



**CROFTING COMMISSION
COIMISEAN NA CROITEARACHD**

COMMISSION MEETING

26 JUNE 2024

**CROFTING COMMISSION MEETING
ST KILDA, GREAT GLEN HOUSE
26 JUNE 2024 AT 0900 hrs**

AGENDA

- | | | |
|--|----------------|-----------------------|
| 1 APOLOGIES | <i>Oral</i> | <i>Standing Item</i> |
| 2 DECLARATIONS OF INTEREST | <i>Oral</i> | <i>Standing Item</i> |
| 3 DRAFT MINUTES FROM 8 MAY 2024* | <i>Minutes</i> | <i>For approval</i> |
| