. 7.

\(^6\) Oppenheim (1992) Ch. 6. p.82.

\(^7\) Oppenheim ibid.

\(^8\) See, for example the collection of essays in Bryman and Burgess (1994).
exploration of a process is intended, it is thought that quantitative methods would not be effective, in that the depth of the data is what is important rather than the quantity. However, it is also recognised that most methodologies for this type of study draw on elements from both approaches and that there is some crossover. This is the case in this study to the extent that the number of interviews is larger than might be expected for a purely qualitative study, allowing some statistical representation of the attributes of the respondents.

5.3 Detailed Methodology - Design and Sample

5.3.1 Type of Interview

Although the Executive Interviews were a little less structured than the others, a standard schedule of questions was used for all the interviews. This ensured that all the pertinent topics were covered in the interview, and that the general structure of each interview was consistent with others in the sample. The schedules started with closed factual questions and led on towards more open-ended ones towards the end of the interview. The reason for this was to deal with easy factual questions while the respondents were perhaps nervous, or on their guard, and to move on to those requiring more expansive answers once the parties were relaxed and had fully assessed the situation. The Schedule used for the Executive Interviews can be found in Appendix 2, and those for the Farmer Interviews and the Warden/Land Agent Interviews in Appendices 7 and 8.

Where necessary, the interviewer would prompt or probe to encourage a further response, encouraging, supporting, showing interest, or repeating as appropriate. The interviewer also attempted so far as was possible to avoid giving reactions to what was said and asking

---

9 See Tables 1 to 20.
leading questions or putting words into the respondents' mouths. However, it was important for the success of these interviews that the process remained of a conversational nature, so that the respondents felt able to express themselves freely. The interviewer took detailed notes of the conversation and of other relevant factors such as silences, facial expressions and gestures, so that the context of particular comments was understood when revisited later. The whole process was also recorded on a small portable cassette recorder, which was placed between the parties.

It should be said here that, although in this instance the researcher had the resources to arrange for the tapes to be fully transcribed by a third party and that the resulting transcripts were invaluable in the analysis process, there are questions to be raised about the value of full transcriptions in this type of research. It is felt that, where there is one researcher who is adept at note taking, the time and expense needed for long transcripts might not be justified. In addition, there is the question of whether the presence of the cassette recorder inhibited the behaviour of the respondents, who had been assured of confidentiality. There was little evidence of this, although some respondents refused to be taped. Of those who were taped, even those who had at first expressed reservations soon appeared to forget about the presence of the machine. However, even so, there were often minor interruptions while the cassette was changed or other technical problems dealt with. Other problems, particularly for the transcriber, were the amount of irrelevant material in this type of interview (although the transcriber had instructions to type up every part of the conversation), the level of background noise, unscheduled interruptions (bearing in mind that the interviews often took place in a farmhouse kitchen), and the difficulty of understanding regional accents. Had the

10 The participants in the Executive Interviews are described below, by name, in the main text. A list, by number only, of the participants in the Farmer and Warden/Land Agent Interviews can be found at Appendix 6.
interviewer been transcribing the cassettes herself, then it is probable that a more selective process of transcription would have been appropriate.

Other recurring problems in the interviewing process were related to the personalities or circumstances of the respondents. Some were clearly busy and in a hurry to complete the process. Others appeared to be lonely and to enjoy having someone to talk to. Some were quiet and reserved, providing little material of interest. Others were confident and articulate and held strong opinions. It is inevitable that the views of these latter were more positively presented, although often it may have been the case that these respondents were indeed, as they might have liked to have believed themselves, the mouthpieces of their peers. This supposed representation should not be automatically assumed, however. Allocating significance to views more confidently expressed, and drawing out the diffident is part of the process of this open ended approach to interviewing. Also, it should be borne in mind that there are several well-known characteristics of the human persona which lead some to dislike expressing extreme views while others love it (for whatever reason), and to a general reluctance among interviewees to admit their ignorance.

5.3.2 Pilot Interviews

Once the Interview Schedules had been designed they were tested on six farmers and the corresponding land agents and wardens in one region of the UK. It was intended that this would reveal any significant problems with the interview process so that they could be ironed out before the full complement of interviews were carried out. In the event, the Schedule and the interviewer's approach appeared to work well and so these interviews were in fact amalgamated with the main body of interviews and the following comments apply to them as to the others.
5.3.3 The Selection Process

It is inevitable with this type of study that the selection of interviewees is usually a compromise to a greater or lesser extent. This was no less the case in this instance for the Farmer Interviews. The target population for this research was tenant farmers in geographical areas where their holdings were likely to have a conservation interest. The chosen sample was fifty in number, selected from a sampling frame of names supplied by their landlords in a manner described below, which included a certain degree of geographic clustering for the reasons set out. This type of sampling is generally known as non-probability sampling, due to the fact that each member of the population is not equally likely to be picked. The choice of interviewees was dependent first on the landlord bodies approached, which had themselves been selected for certain reasons, and then on the researcher, who made the final selection. It was important to have a sufficient number of interviews to be confident that the views represented those of the target population. The choice of fifty as a suitable number came after extensive discussion with other researchers and as a result also of the resources available to the researcher at the time.

It was decided that, for this type of interview, the use of a random selection of farmers would not give the most satisfactory material. It was important to select farmers who were both relatively articulate and willing to talk about their businesses and the relationship with their landlord. Account also needed to be taken of certain geographical and practical constraints. For example farms needed to be relatively close to the interviewer’s home, or at least comparatively near to each other so that travelling and overnight expenses were not unmanageable. On the other hand, a balanced and representative sample of farm types, personalities and attitudes was desirable.
After discussions at a national level with various landlord organisations, requests were made to local or regional land agents or other appropriate staff to supply lists of approximately twice as many of their tenant farmers as it was intended to interview. Particular emphasis was placed on the need for a good mix of circumstances and viewpoints, and a request was made that those farmers with whom a difficult relationship existed should not automatically be excluded (See letter at Appendix 3). From these lists, the interviewer selected approximately one half of the names and requested that the landlords should write to them in the form of a standard letter drafted by the interviewer (See letter at Appendix 4), as it was thought that this would best secure their co-operation.

On confirmation that this letter had been sent, the interviewer then wrote to the relevant farmers (See letter at Appendix 5), and telephoned a few days later to arrange a suitable appointment. Only one farmer refused to co-operate, on the grounds that he was too busy to spend time on the project, and one farmer was not at home when the interviewer called at the agreed time. These two were replaced by suitable alternatives. Most seemed genuinely interested in the work and glad of the opportunity to air their views. A list of the interviewees, identified by number only to protect their identity is included in Appendix 6 below. This list gives the date upon which the interview took place, whether any legal documents were made available to the researcher, whether a tape recording of the interview was made, and the corresponding number of any Warden/Land Agent Interview (See Appendix 6).

5.4 The Composition of the Research Sample

Of the 50 farmers who were visited, 35 were tenants or graziers (and one share farmer) of the National Trust. The National Trust was selected as an appropriate object of study for a variety of reasons. Firstly, the researcher had an existing relationship with it, having previously been
an employee of the Trust for several years. Secondly, the Trust has the largest tenanted agricultural estate of land with conservation value in the UK, and the longest and most extensive experience of managing such an estate for conservation. Thirdly, the Trust had a direct interest in the research and, therefore, the researcher was ensured of its full co-operation and access to information that would not otherwise be available.

Of the other farmers who were visited, six were County Council tenants (from two different counties, one overlapping geographically with one of the National Trust areas used in the study), three were tenants or graziers of a nature conservation body, two were tenants of a National Park Authority, two were tenants of a small charitable trust with mixed objectives, one was from a large private estate and one was an owner/occupier who had previously been a tenant of a private estate with no conservation mandate. The composition of the research sample is shown in Table 1.

![Table 1: Composition of Sample by Landlord](image)

The farms visited were from seven separate areas of England and Wales, representing the following landscape types:

---

11 In this instance, discussion focussed on his former experience as a tenant.
- an area of extensive livestock farmland, with coastal and upland farms and land within a National Park and an ESA
- rolling upland farms, within a National Park, and mainly within an ESA
- a lowland mixed farming area, encompassing arable and dairy farms, with some farms within an ESA (two visits)
- two areas of very low-lying artificially drained land, one primarily in arable cultivation, the other extensively grazed
- a mountainous area, within a National Park, with some farms being within the experimental area for Tir Cymen
- a lowland mixed farming area, with some coastal farms and some intensive arable farms.

In the interest of protecting the confidentiality of particular interviewees, the empirical research data is presented in a way that does not identify individual landlords, except where the discussion is general enough for it not to matter. However, the initial Executive Interviews provided interesting material on the structure and practices of landlord organisations, of both those who went on to participate in the research and others who did not. Some discussion of these now follows.

5.4.1 The National Trust

The National Trust for Places of Historic Interest or Natural Beauty is the largest of the conservation bodies that own farmland that is tenanted. It was set up in 1895, and incorporated by statute in 1907. Its statutory purposes, as set out in that Act, were

12 The National Trust Act 1907.
promoting the permanent preservation for the benefit of the nation of lands and tenements (including buildings) of beauty or historic interest and as regards lands for the preservation (so far as practicable) of their natural aspect features and animal and plant life\textsuperscript{13}. In the pursuit of these purposes, it has the power to acquire and manage property. It now owns over 245000 hectares of land in England Wales and Northern Ireland. In fact, it is now one of the largest farm landlords in the UK, with 60\% of that land comprising a total of over 700 complete agricultural holdings and 1300 other lettings or grazing agreements of blocks of land\textsuperscript{14}.

The structure of the Trust is regionally based. There are 16 Regions, including Northern Ireland, each with a Regional Office, from which a large staff operates. The Regions have some operational autonomy from the Head Office in London, and to a certain extent, their policies and practices may differ. However, advisory staff on all aspects of its estate management are available on a national basis from an office in Cirencester, and major estate policy matters are usually decided here.

Over recent years the Trust has endeavoured, in accordance with its statutory objects, to improve the environmental management of its farmland. Historically, in addition to countryside which was acquired for its own intrinsic value, the Trust had obtained significant areas of farmland as an adjunct to country house estates which were acquired for the house and any immediately surrounding garden or park. The farmland was often taken on to provide an endowment for the management of the core estate, and invariably was subject to existing tenancy agreements, which contained few restrictions on farming practices. As these have expired, or negotiating opportunities have arisen, the Trust has endeavoured to include

\textsuperscript{13} These purposes were extended by s.3 of the National Trust Act 1937.
conservation covenants under Schedule 3 of the 1986 Act, or, more recently with new agreements, to prepare farm and environment plans for the holdings. These have then been incorporated into a separate management agreement to run alongside the tenancy agreement. The Trust has also been at the forefront of initiatives to encourage the imaginative use of farm business tenancies to achieve environmental objectives.

5.4.2 English Nature

English Nature (the Nature Conservancy Council for England) is governed by statutory provision contained in Part VII of the Environmental Protection Act 1990. By virtue of that Act it took over the functions of the Nature Conservancy Council, and thus the rights under the National Parks and Access to the Countryside Act 1949\(^\text{15}\) to acquire and manage land for use as nature reserves\(^\text{16}\). It finds it frustrating not to be able to acquire land as a buffer for other sensitive sites or to offer to farmers as an alternative grazing area for stock, but is unable to do so. It has very few full agricultural tenancies on its land, preferring the flexibility and control offered by Ministry leases and grazing licences, which enable the passing on of fencing obligations. However, the administrative costs of frequent renewals have led to an increased use of slightly longer terms, and now farm business tenancies, containing strict management regimes. In a few cases, it has acquired its own stock to graze a site, if the grazing is uneconomic, but, in common with other conservation bodies, it recognises that the costs of stock management are better born by a third party.

\(^{14}\) National Trust draft Agricultural Policy, September 1999.

\(^{15}\) Ss. 17 and 18.

\(^{16}\) This raises questions over the definition of *agriculture* for the 1986 and 1995 Acts and concerns that nature reserve leases may not legitimately be let as agricultural tenancies and may be caught by the 1954 Act provisions. For this reason, court orders excluding these provisions are often obtained for safety's sake. See further Chapters 2 and 3.
Lack of resources has meant that the monitoring of tenancy arrangements, as with SSSI management agreements, has been intermittent. For this reason, it is recognised that the initial selection of a tenant and more involvement in building up a so-called partnership relationship with them is desirable. Lettings are often routinely repeated and dealt with locally for flexibility of management. This may reduce the choice of tenants or graziers, but, where the relationship is good, can open up a dialogue on the management of adjoining land not in English Nature’s control. Local staff negotiate agreements and regional land agents set up the documentation. A survey of SSSI owners had identified the fact that farmers did not feel that staff understood the culture of agriculture and, therefore, staff are trying to be sensitive to this perception in their dealings. In addition to the above, staff try to use farmers as contractors or encourage other initiatives to foster the involvement of the local community in conservation management.

Site Management Statements are now being prepared for each SSSI. These are intended to provide a brief statement of the main features and management objectives for a site and will be prepared in conjunction with the landowner in each case, giving further opportunity for communication and negotiation. It is felt in the organisation that informal contact and the use of peer group pressure, together with a program of education and information, can be effective in achieving co-operation among farmers.

5.4.3 Countryside Council for Wales

CCW has similar statutory purposes to those of English Nature, see above, but, by virtue of the Environmental Protection Act 1990 it also undertakes the wider powers for the...
countryside in Wales that are parallel to those undertaken by the Countryside Commission\(^ {18}\) in England. This has meant that it has managed the Tir Cymen Scheme, and now the more extensive Tir Gofal Scheme in addition to its responsibilities for SSSI protection. Its general culture, for both régimes, is now one of positive management and whole farm planning.

CCW rarely granted 1986 Act tenancies, although it had a few in place that it had inherited from previous owners. However, at the time of enquiry, it was using approximately 40 grazing licences with extensive conservation provisions to achieve the correct vegetation management. It also, of course, has extensive experience of the application of agricultural prescriptions in its SSSI management agreements\(^ {19}\). As with English Nature, the problem of effective monitoring on a large number of disparate sites is acute, particularly where upland grazing régimes are involved.

### 5.4.4 RSPB

The RSPB is limited by its stated charitable purposes, although these do extend to a consideration of birds in the wider environment, rather than in isolation. At the time of the research, it owned over 200000 acres of land, which is managed as nature reserves. Where farm management is needed, this is most often arranged by way of grazing agreements, then approximately 300, covering an area of roughly 20000 acres. There are a few full agricultural lettings that have been inherited on acquisition and Ministry leases covering an area then of roughly 3000 acres. On occasion, stock is bought and managed by the Society. The preference for grazing licences is born out of a desire for control and incentives for compliance created by the need for annual renewal. Where it can, the Society prefers to

\(^{18}\) Now the Countryside Agency.

\(^{19}\) See Ch. 4, Section 4.2.6.
influence land management without acquisition, perhaps by the use of a management agreement. This type of arrangement is often targeted at a specific locality to protect a particular species, for example the cirl bunting, stone curlew, bittern or corncrake.

Monitoring of the arrangements is undertaken as part of the regular wardening process, and appears to work well. Graziers are introduced by others, or might already have RSPB grazing. They are often tested out on a grazing licence before possibly being offered a Ministry lease. The Society does not always take the highest bid for grazing, having discovered that this does not guarantee the best management. Horse owners often offer the highest rents, although horses are notoriously bad grazers.

As with other conservation organisations, negotiations are often carried out locally, by wardening staff, with the preparation of documentation and implementation of the agreement being undertaken by regional or head office land agents. There are no tenants’ meetings or newsletters, beyond the Society’s general publicity. The Society uses reserve management plans rather than farm based plans, and tends to let buildings separately from land holdings. It plans to make full use of farm business tenancies, particularly where grazing continues over the winter, in the hope that administration costs will be lower than with annually renewable grazing licences.

5.4.5 County Farms Estates

Each County has a different type and size of farm estate and its own policy for managing it. The prime function of the estates has always been to provide an opportunity for new entrants to farming; a ladder to climb as their careers progress. Section 38 of the Agriculture Act 1970 designated the County Councils as smallholdings authorities for this purpose. Protection

---

of the environment on County farm estates has historically been confined to the preservation of traditional landscape features. However, it is commonly known\textsuperscript{21} that, in many Counties, the estates have come under pressure to justify their existence (involving considerable capital value) in terms of public benefit, rather than benefit solely to those in occupation. This has had the effect of promoting conservation, together with education, as vehicles by which such justification can be shown, since they have a wider public appeal.

Generally, though, there tends to be a general lack of resources available for use on the estates, and so tenant farmers are encouraged to pursue conservation benefits through the entering of Government schemes, although some Councils like to foster a partnership approach with their tenants, offering them support and advice. This was especially evident in one Council where a conservation group, with farmer representation, met regularly, and a Tenants' Induction Pack and Patch Officer system had been set up to encourage communication. Some of the larger estates have newsletters and regular tenants' meetings. Grazing licences are often used to manage Country Park areas, where there is a high degree of public access.

\textbf{5.4.6 National Park Authorities}

Each National Park has its own characteristics. Of the two that participated in this research, one had no farmland that it owned in its own right, while the other had a significant estate. The latter tended to manage its farms by way of traditional agricultural tenancies, often inherited, but some were let on short-term arrangements. Of these, notable examples included a 5-year agreement to reduce grazing on a farm in an ESA, another to test out a new tenant, and an agistment scheme on moorland with 20 graziers and a shepherding service. The

\textsuperscript{21} County Farm Conference 1994, Stoneleigh.
Authority had looked at the possibility of a share farming scheme for a particularly sensitive holding, but had ultimately chosen to let it to a non-commercial body on a full tenancy with considerable conservation restrictions. In fact several of the tenancies had included conservation covenants, the most restrictive being on a farm which was also subject to a tripartite s.15 agreement\textsuperscript{22} for the SSSI part of the farm.

The staff of this Authority felt that, on the whole, the various arrangements worked well. But they emphasised the need to communicate with the farmers and monitor the arrangements frequently to avoid the possibility of restrictions being flouted. In this way they had managed to avoid enforcement problems by heading off any potential difficulties before they became too serious.

The National Park Authorities have various functions, and some frustration was expressed in the Interviews at the constraints caused by their various conflicts of interest. In particular, at the time of the interviews, it was felt that their inability to enter Government schemes in their own right (being part of a Government body) was a severe disadvantage. However, by granting long enough terms, the effects of this could be minimised by allowing the tenants to apply in their own right. The Park Authorities also ran their own incentive schemes to supplement others\textsuperscript{23}, and it was noted that the biggest attraction to farmers in these was the offer of assistance with capital works such as walling and hedging. It was noted here, and elsewhere, that older tenants tended to be more interested in the conservation aspects of farm management and to want to farm less intensively.

\textsuperscript{22} I.e. a management agreement entered into under s. 15 Countryside Act 1968. See above Chapter 4 for detail.

\textsuperscript{23} See Ch 4, Section 4.2.5.
The Authority with its own farms did not necessarily take the highest tender for a new letting and used a solicitor to draft tenancy agreements. This invariably caused delays, and many tenants had gone into occupation before the agreement was completed. The use of maps for detailed restrictions was considered to be essential to ensure the effectiveness of the arrangement, and often it was found that the sales particulars, with their précis of the conservation restrictions, were more often used for reference by the parties than the actual tenancy agreement. Presumably this was particularly the case where the agreement had yet to be signed.

5.4.7 Ernest Cook Trust

The Ernest Cook Trust was set up as a small charitable foundation, whose prime rationale was educational. The farm estate was intended to support this role, and, as part of this, has always been managed in a traditional way, that is in the best tradition of the great estates. Its farms are let on long term agricultural tenancies and the tenancy agreements contain some conservation restrictions, but these tend to be traditional clauses designed to protect landscape features such as hedgerows and walls rather than site specific prescriptions for nature conservation management. Shooting rights are included in the tenancy, on condition that the tenant fulfils certain obligations, and this is seen as a good incentive to encourage conservation management. Few short-term agreements are entered into, except for horse grazing, or where a reorganisation is taking place.

5.4.8 Chatsworth Estate

The Chatsworth Estate in Derbyshire is one of the largest private estates in the UK. Owned by the Trustees of the Chatsworth Settlement, a Cavendish family trust, the total acreage in

---

24 See comments as regards the relationship between conservation and sporting rights in Ch. 6.
Derbyshire is in the region of 35000 acres. A charitable trust has been formed to minimise the effects of death duties and to manage 12000 acres of the central estate, with the house gardens and parkland, for the benefit of the nation. There is a small in hand operation on land surrounding the house, and on one other arable farm, but the bulk of the estate is let on approximately 125 traditional agricultural tenancies of varying sizes, the largest farm being 631 acres. In addition, there are a substantial number of smaller lettings, mostly on Gladstone v Bower agreements. New lettings are not normally advertised, usually being offered to the families of existing tenants. A standard tenancy agreement, short and traditional in type, is completed by a land agent. Any conservation clauses tend to be intended to protect the traditional landscape, restrict field size or regulate timber management. The Chatsworth Estate is run on the basis of a very traditional approach, with a distinctly benevolent landlord/tenant relationship and a high regard for the welfare of the people on the estate.

5.4.9 Elan Valley Trust

The Elan Valley Trust holds 40000 acres of water catchment land in mid Wales on a 999 year lease from Welsh Water plc for the purposes of providing public access, conservation and the education of the public. Of this, a considerable area is made up of hill farms with pre-existing full agricultural tenancies with succession rights. In total the Trust is landlord for 43 holdings. The majority of the tenancy agreements, inherited from the water authority25, contain, where they are written, covenants to ensure water quality, but otherwise are generally traditional and unexceptional in character26. The farms are isolated and the farmers generally experience a low standard of living. The Trust receives very few requests for improvements to the

25 Which has held the land since the late 19th century, with statutory duties as regards public access and water conservation etc.

26 Some have unusual arrangements for the ownership of sheep flocks, whereby the landlord owns sheep in its own right and rents them to the tenants. This ensures the continuation of a viable hefted flock.
holdings and tenancies tend to be taken over by the next generation in the family, although recently there have been fewer young people prepared to undertake the lifestyle involved. Where there are no succession rights on a new letting, the Trust intends to use farm business tenancies of 15 years to encourage tenant security and investment and maintain the local community, and has a few already in operation.

Tenancy agreements are generally negotiated by the Trust's (now resident) land agent and prepared by a solicitor. There are tenants' meetings to discuss common issues. The Trust does not actively negotiate for conservation benefits in its agreements, preferring to leave the conservation management of the farms to the ESA and SSSI systems which are in place for almost the whole estate.

5.4.10 Other Landlords

In addition to the above, interviews by telephone or on person, or correspondence, were conducted with the following organisations:

5.4.10.1 The Duchy of Lancaster

The Duchy has a large agricultural estate, let on a variety of arrangements. It is of the view that neither short-term lettings nor fully protected succession tenancies are best for conservation, believing, instead, that the ideal would be a fixed term of between 5 and 25 years. The existence of succession rights, it believes, often removes the incentive to manage the holding well. There is a general understanding within the Duchy's organisation that conservation is equated with what has always been understood as good estate management. However, it is acknowledged that the external pressures created by the general agricultural climate affect the interpretation of these phrases.
The Duchy applies conservation restrictions to many of its tenanted holdings. It achieves this by the use of general clauses, relating, for example, to the management of hedges, walls and trees, the conversion of permanent pasture and the use of sprays, and also by site specific "special conditions", where particular features need protection. However, the view is held that tenancy provisions are no substitute for good management between landlord and tenant, particularly as it is believed that even a landlord who takes an interest in conservation matters would have difficulty enforcing conservation covenants. The Duchy's view is that the best conservation results are achieved by negotiation, good relationships, and by example and leadership.

5.4.10.2 The Duchy of Cornwall

Similar cultural attitudes prevail at the Duchy of Cornwall, where most tenancy agreements have a traditional style and content and only an occasional one contains site specific conservation restrictions. However, the subject of "green restrictions" was under discussion at the organisation at the time of the enquiry and policy is likely to have developed as a result of the 1995 Act legislation. Certainly, it was envisaged that some conservation measures might be best dealt with in an agreement separate to the tenancy agreement, perhaps on the model of the National Trust's farm and environment management agreements.

5.4.10.3 The Crown Estate

The Crown Estate felt strongly that paragraphs in tenancies, or, as it put it, "other legislative practices", are not very helpful in promoting conservation. The Estate would normally prefer to pursue any conservation work on a partnership basis with a tenant, and by persuasion rather than by compulsion. They also believed, at the time of the enquiry, that good conservation practices are capable of running side-by-side with high production agricultural systems and that this was a better option than trying to extensify an agricultural production system. This attitude, that is the belief that conservation on the fringes and margins of highly
productive farmland is the most effective means of achieving environmental benefits, is one that is echoed by others, particularly those with an interest in sporting activities and those from a traditional land agency background. It is not wholly compatible with the moves towards whole farm planning that are occurring elsewhere\textsuperscript{27}, although, undoubtedly, the data from the Farmer Interviews showed clearly the beneficial connection between an interest in shooting and the carrying out of conservation works\textsuperscript{28}.

5.4.11 Non-Landlord Organisations

5.4.11.1 Industry Bodies

Interviews were also carried out with senior staff members from the Country Landowners' Association, the National Farmers' Union, and the Tenant Farmers' Association. Much of the debate between these bodies before the passing of the 1995 Act is in the public domain in the form of responses to consultation documents. However, for none of them did the environment feature highly as a concern. As we have seen in Chapter 1, comments about short-termism were issued in the context of the wider debate on a minimum term length.

In their responses to the current enquiry, none felt that their members were very concerned with the incorporation of conservation provisions in tenancy agreements. To the extent that this went beyond the traditional inclusion of good husbandry obligations, it was seen to be the province of conservation bodies. In view of this, it was felt that, although an important issue was involved, the relevant policy issues were as much about education as about legislation. All three bodies were in favour of this approach, and applauded the initiatives taken by the

\textsuperscript{27} See Chapter 1, Section 1.8.

\textsuperscript{28} See Chapter 6, Section 6.2.1.
Royal Institution of Chartered Surveyors with the publication of their Guidance Notes\textsuperscript{29} and model agreements.

5.4.11.2 \textit{Conservation Bodies}

For the current project, correspondence was exchanged with the Countryside Commission\textsuperscript{30}, the Farming and Wildlife Advisory Group, and LEAF\textsuperscript{31}. Whilst FWAG at the time took a view more akin to the conservation at the margins approach of some of the more traditional landlord bodies, LEAF had for some time been developing a very detailed form of Environmental Audit for farmers who wished to check their performance across the whole farm for compliance reasons or out of interest. LEAF had also been promoting the concept of Integrated Crop Management, which was seen as a whole farm approach to the management of artificial inputs on arable land. However, neither organisation had any specific concerns about conservation on tenanted farmland, except that FWAG was becoming involved in an initiative with other conservation bodies to produce some standard conservation clauses for tenancy agreements that could be offered as precedents to interested parties following the institution of the 1995 legislation.

The Countryside Commission had considered tenancy matters in response to the 1995 Act consultation process and the drafting of the RICS Guidance Notes\textsuperscript{32} and had prepared a note with four basic principles for the incorporation of environmental principles on tenanted farmland. First, it thought, there should be an \textit{assessment} of the environmental assets and potential on a farm as part of a farm business plan. Secondly, this should be supported by an

\textsuperscript{29} RICS (1995).

\textsuperscript{30} Now the Countryside Agency.

\textsuperscript{31} Linking Environment And Farming.

\textsuperscript{32} See above.
environmental *audit* in the LEAF mould. Thirdly tenants should be encouraged or required to undertake *positive* environmental management on their holdings, and fourthly, opportunities should be identified for *creative management or reinstatement* of particular features. Again, however, while the above are important pointers generally for good conservation management, there was, in fact, little in the correspondence of particular relevance to *tenanted* farmland. The management principles set out, could, nonetheless, be of value in devising best practice advice to landlords and tenants as part of an educative process.

5.5 The Characteristics of the Research Sample

The Farmer Interviews were used primarily as a tool to collect qualitative data from which broad conclusions could be drawn about the effectiveness of current conservation arrangements on tenanted farmland. The more open questions in the latter half of the Farmer Interview Schedule (See Appendix 7) were particularly effective for this purpose.

The factual questions at the beginning of the interview (Questions 1 to 5 of the Schedule) were intended to generate numerical data showing the characteristics of the holdings and the individuals involved. Whilst it was not intended that these should be used to demonstrate any statistical conclusions, they are critical to an understanding of the composition of the research sample. They are therefore set out in diagrammatic form in the following sections.

The analysis of the qualitative data generated by the later questions on the Farmer Interview Schedule and those on the Warden/Land Agent Interview Schedule (See Appendix 8) is contained in Chapters 6 to 8 below.
5.5.1 Details of the Holding and the Legal Arrangement

This data was collected from the responses to questions 1.1 to 1.8 of the Farmer Interview Schedule. Of the 50 holdings, 3 had an acreage of less than 100, 17 of between 100 and 300, 11 of between 300 and 500 and 19 of over 500 (Table 2). However, these figures are distorted by the high incidence of upland farm tenancies, within which were included very large areas of non-common mountain land. The amount of in-bye land on these farms was often very small, and, if (as has been done where any mountain grazing is common land), the mountain land had been excluded, the majority of the sample holdings would have been seen to be relatively small farms.

This may explain the high proportion of farmers in the sample who also farmed land other than the subject holding - a total of 34 out of the 50. Often this consisted of land taken on on a short-term basis to supplement grazing, particularly in the winter, when sheep are brought down off the mountain and the in-bye land is insufficient to support them. 8 of the farmers interviewed said that they had common rights registered under the Commons Registration Act 1965.

![Table 2: Size of Holding]

15 farmers reported reductions having been made in their tenanted land since they took it on and 18 had had land added. There were a variety of reasons for this, but often small pieces were taken back in hand by the landlord for conservation or development purposes, while
there was a certain degree of amalgamation taking place when the opportunity arose, giving rise to land being added to existing holdings.

24 of the 35 tenants with full agricultural tenancies had agreements that pre-dated the 1984 change in the succession rules and thus carried full succession rights. Of the others, which included 4 Ministry leases, 2 Gladstone v Bower agreements, one share farming agreement, 3 Farm Business Tenancies and 2 grazing licences, all were granted between 1984 and 1995 (Table 3). However, a significant proportion of the full agricultural tenancies set up between these dates were granted to those who did have statutory succession rights, and the new agreement was merely putting a succession into effect or recording an agreed succession. Often the opportunity was taken at this point to negotiate changes to the agreement. In particular, conservation clauses were often added on these occasions.

<table>
<thead>
<tr>
<th>Pre-1984 Full Tenancy</th>
<th>Post-1984 Full Tenancy</th>
<th>Ministry Lease</th>
<th>Gladstone v Bower Agreement</th>
<th>Share Farming Agreement</th>
<th>Farm Business Tenancy</th>
<th>Grazing Licence</th>
</tr>
</thead>
</table>

Table 3: Type of Agreement

There were a variety of reasons for entering the so-called “unconventional” arrangements. Some of the Ministry leases had been set up to allow what had previously been graziers to enter into ESA agreements (then for 5 years) in their own right. Others, as well as Gladstone v Bower agreements, were being used as an interim measure to test out new tenants or to pass the time until the new legislation permitted the use of farm business tenancies. Grazing

---

33 See Ch.2 for details of the law relating to statutory succession.
licences and the share farming agreement were used merely to maximise the amount of management control retained by the landlord, and for flexibility. A few of the National Trust tenants had management agreements with the Trust, with separate payment structures and linked to a whole farm plan, running alongside their tenancy agreements.

41 of the tenancy agreements were written, 1 was oral (that is no written agreement had been intended by the parties), and 8 had not yet been legally completed (a written agreement was intended, but a draft had either not yet been received from the landlord by the tenant or, having been received, had not yet been signed34) although the "tenants" were already in occupation and, in some cases, had been for several years (Table 4).

![Pie Chart: Recording of Tenancies](image)

**Table 4: Recording of Tenancies**

The farms were varied in the type of land which they encompassed (Table 5), although 47 had at least some area of pasture. 24 had arable land, of which one was in total set-aside, 4 farmers specifically mentioned woodland, and 1 horticultural crops.

---

34 These arrangements were, therefore, usually taking effect as equitable leases.
When asked to specify the most important enterprises, 16 mentioned dairy enterprises, 16 arable, 29 beef, 36 sheep, 2 pigs, 1 poultry and 2 major diversification projects (a campsite and a farm shop) (Table 8). Major changes to these enterprises over the last 10 years had taken place on 18 farms and mainly consisted of expansion, although one or two had ceased milk production, or had made changes in stock brought about by quota or subsidy régimes. One farmer had reduced stocking considerably and had transferred to traditional breeds specifically for nature conservation purposes in conjunction with a management agreement.

5.5.2 Personal Characteristics of the Interviewee

This data was collected from the responses to questions 2.1 to 2.10 of the Farmer Interview Schedule. The age range of the interviewees (Table 7) was suitably wide. While only one was under 25 and 2 over 65, 16 were between 26 and 35 years old, 14 between 36 and 45, 11
between 46 and 55 and 7 between 56 and 65. The low number of tenants at either end of the scale is easily explained by the amount of time needed to establish a business and the fact that retirement normally takes place at or before 65.

<table>
<thead>
<tr>
<th>Age Range</th>
<th>Tenants</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under 25 Years</td>
<td>13</td>
</tr>
<tr>
<td>26 to 35 Years</td>
<td>13</td>
</tr>
<tr>
<td>36 to 45 Years</td>
<td>46</td>
</tr>
<tr>
<td>46 to 55 Years</td>
<td>56</td>
</tr>
<tr>
<td>56 to 65 Years</td>
<td>7</td>
</tr>
<tr>
<td>Over 65 Years</td>
<td>4</td>
</tr>
</tbody>
</table>

Table 7: Age of Tenants

The range of education (Table 8) was also wide, with good numbers of tenants having stayed in full time education until 18 or 21 (9 and 14 respectively), although the majority (that is 27) left school at 16 or before. Of the ones who went on to further education, 22 attended college while only 1 went to university. 20 studied agriculture, or a closely related subject, while 3 undertook unrelated courses. The provision of agricultural education, even at degree level, has traditionally been made by specialist colleges, perhaps with a university affiliation. Very few of the respondents were educated to degree level, however, with most having received a National Certificate or HND. 12 of the interviewees considered that they had undertaken significant further training, often City and Guilds courses, after they had left full time education, although the responses to this question may have been slightly confused in the light of the fact that the respondents may or may not have included training such as that for ATV and sheep dipping safety certificates in their replies.
42 of the tenants interviewed had close relatives in the farming industry and/or grew up on the holding (Table 9).

Of those who didn’t, several married into the business. A separate question about the interviewees’ career paths (Table 10) revealed that 31 of them went straight back to work on the holding after leaving school or college. 18 had been employees elsewhere (not necessarily in agriculture), 3 had undertaken contracting work and 9 had previously been tenants or graziers elsewhere, some on a part time basis.
An attempt to establish a little about the farmers' attitudes towards conservation and their interests was made by asking about their hobbies (Table 11) and membership of different organisations (Table 12).

<table>
<thead>
<tr>
<th>Hobbies and Interests</th>
</tr>
</thead>
<tbody>
<tr>
<td>Keen shooters</td>
</tr>
<tr>
<td>Sporadic shooters</td>
</tr>
<tr>
<td>Keen anglers</td>
</tr>
<tr>
<td>Sporadic anglers</td>
</tr>
<tr>
<td>Keen birdwatchers</td>
</tr>
<tr>
<td>Sporadic birdwatchers</td>
</tr>
<tr>
<td>Keen hunt supporters</td>
</tr>
<tr>
<td>Sporadic hunt supporters</td>
</tr>
</tbody>
</table>

The interviewer prompted replies on shooting, fishing, hunting and birdwatching where they were not specifically mentioned spontaneously. 13 of the farmers were keen on shooting, while 8 undertook some, but not regular shooting activity. With fishing, there were 4 keen and 4 sporadic anglers. 8 farmers described themselves as being keen birdwatchers, while 2 said that they liked to watch birds that they came across during their work but did not go out of their way to seek them out. On the hunting question, there were 6 active supporters and 2 who gave their general backing to the hunt, without actually attending meets themselves. With both hunting and shooting, there was a widespread feeling that the activities were part of the general management of the holding rather than a hobby as such.
The most commonly supported farmers' organisation was the National Farmers' Union, with 33 members among the interviewees. 7 were members of the Farmers' Union of Wales, 5 of the Country Landowners' Association (presumably in relation to other land that they owned) and 4 of the Tenant Farmers' Association. 7 supported the Game Conservancy, 3 the British Association for Shooting and Conservation or the British Fieldsports Association and 6 were members of one or other of what might broadly be called the conservation organisations. 2 of the tenants farmed organically and were members of the relevant trade and advice associations.

5.5.3 The Organisation of the Farm Business

This data was collected from the responses to questions 3.1 to 3.6 of the Farmer Interview Schedule. Having established a little about each holding and the personal characteristics of the farmer, the interviewer asked some questions relating to the farm business. The first of these was intended to establish the way the business was organised (Table 13) and it appears that it is most common for this type of farmer to operate in a partnership, usually with close members of his or her family. 32 of those interviewed operated in this way, with 15 of the others trading as individuals and 3 as limited companies.
The decision making process (Table 14) on each farm was also explored and, while the majority of tenants admitted to being the main decision maker in the business, only 8 said that they made decisions almost entirely alone, while 34 consulted with spouses on important questions, 13 with a parent and 11 with a son or daughter. 2 made decisions with an employee, probably a farm manager, and 3 involved a third party not included in any other category, maybe a more distant relative.

In making these decisions, however, various other sources of advice were used, although a reluctance to pay significant sums for advice was detected. Other sources of advice (Table 15) included Banks (3, and reluctantly), ADAS (17), private consultants (8) and feed, spray or other suppliers (4). For conservation matters, the farmers often relied on the landlord’s advice, particularly in the case of the National Trust.
In terms of labour force (Table 16), the majority of these farms were managed by family members alone. 25 farmers stated that only family members were employed in the business, while 17 had one or more employee, 9 used casual labour and 3 used contractors.

34 of those interviewed had sources of income other than the farm itself (Table 17). This was often in the form of a wife or partner having a job off the farm, and sometimes involved agricultural contracting to spread the cost of machinery etc.. The dependence on other income relates also to the fact that these holdings were often smaller and less productive than many others, reflecting to a certain extent their conservation value. Many were what might be called part-time holdings.
It might be assumed that a farmer's attitude towards the farm business and conservation in particular would be greatly affected by the prospects for a member of the family taking on the farm after his or her retirement. In order to explore this a little (although of course no statistical correlation can be drawn), the farmers were asked what prospects there were for succession to the holding by a member of the family (Table 18). To this, 9 were fairly certain that a succession would take place, 24 thought that maybe it would (this was a common response where children were too young to have made up their minds whether it was something that they wished to do) and 16 had no prospect of handing the farm on. Some expressed regret at this, while others were relieved that their children had not chosen to follow them into what they saw as a hard way to make a living. For a good proportion of those with prospective successors, however, the handing on of the farm was a major motivating factor in the building up of the business and the "stewardship" of the holding.
5.5.4 Government Conservation Schemes and Conservation Covenants

This data was collected from the responses to questions 4.3 and 5.2 of the Farmer Interview Schedule. Of the 50 farmers interviewed, 28 were parties to conservation management agreements or Government schemes of one type or another - most often ESA, Countryside Stewardship or SSSI agreements (Table 19).

![Table 19: Conservation Management Agreements]

32 had, or thought they had, clauses in their tenancy agreement relating specifically to conservation matters (Table 20).

![Table 20: Conservation Covenants]

There was, however, a great deal of ignorance about the actual contents of the legal agreements, and, when the farmers’ answers were checked with the landlords, or against the documents themselves, where access was possible, there were often significant discrepancies.

---

35 See Ch.4 for a description of these schemes.
between what they actually contained and what they were believed to contain. These aspects will be discussed further in more detail in Chapter 6.

5.6 Detailed Methodology - the Analysis of the Qualitative Data

5.6.1 Background

The process of analysis of qualitative data collected in in-depth interviews is notoriously difficult to describe, being dependent as it is, to a certain extent, on the intuition and subconscious thought processes of the researcher. Recently attempts have been made by various experienced researchers to describe their methods of working in order to make the analysis of qualitative data a more transparent and repeatable process. In particular, this has been done in the collection of essays edited by Bryman and Burgess\(^{36}\), which further establishes the use of qualitative data analysis as a reliable research tool. Of the described methods, the one closest to that undertaken in this study is that described by Ritchie and Spencer as the "Framework" method of analysis\(^{37}\). However, as each researcher and each project has its own idiosyncrasies, it can only be said that this has formed a basis for a method in this study, which is fully described below.

Applied research is said by Ritchie and Spencer to be distinguished from basic or theoretical research by its requirements to meet specific information needs and its potential for actionable outcomes\(^{38}\). For the process of obtaining that information and making recommendations, the use of qualitative data is well suited. As Walker put it,

---

\(^{36}\) Bryman and Burgess (1994).

\(^{37}\) Ritchie J and Spencer L, *Qualitative data analysis for applied policy research* Ch. 9, p.173 in Bryman and Burgess supra.

\(^{38}\) Ibid. p. 173.
What qualitative research can offer the policy maker is a theory of social action grounded on the experiences - the world view - of those likely to be affected by a policy decision or thought to be part of the problem.\textsuperscript{39}

This assessment clearly applies to this current project, which aimed to provide an analysis of the rôle of agricultural land tenure law in practice and to make recommendations as to its potential for promoting conservation. A qualitative analysis of the interview data was intended to provide insights, explanations and theories concerning the application of agricultural tenancy agreements for pursuing conservation objectives.

The objectives of any applied policy research methodology are necessarily dictated by the nature of the information sought. Research questions need to be devised that identify the context and nature of the behaviour under scrutiny, attempt a diagnosis of reasons and causes for this, evaluate the effectiveness of the policy tools in operation, and offer strategic solutions to the problems identified by the research\textsuperscript{40}. The methodology for this project is designed to meet these requirements.

In order to produce a coherent and structured account of a large volume of research data (in this case primarily in the form of interview transcripts), Ritchie and Spencer suggest that the researcher needs to define concepts which will describe the processes in play, categorise the data into identifiable groups, seek explanations and associations in the data being revealed, and create theories or strategies for future action\textsuperscript{41}. All of these need to be achieved by a method that can be explained to others and enables easy checking and retrieval of the original


\textsuperscript{40} Ibid, p. 174

\textsuperscript{41} Ibid. p. 176.
material. The "Framework" method aims to facilitate this, and a description of the method and how it has been followed, or departed from, in this case now follows.

5.6.2 A Detailed Description of the Analysis Process

The analysis methodology referred to above is appropriate to differing types of qualitative data. In this project, the data was generated by the Interview Survey, and the material to be analysed consisted of transcripts of the taped interviews, or of the detailed notes taken at the time. The first step for the researcher was to familiarise herself thoroughly with the range and diversity of the data by reading it several times. During this stage, notes were made of recurrent themes and ideas.

The second step involved identifying a thematic framework. In this case, where the researcher designed the Interview Schedules, some of this process was conducted at an earlier stage when the composition and ordering of the questions was undertaken. Thus, the numbering system of the Schedules provided a basic pattern for the analysis. To this extent, the so-called coding of the data had been conducted in advance. However, for the analysis of open-ended questions, such as were used in the latter part of the Schedules, the emergence of themes and recurrent comment could only be seen from the completed transcripts. The identification and labelling of these themes formed the framework, or index, into which the data could be sorted. The construction of this framework was dependent on the rigorous application of the original aims and objectives of the research, as well as on the logical and intuitive thought processes that occurred when the data was reviewed.

The third stage of the analysis was then to sort and categorise (or index) the individual pieces of data into this thematic framework. At this point, the framework itself evolved somewhat, as the relative significance of issues became apparent. For this project, the process of indexing was conducted by the setting up of a colour-coded reference list and the application of codes
to the interview transcripts. Some items of data had multiple themes and had, therefore, to be included in several categories.

The individual pieces of data, that is, portions of the interview text, were then extracted and sorted into their thematic groups by computer. This process is referred to by Ritchie and Spencer as charting. Headings and subheadings were devised, using the thematic framework, the researcher's a priori research questions, and judgements as to how best to present the writing up of the research. At this stage, the skeleton of the finished analysis began to appear.

Finally, the process of real analysis took place, that is the mapping and interpretation of the data. Once the data had been sorted according to core themes, the researcher could identify key characteristics and provide answers to the research questions. This stage involved defining certain concepts, describing the range and nature of the phenomena studied, and providing explanations and associations where possible. The drawing of conclusions and the formulation of recommendations and strategies were the final tasks. This was the part of the project which was most dependent on the particular skills and intuition of the researcher. Indeed, these were applied at each stage, and to this extent, the methodology applied has inevitably been tailored to the project in hand. The main stages of the analysis, however, are as described.

5.7 Conclusions

We have seen above how the research project was planned, and the methodological process involved in the execution of the Interview Survey. The composition and characteristics of the research sample have been explained, and some of the information generated by the Executive Interviews set out, to give a picture of the arena in which the research will have an influence. Finally, a detailed description of the methodology for the analysis of the qualitative
data obtained by the asking of more open-ended questions in the interviews has been given. 

In the following chapters, an account of this data will now be set out.
CHAPTER 6

Current Practice - Conservation: Attitudes and Experience

6.1 Introduction - The Analysis of the Interview Data

A qualitative analysis of the material gathered from the Farmer Interview survey reveals various trends in both the attitudes of the interviewees towards conservation initiatives and the way in which current tenancy and management agreement arrangements are working. The operation and effectiveness of Government schemes and their interaction with tenancy issues are discussed in Chapter 8. Here, in Chapter 6, we will examine the farmers' attitude towards conservation in general, and then, in Chapter 7, their view of how the landlord/tenant relationship operates in practice in the context of conservation management, and how perhaps this could be improved.

In the analysis of the more open-ended questions in these chapters the question numbers from the interview schedules are not specified. The reason for this is that, whilst the schedules were rigidly adhered to, useful data was often collected from information and comment at points in the interviews other than those specifically allocated to a particular topic. As stated earlier, the footnoted interview numbers are illustrative only, referring to examples of where such comments can be found in the transcripts, for the benefit of the researcher.

6.2 Current Attitudes towards Conservation

6.2.1 Hobbies and Interests

As seen in the previous chapter, an indication of the respondents' attitudes towards conservation and country sports was sought by asking them to list their main interests and hobbies, particularly those which were considered to be relevant to the issues raised by the
interview. If the respondent did not spontaneously mention them, the interviewer asked specifically about attitudes towards hunting, shooting, fishing and bird watching as a sample of pursuits that might reveal the respondents' attitudes. The following issues arose from the answers to these questions.

The farmers had relatively few interests which were not related to their work or which did not grow out of their living in the countryside and being involved in the local communities. Many responded that they did not have time to pursue any hobbies, or that farming itself was their hobby and main interest. Pursuits such as walling, stock breeding and showing and sheep dog trials obviously grow out of their day to day work. Interestingly, the same could be said about the general interest in wildlife and the countryside that was professed by several. This was particularly apparent where farmers had significant areas of set-aside land, had entered conservation schemes or had an SSSI on their farm and had gradually become more interested in the special features which made the site environmentally valuable. While no farmers said that they specifically visited other sites for the purpose of bird watching, several said that they were keen to watch the birds and other wildlife around the farm, and some were clearly very knowledgeable.

Perhaps the most significant factor, though, in considering the influence on conservation of the hobbies and interests of the farmers was the link between shooting, hunting and fishing and a professed interest in conservation. Whilst the number of farmers actively involved in fishing or hunting was relatively small, general support for conservation was often expressed in terms of its being an essential part of the farm management system, with the functions of

---

1 For example, Farmer Interviews 22 and 50.

2 E.g. Farmer Interviews 25 and 43.

3 E.g Farmer Interviews 4 and 26.
pest control and carcass disposal being effectively carried out by the local hunt as a good quid pro quo for the hunt's being allowed onto the farmer's land. The removal of carcasses has, though, become rare recently in the face of Government regulations on slaughtering and disposal processes.

However, it is perhaps with regard to the pursuit of shooting that the interrelationship of sporting rights and conservation management should not be overlooked. The dependence of each on the other was emphasised by several farmers, who saw the two as integral.

Certainly, it appeared that enthusiasm for, say, woodland management or extended arable field margins was largely dependent on an interest in encouraging game species such as the Pheasant and the English Partridge. Such connections are clearly being promoted by organisations such as the Game Conservancy and the British Association for Shooting and Conservation, of which several farmers were members, and which were usually identified by the farmers as "conservation bodies" in response to questions about membership of organisations and interest groups.

In several of the interviews, without prompting, there appeared to be a strong belief, whether or not this was accompanied by a personal interest in shooting, that a distinct and identifiable unbalance was occurring in Nature, largely due to the passing of traditional methods of keepering and vermin control. This view was most often heard on large estates where the shooting interest had traditionally been managed as a major part of the estate's function and where practices had changed significantly since acquisition by a conservation body. The most common illustrations of the perceived problems were complaints about the number of birds

---

4 E.g. Farmer Interviews 15 and 16.
5 E.g. Farmer Interviews 9, 14 and 45.
6 E.g. Farmer Interviews 13, 26, 34, 45.
of prey, corvids, foxes and badgers now in evidence in the countryside, to the detriment of other wildlife species\textsuperscript{7}. One farmer claimed once to have seen 70 badgers in one field (\textsuperscript{1})\textsuperscript{8}.

### 6.2.2 The Definition of Conservation

In an attempt to probe the understanding and perception of conservation among the interviewees, they were asked, in their own words, to define the word \textit{conservation} as they understood it in relation to farm management. This prompted a variety of responses and, for several, provided the cue for a free-flowing explanation of their feelings about related issues, which did not necessarily give a straightforward answer to the question asked. However, the question prompted a good deal of material that was very useful in gauging the general attitude and outlook of the farmers, which was the intention of the question's inclusion. It was followed by an enquiry as to the attitude of the farmer towards intensive and extensive farming methods and, to an extent, the responses to each question are closely related and overlap somewhat. However, for these purposes the issues will be examined separately here, with appropriate comment.

One interesting aspect of the responses to the first of these questions was the extent to which, unconsciously or not, the farmers' replies contained elements of the concepts of \textit{stewardship} and \textit{sustainability}, although often the views expressed fitted more closely into a philosophy of agricultural \textit{good husbandry} (see below). There would here, as with any other question, obviously be an element of the interviewees saying what they think the interviewer wants to hear but, nonetheless, the uniformity of response was striking, although there is clearly a problem of distinguishing in the farmers' minds between agricultural and environmental conservation.

\textsuperscript{7} E.g. Farmer Interviews 22 and 43.
6.2.2.1 Stewardship/Sustainability

Two concepts that are related and that have each a philosophical history, the one longer than the other, are *stewardship* and *sustainability*. For a detailed description of the development of each concept, see Alder and Wilkinson (1999)⁹, and, in respect of *sustainability*, Bowers (1995) and Hawke and Kovaleva (1998)¹⁰.

One farmer, who openly professed a Christian faith, actually used the word *stewardship*.¹¹ Otherwise it was more often implicit in mention of the concepts of not destroying things and preserving for future generations¹². Others talked of leaving the countryside in as good a condition as when one started¹³, or leaving a farm in a better state than when it was taken on¹⁴. However, almost always, these concepts were used in the context of agriculture taking priority overall. For example, where a farmer talked of *minding* the countryside, he made clear that it was *within prudent agriculture, in a way that is sustainable*.¹⁵

6.2.2.2 Good Husbandry

A distinction can be made between the above and the concept of *good husbandry* (in its non-technical sense), which, it is contended, has a meaning more related to the keeping the holding in good *agricultural* heart. Concepts of aesthetic beauty and enjoyment, or protection of the environment itself had little influence over the farmers who saw things in these terms,

---

⁸ Farmer Interview 34.
¹⁰ P.10.
¹¹ Farmer Interview 24.
¹² E.g. Farmer Interviews 1, 4,9, 10, 22, 24, 30, 48.
¹³ E.g. Farmer Interviews 15 and 31.
¹⁴ E.g. Farmer Interview 16.
¹⁵ Farmer Interview 24.
although the same ideas of sustainability and custodianship are apparent in the underlying phraseology. Some talked of good farming practice, without letting things go back\textsuperscript{16} and of putting back what one takes out of the land\textsuperscript{17}. Others referred to traditional farming practices based on rotation as being an ideal to follow\textsuperscript{18}. Often there was an appreciation that in recent years change had been swift and not always for the better, that farming and gamekeepering practices had remained unchanged for years and now were becoming unrecognisable\textsuperscript{19}.

\textbf{6.2.2.3 A Balance}

Another strong theme in the answers to this question involved the question of balance\textsuperscript{20}, either between farming and conservation or between different conservation interests. This, along with the fear of going too far or being too extreme\textsuperscript{21}, was expressed more as an opinion of the state of things rather than as an attempt at a definition of the word conservation, but was frequently heard at this point, and spontaneously at others.

That there is a need for balance was mentioned by several farmers. Mostly this was in the context of balancing farming and the need to coexist with wildlife, of profitable farming going hand in hand with consideration for the environment, with no extremes - the one paying for the other\textsuperscript{22}. Some expressed a fear that conservation was taking over\textsuperscript{23}. This was obviously a cause for concern and anxiety for a generation of farmers who had grown up in a

\begin{itemize}
\item \textsuperscript{16} Farmer Interview 37.
\item \textsuperscript{17} Farmer Interview 3.
\item \textsuperscript{18} E.g. Farmer Interview 16.
\item \textsuperscript{19} E.g. Farmer Interview 26.
\item \textsuperscript{20} Farmer Interviews 1, 2, 3, 13, 22, 26, 34, 38, 45, 50.
\item \textsuperscript{21} Farmer Interviews 10, 13, 38.
\item \textsuperscript{22} Farmer Interview 3.
\end{itemize}
very different cultural context. There was acknowledgement that conservation has its place but general concern that it should not be allowed to rule. Often the proliferation of specific species, such as foxes, grey squirrels or magpies, was talked of as an illustration of why the control of vermin is necessary to maintain a balance in Nature. If Nature were to be left alone, other imbalances between the species were feared.

Some referred to the balance between farming and conservation having been lost. There appeared to be a perception in the minds of these that for years farming had taken place without change and that now this was in some way being spoilt by pressure to think only of conservation and wildlife. Farmers found this frustrating - an abrogation of all that they were familiar with. The need for the parties to work together and compromise where necessary was often mentioned.

6.2.2.4 Preservation

A further principle that emerged in the answers to this question was the equating of the word conservation with some kind of preservation. This was expressed in a variety of ways, and in relation to different aspects of a farm's features. Farmers talked of keeping it as it was, the preservation of native species (most, if not all), protecting things (but not everything, there

---

23 E.g. Farmer Interview 13.
24 E.g. Farmer Interview 38.
25 Farmer Interviews 22, 34, 43, 48.
26 E.g. Farmer Interview 26.
27 Farmer Interview 26.
29 Farmer Interview 1.
30 Farmer Interview 9.
is no need if they are common)\textsuperscript{31}, not damaging anything (but not leaving things as they were 100 years ago)\textsuperscript{32}, and not destroying things\textsuperscript{33}. There is a clear concept here of conservation's being a negative process, that is of not causing damage, rather than a positive one of enhancing or creating environmental interest on a holding.

6.2.2.5 The Narrow View

Some of these responses also revealed a very narrow view of what conservation entails. Many farmers appeared to relate the word conservation to a limited sphere, such as ponds, trees, hedges or wildlife\textsuperscript{34}, or to see conservation merely in terms of keeping the farm tidy\textsuperscript{35}. One farmer did make use of the phrase promotion of wildlife\textsuperscript{36}, but generally reference was made to looking after particular landscape features, or liking to see them on the holding\textsuperscript{37}. There was little evidence of any of the broader concepts of conservation, as used in this project\textsuperscript{38} and currently favoured by some environmentalists, having made any impact on the farming community, although there were a few individuals who had clearly been influenced by current thinking.

6.2.2.6 Conservation in Society

Moreover, some farmers did appear to have a wider perception of the rôle of conservation in respect of its place in relation to people. They talked of the community being important in

---

\textsuperscript{31} Farmer Interview 10. \\
\textsuperscript{32} Farmer Interview 11. \\
\textsuperscript{33} Farmer Interview 30. \\
\textsuperscript{34} E.g. Farmer Interview 4. \\
\textsuperscript{35} E.g. Farmer Interview 31. \\
\textsuperscript{36} Farmer Interview 8. \\
\textsuperscript{37} E.g. Farmer Interviews 5 and 14. \\
\textsuperscript{38} See Glossary of Terms.
conservation, particularly the application of local knowledge\textsuperscript{39}, or they related conservation to the concept of public enjoyment, by discussing the idea of making the countryside more interesting for the public to enjoy\textsuperscript{40}.

6.2.2.7 Public Access

Some discussion would be worthwhile here of the comments made by interviewees on the question of public access to the countryside. While there were no questions in the interview schedule that invited the farmers specifically to address this issue, several raised the subject spontaneously and had the following observations. Some had had problems with dogs and gates being left open and also unauthorised camping\textsuperscript{41}. These usually expressed the view that open access (for example under a Countryside Stewardship agreement with MAFF) was not a successful policy because of the real problems of managing the public, dealing with sheep worrying, boundary damage and so forth. It was pointed out that such access affects conservation and bird life as well as the privacy of the farmer\textsuperscript{42}, and normally farmers conveyed the impression that public access should be confined to the use of public footpaths at most. The debate about public access has now become more topical with the Government's recent announcement concerning future legislation on the right to roam.

6.2.2.8 Other Responses

Other farmers took the opportunity at this juncture to comment on the lack of information available on conservation management or the perceived ignorance of staff in the various conservation agencies. These attitudes were explored further when the interviewer next asked

\textsuperscript{39} Farmer Interview 26.

\textsuperscript{40} Farmer Interview 44.

\textsuperscript{41} Farmer Interviews 3, 6, 10, 18, 43, 46,

\textsuperscript{42} Farmer Interview 43.
the farmers how they would describe their farming methods, in terms of intensity and conservation awareness.

6.2.3 Conservation in Farming Methods

6.2.3.1 Balancing Business with Conservation

Again, the most significant theme in the responses to this section of the discussions was an appeal for balance in the demands made upon farmers. That is, most farmers expressed some sympathy to the ideals of non-intensive farming methods while emphasising the need for the business side of their operations to receive priority. This attitude was often linked with the need to pay the rent and, particularly with newer tenants, the interest on capital borrowed to set up the farm business and purchase quota, stock and other equipment.

Similarly, individual conservation measures which are actually made by farmers very often have a dual function e.g. shelter belt tree planting, or wider headlands on farms where there is a shooting interest.

Consideration of conservation ends is also often tempered by a strong pride in the production of high yields as a measure of success as farmers and businessmen. This ethos is changing slowly, it seems, but is deeply ingrained for many. One farmer recalled that it was not so long ago, as recently as the 1980s, that farmers wanted to kill every wild oat to keep up with their neighbours, while now policy measures were leading towards extensification and set aside. He pointed out that some of the same members of staff in ADAS who had been advocating intensification are now advising on conservation and that much confusion has been caused

---

43 See below.
(as he saw it) by the stupidity of Government shifts in policy, although attitudes seem now to be more positive\textsuperscript{44}.

Most farmers would describe themselves as supportive of conservation, as long as it does not interfere with their ability to run a business. Indeed, the view was expressed that most people in farming are genuinely interested in conservation - that the two go together\textsuperscript{45}. However, in acknowledging this, the phrase \textit{hand in hand} was often used to show that “conservation” should be kept in its place and should not take over the operation\textsuperscript{46}. One farmer suggested that some conservation initiatives work for the farmer, for example the capital payments made to enable stone walling to take place, while others make life impossible\textsuperscript{47}. It was also pointed out that some farmers feel distress at looking out on a wilderness all the time and that it does not feel right to let the land degenerate too much\textsuperscript{48}. Some landlord bodies, or conservation agencies were definitely perceived as going too far, or being too extreme. This was especially seen to be the case where landscapes were believed to have been created by the farming process in the first place, for example by the burning of heather on the moorland. In this context conservationists were again often seen as townspeople, who did not know what they were talking about\textsuperscript{49}.

\begin{footnotes}
\item[44] Farmer Interview 39.
\item[45] Farmer Interview 10.
\item[46] E.g. Farmer Interview 13.
\item[47] Farmer Interview 38.
\item[48] Farmer Interview 21.
\item[49] Farmer Interview 33.
\end{footnotes}
6.2.3.2 Issues of Practicality

This need for any conservation initiative to fit in with the farming operation, or with leisure interests such as shooting, is apparent in the type of conservation works that are carried out by farmers. In the main, those works that offer a degree of benefit to the farming operation as well as to the environment are more likely to receive acceptance with farmers. At the least it was preferred that little or no adverse effect was experienced.

So, for example, the planting or maintaining of woodland was held to be useful for providing shelter for livestock.\(^{50}\) Stone walls and hedges had a similar role, as well as providing a screening function, as trees do.\(^{51}\) These options were preferred to fencing, where it was economically viable. Trees were also seen as being an acceptable option on land that was not suitable for other uses such as grazing or cultivation.\(^{52}\) In these areas, where land is marginal, it is not worth investing in intensive application of fertilisers etc. in any event, so they might as well be dedicated to a conservation function.\(^{53}\)

Similarly, where a farmer had an interest in shooting, he or she would be more likely to undertake works which were likely to benefit the quarry species, even if these had a wider environmental spin off. Examples of these types of work would be the creation of beetle banks and conservation headlands to encourage partridges, or the management of set aside areas for game purposes.\(^{54}\)

---

\(^{50}\) Farmer Interview 1.

\(^{51}\) Farmer Interview 14.

\(^{52}\) Farmer Interview 44.

\(^{53}\) Farmer Interview 15.

\(^{54}\) E.g. Farmer Interviews 9 and 45.
6.2.3.3 Voluntary Works and Self-interest

This self-interest is also seen in the number of conservation works which farmers have carried out on a purely voluntary basis and in the carrying out of any works for combating pollution. Work has been carried out usually on the basis either that it costs nothing (or very little) in financial or other terms, or that it served the farmer's own purposes in some way, a good example of this latter being the clearing of bracken and rhododendrons on one farm\textsuperscript{55}. This is not surprising, but offers an insight into the psychology of persuasion. As one interviewee put it, farmers have limited time and money and so are unlikely to invest much without some incentive\textsuperscript{56}. That being said, on some traditional family farms, the routine maintenance of (say) pollarded trees or hedgerows is seen as part of normal management and is carried out as part of the annual agricultural cycle\textsuperscript{57}.

Anti-pollution work has usually been carried out for fear of prosecution, or at the behest of the landlord, particularly recently on dairy farms as a result of grants having been available under the Farm and Conservation Grant Scheme\textsuperscript{58} for compliance with the Control of Pollution (Silage, Slurry and Fuel Oil) Regulations 1991\textsuperscript{59}. Often the remaining cost of putting in new dirty water systems has been shared between the landlord and the tenant of a holding\textsuperscript{60}. This has happened particularly where the landlord has had a conservation interest, although the legal liability for such works has not always been clear\textsuperscript{61}.

\textsuperscript{55} Farmer Interview 33.

\textsuperscript{56} Farmer Interview 2.

\textsuperscript{57} E.g. Farmer Interview 21.

\textsuperscript{58} SI 1989/128.

\textsuperscript{59} SI 1991/324.

\textsuperscript{60} Farmer Interview 1.

\textsuperscript{61} See Chapter 2, Section 2.13.
Some have had pollution surveys carried out by ADAS, because they did not cost the farmer anything. On other farms, where there was an identifiable problem, for example with slurry run off, the farmer had already discussed the problem with the (then) National Rivers Authority and carried out work to avert prosecution. One farmer had eventually left dairy farming at the request of the landlord after persistent problems. There was, though, a feeling in all these cases that farmers were often doing as little as they could realistically get away with to deal with these issues.

6.2.3.4 Financial Implications

The need to integrate conservation with other operations is, of course, related to the financial position of the farmer in question, or to the general health of the farming economy. Several of the interviewees made the seemingly obvious link between finance and the carrying out of conservation works in their replies to this question of attitude. This clearly has implications for the setting of policy objectives and the assessing of incentive and compensation levels in conservation schemes. It will also be relevant in assessing the levels of rent which might be appropriate in these situations, particularly as, for some, the level of rent is perceived as having a direct effect on the intensity of the farming operation. One farmer, for example, stated that he thought landlords were responsible for overgrazing on the uplands because they set rent levels too high. Another pointed out that he could not afford to do any conservation

---

62 Farmer Interview 3.
63 Farmer Interviews 7 and 18.
64 Farmer Interview 12.
65 See comment in Chapter 3 on this aspect, Section 3.7.
66 Farmer Interview 28.
when scraping a living on a few acres. It is directly related to the rent, he suggested. If you cut fertiliser by a half, then the rent should be cut by a half\textsuperscript{67}.

The impact of the landlord/tenant relationship and the level of rent payments on the incentive function of conservation payments is intricate. It is difficult to assess with any certainty because, in any one case, there is a variety of factors at play in the decision making process. While in the majority of cases finance was stated to be the most influential factor for farmers deciding whether to enter conservation schemes, some of the other factors are difficult to evaluate, being related to the background, emotions, and life values of a particular individual.

Although some interviewees insisted that the level of payments under conservation schemes was set too low to make the schemes attractive\textsuperscript{68}, others confirmed that it was financial considerations alone which had encouraged them to enter a scheme\textsuperscript{69}. As discussed above, often it was the capital payments available for walling work that had proved decisive\textsuperscript{70}. If full grants had been available for work to restore ponds, for example, then farmers would also have been prepared to consider this, it was suggested\textsuperscript{71}.

It is clear that the success of conservation initiatives is directly related to the profitability of farming and the agricultural climate generally. At the time of the interviews the view was often held that conservation was happening because farming at that time was prosperous, but that if subsidy levels were reduced and farmers were exposed to free world trade, then prices would drop and conservation would suffer, if not disappear altogether. When farmers are

\textsuperscript{67} Farmer Interview 46.

\textsuperscript{68} Farmer Interviews 1, 45.

\textsuperscript{69} Farmer Interview 44.

\textsuperscript{70} E.g. Farmer Interview 35.

\textsuperscript{71} Farmer Interview 34.
hard up, one said, then there is no conservation\textsuperscript{72}. If this is the case, then effective conservation would seem to depend on whether agricultural support payments are replaced by sufficiently attractive payments to farmers for environmental action.

On the other hand, if farming was not prosperous and the price of land fell, then conservation groups and individuals might be able to purchase farmland for the establishment of nature reserves and the provision of environmental benefits. Local community involvement in countryside management, such as that envisaged by Dwyer and Hodge\textsuperscript{73}, would then become a real possibility. This more radical solution is not, though, one that is entertained by the farming community, which, as we have seen above\textsuperscript{74}, formulates the definition of "conservation" in a very agricultural context and holds a very narrow concept of how land should be managed.

In addition to these main themes, various other factors and opinions were expressed by the interviewees in this part of the discussion. Some of these may more appropriately be discussed elsewhere, but will also be recorded here:

\textit{6.2.3.5 Animal Welfare Issues}

Several farmers were concerned about the veterinary aspects of conservation farming, particularly with organic systems\textsuperscript{75}. One had reduced the area given over to conservation

\textsuperscript{72} Farmer Interview 44.

\textsuperscript{73} Dwyer and Hodge (1996).

\textsuperscript{74} Section 6.2.2.5.

\textsuperscript{75} Farmer Interviews 2, 3.
because it was unsuitable for a dairy system. It was felt that the land was going back and there were welfare problems of disease and nutrition\textsuperscript{76}.

6.2.3.6 Expertise and Information

There appears to be a general perception among farmers that communication between conservation landlords and tenants is not effectively being carried out and information about conservation management is not readily available to farmers\textsuperscript{77}. When there is contact with conservation agencies then the question of expertise arises again. Farmers are quick to express their feelings of not being sufficiently respected for the knowledge that they could impart and the skills that they offer. Again and again farmers referred to the fact that it was farming which had shaped the countryside in the first place\textsuperscript{78}. Some were positive about their experience of schemes, stating that their interest in conservation had increased as a result of their involvement\textsuperscript{79}, but more often there was disillusion with the bureaucracy and perceived ignorance that they had encountered\textsuperscript{80}. This was often expressed by reference to a particular management issue (for example, in one case, this was the question of fencing woodland for regeneration\textsuperscript{81}), and it was clear that often there were two very distinct sides to the argument. However, the cultural and communication difficulties should not be underestimated.

\textsuperscript{76} Farmer Interview 21.

\textsuperscript{77} E.g. Farmer Interview 11.

\textsuperscript{78} E.g. Farmer Interview 14.

\textsuperscript{79} E.g. Farmer Interview 20.

\textsuperscript{80} E.g. Farmer Interviews 29, 32.

\textsuperscript{81} Farmer Interview 34.
6.2.3.7 The Influence of Personal Attributes

Finally, the one factor that is universally prevalent, and difficult to assess, is the effect of the personal attributes of those involved. To put the above comments in perspective, it must be said that there are some farmers who are genuinely interested in conservation and are happy to modify their farming practices to fit in with this philosophy. There are possibly more of these in this sample than is otherwise the case, in view of the conservation interest of many of the farms considered. They are often farmers who have taken on a farm knowing of the conservation objectives of the landlord, and have been selected for their stated interest in those aspects. Sometimes, this amenability is born out of the personal life view or religion of the farmer and is a reflection on his or her personality. It is often acknowledged that, if they owned the farm, the constraints on their freedom of operation would be less welcome, but this type of farmer acknowledges the obligations of the arrangement with the landlord and sees it as a challenge to operate within its parameters.

6.3 The Impact of Land Tenure on Conservation Practice

6.3.1 The Effect of Succession Rights and Term Length

Having established something of the general attitude of each farmer towards conservation, it is then appropriate to consider the effect of that attitude on their perception of the landlord/tenant relationship and the effect of tenure issues on his or her farming practice. As has been seen, two of the critical issues raised by the 1995 Act have been the impacts of changes in term length and succession rights on the tenanted sector. In view of this, the farmers were asked to consider these issues. The strongest views were held on the former, perhaps fanned by the then recent debate in the farming press and by lobby groups over the issue. However, we will first consider the effect of succession on attitudes towards conservation on farms.
6.3.1.1 Succession Rights

A tenant’s right to succession under the 1986 Act régime has been described in detail in Chapter 2\textsuperscript{82}. In essence, it is limited to those tenancies that were in place before 1984, and is dependent, on both death and retirement, on the prospective successor satisfying tests as to his or her eligibility and suitability. These are based on agricultural rather than environmental criteria, and present certain problems for aspiring successors on holdings with a strong conservation interest.

Only one or two farmers fell into the expected category of believing that the ability to hand the farm on to their children was their prime motivation in their business life. However, the lack of succession rights was suggested to be a reason for a lack of capital investment in the later years of a tenancy\textsuperscript{83}. More often, though, the view was expressed that the right to succession was not necessarily good for the farming industry. While some clearly felt that the new legislation was a threat to the right of sons and daughters to take over a farm, others recognised that it was not always the best thing\textsuperscript{84}. The fact of growing up on a farm did not necessarily guarantee a suitable candidate to take over for the future, and personal relationships often compromised the successor’s ability to make the best of the operation. On the other hand, it was also not perceived as beneficial to the industry that tenant farmers often cannot afford to buy another house, causing them to \textit{stay on until they drop}\textsuperscript{85}.

\textsuperscript{82} Section 2.4.

\textsuperscript{83} Farmer Interview 15.

\textsuperscript{84} E.g. Farmer Interviews 2, 11, 34.

\textsuperscript{85} Farmer Interview 34.
6.3.1.2 Term Length

When asked about the effect of the 1995 legislation on term length and husbandry, farmers did, almost universally, believe that short-term farm business tenancies would have a detrimental effect on the quality of husbandry and their ability to plan their businesses effectively. This was one of the most hotly debated issues during the interviews, as it had been during the passage of the legislation itself.

One farmer used the phrase "landlords' charter" when referring to the new legislation. This was possibly repeated from a soundbite used in the pre-legislation debate, but showed the political feeling that surrounded the changes. Again and again, the interviewer was told that a certain length of term (this varied from 10 years to a lifetime) would be needed to encourage any investment in a holding and to ensure long-term commitment from a tenant. If a lifetime tenancy or a minimum of 20 years were available, said one respondent, then it would be possible to farm as if you owned the holding and take a pride in it, wanting to pass it on through the family.

There are two schools of opinion, as to the likely effect of short terms on husbandry. A lack of investment was anticipated by many, particularly the failure to apply sensible rates of potash and fertiliser etc. This would comply with the findings of Winter et al., who found some evidence of a lack of soil care in grazing lets. On the other hand, a term shorter than 10 years was viewed by many farmers as a licence to intensify production to get the most out of

---

86 Farmer Interview 1.
87 Farmer Interviews 1, 3, 10, 11, 22, 26, 32, 44.
88 Farmer Interview 3.
89 Farmer Interviews 7, 12.
a holding while it was possible\textsuperscript{91}. This trend towards immediate intensification (exploitation in the eyes of some) would be accentuated, it was said, by the need to pay the high rents being asked for short terms\textsuperscript{92}. This scenario was seen to favour big farmers, who were not noted for their sensitivity to the surrounding countryside, and had the infrastructure in place to spread costs\textsuperscript{93}. Smaller farmers envisaged problems in borrowing money for short terms\textsuperscript{94}, and the problem of uncertainty featured as being very significant with shorter terms\textsuperscript{95}. Landlords would have to choose, it was said, between conservation and high rents\textsuperscript{96}.

In conservation terms, it was clear from the interviews that farmers thought that management would suffer with shorter terms. Conservation schemes would not have a chance to develop\textsuperscript{97}, and any work carried out could be jeopardised by a change of tenant at the end of the term\textsuperscript{98}. The benefits of conservation management were perceived as being long term, with changes in the landscape and ecological balance being slow to develop. A short-term tenant would not be confident of enjoying these benefits and would, therefore be reluctant to carry out works\textsuperscript{99}. There were also management implications created by peculiar aspects of hill livestock farming, for example the need for hefting\textsuperscript{100}, appropriate breeding etc. and the cost of good

\textsuperscript{91} E.g. Farmer Interviews 2, 8, 12, 44.
\textsuperscript{92} Farmer Interviews 12, 17, 44.
\textsuperscript{93} Farmer Interviews 10, 15, 32.
\textsuperscript{94} Farmer Interview 32.
\textsuperscript{95} Farmer Interview 13.
\textsuperscript{96} Farmer Interview 17.
\textsuperscript{97} Farmer Interview 8.
\textsuperscript{98} Farmer Interview 22.
\textsuperscript{99} Farmer Interviews 10, 44.
\textsuperscript{100} That is the acclimatisation of particular sheep to their part of the mountain, although an incoming tenant would probably take on an outgoing tenant’s hefted flock.
sheep, which would prove particularly difficult to manage in a short-term farm business tenancy.

The predicted effect of shorter term lengths was, therefore, that conservation work would tend to revert to the landlord\(^{101}\) unless the tenant was compelled to do it by the legal agreement and was compensated in some way, most obviously by a lower rent level.

6.3.1.3 The Benefits of Short-Term Agreements

Only a few farmers, and one or two of the conservation staff who were interviewed, saw any benefit in the 1995 farm business tenancy legislation, either to themselves or to the conservation interest. Whilst one countryside warden talked of the legislation being "an utter disaster" and liable to cause "smash and grab raids" and short-termism, with the management of trees and hedgerows suffering\(^{102}\), another spoke of it discouraging improvement and bringing increased pressure on the landlord to provide new buildings\(^{103}\). Others, however, did recognise the flexibility that the new régime would bring. One talked of farm business tenancies being "like a godsend for conservation" enabling conservation landlords to decide on the ideal management for a site and then to write it into the tender documents\(^{104}\).

It has to be said that the despondency among farmers about term lengths was alleviated in some degree by a suspicion that the disadvantages were being exaggerated. For why, it was sometimes asked would a landlord necessarily want to get rid of a good tenant at the end of a short term?\(^{105}\) Surely, unless circumstances had significantly changed, it was likely that a

---

\(^{101}\) Farmer Interviews 11, 24.

\(^{102}\) Warden Interview 1.

\(^{103}\) Warden Interview 17.

\(^{104}\) Warden Interview 32.

\(^{105}\) Farmer Interview 31.
short term would be renewed, sometimes indefinitely, in the same way that grazing licences and *Gladstone v. Bower* agreements had been in the past. So, small farmers and starters in the industry would be able to take a tenancy in the knowledge that, if they did well, it would prove to be a longer-term arrangement\(^\text{106}\). Some acknowledged that, for some purposes, the grazing let or short-term agreement had been very effective, particularly where a sensitive grazing régime had been required. But it was pointed out that no-one liked to invest in a piece of land without the security of knowing that they would be able to farm it for some considerable time\(^\text{107}\). It should also be said that even the farmers who were able to see some benefits in short term agreements nonetheless agreed that it would all depend on the individuals involved, as some did have a genuine interest in conservation whatever the arrangement, and others certainly did not\(^\text{108}\).

The implications of all these comments have been considered to a certain extent in Chapter 3, but it is clear from their content that, whatever the effect of the 1995 legislation on the management of tenanted farmland by conservation bodies, the introduction of short-term farm business tenancies will also also have a widespread influence on the way in which tenant farmers across the countryside manage their holdings.

6.3.2 *Conservation Provisions in the Tenancy Agreement*

6.3.2.1 *Generally*

The use and effectiveness of conservation clauses inserted in tenancy agreements is a subject which has implications for both the general attitude of farmers towards conservation and for the more specific relationship between the conservation landlord and its tenants. In view of

\(^{106}\) Farmer Interview 36.

\(^{107}\) Farmer Interview 38.
the increased flexibility brought by the 1995 Act specifically to include innovative conservation arrangements in legal agreements for farm business tenancies, the efficiency of the model as a means of controlling environmental management is important. With this in mind some emphasis was placed on the subject in the interview survey, particularly where conservation clauses were already in operation on a particular farm. This process revealed some problems with assessing effectiveness that, while limiting the certainty of pronouncement on the subject to a certain degree, do not by any means invalidate the usefulness of the exercise, which produced much valuable information.

These problems related to the difficulty of assessing the scientific impact of such clauses, particularly in relation to other influential factors. These factors include natural and meteorological phenomena as well as policy and practice influences on the behaviour of the farmer. The process of collecting or interpreting sufficient scientific data to make categorical statements on the relative importance of these factors was beyond the scope of this study. The information gathered can, however, be used to suggest certain trends in the use and effectiveness of conservation clauses in this context, which might inform future practice or further research.

The conservation clauses from the tenancy agreements that were made available to the researcher following the Farmer Interviews tended to fall into two categories. The first of these includes clauses inserted routinely into tenancy agreements to cover the whole holding. Examples of these would be clauses to govern the maintenance of hedgerows walls and ditches. The second type of clause is one that is geographically specific, applying to distinct areas of a holding where sensitive sites are located. The application of such clauses might be specified by reference to a description and/or field number or by reference to a detailed map.

108 Farmer Interview 21.
A copy of the National Trust's standard conservation clause for insertion into its tenancy agreements, in use until 1995, is included at Appendix 9 of this thesis. This is a clause which, in one guise or another, was the most frequently encountered, and it is true to say that forms of this clause are still being incorporated into National Trust farm business tenancies today, notwithstanding the trend towards a whole farm approach.

Other research shows that the use of conservation clauses is generally limited to holdings with conservation landlords\(^{109}\) and that their use in farm business tenancies is still not widespread, notwithstanding the new freedom of contract. However, on the farms included in the Interview Survey for this thesis, the incidence of such clauses was high. 32 farmers reported having such restriction and 16 thought they had not\(^{110}\). This is a reflection of the particular nature of the chosen sample\(^{111}\).

The particular topics that arose during the Interview Survey on the subject of conservation clauses were:

**6.3.2.1 Practical Impact**

One of the interesting features to arise out of discussions on the use of conservation clauses in tenancy agreements was the level of ignorance of the contents of their current agreements by incumbent tenants. Often a farmer would not know whether there were particular clauses restricting his or her activities on conservation grounds. Sometimes a confident answer was given that no such clauses existed, which, when checked, was shown to be false. Clearly this has detrimental implications for the effectiveness of such clauses, but it should not be

---

\(^{109}\) Whitehead et al., MAFF (1997) Para. 3.50 ff.

\(^{110}\) These assumptions were not always borne out by an examination of the documents in question, though.

\(^{111}\) See Chapter 5.
assumed that severe damage to the conservation interest is being caused by such clauses being blatantly ignored, or breached in ignorance of their existence in the agreement.

More likely, it seems is the probability that the content of the clauses actually has little or no impact on the planned farming operation and that they are seen largely as irrelevant to the farm planning process. This is borne out by the number of replies which indicated that, where clauses were included, they covered only those areas which had no agricultural value and which were, for example, too steep or wet to improve or cultivate\textsuperscript{112}.

On the other hand, there are those subject to restrictions who find varying degrees of practical frustration in trying to comply with their terms. Some find it frustrating not being able to feed stock where or when would be convenient\textsuperscript{113}. Others feel that it is important for farmers to have a say in management decisions. For example, they should have the chance to say that they need sheltered areas for stock\textsuperscript{114}. There are often particular problems, such as these, with stock management and grazing patterns. One farmer reported difficulties with “ganging” (the gathering of stock on the most fertile areas) and the dates set for grazing limits, for example\textsuperscript{115}. However, he also reported that, where the landlord is flexible and it is possible to discuss the problems with them, a full tenancy agreement with restrictions is a good mechanism because any grazing licence arrangement would not be effective on the moors because of stock numbers, hefting etc.\textsuperscript{116} Many of these comments on upland management

\textsuperscript{112} E.g. Farmer Interviews 2, 13.
\textsuperscript{113} E.g. Farmer Interview 14.
\textsuperscript{114} Farmer Interview 22.
\textsuperscript{115} Farmer Interview 37.
\textsuperscript{116} Farmer Interview 37.
overlap heavily with those made in connection with the operation of Government incentive schemes, reported in Chapter 8.

6.3.2.2 The Consultation Process

The view was often expressed that the practical frustrations could be minimised by more consultation with the farmers before restrictions were put in place, and more attention paid to the opinions of local people\textsuperscript{117} and previous tenants. Here, again, farmers often pointed out that the landscape was of value because of the previous actions of the farming industry and, in view of this, it would seem sensible to consult previous farmers to find out the practices that had made it of conservation importance\textsuperscript{118}. Certainly, it was felt, a full survey should be conducted of previous management practices\textsuperscript{119} and the conservation policy for a holding should be decided by a group of people, including farmers, rather than by one individual\textsuperscript{120}.

This concept of consultation and tenant participation was also put forward by wardens and land agents on behalf of the landlord, perhaps reflecting a growing appreciation of the need for co-operation rather than confrontation over these issues and the need to foster "partnerships" in the pursuit of conservation gains. Some of these issues are discussed further in Chapter 7 in the analysis of the landlord/tenant relationship.

The idea of partnership was often mentioned as being important\textsuperscript{121}, and landlord staff did acknowledge that more use should be made of the tenant's experience and knowledge\textsuperscript{122}. This

\textsuperscript{117} E.g. Farmer Interview 20, 28.

\textsuperscript{118} E.g. Farmer Interview 33.

\textsuperscript{119} Farmer Interview 34.

\textsuperscript{120} Farmer Interview 44.

\textsuperscript{121} Land Agent Interview 22.

\textsuperscript{122} Warden Interview 6.
can be difficult, of course, where an agreement is drafted before the tenant is selected. Attempts had been made to avoid this problem by including a clause in the agreement that a management plan should be prepared within (say) within 18 months of the start date with the tenant co-operating in its preparation\textsuperscript{123}. The problems of enforcing such a clause, or any subsequent management requirements, though, are self-evident. Certainly, at the very least, it should be acknowledged that there is a need for a good monitoring and discussion process to be established with the tenant\textsuperscript{124}.

6.3.2.3 General Views and the Types of Restriction

This need for communication was also reflected in a common wish that, in writing prescriptions, there should be more emphasis on the ends to be achieved rather than the means to achieve them\textsuperscript{125}. Farmers clearly feel more responsive and in control where they feel they are trusted to make management decisions as to their day to day operations rather than have these dictated to them. Some respond very positively to the challenge raised by the need to farm within certain constraints where they feel they have sufficient flexibility to have a real influence on the outcome\textsuperscript{126}. It was pointed out that there are often different ways of achieving an aim and that land managers, that is the farmers, should be permitted to do it in their own manner.

However, if this is to be the case then the ends must be agreed and clearly defined in advance, which is often difficult, as conservation management can be a very dynamic process. In view

\textsuperscript{123} Land Agent Interview 19.

\textsuperscript{124} Warden Interview 38.

\textsuperscript{125} Farmer Interviews, 12, 20.

\textsuperscript{126} Farmer Interview 21.
of this, while needing to be clear, obligations also need to be sufficiently flexible. For example, you may have two farms side by side that need different treatment\textsuperscript{127}.

So, it is true that, while appreciating flexibility and control, farmers also seek clarity in the arrangements that are set up. They are often critical where they feel that the staff of the landlord organisation do not give them clear direction, or where they are getting conflicting views imparted by different members of staff. Certainly, among new tenants, there was a marked preference for having had all the details of the arrangement set out in the tenancy agreement, and preferably in the tender documents, so that they had taken the farm on that basis and were not then later asked to include management prescriptions that might substantially affect the nature of the enterprise.

While landlord organisations recognise this preference and agree that it is an ideal to work towards, the necessity of being able to let the farm quickly, for financial or other reasons, often does not allow for the detailed working out of prescriptions prior to the new tenants’ taking up of occupation. Even where a temporary short-term arrangement, such as a \textit{Gladstone v Bower} agreement or a Ministry letting is undertaken to allow for this, the negotiation of changes is more difficult once a tenant is in place and establishing his or her farming system, and the landlord/tenant relationship can suffer as a result.

A variety of views were therefore expressed on these aspects of the inclusion of conservation provisions in the tenancy agreement. The importance for a landlord of finding a like minded tenant was emphasised\textsuperscript{128}, together with the need to have expectations properly stated and set

\textsuperscript{127} Farmer Interview 34.

\textsuperscript{128} Farmer Interview 2.
out from the start\textsuperscript{129}, although it was appreciated that difficulties arose where plans changed during the course of an agreement\textsuperscript{130}. This problem was often addressed by the landlord organisation by the use of short-term agreements, which allowed the necessary interim flexibility, where objectives had not been clearly formulated from the beginning. One tenant expressed reservations, though, about whether it could be even more difficult to formulate requirements once a tenant was in place\textsuperscript{131}.

The formulation of objectives could also be impeded, it seems, by the existence of conflict between the different specialist staff and in the rapid turnover of non-local staff in some organisations\textsuperscript{132}. An organisation might appear, in this situation, not even to know itself how it wished to proceed, hardly inspiring confidence and certainty in its tenant\textsuperscript{133}.

Generally, then, while it was often recognised that the conservation clause in a tenancy agreement could be a good mechanism, this was only thought to be the case where a requirement was practical in farming terms as well as for conservationists and the local community. One farmer referred to the need for a wide-angled view rather than a one aspect perspective\textsuperscript{134}. Above all, however, the mechanism was applauded for creating some certainty between the parties. Tenants referred to the clauses as being a good guide, and to knowing where they stood\textsuperscript{135}. In addition, it was felt that, the average British farmer being as he or she

\textsuperscript{129} Farmer Interviews 8, 40.
\textsuperscript{130} Land Agent Interview 8.
\textsuperscript{131} Farmer Interview 39.
\textsuperscript{132} Farmer Interview 21.
\textsuperscript{133} Farmer Interviews 24, 45.
\textsuperscript{134} Farmer Interview 34.
\textsuperscript{135} Farmer Interviews 8, 40.
is, compliance with requirements would be more likely to be forthcoming if a legal obligation was set out in the agreement\textsuperscript{136}.

The need for certainty and detail leads to a discussion of which type of prescription is most effective, and particularly to the question of whether substantial farm plans are a good way of recording the landlord's objectives for a holding in a way which can be incorporated into the legal relationship. Some comment on this has already been made in Chapter 2 and it will again be discussed in Chapter 7.

\textbf{6.3.2.4 Commercial Implications}

In the meantime, whether or not the use of conservation clauses are felt to be effective, the issue of commercial viability and rent levels was often perceived as an important element in what can be expected of farmers in terms of extensification etc. It is difficult to establish exactly what actual effect on income is had by the imposition of conservation covenants and any calculations have necessarily been rather arbitrary. In 1992, Hearn\textsuperscript{137} estimated that the average reduction in rent for National Trust holdings was £5.90 per hectare, although there would be much variation and no effect at all on some holdings. It is also difficult to establish exactly to what extent farmers feel the effect on profitability of the type of restrictions that have traditionally been imposed.

However, for whatever reason, if only for the self-interested one that a rent review is close at hand, several farmers made a direct link between what they thought might be expected of them in conservation terms and what rent they might be expected to pay. For new lettings, it was felt that the rent should be set and then the best tenant should be chosen, rather than an

\textsuperscript{136} Farmer Interview 41.

\textsuperscript{137} The Environmental Challenge in the Management and Development of Glebe - Moving On 2\textsuperscript{nd} Glebe Conference at Stoneleigh, 1992.
agreement being made with the maker of the highest tender\textsuperscript{138}. It was pointed out, though, that for farmers other than new tenants these things would have to be negotiated on rent review. Clearly, the farmers felt that, if there were a lower rent, then it would take the commercial pressure off and compliance with conservation aims would be made easier\textsuperscript{139}. Indeed, most thought that they would agree to changes if it did not affect them too much and the rent was reduced\textsuperscript{140}, although some expressed fears that there might be difficulty in reclaiming the land later on if necessary\textsuperscript{141}. Where a proposed rent reduction was not perceived to be sufficient, a farmer would be prepared to negotiate restrictions on some parts of the farm only if he or she felt that the farm business could carry them by intensifying on other areas\textsuperscript{142}. This could bring its own environmental problems.

\textsuperscript{138} Farmer Interview 33.

\textsuperscript{139} Farmer Interview 2.

\textsuperscript{140} E.g., Farmer Interview 15.

\textsuperscript{141} E.g., Farmer Interview 21.

\textsuperscript{142} Farmer Interviews 45, 48.
6.4 Conclusions

It seems from the above that, whilst there are some quite acute cultural differences between farmers and conservationists, many farmers are now becoming pragmatic about the need to accommodate environmental practices into their farming systems. This is probably even more the case now than at the time of the interviews, as the prosperity of agriculture has declined and the prospect of further changes to the support systems is at the forefront of debate in the agricultural community. However, farmers are preoccupied with the concepts of balance and certainty, and will expect these from future policies, whether they are operated by Government agencies or their own landlords.

In addition, farmers feel that their own expertise, acquired over generations of farming experience, should be better used in environmental initiatives, and that they should have a rôle in designing and implementing the prescriptions with which they need to comply. Specifically, they feel that conservation bodies should be more clear about the ends that they mean to achieve, rather than being preoccupied with the imposition of detailed management techniques that may prove not to be the most effective.

A final comment concerns the “voice” of farming. It seems from the interview survey that, as may have been predicted, farmers as individuals are less trenchant in their views than the bodies and the press that represent them would have us believe. This was particularly apparent in discussions on term length and succession. During the debate on the 1995 legislation, these had been the most acrimonious areas of discussion. Yet, in the interviews for this research, it became apparent that, whilst these are topics on which farmers hold strong views, there is greater diversity and flexibility than we might have expected. This holds implications for the conduct of the landlord/tenant relationship, which will be discussed in the next chapter.
CHAPTER 7

Current Practice - The Landlord/Tenant Relationship

7.1 Introduction

We have seen in Chapter 6 an examination of the attitudes of farmers towards conservation initiatives and the imposition of prescriptions on their farming practice. These attitudes are inextricably linked to the most effective means of implementing conservation objectives through the landlord/tenant relationship. Where conservation management is to be a significant part of a letting agreement, then the conduct of the relationship between the parties, and the individuals involved, will play a critical rôle in the success of the arrangement. This is particularly the case as the context for the relationship is not fully commercial and the nature of conservation management is such that aims and objectives can evolve over a period of time. The essential elements of the arrangement would therefore, appear to be communication and flexibility. In the analysis that follows we shall see the extent that these are in existence in current arrangements, and how they might better be incorporated.

7.2 The Choice of Tenant

Because of the problems of enforcement and question marks over the effectiveness of simple prescriptive clauses in a tenancy agreement for achieving sensitive management¹, the choice of tenant is obviously critical in the pursuit of successful and flexible conservation on let

¹ See Chs 2 and 6 above.
farmland. This became apparent, not only from the farmers’ explicit comments in the research interviews, but from general impressions and the tone of what they said. Where a new tenant has come to a farm knowing what is expected of him or her, and with an interest in conservation, there is more likelihood of their working together with the landlord in seeking an appropriate management régime for the farm. However, the benefits of this might be offset by the apparent relative inexperience of this type of applicant in agricultural terms. Many of the practices required by good conservation management are dependent on agricultural experience and business acumen in those asked to perform them and this must be balanced with the need for a compatible philosophy and similar outlook. One warden expressed the view that it would be better not to take local young farmers, but to let to those who had no desire to farm intensively.

7.3 The Landlord’s Objectives and Whole Farm Plans

7.3.1 The Landlord’s Objectives

Comments relating to the landlord’s objectives are relevant to the role of what we might broadly call whole farm plans or farm and environment plans, and also have a bearing on the importance and best ways of communicating the landlords’ priorities to the tenant farmers. When asked about their understanding of the landlords’ objectives for their farms, most of the farmers showed a marked degree of ignorance, which was as much a product of poor communication by the landlord organisations as of their own lack of interest. Some felt that there was no coherent set of objectives held by the landlord and that it depended on the member of staff to whom they were speaking as to what they might be. Others had a view of what was required of them which was largely inadequate when checked in interviews with

---

2 Warden Interview 49
the relevant members of the landlord's staff. In other cases it seemed that a deliberate policy had been adopted which kept farmers in the dark as to the landlord's long term objectives for the holding, for fear of encountering a lack of co-operation or possible antagonism.

Often, although internally the landlord organisation might have a well-developed and detailed policy and management plan for a holding, the tenant has little or no knowledge of this and has a very limited perception of what is considered important. For example, when asked what they believed to be the landlord's objectives for their holding, farmers referred to the landlord liking the view from the holding, and trees and hedges and things being kept tidy, with gates and fences maintained\(^3\). Others thought that the landlord would be happy as long as everything was kept the way that it was\(^4\). Where there was some kind of whole farm plan or farm and environment plan in place, the tenant's understanding of what was required of him or her was greatly enhanced\(^5\). However, generally, the communication process was revealed to be poor, even where there was a brand new tenant\(^6\).

One farmer referred to the landlord appearing to have moved its objectives "from good husbandry to good conservation", but felt that there had not been sufficient information given to him of how this shift might affect him in practice\(^7\). Also, there was a clear perception that the landlord's objectives were often fluid, altering with changes in members of staff\(^8\), and that the farmers themselves did not have any input into changes in policy or the planning process.

\(^{3}\) Farmer Interviews 4 and 6.

\(^{4}\) Farmer Interviews 2 and 5.

\(^{5}\) Farmer Interview 16.

\(^{6}\) Farmer Interview 31.

\(^{7}\) Farmer Interview 29.

\(^{8}\) Farmer Interviews 34 and 40.
One felt that there was no opportunity to comment on the survey process for his holding. Another commented that there is a great danger in decisions and recommendations being made after one short visit by a conservationist, while the farmer who lives there knows the land intimately and could have a valuable input into the process.

In some organisations, where there were land agents and conservation staff, the wardens for properties felt that they too did not have enough influence on the development of plans and objectives, although they were there “on the ground”. It is clear that a system whereby plans are prepared locally, with the opportunity for all those with an interest to contribute to discussions, would be more acceptable, and possibly more likely to be effectively implemented. On the other hand, this kind of involvement would entail considerable time and commitment from the participants, and, in some ways, such a process might be considered inefficient in a purely cost benefit review. This was certainly the view of some of the land agents interviewed, who felt that the preparation of separate management agreements for tenanted farms was not appropriate, and that it was better to rely on Government schemes for environmental benefits, with an equitable sharing of any payments received.

7.3.2 Whole Farm Plans

The current development of thinking on the use of whole farm plans and the involvement of local staff and the tenant in the planning process may lead towards a greater appreciation of the need to integrate the agricultural and environmental aspects of a farm’s management. Certainly some of the comments of the conservation landlord staff might suggest this. Some

---

9 Farmer Interview 3.
10 Farmer Interview 44.
11 Warden Interview 25.
confirmed that there is a need for local staff to be involved in tenancy agreements and then for the lawyers and land agents to see if what is suggested is feasible\textsuperscript{13}. They emphasised the need for trust and openness, with no hidden agendas, and agreed that it is important for the parties to explain their objectives from the outset\textsuperscript{14}. The tenancy agreement could be seen as one of a suite of tools used to achieve conservation management, more appropriate in some situations than others\textsuperscript{15}.

Sometimes, whatever the relationship with any prospective tenant, there might be some conflict within the landlord organisation itself, as the proponents of different management techniques negotiate for influence. Some conservation staff feel that this is exacerbated by the traditional ethos and culture of the land agency profession, which has customarily had charge of farm management decisions. Conservation staff can feel frustrated that often they invest substantially in preparing proposals but that they have no chance to discuss them directly with a prospective tenant, who deals only with a land agent. They would welcome the opportunity to explain their rationale and have an influence over proceedings\textsuperscript{16}. It is suggested that farm plans can be useful in this situation, as some of the conflicts can be debated and resolved before the tenancy agreement is set up, thus reducing ambiguities and confusion. In addition, the landlord organisation needs to have a clearly set out national policy on farming practice (perhaps with accompanying Codes of Practice and guidelines) which can then inform local proposals.

\textsuperscript{12} E.g. Land Agent Interview 38.
\textsuperscript{13} Warden Interview 1.
\textsuperscript{14} Warden Interview 6.
\textsuperscript{15} Warden Interview 1.
\textsuperscript{16} Warden Interview 26.
However, even when all the parties are clear about the objectives for a holding, there is still the possibility that those objectives may change, and flexibility is therefore critical in the setting up of an arrangement. This does not sit well with the legal and commercial requirements for certainty. As one warden put it, tenants want more security than the landlord ought to give them\textsuperscript{17}.

On the whole, the use of clauses in the tenancy agreement is considered by conservation staff to be worthwhile, although some are concerned about the difficulties in monitoring and enforcing them. These members of the landlord’s staff are often of the opinion that it is better to rely on other Government sponsored agri-environment schemes to achieve conservation benefits on tenanted land, where this is possible. This would avoid some of the tension caused by staff trying to encourage and work with tenants at the same time as having an enforcement role. Some staff felt that tenants were \textit{getting away with things} and needed stronger and more formal monitoring\textsuperscript{18}, while others would like to have been able to have a more relaxed, open relationship with the tenants, which they felt was precluded by the legal constraints of the traditional landlord/tenant roles\textsuperscript{19}.

This dilemma has been overcome, or at least improved, in some places, by the appointment by landlord organisations of \textit{Patch Officers} or \textit{Property Managers}. The rationale behind these appointments is the shortening of the chain of command and the provision of one point of contact for the tenant. However, there appear to remain problems with the exchange of information and the provision of up to date accurate advice, even with these posts in place.

\textsuperscript{17} Warden Interview 22.
\textsuperscript{18} Warden Interview 45.
\textsuperscript{19} Warden Interview 6.
Where there have been efforts to introduce whole farm plans, these have varied in style and content, and have had a mixed response. Nonetheless, it is possible to draw some clear conclusions from the interview discussions. The content of these plans, and the nature in which they are written, are subjects which overlap with current debate on *site management statements* and *management plans* for SSSIs\(^2^0\). Further discussion of this is set out in Chapters 4 and 8.

Suffice to say here that, while some feel that it is important to have detail spelt out clearly and unambiguously to avoid confusion, others have strong reservations about the scale of some of the plans in existence, feeling that they need to be shorter, more precise and, above all, map based. Again and again the importance of good maps was emphasised in interviews\(^2^1\). Landlord staff and tenants all expressed a preference for taking in information from a good quality, colour coded map, rather than having to read through dense text to find the detail of a prescription. This is a practical observation of much importance, but, of course, for legal purposes the linking of map based information to unambiguous text is essential.

### 7.4 The Tenancy Agreement

With regard to the use of tenancy agreement documents themselves, their importance can sometimes be overestimated by those involved with drafting them. Generally it seems that once agreed and signed, the document becomes of secondary significance and is often put away and not consulted further in the governing of the relationship between landlord and tenant.

---

\(^{2^0}\) And see Rodgers and Bishop (1998) p. 32.

\(^{2^1}\) E.g. Farmer Interviews 16 and 49, Warden Interview 49, and Land Agent Interview 22.
The significance of the written document to the farmers interviewed obviously varied from holding to holding, but it became clear that it was not viewed with the reverence that lawyers might expect for a legal document. One farmer confessed that he did not stick to the letter of the agreement and that it had been varied several times by informal letters between the parties. Another confirmed the opinion that if one has to consult the tenancy agreement it is a bad sign for the state of the landlord/tenant relationship. More often farmers admitted that they had never looked at the agreement since the day it was signed, and that then they had found it impossible to read.

The complexity and length of the documents was emphasised by other farmers, too. Sometimes it was acknowledged that this was of necessity, as the documents were to serve a legal function, but often the view was held that they would be more useful as a tool governing the relationship if they were easily understood. It was true, said one interviewee, that agreements had evolved over the years to cover most eventualities, but this made them longwinded. Another said that he "would like more yes and no and not go round the mulberry bush to get to it".

One warden felt that there should be better integration of the relationship of the tenancy agreement with other initiatives taken by the landlord or other agencies, particularly in cases where there was in use a management agreement, management plan or farm plan consisting

---

22 Farmer Interview 1.
23 Farmer Interview 3.
24 E.g. Farmer Interviews 5 and 18.
25 Farmer Interview 2.
26 Farmer Interview 19.
of a separate document\textsuperscript{27}. Farmers also expressed confusion as to the relationship between the various agreements in place for their holding. Sometimes there would be a tenancy agreement, ESA prescriptions and an SSSI management agreement, all containing instructions on conservation management. This inevitably led to some conflict, for example with grazing dates and spraying policies. The view was expressed that these would best be contained in one document, with one management agency\textsuperscript{28}.

Alternatively (and this may begin to happen more frequently with shorter term farm business tenancies), it was felt that all the details should be set out from the beginning in the tenancy agreement itself so that a new tenant was then signing up to a complete package\textsuperscript{29}. Certainly, while some were complaining of the length and complexity of the documents involved, others admitted that, once the various schemes were in place, it was important and helpful to have all the details set out in the tenancy agreement documents\textsuperscript{30}. Whilst it could be said that adding management prescriptions to the legal tenancy agreement lends formality and authority to them, so that they might better be observed, a similar argument could be made for the backing up of clauses in the tenancy agreement by clear policies set out in farm management plans. These are usually public documents, and the public nature of the stated policies would increase the accountability of those with the burden of implementing them\textsuperscript{31}.

\textsuperscript{27} Warden Interview 3.
\textsuperscript{28} Farmer Interview 19.
\textsuperscript{29} Farmer Interview 48.
\textsuperscript{30} E.g. Farmer Interview 45.
\textsuperscript{31} Land Agent Interview 9.
As to ways in which the tenancy agreement (or indeed other management documents) could be improved, several of the interviewees suggested that better maps would be useful\textsuperscript{32}, possibly even of the buildings on the farm, and particularly in view of the need for accurate maps for IACS returns. Others suggested that perhaps the agreement could be in Welsh where appropriate\textsuperscript{33}.

Very few of the interviewees had taken legal or other independent advice before signing the agreement, although a few expressed regret at this omission, presumably because of current disputes or situations.

7.5 A Look at the Actual Documents - the Document Review

The majority of the tenancy agreements made available to the researcher were from National Trust holdings. In view of this, there was a strong element of uniformity between them, and a high number of conservation provisions of various sorts contained in the documents\textsuperscript{34}. However, several of the agreements had been inherited from previous landlords, and these were short and uninformative in nature. One or two of the tenancy agreements seen were innovative and contained reference to a management agreement with the landlord and whole farm plan running alongside the landlord/tenant arrangement, but not financially inter-linked with it. The use of such arrangements has been discussed in Chapter 2\textsuperscript{35}.

\textsuperscript{32} Farmer Interviews 3, 18 and 24.

\textsuperscript{33} Farmer Interview 26.

\textsuperscript{34} See Chapter 6, Section 6.3.2.1 for further comment on the type of clause, and see Appendix 9 for the National Trust's standard conservation clause.

\textsuperscript{35} Section 2.2.3.8.
7.6 General Relationship and the Decision-Making Process

It is clear that one of the most critical factors in determining the success or otherwise of a conservation initiative on tenanted farmland is the quality of the relationship between the landlord and tenant. In this context we speak not of the formal relationship, as governed by the terms of the tenancy agreement, but of the informal day to day contact between individuals and the decision-making process with which they have to deal. In this respect, many of the findings of the Interview Survey were not surprising, human nature being what it is, but the conclusions do bear being set out as they are important in any assessment of the effectiveness of the legal arrangement.

The first aspect of the relationship to be considered is the whole area of communication between the parties. As may be expected, farmers appreciate straightforwardness in their dealings with their landlord\textsuperscript{36}. This was often stated in the face of a perception that, in their negotiations, landlords had a hidden agenda of conservation objectives to which the farmers' access was patchy. Some staff from conservation landlord organisations also expressed the wish that they should be able to be more open with tenants, which lends credence to this perception. The communication of policy is, however, something which farmers desire or not according to their personalities. Some suggested that communication of policy at a national level could be improved, whilst at an individual level a list of dos and don'ts would be appreciated\textsuperscript{37}. Others, though, would see this as undue interference with their independence,

\textsuperscript{36} Farmer Interview 1.

\textsuperscript{37} Farmer Interview 30.
and these expressed the view that the less contact with the landlord the better from their point of view\textsuperscript{38}.

With those who saw communication as an issue, there was often an opinion expressed as to with whom in particular they preferred to deal. In so far as this can be translated into general rules, not solely governed by the personalities involved, the following comments provide an insight. A strong thread in discussions was that farmers generally preferred to have contact with land agents, and found decision-making quicker and easier when this was the case, particularly where there was one local agent with detailed knowledge of the estate in particular and farming issues in general\textsuperscript{39}. This, of course, is dependent on the agent in question having the power to make decisions without too much bureaucratic intervention from "London people"\textsuperscript{40}. However, even where some referring back was necessary, the concept of dealing only with one individual directly was almost universally popular, whether it be with a land agent or other \textit{Patch Officer}\textsuperscript{41}.

The success of such a one to one relationship, however, is clearly dependent on continuity and certainty. This has been repeatedly undermined, in practice, by the rate of turnover of staff within the landlord organisation\textsuperscript{42}. This has been a major element in the perceived inefficiencies of decision-making within large organisations, which can result in severe frustration for those on the ground, who are trying to make day to day business decisions and

\begin{footnotesize}
\begin{enumerate}
\item Farmer Interview 33.
\item Farmer Interviews 1, 20, 22, and 45.
\item Farmer Interview 28.
\item E.g. Farmer Interview 9.
\item Farmer Interviews 1, 3, 12, and 21.
\end{enumerate}
\end{footnotesize}
get the feeling of going round and round in circles\textsuperscript{43}. The other elements are perceived to be the inappropriateness of a cumbersome committee structure (especially for decisions about buildings)\textsuperscript{44}, the problem of "too many chiefs and not enough Indians"\textsuperscript{45}, and the supposed ignorance and indecisiveness of the landlord's staff in farming matters\textsuperscript{46}.

One farmer had lost a significant Government grant because of delays in discussions caused by excessive consultations between what he saw as a young and naïve staff, who were happy to interfere with small things, but could not formulate sensible decisions for major proposals\textsuperscript{47}. This same farmer felt that there was no communication from the landlord of a national "Head Office" policy on certain matters, and would have liked a list of do's and don'ts in this regard. Another confirmed that he would like the landlord to have a definite plan and to be open about it. He felt that there were too many staff not achieving very much, particularly as they were located too far away from the holding\textsuperscript{48}.

Various attempts have been made within the various landlord bodies to overcome this sort of problem. One had established an in-house conservation group, including farmers in its membership, to discuss policy matters. The tenant farmers of this organisation at least felt that they had a forum to which they could put their ideas and opinions. But in a large organisation, the chain of command is often too long and the diversity of interests within the

\textsuperscript{43} Farmer Interview 16.
\textsuperscript{44} Farmer Interview 7.
\textsuperscript{45} Farmer Interview 16.
\textsuperscript{46} Farmer Interviews 7 and 19.
\textsuperscript{47} Farmer Interview 30.
\textsuperscript{48} Farmer Interview 34.
organisation can sometimes lead to difficulties, and cause further delays in the decision-making process.

In another organisation, regular monthly meetings had been established between the tenant and the nominated member of the landlord’s staff. This was felt to be an effective way of anticipating problems and planning ahead together. However, it again depended on personalities and the ability to co-operate. The member of staff involved needed to be used to dealing with farmers⁴⁹. It was generally felt that this was more likely to be the case where it was a land agent. On the other hand, from the land agents’ point of view, whilst it was considered to be good practice to be able to walk the farm and explain the conservation interest to a tenant, some were uncomfortable with the partnership approach. They were more used to a more formal relationship, and felt that it was better if this sort of regular communication was with someone other than the responsible land agent or property manager, so that other agendas did not come into play⁵⁰. Some farmers concurred with this view, feeling that the relationship was properly a business one, and not a partnership⁵¹.

Although often farmers expressed a preference for discussing matters with a land agent, in the subject organisations, the land agents employed by the landlord were not often local and were not able to commit sufficient time to building good relations with the tenants. Also, as a profession, land agents are often concerned with maintaining their independence and are not, therefore, always open to a style of management which takes more of a partnership approach, lest this should confuse the relationship and compromise their professional integrity. The traditional view taken here is that there is insufficient time for close communication and farm

⁴⁹ Farmer Interview 35.
⁵⁰ Land Agent Interview 26.
⁵¹ Farmer Interview 44.
visits and that rent review discussions are a good opportunity for ironing out any problems\textsuperscript{52}. However, under the 1986 Act these take place only once every three years and are often adversarial in character. It should be questioned whether the type of communication taking place here is sufficiently open and constructive for the purpose in hand.

So, the trends seem to be that farmers prefer to deal with land agents in terms of profession and local rather than distant members of staff. Rapid turnover of staff within large organisations was one of the most frequently mentioned problems that affected the efficiency of the relationship, and the youth, and perceived ignorance and naïvety of staff was frequently commented upon. Another cause of frustration was clearly the need for decisions to be ratified by several members of the landlord's staff or to pass through several committee meetings before being confirmed. This had often caused real hardship in financial terms to farmers who had been unable to take advantage of available opportunities or had missed deadlines as a result of slow decision making. However, in all these discussions about communication, one cannot escape the fact that it is the personality of the individuals involved which usually governs the success or otherwise of an arrangement. And where the personalities are amenable and the structures are in place for quick and easy decision making, then the legal formalities of the relationship are of little consequence.

The respondents in the Farmer Interviews were asked whether there were any measures that they believed could be taken to improve the quality of communication between their landlords and themselves. In particular it was of interest to note whether the idea of tenants' associations, newsletters and meetings would be welcomed. The following comments resulted, but here more than anywhere the views expressed depended on the personality and experience of the interviewee. Some felt that it would be good to have more communication,

\textsuperscript{52} Land Agent Interview 33.
visits to other farms, and information about, for example, other land to let\textsuperscript{53}. Others felt that a newsletter would be useful and informative\textsuperscript{54}. On the other hand, some felt that the relationship was more easily conducted between individuals, rather than through any association, because there was not necessarily any cohesion between tenants merely by virtue of their having the same landlord\textsuperscript{55}. This view was repeated by landlord staff, who found it easier to deal with individuals, particularly if there was any antagonism in the relationship, and who felt that newsletters and associations, while sounding a good idea, did not work in practice, only encouraging the adversarial tendencies inherent in the landlord/tenant relationship\textsuperscript{56}.

Of the other matters of concern to tenants, the specific issues of rent levels, boundaries and quotas were often mentioned as being of the most importance\textsuperscript{57}. One of the other major issues remained, however, the whole question of the communication of aims and objectives. It is suggested that this could be improved by the clear establishing of goals before the letting process is undertaken\textsuperscript{58}, the stating of ends as well as means in the documentation\textsuperscript{59} and the fullest explanation possible to a prospective tenant of the need and the methods required to protect the important features of the holding\textsuperscript{60}. These steps, it is hoped would create the best

\textsuperscript{53} Farmer Interviews 2 and 5.

\textsuperscript{54} E.g. Farmer Interview 13.

\textsuperscript{55} E.g. Farmer Interview 15.

\textsuperscript{56} E.g. Warden Interview 3.

\textsuperscript{57} Farmer Interview 14.

\textsuperscript{58} Farmer Interview 7.

\textsuperscript{59} Farmer Interview 20.

\textsuperscript{60} Farmer Interview 21.
environment for a constructive relationship between the landlord and tenant of an environmentally sensitive holding.

Interestingly, there is a quite clearly defined difference in attitude between the different categories of professionals on a conservation landlord's staff, with land agents revealing a comparatively good understanding of agricultural objectives and wardens displaying much less sympathy for the sensivities of the tenant farmers. This is part of the cultural diversity which has caused some problems of communication in the past and, to a certain extent, it is an inevitable result of different backgrounds and educations. However, where the stated aim of the landlord organisation is first to protect the landscape or other conservation features of a holding, some would say that the conservationists' less sympathetic and more radical approach is justified, and likely to achieve a better attainment of the objective than the more traditional one favoured by, say, the land agency profession.

Probably the true solution lies in initiatives to bring all sides closer to the positions of the others, so that better understanding is fostered of the varying priorities held by the farmers and the landlord's staff. For example, one warden suggested training courses for the tenant farmers on the various environmental management schemes available, perhaps with payments dependent on that training, in an attempt to broaden their horizons from the purely agricultural\(^61\). He pointed out that farm diversification was usually into another agricultural enterprise, although there were other options available to farmers. With respect to tenant selection, he felt that the criteria used should not be merely an assessment of an applicant's farming ability, but should reflect wider considerations\(^62\).

\(^61\) The Tir Gofal scheme in Wales now includes a training element in its package for farmers. See Chapter 4, Section 4.2.4.

\(^62\) Warden Interview 26.
This last suggestion is consistent with the comments of both land agents and farmers themselves, which brings us again to the fact that tenant selection is one of the most critical factors in the success or otherwise of the conservation farm tenancy. As another warden put it, the tenant is but another pair of hands for the achieving of the conservation objectives. Therefore the landlord should be open with him or her, having first set out the objectives for the holding in one clear document after consultation with the relevant experts and consideration of the appropriate management plan, if there is one available. If this process is followed, then there should be less scope for misunderstanding and dispute and no danger of the tenant receiving different messages from different members of staff.73

7.7 Conclusions

It is clear that the selection of the tenant is the single most important factor in whether or not a conservation letting is destined to be a success. This aside, the issues of education and communication, particularly as to the true character of the landlord's objectives for the holding appear to be more significant factors than the nature or contents of the tenancy agreement. In the drafting of documents, however, the attributes of clarity and completeness should be sought after. On the other hand, the benefits of having a clear and full set of documents, perhaps including a whole farm plan, need to be balanced against the staff time and resources necessary to put them in place. Finally, whilst an attitude of partnership might be sought between the parties in an effort to improve the effectiveness of the relationship in management terms, there is a strong adversarial culture of distance between a landlord and tenant that impairs this objective in many cases.

73 Warden Interview 3.
CHAPTER 8

Current Practice - Agricultural Tenancies and Government Schemes

8.1 Introduction

As seen in Chapter 4, the present array of Government sponsored conservation schemes available to farmers and landowners is considerable. Whilst the administration of these schemes may be confusing in itself, there is the added complication for the tenant farmer of how these schemes might interrelate with his or her tenancy arrangement. For some this is an identified problem to which they have given some thought. But for others the implications of the landlord/tenant relationships have not been recognised and, often, issues will not be faced until a difficult situation arises. In this chapter an attempt is made to identify from the interview material some of those situations and to illustrate the level to which farmers are aware of the nature of their arrangements. It was clear from the interviews that the most effective relationships are developed where the tenancy and the schemes are considered as a package before a holding is let, so that the arrangements are fully integrated. However, this ideal is rarely achieved, for lack of time or opportunity, and problems will continue to arise.

8.2 Term Length

One of the most important implications for tenant farmers and their landlords of the interrelationship between tenancies and schemes is the fact that the term length of management agreements and tenancies will not often coincide without some sort of manipulation. With 1986 Act régime tenancies this has not been so much of a problem, as a tenant has usually had security of tenure, and this has been considered a sufficiently long-term interest to justify commitment to a management agreement for, say, a 10 year period. However, as pointed out in Chapter 3, with farm business tenancies of a short term length, a
tenant will not have a sufficiently long interest to permit him or her to enter a management agreement for a longer period.

Therefore, increasingly, it will become normal for the administering agencies to request a management agreement with the landlord or some kind of tripartite arrangement\(^1\). As an alternative, it seems that the parties might consider manipulating the situation to eliminate the problem, for example by terminating an existing tenancy agreement and entering a new one of a more appropriate length. This will, of course, be a matter to be negotiated by the individual parties in each situation and will depend on the suitability of the existing relationship for this type of arrangement. For example, some landlords would want detailed involvement in the management agreement negotiations and, for these, a tripartite arrangement would be more convenient. The perceived advantages and disadvantages of tripartite agreements are considered below.

### 8.3 Leasehold Obligations and Government Schemes

A separate reason for considering a tripartite agreement is the incompatibility of management agreement obligations with the allocated responsibilities of landlord and tenant under a tenancy agreement. This will most frequently occur in the areas of buildings and fixed equipment and of woodland, both of which have traditionally and at least to some extent been considered the landlord's responsibility. Timber is invariably reserved to the landlord in agricultural tenancy agreements and the repair and maintenance of buildings and fixed equipment has, under the 1986 Act régime, been governed by the so-called Model Clauses\(^2\), which have been incorporated in agreements under the provisions of s.7 of the 1986 Act.

\(^1\) Rodgers and Bishop (1998) p. 70.

Most farm business tenancies have retained these traditions through the insertion of express
provision. In the case of timber and of buildings, where a management agreement requires
action to preserve these features, a separate agreement with the landlord or a tripartite
agreement will usually be necessary.

The House of Commons Select Committee on Agriculture recently considered this problem
in its report on Agri-Environment Schemes\(^3\), particularly in relation to vernacular features
such as Pennine barns. The Committee preferred the use of tripartite agreements so that all
the obligations affecting a site are dealt with in one document. However, the conservation
agencies and some farmers find these difficult to administer. The reasons for this are
examined in detail in the paragraphs below relating to the interview data.

A further, and controversial, matter in the area of leasehold obligations is the attitude of the
conservation agencies towards existing conservation obligations contained in tenancy
agreements. This issue arises where a tenant farmer applies for a management agreement with
MAFF or English Nature or the Countryside Council for Wales and the landlord of the
holding is a conservation body such as the National Trust. The landlord will often have
imposed conservation obligations in the tenancy agreement to further its own objectives.
With 1986 Act régime holdings these would be subject to the rules relating to conservation
covenants contained in Schedule 3 of the 1986 Act\(^4\) but such conservation clauses occur also
in farm business tenancies.

There is anecdotal evidence that this type of obligation is proving to be a barrier to the
offering of management agreements by English Nature and CCW to the tenants of such

---

\(^3\) Environmentally Sensitive Areas and Other Schemes under the Agri-Environment Regulation (Second Report

\(^4\) See Chapter 2, Section 2.7.
holdings. The conservation agencies, in some instances, have taken the attitude that public money should not be expended on paying for management which a tenant farmer is already under an obligation to undertake. Whilst this view may be understood in purely economic terms, it cannot be justified on grounds of public policy. It discourages the inclusion of such clauses, which in the wider picture can only assist in the conservation interest. For this reason it is suggested that such clauses should be disregarded by the conservation agencies when decisions are made as to whether to offer a management agreement under an environmental scheme.

It should be said, however, that, where comprehensive conservation clauses are included in a tenancy agreement, this can cause problems of inconsistency if the prescriptions are not compatible with those contained in a management agreement. In this case, as evidenced by interview responses, there becomes a need for the parties to negotiate a way forward which may not necessarily be in accord with the legal documentation of either arrangement. This is obviously not wholly satisfactory.

8.4 Conservation Covenant Provisions in the 1986 Act

Where obligations under a management agreement would put a tenant in breach of his or her 1986 Act tenancy agreement under the rules of good husbandry, it is important that the landlord is a party to the management agreement, or a separate agreement, to signify consent to such obligations. The agreement should also acknowledge that the object of the obligations is the furtherance of the conservation of flora and fauna, the protection of buildings or other objects of archaeological, architectural or historical interest, the conservation and

---

5 Which are encouraged by the RICS in its Guidance Notes at para. 7.4.

6 See above, particularly in Ch. 2, Section 2.6.
enhancement of the natural beauty of the countryside, or the promotion of its enjoyment by
the public. Alternatively such an acknowledgement should be inserted in the tenancy
agreement by agreement with the landlord. This would counter any prospective action for
breach of tenancy by complying with the requirements of Schedule 3 of the 1986 Act, which
provides in paras 9(2), 10(1)(d) and 11(2) that management undertaken pursuant to
obligations inserted under the protection of such a clause shall be disregarded for the purpose
of deciding whether to issue a certificate of bad husbandry and that such obligations are to be
regarded as terms of the tenancy which are not inconsistent with the tenant’s duty to farm in
accordance with the rules of good husbandry.

8.5 Tripartite Agreements

While acknowledging above that tripartite agreements will be desirable in some
circumstances, it is important to recognise that their operation in practice can cause
difficulties. This was a view expressed by several of the interviewees during the research.
Particularly, it was felt that communication could be difficult in this type of arrangement,
resulting in difficulties for both the tenant and the administering agency\textsuperscript{7}. The staff from the
agencies themselves felt that it was better for them to deal directly with the person doing the
actual farming on a holding, so that decisions could be made quickly and efficiently\textsuperscript{8}. Tenants
felt that it was easier for them if instructions came from one source, and the landlord was not
involved in the day to day running of an agreement. Often, a landlord had entered a scheme
or negotiated an agreement before the tenant became involved, and this could cause

\textsuperscript{7} Farmer Interviews 1 and 16.

\textsuperscript{8} Executive Interview, English Nature.
difficulties in implementation if details and rationale were not well communicated and agreed in advance.9

On the other hand, some landlords in tripartite agreements were concerned about their lack of control over the day to day farming on the holding and thus their liability for repayment of monies in the event of a breach of the management agreement10. Certainly, one advantage for the enforcing agency would be that, in a tripartite agreement, there is more than one party to pursue to ensure compliance.

Another factor that was raised several times in the course of the interviews was the difficulty with a tripartite agreement of deciding how to distribute the payments. When the tenant was carrying out the management required by the agreement, it would seem fair that payments should substantially be made to him or her. In some arrangements the landlord and the tenant were taking 50% each of the agreement payments, with the landlord being responsible for the capital works11. There is a strong feeling among tenants, and within the agencies, that monies received as part of an agreement should be spent on the land in question in each case12.

8.6 Changes in Occupation

One of the problems facing the agencies which are responsible for entering management agreements with farmers under the agri-environment schemes is how to ensure that the environmental obligations under the management agreement do not become unenforceable in the event of a change of ownership or occupation of the holding. Whilst, in most long-term

---

9 Farmer Interview 16.
10 Land Agent Interview 32.
11 Farmer Interview 37.
12 E.g. Farmer Interview 37, Executive Interview, English Nature.
management agreements\textsuperscript{13}, the obligations are expressed to be binding on successors in title, this would not protect the agencies if a change in occupation occurs not as a result of an assignment, but by way of surrender, and possible re-letting. In addition, it is probable that \textit{positive} management prescriptions would not be binding on successors in any event under the rule in \textit{Tulk v Moxhay}\textsuperscript{14}, and the transfer of the obligation of \textit{restrictive} covenants would only take place if the agreement had been under seal and the covenants registered as Dii land charges.

Very few long-term management agreements are now entered into and most short-term agreements do not purport to bind successors. The agencies seek other means of ensuring the continuity of the agreements. The documents often contain an obligation to repay monies expended if the farmer wishes to terminate the agreement, unless a new agreement can be negotiated. In practice, it is very rare for these issues to cause problems, as new owners usually enter new agreements\textsuperscript{15}, but the fear of having to repay money or of continuing to be liable under an agreement even after having left the holding was often expressed\textsuperscript{16}. A similar fear was expressed by landlord staff over liability for management issues in a tri-partite agreement, should the tenant leave, or default\textsuperscript{17}.

\footnote{13}{For example, those on ESAs or SSSIs.}
\footnote{14}{(1848) 2 Ph 774.}
\footnote{15}{Rodgers and Bishop (1998) p. 36.}
\footnote{16}{E.g. Farmer Interviews 47.}
\footnote{17}{Land Agent Interview 32.}
8.7 Monitoring and Enforcement

It is a matter of public record that the monitoring and enforcement of SSSI management agreement prescriptions has not always been effectively carried out\(^\text{18}\). For the most part this is a product of lack of resources and staff time, but there is also a significant element of difficulty introduced by the very nature of the agreements. For example, holdings are often geographically isolated and scattered, and prescriptions in all the schemes often contain restrictions on stock numbers that can only be checked by counting. The practical problems are obvious. In addition, it is extremely difficult to distinguish the various factors that might affect whether a scientific prescription designed to benefit a certain eco-system has been successful or not. The problem of monitoring and enforcement of schemes, as with conservation covenants in tenancy agreements is therefore an acknowledged area of weakness. Whilst there are statutory obligations on the agencies to carry out monitoring and review, for example in the Agriculture Act 1986\(^\text{19}\) with respect to ESAs, the reality is often far from satisfactory.

8.8 Confidentiality and Information

One other issue in the operation of Government schemes is that of confidentiality and the availability of information. To some extent, the agencies administering the schemes are at a disadvantage in their negotiations for lack of knowledge about the existence and terms of other management agreements on a holding\(^\text{20}\). MAFF particularly have been heavily


\(^{19}\) S.18(8).

\(^{20}\) See Rodgers and Bishop (1998) p.34.
criticised\textsuperscript{21} for not making information available to other agencies. Farmers, however, are particularly wary of making public their financial arrangements and their reliance on confidentiality is a strong factor in generating the confidence to enter schemes. Whilst it would seem to be in the public interest for scheme records to become more open and public, it is possible that such developments might have the effect of deterring participation in the future.

8.9 Reasons for Entry (or not)

In giving their reasons for entering the various schemes, or not as the case may have been, the interviewed farmers gave a variety of replies, although some responses recurred more frequently than others. Among their answers were some which had an impact upon, or reflected, the landlord/tenant relationship. For example, some had entered schemes because their landlord had requested it or had made it a condition of the tenancy\textsuperscript{22}. For most, however, the decision had been a financial one, in some guise or other. Even those who had entered to please the landlord had only done so because it was also financially worthwhile. Many stated that they might as well enter as they were no worse off financially\textsuperscript{23}. In view of this they felt that they might as well work with the conservationists as against them, and get paid for it\textsuperscript{24}.

Often, entry into a scheme meant little or no change in the way in which the land was managed\textsuperscript{25}. This was particularly the case with the lower tiers of ESAs and with access payments, where the public had always had de facto access to some degree in a particular

\footnotesize{\textsuperscript{21} Agriculture Committee Report (1997) referred to above, Vol 1, para 92.}
\footnotesize{\textsuperscript{22} Farmer Interviews 3 and 19.}
\footnotesize{\textsuperscript{23} E.g. Farmer Interview 5.}
\footnotesize{\textsuperscript{24} Farmer Interview 19.}
\footnotesize{\textsuperscript{25} Farmer Interviews 5, 10, 16, 33, 44.}
area. It was also often the case where a tenancy agreement already contained provisions to protect the conservation interest.

Several of the farmers had initially entered a scheme because they were attracted by the prospect of not having to farm the least profitable areas of a holding intensively. As one farmer put it, he was glad to be locked into the scheme because it would not be "so much of a chase" and he had fewer animals to feed. However, at the time of the interviews, several of the farmers who had been initially keen on the schemes were now feeling disenchanted because of the effect of high arable prices and the IACS regime on farm incomes. This is obviously an aspect of the attractiveness of schemes that will vary from time to time according to the agricultural climate.

The initial attraction of a scheme was often expressed to have been related to the payments available to assist with capital works, such as hedge-laying, or dry stone walling. This was particularly apparent in areas where there were extensive lengths of vernacular walls. The secondary effect of these payments in providing work for local people, and often for the farmers themselves or their families, was also mentioned. However, one farmer saw the walling obligation in the ESA scheme as a disincentive, rather than an attraction. The attractiveness to tenants of payments for capital works where they were sometimes not

26 Farmer Interview 10.
27 Farmer Interview 37.
28 Farmer Interview 10.
29 Farmer Interviews 10, 11.
30 Farmer Interviews 10, 11, 17, 18, 33, 37, 39.
31 Farmer Interview 37.
32 Farmer Interview 15.
responsible for them under the tenancy agreement was interesting, and clearly also of benefit to landlords.

Just as finance was often the main reason for deciding to enter a scheme, so it was also the main factor given as influencing decisions not to be involved. The financial decision in question might be the immediate calculation of how prescriptions and payments would affect the farm income, or it might be a more long-term view. This would involve taking account of the uncertainty involved in not knowing what would take place when the term of the scheme came to an end\textsuperscript{33}, or the fear of having to pay back large sums if the farmer were to vacate the holding or leave the scheme before its termination\textsuperscript{34}.

8.10 Flexibility

One of the most common causes of complaint about all the schemes among the farming interviewees was the lack of flexibility incorporated into the system. This was particularly prevalent in discussions about the ESA Scheme, but was also an issue for farmers with Countryside Stewardship agreements. This is particularly interesting, given this scheme's reputation for greater manoeuvrability. Lack of flexibility was identified in the payment régimes (for example, none of the ESA schemes were financially attractive to the intensive dairy farmer\textsuperscript{35}) and in the management prescriptions. Many of the points made here were also prevalent in earlier discussions about conservation covenants in tenancy agreements.

\textsuperscript{33} Farmer Interview 33.

\textsuperscript{34} Farmer Interview 47.

\textsuperscript{35} Farmer Interview 44.
Typical of this perceived lack of management flexibility were the rules for grazing set for sward control\textsuperscript{36}, and the inability to feed animals on upland hillsides\textsuperscript{37}. This latter has always been a source of controversy amongst farmers and conservationists and is the subject of some considerable legal uncertainties where the land is common land\textsuperscript{38}. In essence, whether a right to feed on a common will depend on the facts in each case and whether a prescriptive right can be established\textsuperscript{39}. Records and memories will seldom be sufficiently reliable for such a right to be proved.

With regard to grazing restrictions in Government schemes, one farmer thought these should be determined by the length of the grass and not by arbitrarily decided dates\textsuperscript{40}. Another pointed out that the conservationists did not appreciate the grazing habits of sheep flocks in the uplands. When grazing was governed by strict date compliance, it affected grazing evenness and there were problems caused by sheep ganging together to graze the lushest areas\textsuperscript{41}. While appreciating these sentiments, the agencies stated that they needed to have some clearly identified and easily enforceable guidelines for this kind of prescription and that, although a compromise, the uniform setting of dates was the only manageable method of dealing with this issue\textsuperscript{42}. This is a good example of the tension between the agencies and the

\textsuperscript{36} Farmer Interviews 1, 10.

\textsuperscript{37} Farmer Interview 10.

\textsuperscript{38} See above, Ch. 4, Section 4.8, and Rodgers and Bishop (1998) p.55 for a review of the issues of environmental management agreements on commons.

\textsuperscript{39} White v Taylor No 2 [1969] 1 Ch 160.

\textsuperscript{40} Farmer Interview 44.

\textsuperscript{41} Farmer Interview 37.

\textsuperscript{42} Executive Interview, English Nature.
farmers over the drafting of prescriptions, which farmers feel do not give enough credit to their expertise and judgement and are based only on means and not ends⁴³.

8.11 Practical Difficulties

Illustration of the lack of flexibility in the schemes can be seen in the catalogue of practical difficulties experienced by farmers who had entered management agreements. Some of these difficulties are intricately related to the fact that the holdings were tenanted. Others would also have been suffered by owner/occupiers. However, for the sake of completeness, all are mentioned here so that an integrated picture might be assembled. Some of these are also highlighted in the Agriculture Committee Report ESAs and Other Schemes under the Agriculture Environment Regulation⁴⁴.

8.11.1 Boundaries

Several farmers mentioned the unfairness, in their view, of the delineation of boundaries dictating eligibility for various schemes. In particular, the arbitrary extent of Less Favoured Areas and ESAs were spoken of⁴⁵. This could cause problems for individual farmers, whose holdings fell on the wrong side of a boundary and, as seen below, the wider effect could entail a distortion of the grassland market, causing more widespread inequalities.

8.11.2 Husbandry and Animal Welfare

With conservation management, there is an inevitable step in what some farmers see as a backward direction, in that the required practices are often less intensive in nature. This can

---

⁴³ This is also noted in the context of tenancy agreement restrictions in Chapter 6 above.


⁴⁵ Farmer Interviews 2, 26.
cause distinct deterioration in the quality of the sward and a more obvious population of weeds in many cases. This is something that farmers appeared to be very sensitive about. For fifty years the farming community has striven to rid the countryside of pests and weeds, using ever-increasing amounts of herbicides and pesticides to do so. To its credit, in most cases, it has been eminently successful in this quest and has shown a degree of pride in this achievement.

To ask farmers then to allow their land to "go back", is a significant cultural change. Some feel a degree of shame in the knowledge that their neighbours can look over the fence and see a proliferation of weeds or disease. This sensitivity runs very deep, and resistance to change is difficult to overcome in some cases, although there are some who see overcoming the logistical problems of extensive farming as a management challenge in itself. Even so, these same farmers expressed strongly the cultural difficulties to be overcome and the level of embarrassment felt by farmers who have extensified in pursuance of a scheme.

The effects of a poor sward extend beyond weed problems, however. Several of the interviewees (land agents and wardens, as well as farmers) expressed reservations about the animal welfare implications of extensive management. Some had specific examples of disease and poor nourishment arising directly action taken in compliance with conservation schemes. These were more common where drainage was also restricted or the feeding of stock on the ground in the winter was discouraged. Some pointed out that it was less of a problem if one had other land for which the use was unrestricted, but that, otherwise, the

---

46 Farmer Interview 19.
47 Farmer Interview 21.
48 Farmer Interviews 37, 44 and Land Agent Interview 8.
49 Farmer Interviews 19, 20.
management of stock could be very difficult, with decisions being made at short notice over
the optimum stocking rates or timings for grazings\(^50\). Others pointed out that the process of
sheep husbandry was very complicated and that, for example, there are reasons for the
heavier stocking of uplands which are unrelated to manipulation of the aid schemes. A case in
point would be the enhanced lambing rates achieved by developments in stock management,
with most ewes now producing and nurturing at least two lambs, and the fact that sheep are
generally heavier now than they might have been in the past, through breeding and intensive
nutrition\(^51\).

8.11.3 Cultural Differences

The practical husbandry points outlined above, illustrate the complexity of stock and sward
management which farmers did not feel was always appreciated by the staff of the
conservation agencies with which they were dealing. This was a common cause of complaint,
and there is much to be learnt in the pursuit of co-operation and understanding between the
various parties involved in conservation management of farmland. Too often farmers felt that
they were not given credit for the years, sometimes generations, of local knowledge which
they had acquired and that inexperienced conservationists were taking a simplistic view of
issues which warranted a more intricate understanding.

Problems occurred across the disciplines, from botanists to archaeologists, but the complaint
was the same: that the individuals involved did not understand the agricultural and economic
constraints under which the farmers were operating and were too dogmatic in their

\(^{50}\) E.g. Farmer Interview 21.

\(^{51}\) Farmer Interview 37.
requirements. In addition, it was often felt that the decisions taken were often subjective and were taken by one individual without sufficient consultation with others.

This is clearly an area of discussion that varies enormously according to the personalities involved, and the complaint was by no means universal. However, comment was passed often enough to merit further consideration. No doubt the conservationists involved would defend themselves by stating that the farmers in question were themselves not aspiring to understand the conservation issues and it is therefore important to recognise that the solution to this perceived problem is better mechanisms for communication. Whilst personalities will continue to vary widely, if the right frameworks are in place at every level to ensure adequate discussion and consultation, then some of these misunderstandings might be avoided and conservation management might become more effective as a result. These levels range from Government consultations prior to the implementation of policy through to individual discussions at “ground level”.

8.11.4 The Need for Integration

However, while acknowledging the problems caused by non-communication, the other side of the coin is that farmers are also frustrated and confused by the “quagmire” of schemes that are currently available and the complicated and long-winded decision-making processes involved in each. They speak of being submerged in paperwork and finding it difficult to get decisions. Complicated forms and the proliferation of agencies and options available only

---

52 Farmer Interviews 10, 19.
53 Farmer Interview 37.
54 Farmer Interview 44.
55 Farmer Interview 10.
56 Farmer Interviews 19, 37.
serve to confuse and put off, especially the smaller less business-minded farmers, and there are a lot of misunderstandings caused by unnecessary duplication and complexity. Fear of red tape and undue interference leads some farmers to conceal interesting conservation features, for example a patch of orchids, from the agencies involved.

Ideally, the farmers say, there should be one main scheme with one agency for them to deal with. This recommendation has been made by Rodgers (1992) and by Rodgers and Bishop (1998). In the introduction of Wales’s new Tir Gofal Scheme and the Scottish Countryside Premium Scheme perhaps some progress is being made towards this goal of integration. Certainly it seems that MAFF too are making policy moves towards this objective.

8.11.5 What happens at the end of a scheme?

We have considered the position above in relation to changes in occupation. Whether or not a change is anticipated, the rapidly changing panorama of schemes leads to a general lack of certainty about the future and reluctance to commit to something that might not be available once the current management agreements expire. In addition to this, some conservation landlords have felt the need to underwrite the other schemes with their own provision in tenancy agreements because of the short-term nature and uncertainty of the schemes.

57 Farmer Interview 37.
58 Farmer Interview 44.
59 Farmer Interviews 19, 40.
60 It is intended in the next few years to integrate the agri-environment schemes, ESAs and Countryside Stewardship to a greater degree.
61 Farmer Interview 33.
62 Warden Interview 14.
8.11.6 Accountability and Public Benefit

This uncertainty led to several comments about the accountability and long-term effectiveness of agri-environmental policies. The view was often expressed that, if there might not be a similar scheme in place at the end of a ten-year agreement, or if a farmer chooses not to re-enter such a scheme for whatever reason, then it was difficult to justify the public expenditure on making payments to the farmer in the short-term. It could all be a waste of time and money. This is, of course, a necessary feature of the voluntary approach to these matters chosen by the UK as a means of pursuing this type of policy.

Further questions were raised about public benefit and value for money which were related to the degree of public access to those sites for which payments were being made. There are some fairly deep philosophical arguments that could be brought to bear here, concerning the essence of environmental benefit, and whether it needs to be justified by human enjoyment. Suffice to say here that there is scope for questions to be raised over these issues in the current arrangements and that the agencies and farmers should not underestimate the need to be seen to be providing good value for money for the public monies expended on these schemes, in order to retain their credibility and, ultimately, to ensure the schemes' survival.

Other farmers and conservationists who were interviewed for the research expressed views over the effectiveness and public benefit accruing to individual schemes or particular holdings. For example, some did not believe that set-aside (which we have seen in any event

63 Farmer Interview 33.
64 Farmer Interview 11.
was set up for other primary purposes) was good for conservation. It is appreciated that this type of comment is necessarily very subjective and that the perception of an individual is often coloured by a very localised experience. This type of comment is therefore not discussed widely here, although the wider policy issues of accountability and public benefit mentioned above are of some considerable importance.

8.11.7 Financial Implications

Of the other comments concerning agri-environment schemes made by farmers, several related to the financial effects on their own enterprise or on the agricultural economy in general. While many farmers gave financial reasons for entering agreements, others held back for fear of the unforeseen financial effects of participating in a scheme. There was often a fear that monies would have to be repaid if an enforced change of direction were to occur in the business or that payments might be radically reduced without notice. Younger farmers were fearful that entry into a scheme would hamper their desire to make technological progress on the holding.

On the other hand, many farmers recognised that their businesses were only thriving because of the effect of one scheme or another, and were thankful that they were not fighting to make a living out of intensive management of unsuitable land. Indeed, there was often an impression, particularly among older farmers, that they were relieved to be given a way in which they could afford to continue in the old ways that they felt familiar with and which retained the appearance and nature of the landscape as they had always known it. Often, an arrangement made between a landlord organisation and a tenant was only viable because of

---

66 Farmer Interview 15.

67 Farmer Interview 47.
the input contributed by an outside agency in the way of a management agreement under one of the schemes.68

8.11.8 Quota and IACS Implications

Several of the interviewees referred to concerns about IACS or quotas when discussing other agri-environment schemes.69 One of the most commonly raised reservations was the fear that, by extensifying production and reducing stock (for example), one would be excluding oneself from eligibility for future quota allocations. This fear has been partially addressed by the developments to the Sheep Annual Premium and Suckler Cow Premium régimes mentioned above. Provisions now contained in Schedule 3 of the Sheep Annual Premium and Suckler Cow Premium Quotas Regulations 199770 address the lack of integration between the quota and agri-environment systems. They permit producers who were participants in a management agreement in the “relevant year”71 to receive quota from the National Reserve at the end of the agreement. However, the position of those entering schemes after the relevant dates is not so clear72.

Similarly, IACS problems were feared by those entering the grass conversion elements of the Countryside Stewardship scheme.73 While the scheme was often financially attractive in the first instance because of assistance with fixed costs, the IACS implications meant that several were disillusioned with the perceived benefits of the scheme. Certainly, for many, the

---

68 Warden Interviews 32, 33.

69 Farmer Interview 11.

70 SI 1997/2844.

71 That is the 1991 marketing year for sheep and 1992 calendar year for cows.

72 For a detailed overview of the impact of quotas on the environment see Cardwell (1997).

73 Farmer Interview 11.
promise of money allocated to the repair and maintenance of walls and barns provided the
incentive to enter a scheme in the first place, but the longer term implications on their
business had not been anticipated or appreciated by the participants.

One specific effect of the Government schemes on IACS payments is that the removal of
stock from woodland grazing for conservation reasons under a scheme might put in jeopardy
the receipt of extensification payments. This would happen if the remaining available forage
area were to become too densely stocked as a result. This problem can be alleviated by
working with the Woodland Grant Scheme under which stock exclusion payments are now
available.

8.11.9 The Effect on the Market

Broader than the effect on individual businesses, but related, is the effect of these
environmental schemes on the wider agricultural market. The best illustration of this is the
rise in grass keep prices caused by the search for alternative grazing by those reducing stock
numbers under one or other of the schemes74. Often, using the payments made under the
scheme to finance their plans, farmers would seek grassland out of their area and move their
stock considerable distances to take advantage of it75. Thus, a market which was traditionally
very local and predictable, had influences inflicted from outside which distorted the price and
availability for others. This phenomenon would also have an impact on rent levels on other
holdings, having a direct impact on the landlord/tenant relationship, and thus the cycle would
continue.

74 Farmer Interview 21.
75 Farmer Interview 33.
8.12 Conclusions

We have seen above the various ways in which agri-environment support schemes interact with tenancy arrangements, and how they are viewed by the farmers required to operate them. Clearly, much of the interview data is also relevant to the landlord/tenant relationship, being of great interest to the conservation landlord. It throws light on the attitude and experiences of tenant farmers in relation to conservation management and can, therefore, inform the process of negotiation and drafting when a new tenancy agreement is being set up.

The lesson to be learnt is that the interrelationship of all the legal agreements affecting a piece of land must be considered carefully at every stage to avoid inconsistencies and confusion. At a wider policy level, the administration of the schemes needs to be simplified so that farmers are clear of the options available to them and can deal easily with any queries or problems. Ideally, one form of documentation and one point of contact should be available \(^76\).

\(^76\) This is discussed further by Rodgers and Bishop in their report and is included as one of their final recommendations at p.7.
CHAPTER 9

Conclusions and Recommendations

9.1 Introduction

In Section 1 we examined the law and policy framework within which the operation of agricultural tenancy agreements must take place. In the context of land tenure arrangements being a tool for, or at least an influence on, the pursuit of conservation objectives in the countryside, we also considered the Government instruments currently in use for protecting the rural environment. In the course of reviewing the law, various assumptions were made about the practical implications of certain provisions or developments, which can now be revisited in the light of the qualitative data analysis carried out in Section 2.

In Section 2, an account of the Interview Survey results was given in accordance with the methodology set out in Chapter 5. We looked at the general attitudes of farmers towards conservation initiatives and their farming methods, at the operation in practice of the landlord/tenant relationship in this context, and the views and experiences of farmers who had had contact with Government environmental schemes. Inevitably, much of the material reviewed at this stage had implications for more than one of the areas of interest. In the conclusions and recommendations that follow, we have drawn together the threads from the different parts of the project to generate an assessment of the whole and a view of the way ahead.

Under each heading below, we will give an overview of the legal and practical issues and the relevant conclusions and then follow this by making numbered recommendations on the topic. These will be extracted and set out separately in Appendix 11 for ease of reference.
9.2 Legislative Effectiveness and Reform

In assessing the legislative framework for the area of study it is necessary to consider the law for two separate agricultural tenancy regimes, the 1986 Act and the 1995 Act, and the wider field of environmental measures in which they take effect. In each of these three areas, and between them, the main issue is the degree of integration between the agricultural and environmental imperatives. Although some small initiatives have been taken to improve the compatibility of the two, it remains poor, and is the source of several difficulties and inconsistencies. Of these, the following are the most critical.

9.2.1 The 1986 Act Régime

The most critical factor for conservation management in the 1986 Act régime is the agricultural terminology in which many of the concepts are couched. Across the provisions, affecting all aspects of the landlord/tenant relationship, the language takes on the assumption that the overriding imperative is one of high agricultural productivity. This assumption is an understandable product of the political climate in which the post-war legislation was drafted, but it now sits uncomfortably beside the fact that commodities are over-produced and EU policy is evolving to encourage the provision of environmental goods on agricultural land.

Whilst phrases such as productive capacity and reasonably skilled in husbandry inhabit the rent and compensation provisions of the legislation, it is difficult for tenants to farm less intensively or to enter a Government environmental scheme without some anxiety about their financial status. In addition, the definition of agriculture contained in s.96 of the 1986 Act, and the interpretation of the phrases good husbandry and sound estate management have been difficult to assimilate into the current agricultural climate, notwithstanding the limited
conservation provision made in Schedule 3 of the 1986 Act. This has created much uncertainty.

At the time of the debate on the 1995 Act, it was suggested that these phrases be updated, but such suggestions were rejected in favour of retaining the status quo, for fear of affecting existing tenancies. This, in the researcher's view was a mistake. For, whilst it is possible under the new legislation to design new and innovative husbandry and conservation prescriptions, the MAFF (1997) survey shows us that the tendency has been, nonetheless, to incorporate the familiar concepts from the old régime. The culture of high productivity would therefore seem to be set to continue for so long as this is the case, notwithstanding the fact that the lack of any statutory framework for the rules of good husbandry or, indeed, the Model Clauses, would make enforcement rather more complex than anticipated. The RICS Guidance Notes address these issues and suggest amending the rules of good husbandry in almost all cases.

RECOMMENDATION 1

The agricultural nature of the terminology in the 1986 Act creates problems for landlords and tenants interested in conservation. The rules of good husbandry and the definition of agriculture from the 1986 Act need to be redefined, at least for the purposes of any reference under the 1995 Act and future legislation. In the absence of such a change, the parties should seek new ways of setting up-to-date husbandry standards in farm business tenancies.

Many 1986 Act tenancies are either unwritten, or inadequate. They may last for many years and, in addition, may carry succession rights for up to two further generations. In these instances it is possible for either party to make an application under s.6 of the 1986 Act for the agreement to be properly recorded. However, at present, only the matters contained in

---

1 For example, the cross-compliance measures introduced into the Sheep and Suckler Cow Premium schemes referred to in Chapter 4 and, in more detail, by Cardwell (1997) p. 78.

2 In England 93% and in Wales 100% of the FBTs in their landowner survey incorporated the rules of good husbandry, while 34% purported to have repair obligations in line with the Model Clauses. pp. 55 and 52.
Schedule 1 of the 1986 Act may be included. This does not include covenants for the protection of the environment.

**RECOMMENDATION 2**

Schedule 1 of the 1986 Act should be amended to enable the inclusion of conservation covenants, similar to those defined in Part II of Schedule 3 of the Act, on an application under s.6.

Security of tenure and succession rights have been assumed to be a major influence on management practices on 1986 Act holdings. It seems from the interview data in this project that farmers are not necessarily as heavily influenced by these factors as one might expect. Whilst confirming that shorter terms might result in more intensified farming methods, farmers also referred to a sense of complacency conferred by the 1986 Act protection, which did not contribute to the well-being of holdings. A belief was held that a good farmer could be assured of the necessary certainty and continuity even with a series of shorter lettings, or at least with a term of (say) 10 to 15 years.

**RECOMMENDATION 3**

The environmental impact of security of tenure and succession rights is not straightforward. The importance of this issue will, in any event, decline with the years. In the meantime, for the conservation landlord, opportunities for re-negotiation and the insertion of conservation provisions often arise on succession or during a protected tenancy. These opportunities should be grasped.

**9.2.2 1995 Act Régime**

Whilst there is no doubt that the 1995 Act has brought new opportunities for flexible and innovative agreements, there is little evidence of these being used by those other than committed conservation landlords. In this respect, it could be said that the Act has done nothing to promote the integration of environmental policy with land tenure issues in the

---

3 Whitehead et al. (1999) suggest that there is a relatively high and growing usage, but it is suggested that the question that provided the data for this conclusion left the respondents to define what they considered to be
wider countryside. Other means need to be found to encourage the participation of other landlords and tenants in conservation arrangements. To this extent, educational initiatives can play a large part. The RICS Guidance Notes provide some guidance on the environmental implications of the Act, and recommend drafting techniques to maximise environmental benefit. More needs to be done to publicise the opportunities and dangers posed by the 1995 Act in the absence of statutory regulation, and to promote conservation options.

The role of the land agent in this process is critical, particularly in view of the farmers' often high regard for the profession. It is clear that even land agents working for conservation bodies are concerned about compromising their independence by liaising too closely with tenant farmers, and others feel that the concept of promoting a certain course of action threatens their tradition of acting only on a client's explicit instructions. However, as Manley and Baines (1999) point out, the General Council of the RICS\(^4\) has itself made public an environmental strategy that includes the "promotion of environmental improvement and sustainability in the public interest".

**RECOMMENDATION 4**

Educational and other initiatives need to be taken by conservation and professional bodies, and their individual members, to promote amongst farmers and landowners the opportunities for environmental management arising out of the 1995 Act, and to offer advice and guidance.

The framework is now available for the incorporation of conservation provisions in farm business tenancies, provided that the business and the agriculture or the notice conditions of the 1995 Act are satisfied. However, the inadequacies of the remedy of forfeiture ensure that enforcement is still problematic.

---

\(^{4}\)RICS (1996)

*specific requirements largely concerning conservation* and that this may have resulted in an exaggerated result if respondents included largely traditional clauses such as protection of hedgerows under this heading.
RECOMMENDATION 5

The incorporation of conservation provisions in agricultural tenancy agreements is easier under the 1995 Act. However, the enforcement of such clauses remains problematic. Careful drafting is needed to ensure that clear, unambiguous clauses are in place and that the landlord's objectives are well set out.

The other major effect of the 1995 Act will be on the term-length of agricultural lettings. Much is being said on the environmental implications of short-term lettings, and the interview data certainly suggests that they will tend to encourage more intensive farming practices. However, more scientifically-based research is needed to make any categorical judgements on this.

RECOMMENDATION 6

The signs are that farmers are likely to farm more intensively in short-term lettings. Further research, of a scientific nature, is necessary on the real effects of short-term tenancy arrangements on land management practices.

On the other hand, the other implication of short tenancies is the way in which they interact with Government incentive schemes, and a thorough review of this aspect, and the advantages and disadvantages of landlords rather than tenants entering management agreements (e.g. with MAFF or English Nature) and of tripartite agreements (i.e. between a Government agency, the landlord and the tenant), needs to be undertaken.

RECOMMENDATION 7

A review of the implications of short-term farm business tenancies on the take-up and effectiveness of Government environmental incentive schemes should be undertaken and appropriate measures taken to alleviate any negative effects.

Farmers are motivated, as others, by the financial implications of their decision-making. In view of this, the impact of the 1995 Act on rent levels may have an influence on management practices. Whilst rents will inevitably fluctuate with changes in the agricultural climate, it is probable that, where they are high, more intensive management will result. It is also predicted that 1995 Act rents, being a legitimate and relevant factor on review, will have an uplifting effect on those governed by the 1986 Act.
RECOMMENDATION 8

Conservation landlords need to be realistic about the rents they seek on environmentally valuable holdings. It is probable that they will acquire a tenant with a more sensitive management style if they do not accept the highest tender. They should also be amenable to the concept of smaller farms being part-time holdings.

It has been seen in Chapter 3 that, under the 1995 Act, the general law will play a much increased rôle. To this extent, explicit provisions will need to be inserted in farm business tenancies to cover the treatment of repairs and maintenance, dilapidations, and compensation for improvements. This is particularly so for conservation landlords and tenants, as environmental works may be critical to the survival of the conservation interest on a holding, and yet may reduce rather than increase its general value.

RECOMMENDATION 9

The parties need to consider carefully all the general terms of new farm business tenancies to ensure that they put in place a clear and appropriate régime for the features on a holding.

9.2.3 Government Environmental Schemes

We have suggested above that there should be a full review of the way in which tenancies and Government schemes interact. This is important to determine the basic structure of the arrangements entered into by farmers and landowners. In addition, in each particular case, difficulties can arise where management prescriptions contained in a management agreement are not compatible with those in a tenancy agreement for the same holding. These can be particularly acute when management obligations under the tenancy, e.g. for reserved woodland, do not fall with the person entering the management agreement, or where detailed prescriptions are in contradiction of each other.

Where possible, it is ideal if the agreements can be drafted and entered into at the same time, to ensure compatibility. In addition, tenants need to protect themselves by ensuring that any implied or express obligations to farm in accordance with the rules of good husbandry are
tempered, either in accordance with Part II of Schedule 3 of the 1986 Act, or by express provision in a farm business tenancy.

RECOMMENDATION 10

Careful attention needs to be paid by all parties to the compatibility of obligations under tenancy agreements and Government management agreements affecting the same holding.

We also endorse here the conclusion reached by Rodgers and Bishop (1998) that, where conservation covenants are in place in a tenancy agreement, these should be ignored by Government agencies in deciding whether or not to offer a management agreement. This would serve the wider policy objective of encouraging landlords and tenants to take conservation initiatives without fear that they may later be penalised for it.

RECOMMENDATION 11

Where conservation covenants are in place in a tenancy agreement, these should be ignored by Government agencies in deciding whether or not to offer a management agreement for that holding under an incentive scheme.

It was clear from the Farmer Interview Survey that there is a large amount of confusion and frustration as a result of the number and diversity of available Government environmental incentive schemes. The goal of integration and cohesion is an obvious one. However, it is important that, in making progress towards that goal, the diversity and flexibility of the best of the individual schemes should not be lost. Policy should aim for what Rodgers and Bishop (1999) call "convergence, not uniformity"\(^5\). So, the administration of the incentive schemes should be rationalised, perhaps in the hands of one agency, while the essential elements and objectives of the different initiatives are retained, albeit as part of a menu for an integrated package. The models of Tir Gofal and the Scottish Countryside Premium Scheme should be monitored and reviewed to see how these principles can be applied.

\(^5\) p.77.
RECOMMENDATION 12

The administration of the Government's environmental incentive schemes should be rationalised and integrated, along the lines suggested by Rodgers and Bishop (1998). Ideally farmers should have one point of contact with one Government agency.

This rationalisation process could then be carried over into the actual preparation of the legal documentation required. Again, as suggested by Rodgers and Bishop (1998)⁶, a standard form of environmental land management contract could be brought into being, which would be more easily accessible to those using it and which could contain all the environmental obligations affecting a holding in one document, albeit containing a series of schedules containing distinctive prescriptions appropriate to each scheme.

RECOMMENDATION 13

In the administration of Government environmental incentive schemes there should be introduced a model form of contract or management agreement which can contain all the prescriptions affecting a holding in one document.

Two further, connected, factors became apparent as factors in the use and effectiveness of Government schemes by the farmers in the Interview Survey. They are both products of the cultural differences presented by the conservation and the agricultural communities. The first is that farmers often felt that, whilst their undoubted skills and expertise as agricultural land managers was not sufficiently recognised by the agencies with which they were dealing, they were not given sufficient information or advice on the conservation features and ecosystems present on the holding. The Agriculture Committee of the House of Commons, in its recent report on the operation of incentive schemes, recommended that training should be made available to participating farmers, and this proposal has been incorporated into the Tir Gofal

⁶ p.78.
scheme, notwithstanding that provision for the funding of this type of initiative was not included in the original Agri-Environment Regulation\(^7\).

**RECOMMENDATION 14**

Farmers should be provided with education and training opportunities in conservation management as part of their participation in Government environmental schemes.

The other linked element to this conclusion is that conservation staff are too often identified as having little or no knowledge of agricultural practice and insufficient sensitivity to the constraints under which farmers are often operating.

**RECOMMENDATION 15**

The staff of Government conservation agencies should, by the operation of recruitment and training policies, become more conversant in agricultural policy and practice and be prepared to listen to and learn from the agricultural community, particularly at a local level.

**9.3 Good Practice**

From the Interview Survey, and from other sources, it has been possible to assess the effectiveness of the practices currently favoured in the administration of conservation tenancy arrangements. These can be divided into several groupings and treated separately, as we have done below. However, various principles override categorical divisions and can be put forward as guidelines for practice across the whole process. These are

i) *Certainty* - farmers and land managers need arrangements that are clear and unequivocal in all respects. This does not necessarily mean that agreements must be long-term, but for the circumstances of each situation, a suitable option must be chosen that allows the parties to plan and operate in confidence. It must then be documented in a way that is accessible and easy to put into practice.

---

\(^7\) See Hawke and Kovaleva p.109.
ii) **Flexibility** - within such arrangements, it is necessary to build in sufficient flexibility and opportunity for review. This allows farmers to be in control of their day to day decision-making, and management schemes to evolve with the acquisition of knowledge.

iii) **Balance** - in all aspects it is important for balance to be maintained, without compromising the main objectives for a holding. Thus conservation objectives need sometimes to take account of agricultural or business constraints and vice versa. Proposals need to be *practical* and in tune with *local* knowledge.

iv) **Openness** - the parties should operate in an environment of openness and a spirit of partnership. Trust is built by transparency, and there should be no hidden agendas.

### 9.3.1 The Type of Legal Arrangement

Whilst term-length is clearly of some import in the carrying out of conservation management, it is difficult to make generalisations about the effects of particular types of legal agreement. Winter (1990) makes some observations, but it is clear that, in each situation, there will be an arrangement that is best suited to all the circumstances. For, example, where a high degree of control is required, or direct managerial input by the landlord, then grazing licences, or share or contract farming arrangements may still be appropriate, or a separate management agreement may be considered. However, a high level of communication and staff time can be involved in these options and this should be appreciated. Under the 1995 Act, the variables are now more complex, and the common law implications of freedom of contract not always properly understood.

---

RECOMMENDATION 16

From the outset of a new tenancy agreement, the parties need to consider carefully all the relevant factors, legal and practical, in setting up an agreement that is compatible with the landlord's objectives, the tenant's aspirations and the environmental schemes available. Where necessary, this will have to be with professional advice.

It seems that the actual content of farm business tenancies is not significantly changed from tenancy agreements entered into under the 1986 régime. As time passes it is hoped and anticipated that, with the right encouragement (see Conclusion 4 above), farm business tenancy agreements will begin to reflect the flexibility that is now available. In addition, it is probable that some landlords will continue to explore the use and effectiveness of separate management agreements with their tenants, with a separate payment structure from the rent relationship. The advantages of this is that the environmental management of the holding is seen as a positive incentive to the farmer, rather than a restriction, and enforcement could be undertaken most easily by the withholding of payments for lack of performance, thereby avoiding the inadequacies of the legal remedies available for breach of covenant in a tenancy agreement.

9.3.2 The Type and Style of Documentation

The Interview Survey showed that the actual content of existing agricultural tenancy agreements is not actually playing a high rôle in the day-to-day management decision-making of farmers. Very often the tenancy agreement document has not been read since it was completed, and many criticised the wordiness and non-intelligibility of the style. These may be features specific to old-style 1986 Act tenancies, however, where the culture and basic structure of landlord/tenant relationships was very uniform, and familiar to the parties. To that extent, frequent consultation of the documentation was not necessary.

---

9 MAFF (1997)
RECOMMENDATION 17

The actual tenancy agreement document will assume more importance under the 1995 Act, as its provisions will not be so uniform and the culture not so well understood by the parties. Careful negotiation and drafting will therefore be paramount, and clarity and conciseness imperative.

Linked to the exploration of separate management agreements as a management tool, is the debate as to whether the detailed but non-legal language of a whole farm plan is appropriate for incorporation into a legal landlord/tenant relationship. It seems clear that such plans are welcome and effective as management tools, with the process of surveying the holding and formulating the objectives an ideal opportunity to integrate the competing objectives. It is particularly effective if a tenant, or prospective tenant can be involved at this stage, so that he or she has a sense of "ownership" over the proposals and might be more likely to comply with them. This is a prime opportunity to employ the four principles set out above in the production of one package of management prescriptions, illustrated by accurate and informative maps. However, the difficulties of incorporating this type of document into an enforceable legal agreement remain, as do fears that the necessary detail might compromise the other goals of clarity and conciseness in the documentation.

RECOMMENDATION 18

Further research and experimentation is necessary to establish the effectiveness and best model for whole farm plans, and the practicality of incorporating them into enforceable legal documents. In essence, however, where the resources are available they appear to be a useful management tool.

9.3.3 Conservation Covenants

With regard to the simple inclusion of conservation provisions in tenancy agreements, again more research is required. The Interview Survey has provided much useful material on their use and effectiveness on the holdings forming part of the sample. However, a scientific

\(^{10}\) Whitehead et al (1999) final page.
analysis of whether they are achieving their conservation objectives is beyond the scope of this project. Nonetheless, certain guidelines can be established.

First, it was very apparent from the interviews\textsuperscript{11}, that there is a high degree of ignorance among farmers as the true nature and content of the obligations contained in their tenancy agreements, and of their relationship with Government designations or environmental management agreements. Much confusion exists, and a review of actual tenancy documents showed that the position was often not as it was believed to be. It is probable that farmers’ understanding of and use of the tenancy document, particularly of conservation covenants, will be greatly enhanced if they have some input into the contents.

RECOMMENDATION 19

Under the 1995 Act, the actual contents of agricultural tenancy agreements will vary greatly. Careful scrutiny of management obligations contained in them will need to be maintained by the parties in order to comply with, or monitor them. To this extent, where possible, obligations should be prepared after consultation with all the parties, and explained clearly to the farmer.

There are clear parallels here between the process of preparing conservation covenants and that of constructing a whole farm plan. In addition, many of the issues here have implications for the process of preparing Government incentive scheme management agreements. Indeed, to a certain extent, the process of experimenting with different forms and processes for the preparation of management prescriptions is probably more advanced in that field.

RECOMMENDATION 20

Lessons for the preparing of conservation covenants in tenancy agreements should be learnt from the experiences of Government agencies in the formulating of management agreement structures and detail. In particular, the experiences of English Nature with the Wildlife Enhancement Scheme and Site Management Statements and the Countryside Council for Wales with Tir Gofal should be reviewed.

\textsuperscript{11} And this appears to be backed up by MAFF (1997) pp. 57 and 58.
Experience is extensive here too in the deliberation of whether incentive-based approaches are more effective than prescriptive ones. It seems universally accepted that the latter are more productive of environmental goods and more cost-effective than those necessitating a compensatory approach\textsuperscript{12}. In addition, it was apparent from the Farmer Interview Survey that a move towards obligations that specified ends or products rather than the means whereby they might be achieved would be more assured of co-operation from farmers, who would then feel a sense of challenge and self-determination that is often absent from current schemes. It seems too that a mixture of generally applicable clauses and site-specific ones will continue to be necessary and appropriate. In view of the responses to the Interview Survey, it would be pragmatic for landlords to be realistic about exploiting farmers' understandable self-interest, keenness on fieldsports (where appropriate), and financial motivation.

RECOMMENDATION 21

Conservation covenants in tenancy agreements should, where possible, be positive rather than negative, specify ends rather than means, and combine general and site specific prescriptions.

9.3.4 Negotiation and Relationships

As hinted above, and certainly under the 1986 Act régime, the rôle of the legal documentation in the governing of agricultural practices on a holding and the relationship between landlord and tenant is of little significance, unless problems arise, in which case it is invaluable in setting out the position. For the rest of the time, the nature of the relationship and the success of the arrangement are governed far more by the quality of the communication between the parties. This is critical to the proceedings and highlights the need

\textsuperscript{12} See, again, Rodgers and Bishop (1998) on the advantages and disadvantages of positive and compensatory management agreements on SSSIs, p 26 ff.
for the choice of tenant to be appropriate for the holding and for the landlord's objectives. These objectives need to be clearly spelt out and understood.

RECOMMENDATION 22

The choice of tenant is the single most important factor in the success of a conservation letting. It is necessary to have a farmer who is sympathetic to the landlord's objectives, whilst being competent in the husbandry practices necessary to fulfil them. The landlord's objectives should be clearly set out, for the holding and, where appropriate, at a national or regional level.

For good communication to take place, regular meetings should be held with the tenant to apprise him or her of any developments and to listen to his or her concerns. For these to be a success, cultural and individual differences need to be minimised. This can be achieved to a certain extent by education and training (see above), but is also dependent on good one-to-one relationships. These can be better built where contact and decision-making takes place at a local level, where turnover of staff is low, and where tenants deal mainly with one individual on a regular basis. Farmers in the Interview Survey expressed a preference for this contact to be with a land agent. Newsletters and tenants' associations do not necessarily improve the quality of this one-to-one communication.

RECOMMENDATION 23

Communication between landlords and tenants should be frequent, open and consistent. Tenants need to have one point of contact with a person who has decision-making power.

9.3.5 Monitoring and Enforcement

The monitoring and enforcement of environmental agreements remains problematic. For proper checks to be made, considerable staff time and resources need to be expended. However, the costs of even one significant enforcement action can be extremely high, often with an uncertain prospect of success, and the available remedies are notoriously poor at preventing or remedying environmental damage. Good communication, such as envisaged above, can obviate the need for such actions, by identifying problems in their early stages and opening up possibilities of resolution without recourse to legal action. So, by regular and
open visiting, and a real sharing of information, difficulties can be averted and positive
initiatives be suggested. As ever, however, this will depend, to a certain extent of individual
personalities, as well as on the flexibility of the legal arrangement and the provision for
review.

RECOMMENDATION 24

Monitoring and enforcement of environmental agreements is most effectively carried out on an
informal and flexible basis. Notwithstanding this, all legal documentation should be drafted in
such a way that it can be relied on in the event of communications breaking down.

9.4 The Position of Tenancy Matters in the Wider Picture

Whilst the acreage of tenanted farmland may be proportionately small, if the 1995 Act is
successful, as has been suggested, it will remain a significant proportion of the agricultural
estate in the UK. For land of conservation value, the proportion that is tenanted is likely to be
higher than elsewhere in any event, due to the large area in public or charitable ownership. It
has also been suggested that this type of ownership should be increased, and this is likely to
happen if price support systems are decreased and land becomes more affordable\(^{13}\). The
operation of conservation provisions in agricultural tenancy agreements will increasingly
become a matter of public policy interest. In addition, we can see from this project that the
interdependence of this field of study with the operation of Government incentive schemes is
necessarily high, and the lessons learnt from the one can effectively inform the other.

RECOMMENDATION 25

The operation of conservation provisions in agricultural lettings and how the pattern of lettings
affects the countryside will increasingly become a matter of public interest. Channels should be
kept open whereby a flow of information can be effectively maintained between the interested
parties and Government agencies

\(^{13}\) See Dwyer and Hodge (1996).
9.5 The Application of Principles to General Environmental Control

The subject matter of this project is a good example of the voluntary contractual approach to environmental protection operating in practice. It shows the pursuit of policy objectives, that is of environmental protection and conservation management, in a market-led environment, where financial and business decisions affect the success or otherwise of arrangements. The project shows that, for arrangements to be effective, the incentives must be great enough. Research into the mechanics of incentive-based policies is urgently needed in a climate where the EU's agricultural policy, as seen in Chapter 1, will be increasingly targeted towards environmental protection rather than agricultural production. However, the contractual approach is not confined to agricultural matters and there are also lessons to be learnt from this project for other planning and pollution control initiatives, such as those used on the continent to promote water quality on major rivers.

In addition, the interplay here between public policy issues and private property rights influences is of considerable interest. In particular, the effect of land tenure issues on the take-up of government sponsored environmental initiatives. There is potential here for further comparative research on how these influences differ in the member states of the EU, and in other jurisdictions.

RECOMMENDATION 26

The potential for applying the results of this research to other fields of environmental law and policy, in the UK and in other jurisdictions should be recognised and explored.

9.6 Final Conclusions

The Interview Survey has provided information about past experience, current practice and the needs for the future. As expected, there has been a call from both farmers and managers for simplification in the legal process and realism in the expectations made of tenant farmers.
and land managers. This has to be balanced against the importance of certainty and enforceability in the securing of the landowner's objectives.

It seems that farmers are more likely to comply with positive management obligations that are specified by the ends to be achieved and are linked to some directly related financial reward, notwithstanding the fact that a rent reduction might be expected for straightforward prohibitions inserted into tenancy agreements. The relationship between the parties and the intangible concept of "partnership" are significant factors in the effective achievement of conservation objectives. However, these factors can only be accommodated within the available legal framework, where the clear allocation of responsibilities and rights and the fair resolution of disputes will usually be the main considerations. This leads to difficulties and compromises in an attempt to reconcile the different emphases demanded by these various approaches.

At a legislative level, it is clear that the 1986 agricultural holdings legislation inhibits environmental management of tenanted agricultural land. This has been overcome, to a certain extent, by the freedom of contract and flexibility in the régime brought in by the 1995 Act. However, there is still no explicit integration of environmental concerns in the legislation and their incorporation into tenancy agreements is heavily dependent on landlords using this freedom to pursue environmental management. Whether this happens will, in turn, depend on other factors such as education and economic influences.

In addition, a more cohesive package of government incentives for farmers, the régimes of which interlock with all types of land tenure and other schemes in a way which ensures consistency and compatibility, is clearly an ideal. However, the relationship of land tenure arrangements to other schemes is inevitably complex, particularly in the areas of eligibility
and compatibility. The Interview Survey has shown how some of these schemes are interrelating in practice and where difficulties are occurring.

Various recommendations have been made above concerning the most effective legal mechanisms for securing conservation objectives on tenanted farmland and this project has also provided an indication of the other important factors which influence the success or otherwise of individual arrangements.
SECTION FOUR

APPENDICES AND BIBLIOGRAPHY
The Rules of Good Husbandry

s.11. Agriculture Act 1947

11(1) For the purposes of this Act, the occupier of an agricultural unit shall be deemed to fulfil his responsibilities to farm it in accordance with the rules of good husbandry in so far as the extent to which and the manner in which the unit is being farmed (as respects both the kind of operations carried out and the way in which they are carried out) is such that, having regard to the character and situation of the unit, the standard of management thereof by the owner and other relevant circumstances, the occupier is maintaining a reasonable standard of efficient production, as respects both the kind of produce and the quality and quantity thereof, while keeping the unit in a condition to enable such a standard to be maintained in the future.

(2) In determining whether the manner in which a unit is being farmed is such as aforesaid, regard shall be had, but without prejudice to the generality of the provisions of the last foregoing subsection, to the extent to which—

(a) permanent pasture is being properly mown or grazed and maintained in a good state of cultivation and fertility and in good condition;

(b) the manner in which arable land is being cropped is such as to maintain that land clean and in a good state of cultivation and fertility and in good condition;

(c) the unit is properly stocked where the system of farming practised requires the keeping of livestock, and an efficient standard of management of livestock is maintained where livestock are kept and of breeding where the breeding of livestock is carried out;

(d) the necessary steps are being taken to secure and maintain crops and livestock free from disease and from infestation by insects and other pests;

(e) the necessary steps are being taken for the protection and preservation of crops harvested or lifted, or in course of being harvested or lifted;

(f) the necessary work of maintenance and repair is being carried out.

(3) The responsibilities under the rules of good husbandry of an occupier of an agricultural unit which is not owned by him shall not include an obligation to carry out any work of maintenance or repair which the owner of the unit or any part thereof is under an obligation to carry out in order to fulfil his responsibilities to manage in accordance with the rules of good estate management.
INTERVIEW SCHEDULE (EXECUTIVE)

Meeting with .......... at .......... Date ..........

Details of Practice on .......... Land

- Set up and constraints of legislation/constitution etc.

- Total acreage of farmland

- Number of agreements

- Type of agreements - reasons - success, problems etc.

Share/contract/p/shp

Full agricultural tenancy
Gladstone v Bower

Ministry lease/licence

Grazing/mowing licence

Cropping arrangements

Management agreements

Own stock/In hand

- Copies of standard/interesting forms of agreement
- Use of conservation covenants - effectiveness and enforcement, monitoring and measurement

- Problems as result of Agric. Holdings legislation

- Selection of tenants/licensees

- Negotiation process - use of land agents, local staff, solicitors etc. - style of agreement, maps etc.

- Other initiatives - formal and informal - effectiveness
- Use of whole farm plans - type of restrictions imposed etc.

- History and reasoning behind attitude towards the Bill - current concerns

- Plans after the Farm Tenancies Act

- Interview tenants/licensees?

General

- Farmer attitudes - age, technology, farm attributes, motivation, small farms etc.
• Effect of tenure on conservation attitudes, involvement in schemes

• Evidence of short-termism - change of occupancy damage

• Views on research/project - questions for survey - interview structure/technique - measurement

• Other contacts/research

• Any other points
Dear ,

Farm Tenancies and Conservation

I am intending to conduct the interview survey for my research between the beginning of November and Christmas and you kindly agreed to let me have a list of tenant farmers whom I might interview.

I have decided that a random selection will not give the best results for this type of research, so please could you let me have a list of ... names of suitable farmers (of which I hope to see ...) representing a mix of attitudes, farm types, and agreements, together with their addresses, telephone numbers and an indication of whether their tenancy agreement contains any conservation provisions. Please do not automatically exclude any tenant with whom a difficult relationship exists. If possible the farms should not be too scattered.

In addition, please set out, for each farm, the name and telephone number of the responsible warden/property manager, and the name of the managing agent, as I might also like to interview them briefly. It would help me greatly if I could have the lists by the 24th October. Please ring if you have any queries.

If you wish to write to the farmers telling them of the project, please do so in as close as possible to the enclosed form, so that all farmers, whichever organisation, will receive the same information.

Many thanks for your help in this. I know you and your staff are very busy and appreciate your co-operation very much.

Best wishes

Yours sincerely

Jennifer Bishop
Research Associate
Centre for Law in Rural Areas
University of Wales
Aberystwyth
Dear ,

Farm Tenancies and Conservation

We are co-operating with a research project being undertaken by Jennifer Bishop, who is a research associate at the University of Wales, Aberystwyth. Jennifer is interested in the way in which conservation objectives are pursued on tenanted farmland and is keen to seek the views of tenant farmers.

To this end, she is conducting an interview survey in November and December and has asked us to supply the names of farmers who might be willing to talk with her. I have given her your name, address and telephone number in the hope that you might be prepared to do this. Jennifer will be contacting you in the near future to arrange a suitable time to visit.

I hope that you do not mind your name being put forward in this way. I believe that the project is worthwhile, and it is important that Jennifer obtains a well-balanced mix of views.

Many thanks in advance for your assistance.
Dear

Farm Tenancies and Conservation

I am writing to confirm the appointment that we made over the telephone for

The research that I am conducting is for a PhD, and is concerned with conservation on tenanted farms. The work is being funded by the National Trust. As part of the research, I am going to be interviewing a number of tenant farmers about their own views and experience.

I will be wanting to ask you about your tenancy agreement, your relationship with your landlord and your attitudes towards conservation. To put your answers in context, I will also ask you a little about your own background.

Your replies will remain completely confidential and will not be presented in a way in which you can be identified. They will certainly not be communicated to your landlord. It will help me greatly if your replies are as full and frank as possible. The research will be used to make recommendations as to how conservation objectives can best be pursued on tenanted farms and it is important that the people actually farming the land have an input into this.

I look forward to meeting you.

Yours sincerely

Jennifer Bishop
Research Associate
Centre for Law in Rural Areas
University of Wales, Aberystwyth.
### LIST OF INTERVIEWEES

**List of Farmer Interviews by Number**

<table>
<thead>
<tr>
<th>No.</th>
<th>Date</th>
<th>Documents Seen</th>
<th>Tape</th>
<th>Warden</th>
<th>Land Agent</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Region 1</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>F1</td>
<td>11 October 1995</td>
<td>No</td>
<td>Yes</td>
<td>W1</td>
<td>L1</td>
</tr>
<tr>
<td>F2</td>
<td>11 October 1995</td>
<td>No</td>
<td>Yes</td>
<td>W2</td>
<td>L2</td>
</tr>
<tr>
<td>F3</td>
<td>12 October 1995</td>
<td>Tenancy Agreement</td>
<td>Yes</td>
<td>W3</td>
<td>L3</td>
</tr>
<tr>
<td>F4</td>
<td>12 October 1995</td>
<td>Tenancy Agreement</td>
<td>Yes</td>
<td>W4</td>
<td>L4</td>
</tr>
<tr>
<td>F5</td>
<td>13 October 1995</td>
<td>Tenancy Agreement</td>
<td>No</td>
<td>W5</td>
<td>L5</td>
</tr>
<tr>
<td>F6</td>
<td>13 October 1995</td>
<td>No</td>
<td>Yes</td>
<td>W6</td>
<td>L6</td>
</tr>
<tr>
<td>F7</td>
<td>13 October 1995</td>
<td>Tenancy Agreement</td>
<td>No</td>
<td>W7</td>
<td>L7</td>
</tr>
<tr>
<td><strong>Region 2</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>F8</td>
<td>8 November 1995</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>L8</td>
</tr>
<tr>
<td>F9</td>
<td>8 November 1995</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>L9</td>
</tr>
<tr>
<td>F10</td>
<td>9 November 1995</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>L10</td>
</tr>
<tr>
<td>F11</td>
<td>9 November 1995</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>L11</td>
</tr>
<tr>
<td><strong>Region 3</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>F12</td>
<td>15 November 1995</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>F13</td>
<td>15 November 1995</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>F14</td>
<td>16 November 1995</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>F15</td>
<td>16 November 1995</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>F16</td>
<td>16 November 1995</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>F17</td>
<td>17 November 1995</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>F18</td>
<td>17 November 1995</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td></td>
</tr>
</tbody>
</table>

**Region 4**

<p>| | | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>F19</td>
<td>22 November 1995</td>
<td>No</td>
<td>Yes</td>
<td>W19</td>
</tr>
<tr>
<td>F20</td>
<td>22 November 1995</td>
<td>No</td>
<td>Yes</td>
<td>W20</td>
</tr>
<tr>
<td>F21</td>
<td>23 November 1995</td>
<td>No</td>
<td>Yes</td>
<td>W21</td>
</tr>
</tbody>
</table>

**Region 5**

<p>| | | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>F22</td>
<td>24 November 1995</td>
<td>No</td>
<td>Yes</td>
<td>W22</td>
</tr>
<tr>
<td>F23</td>
<td>24 November 1995</td>
<td>Tenancy/Management Agreement</td>
<td>Yes</td>
<td>W23</td>
</tr>
<tr>
<td>F24</td>
<td>24 November 1995</td>
<td>No</td>
<td>No</td>
<td>W24</td>
</tr>
<tr>
<td>F25</td>
<td>24 November 1995</td>
<td>No</td>
<td>Yes</td>
<td>W25</td>
</tr>
</tbody>
</table>

**Region 6**

<p>| | | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>F26</td>
<td>29 November 1995</td>
<td>No</td>
<td>Yes</td>
<td>W26</td>
</tr>
<tr>
<td>F27</td>
<td>29 November 1995</td>
<td>Tenancy Agreement</td>
<td>Yes</td>
<td>W27</td>
</tr>
<tr>
<td>F28</td>
<td>29 November 1995</td>
<td>Tenancy Agreement</td>
<td>No</td>
<td>W28</td>
</tr>
<tr>
<td>F29</td>
<td>29 November 1995</td>
<td>Tenancy Agreement</td>
<td>No</td>
<td>W29</td>
</tr>
<tr>
<td>F30</td>
<td>29 November 1995</td>
<td>Tenancy Agreement</td>
<td>Yes</td>
<td>W30</td>
</tr>
<tr>
<td>F31</td>
<td>29 November 1995</td>
<td>No</td>
<td>Yes</td>
<td>W31</td>
</tr>
<tr>
<td>F32</td>
<td>29 November 1995</td>
<td>Tenancy Agreement</td>
<td>Yes</td>
<td>W32</td>
</tr>
<tr>
<td>F33</td>
<td>29 November 1995</td>
<td>Tenancy Agreement</td>
<td>Yes</td>
<td>W33</td>
</tr>
<tr>
<td>F34</td>
<td>29 November 1995</td>
<td>Tenancy Agreement</td>
<td>Yes</td>
<td>W34</td>
</tr>
<tr>
<td>F35</td>
<td>29 November 1995</td>
<td>No</td>
<td>Yes</td>
<td>W35</td>
</tr>
</tbody>
</table>
### Region 7

<table>
<thead>
<tr>
<th>F36</th>
<th>6 December 1995</th>
<th>No</th>
<th>No</th>
<th>No</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>F37</td>
<td>6 December 1995</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>F38</td>
<td>6 December 1995</td>
<td>No</td>
<td>Yes</td>
<td>W38</td>
<td>L38</td>
</tr>
<tr>
<td>F39</td>
<td>6 December 1995</td>
<td>Tenancy Agreement</td>
<td>Yes</td>
<td>W39</td>
<td>L39</td>
</tr>
<tr>
<td>F40</td>
<td>7 December 1995</td>
<td>Tenancy Agreement</td>
<td>Yes</td>
<td>W40</td>
<td>L40</td>
</tr>
<tr>
<td>F41</td>
<td>7 December 1995</td>
<td>Tenancy Agreement</td>
<td>Yes</td>
<td>W41</td>
<td>L41</td>
</tr>
<tr>
<td>F42</td>
<td>7 December 1995</td>
<td>Tenancy Agreement</td>
<td>Yes</td>
<td>W42</td>
<td>L42</td>
</tr>
<tr>
<td>F43</td>
<td>7 December 1995</td>
<td>No</td>
<td>Yes</td>
<td>W43</td>
<td>L43</td>
</tr>
<tr>
<td>F44</td>
<td>8 December 1995</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

### Region 8

<table>
<thead>
<tr>
<th>F45</th>
<th>18 December 1995</th>
<th>No</th>
<th>Yes</th>
<th>W45</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>F46</td>
<td>18 December 1995</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>F47</td>
<td>21 December 1995</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>F48</td>
<td>21 December 1995</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>F49</td>
<td>15 February 1996</td>
<td>Tenancy/Management Agreement</td>
<td>Yes</td>
<td>W49</td>
<td>No</td>
</tr>
<tr>
<td>F50</td>
<td>4 March 1996</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>
INTERVIEW SCHEDULE (FARMERS)  Number ........

Name

Address

Telephone Number

1. Details of the Holding

1.1 Total acres/hectares

1.2 Details of land owned and rented (date, oral/written, area, buildings, term, parties, changes of landlord)

Define "the Holding" for the purposes of interview

1.3 Main land types on the Holding (arable, temp. grass, perm. pasture, horticulture, woodland, rough grazing)

1.4 Main enterprises on the Holding (dairy, arable, beef, sheep etc.)

1.5 Major changes in enterprises (last 10 years)

1.6 Common grazing rights?

1.7 Land removed from tenancy (and why)

1.8 Land added to tenancy (and why)
2. Personal Details

2.1 Age

Under 25  26-35  36-45  46-55  56-65  Over 65

2.2 Age finished full-time education

16  18  21  other

2.3 Further education

College  University  Other

2.4 Course/qualification/s

2.5 Other training and qualifications

2.7 Close relatives in farming/raised on farm/the Holding

2.8 Brief history of career in farming

2.9 Hobbies and interests (esp. shooting, hunting, birdwatching, fishing)

2.10 Support of organisations/charities (esp. farming and conservation)

2.11 Understanding of Conservation on farms

2.12 Attitude towards conservation and intensive/extensive farming methods on farms
3. **Farm Business**

3.1 **Business arrangement**

| individual | partnership | company | other arrangement |

3.2 **Making of management decisions and others involved**

| Spouse or Parent | Son or daughter | Other relation | Employee | Other |

3.3 **Sources of advice (bank, ADAS, independent etc.)**

3.4 **Employees/family/contractors**

3.6 **Plans for the future**

3.5 **Other sources of income/viability**

3.7 **Prospects for succession (inc. age of successor)**

4. **Conservation and Tenancy Agreement**

4.1 **Understanding and opinion of landlord’s objectives for Holding**

4.2 **Important features on Holding**

4.3 **Conservation restrictions in tenancy agreement**

4.3.1 **Original agreement or added (if added, circumstances)**

4.3.2 **Aim**

4.3.3 **Effectiveness (if not, why not)**
4.3.4 Ease of compliance and reasons

4.3.5 (Other) difficulties

4.3.6 Effect on the rent/income

4.4 Suggestions for different mechanisms

4.5 Other arrangements/failed initiatives with landlord for conservation

4.6 Experience of other land with conservation restrictions

4.7 Effect of length of the term (on farming practice and conservation)

5. Other Schemes and Agreements

5.1 Other designations

5.2 Entry into other scheme/s/management agreements

5.3 Main reasons for entering or not

5.4 Problems (conflict with tenancy agreement, length, other)

5.5 Effectiveness

6. Other Conservation Works

6.1 Conservation works voluntarily carried out (details, reasons, payment, advice, maintenance)
6.2 Management plan/whole farm plan/audit (ADAS/FWAG/LEAF)

6.3 Pollution incidents/works

7. Use of the Tenancy Agreement Document
   7.1 Tenant selection process
   7.2 Who prepared
   7.3 Where kept
   7.4 How often referred to
   7.5 How easy to understand
   7.6 Possible improvement (use of maps/lay out/type of prescription)
   7.7 Importance as a management tool

8. Relationship with Landowner
   8.1 Normal contact (ease/usefulness of contact, frequency, authority, time in post etc.)
   8.2 Decision making
   8.3 Problems/disputes (improvements, fixtures, husbandry matters, cropping and stocking regimes, breaches of covenant, rent)
   8.4 Means of resolution
   8.5 Comments on relationship and communication with landlord and suggestions for change

General Comments....
INTERVIEW SCHEDULE (WARDENS/LAND AGENTS)  Number...........

<table>
<thead>
<tr>
<th>Name</th>
<th>Address</th>
<th>Telephone Number</th>
<th>Job Title</th>
<th>Name of Tenant</th>
<th>Name of the Holding</th>
</tr>
</thead>
</table>

1. Tenant's attitude towards conservation (2.10 and 2.11)

2. Landlord's objectives for Holding (4.1)

3. Important features on Holding (4.2)
4. Conservation restrictions in tenancy agreement (4.3)

4.1 Aim (4.3.2)

4.2 Effectiveness (if not, why not) (4.3.3)

4.3 Level of compliance and reasons (4.3.4)

4.4 Monitoring procedure

4.5 Difficulties/resolution (4.3.5)

4.6 Other arrangements/failed initiatives with Tenant for conservation (4.5)

4.7 Experience of other land with conservation restrictions

4.8 Suggestions for better mechanisms

4.10 Effect of length of the term (on farming practice and conservation)

5. Other Schemes and Agreements

5.1 Problems (conflict with tenancy agreement, length, other) (5.4)
5.2 Effectiveness (5.5)

6. Use of the Tenancy Agreement Document

6.1 Involvement in preparation

6.2 Where kept

6.3 How often referred to

6.4 How easy to understand

6.5 Possible improvement (use of maps/lay out/type of prescription)

7. Relationship with Tenant

7.1 Type/frequency of contact (8.1)

7.2 Decision making process (8.2)

7.3 Problems/disputes (improvements, fixtures, husbandry matters, cropping and stocking regimes, breaches of covenant, rent) (8.3)

7.4 Means of resolution (8.4)

7.5 General suggestions for improving landlord/tenant relationship

General Comments ...........
National Trust Standard Conservation Clause

54 (a) Not to carry out any of the following works or acts without having obtained the Landlord's prior approval in writing:

(i) any works of maintenance or repair to such live and dead hedges or fences banks fields walls bridges culverts ponds hatches watercourse ditches as are specified in Schedule 3(i)

(ii) introduce stock onto the areas specified in Schedule 3(ii) in excess of the numbers and in each case only during the periods specified by the Landlord

(iii) apply herbicides pesticides or fertiliser to the areas specified in Schedule 3(iii) and in each case not to undertake in those areas any measures for the elimination of any pesticides of plant or animal life or the destruction of the natural habitat of those species

(iv) destroy alter or reduce in height any hedge fence bank or wall or obliterate any landmark or boundary or create any new boundary whereby the size or shape of the fields or the general layout of the holding is changed

(v) break up drain lime or treat with artificial fertiliser or herbicide any downland wetland heather or other moorland so described in Schedule 3(iv) nor to plough or break up burn spray or otherwise damage or destroy gorse heather bracken brambles or scrub

(vi) break the surface of the ground covering the sites of any archaeological or other monuments including those specified in Schedule 3(v) hereto and not to deface or damage or permit to be defaced or damaged such monument whether buried or not and in particular to use his best endeavours to prevent damage by any burrowing animals

In each case for one or more of the purposes specified in Schedule 3 Part II Section 9(2) of the Agricultural Holdings Act 1986

(b) It is hereby recorded and agreed that the Landlord shall be empowered at his absolute discretion to add in furtherance of the purposes specified in Schedule 3 Part II Section 9(2) of the Agricultural Holdings Act 1986 any further prohibition to be inserted in sub-clause (a) hereof and Schedule 3

(c) In those cases where the Landlord gives his consent under sub-clause (a) hereof to conform to any conditions imposed by the Landlord in granting such consent

313
THE THIRD SCHEDULE

(Referred to in Clause 54)

(i) Hedges fences banks field walls bridges culverts ponds hatches water courses ditches of archaeological historic or natural history importance or significance

(ii) Areas of biological importance or significance for the preservation of which stocking levels and periods must be controlled

(iii) Areas subject to restrictions re herbicides pesticides or fertiliser

(iv) Areas of downland wetland heather and other moorland

(v) Archaeological or other monuments
Example Contents Page of a Farm and Environment Plan

(Mixed Lowland Dairy and Arable Farm - National Trust)

1. Introduction

2. Access (Map 1)
   2.1 Public Rights of Way
   2.2 Permitted Access
   2.3 Tenant's Access

3. Maintenance (Map 2)
   3.1 Fencing
   3.2 Walls
   3.3 Gates and Gateposts
   3.4 Hedges
   3.5 Tracks
   3.6 Irrigation Systems

4. Use of Fertilisers, Chemicals and Other Products (Map 3)
   4.1 Farm Wastes/Organic Fertilisers
   4.2 Herbicides, Pesticides and Inorganic Fertilisers
   4.3 Veterinary Products
   4.4 Environmental Protection

5. Waste Disposal
   5.1 Sheep Dipping
   5.2 Disposal of Dead Animals
   5.3 Dumping/Tipping/Burning
   5.4 Pest and Predator Control
   5.5 Firearms and Shooting

6. Nature Conservation Interest (Maps 4 and 5)
   7.1 Parkland Trees and Wood Pasture
   7.2 Watercourses, Ditches and Streams
   7.3 Water Meadows
   7.4 Species Protection

8. Archaeology (Map 5)

9. Fuel and Silage Storage
   9.1 Fuel Storage
   9.2 Silage

10. Water Extraction
RECOMMENDATIONS

RECOMMENDATION 1

The agricultural nature of the terminology in the 1986 Act creates problems for landlords and tenants interested in conservation. The rules of good husbandry and the definition of agriculture from the 1986 Act need to be redefined. In the absence of such a change, the parties should seek new ways of setting up-to-date husbandry standards in farm business tenancies.

RECOMMENDATION 2

Schedule 1 of the 1986 Act should be amended to enable the inclusion of conservation covenants, similar to those defined in Part II of Schedule 3 of the Act, on an application under s.6.

RECOMMENDATION 3

The environmental impact of security of tenure and succession rights is not straightforward. The importance of this issue will, in any event, decline with the years. In the meantime, for the conservation landlord, opportunities for re-negotiation and the insertion of conservation provisions often arise on succession or during a protected tenancy. These opportunities should be grasped.

RECOMMENDATION 4

Educational and other initiatives need to be taken by conservation and professional bodies, and their individual members, to promote amongst farmers and landowners the opportunities for environmental management arising out of the 1995 Act, and to offer advice and guidance.

RECOMMENDATION 5

The incorporation of conservation provisions in agricultural tenancy agreements is easier under the 1995 Act. However, the enforcement of such clauses remains problematic. Careful drafting is needed to ensure that the most effective types of clauses are in place.

RECOMMENDATION 6

The signs are that farmers are likely to farm more intensively in short-term lettings. Further research, of a scientific nature, is necessary on the real effects of short-term tenancy arrangements on land management practices.

RECOMMENDATION 7

A review of the implications of short-term farm business tenancies on the take-up and effectiveness of Government environmental incentive schemes should be undertaken and appropriate measures taken to alleviate any negative effects.

RECOMMENDATION 8

Conservation landlords need to be realistic about the rents they seek on environmentally valuable holdings. It is probable that they will acquire a tenant with a more sensitive management style if they do not accept the highest tender. They should also be amenable to the concept of smaller farms being part-time holdings.
RECOMMENDATION 9

The parties need to consider carefully all the general terms of new farm business tenancies to ensure that they put in place a clear and appropriate régime for the features on a holding.

RECOMMENDATION 10

Careful attention needs to be paid by all parties to the compatibility of obligations under tenancy agreements and Government management agreements affecting the same holding.

RECOMMENDATION 11

Where conservation covenants are in place in a tenancy agreement, these should be ignored by Government agencies in deciding whether or not to offer a management agreement for that holding under an incentive scheme.

RECOMMENDATION 12

The administration of the Government’s environmental incentive schemes should be rationalised and integrated, along the lines suggested by Rodgers and Bishop (1998). Ideally farmers should have one point of contact with one Government agency.

RECOMMENDATION 13

In the administration of Government environmental incentive schemes there should be introduced a model form of contract or management agreement which can contain all the prescriptions affecting a holding in one document.

RECOMMENDATION 14

Farmers should be provided with education and training opportunities in conservation management as part of their participation in Government environmental schemes.

RECOMMENDATION 15

The staff of Government conservation agencies should, by the operation of recruitment and training policies, become more conversant in agricultural policy and practice and be prepared to listen to and learn from the agricultural community, particularly at a local level.

RECOMMENDATION 16

From the outset of a new agreement, the parties need to consider carefully all the relevant factors, legal and practical, in setting up an agreement that is compatible with the landlord’s objectives, the tenant’s aspirations and the environmental schemes available. Where necessary, this will have to be with professional advice.

RECOMMENDATION 17

The actual tenancy agreement document will assume more importance under the 1995 Act, as its provisions will not be so uniform and the culture not so well understood by the parties. Careful negotiation and drafting will therefore be paramount, and clarity and conciseness imperative.
RECOMMENDATION 18

Further research and experimentation is necessary to establish the effectiveness and best model for whole farm plans, and the practicality of incorporating them into enforceable legal documents. In essence, however, where the resources are available they appear to be useful management tool.

RECOMMENDATION 19

Under the 1995 Act, the actual contents of agricultural tenancy agreements will vary greatly. Careful scrutiny of management obligations contained in them will need to be maintained by the parties in order to comply with, or monitor them. To this extent, where possible, obligations should be prepared after consultation with all the parties, and explained clearly to the farmer.

RECOMMENDATION 20

Lessons for the preparing of conservation covenants in tenancy agreements should be learnt from the experiences of Government agencies in the formulating of management agreement structures and detail. In particular, the experiences of English Nature with the Wildlife Enhancement Scheme and Site Management Statements and the Countryside Council for Wales with Tir Gofal should be reviewed.

RECOMMENDATION 21

Conservation covenants in tenancy agreements should, where possible, be positive rather than negative, specify ends rather than means, and combine general and site specific prescriptions.

RECOMMENDATION 22

The choice of tenant is the single most important factor in the success of a conservation letting. It is necessary to have a farmer who is sympathetic to the landlord's objectives, whilst being competent in the husbandry practices necessary to fulfil them. The landlord's objectives should be clearly set out, for the holding and, where appropriate, at a national or regional level.

RECOMMENDATION 23

Communication between landlords and tenants should be frequent, open and consistent. Tenants need to have one point of contact with a person who has decision-making power.

RECOMMENDATION 24

Monitoring and enforcement of environmental agreements is most effectively carried out on an informal and flexible basis. Notwithstanding this, legal documentation should be drafted in such a way that it can be relied on in the event of communications breaking down.

RECOMMENDATION 25

The operation of conservation provisions in agricultural lettings and how the pattern of lettings affects the countryside will increasingly become a matter of public interest. Channels should be kept open whereby a flow of information can be effectively maintained between the interested parties and Government agencies.

RECOMMENDATION 26

The potential for applying the results of this research to other fields of environmental law and policy, in the UK and in other jurisdictions should be recognised and explored.
BIBLIOGRAPHY


Agriculture Committee of the House of Commons (1997) *ESAs and Other Schemes under the Agri-Environment Regulation* (2nd Report) Volume 1, Stationery Office


Agnew of Lochnaw C (1996) *Agricultural Law in Scotland* Butterworths


Bryman A and Burgess R G (1994) *Analysing Qualitative Data* Routledge


Clarke A and O'Riordan T (1989) *A Case for a Farm Conservation Unit* ECOS 10 (2) 30


Colman D, Crabtree B, Froud and O'Carroll L (1992) *Comparative Effectiveness of Conservation Mechanisms* Dept of Agricultural Economics, University of Manchester


Country Landowners' Association (1989) *Enterprise in the Rural Environment* CLA

Country Landowners' Association (1993) *Share Farming - The Practice (3rd Ed.)* CLA

Country Landowners' Association (1994) *Focus on the CAP* CLA


Countryside Council for Wales (1997) *Tir Cymen - the First Five Years* CCW


Elworthy S (1994) *Farming for Drinking Water* Avebury

Erickson D And De Young R (1993) *Management of Farm Woodlots and Windbreaks - Some Psychological and Landscape Patterns* Journal of Environmental Systems 22 (3) 233


Gasson R and Winter M (1993) *Entry to Farming* Farm Management 8 (6)


Gregory M (1994) *Conservation Law in the Countryside* Tolley

Grossman M R and Brussaard W (1992) *Agrarian Land Law in the Western World* CAB

Hamilton N D (1984/5) *Legal Aspects of Farm Tenancy in Iowa* Drake Law Review 34 (2) 267

Hansard, House of Commons and House of Lords (Various)


Hill B and Gasson R (1985) *Farm Tenure and Farming Practice* Journal of Agricultural Economics 36 187


Hodge I D (1988) *Property Institutions and Environmental Improvement* Journal of Agricultural Economics 39 369


Hodge I D, Adams W M and Bourn N A D (1994) *Conservation Policy in the Wider Countryside: Agency Competition and Innovation* Journal of Environmental Planning and Management 37 (2) 199


Holland A and Rawles K (1993) *Values in Conservation* ECOS 14 (1) 14


Hughes D (1992) *Environmental Law (2nd Ed.)* Butterworths


MacDermott H (1988) *The Role of Limited Partnerships in Scottish Agriculture* Conference paper Edinburgh School of Agriculture

Manley W (1998) *New Agricultural Tenancies: Conservation or Conflict?* ECOS 19 (2) 55
Manley W and Baines R (1999)  *Food and environment - barriers to the tenant farmer*  ROOTS Conference 1999 RICS


Ministry of Agriculture, Fisheries and Food  *Codes of Good Agricultural Practice for the Protection of Water (1991), Air (1992) and Soil (1993)*  MAFF


Munton R J C, Marsden T K and Eldon J (1988)  *Occupancy Change and the Farmed Landscape*  CCD 33 Countryside Commission


Pawlowski M (1993)  *The Forfeiture of Leases*  Sweet and Maxwell


Potter C (1990)  *Conservation under a European Farm Survival Policy*  Journal of Rural Studies 6 (1) 1

Potter C (1998)  *Against the Grain - Agri-Environmental Reform in the United States and the European Union*  CAB

326


Reid C (1994) Nature Conservation Law W. Green/Sweet and Maxwell


Rodgers C P (Ed.) (1996b) Nature Conservation and Countryside Law University of Wales


Royal Institution of Chartered Surveyors, Royal Town Planning Institute, County Planning Officers' Society and District Planning Officers' Society (1993) Tomorrow's Countryside RICS

Royal Institution of Chartered Surveyors (1977) The Future Pattern of Land Ownership and Occupation (discussion paper) RICS

Royal Institution of Chartered Surveyors (1983) Contractual Relationships in Farming RICS


Slatter M and Barr W (1987) *Farm Tenancies* BSP Professional Books


Whitby M C (Ed) (1994) *Incentives for Countryside Management - the Case for ESAs* CAB International


Whitehead I and Millard N (1999) *Flexibility and farm business tenancies: to what extent is the industry making full use of the new-found freedom?* ROOTS Conference 1999 RICS

Winter M, Richardson C, Short C and Watkins C (1990) *Agricultural Land Tenure in England and Wales* RICS


Young J D and Andrews D C M (Eds.) (1987) *Fixed Term Tenancies (seminar proceedings)* Royal Agricultural College, Cirencester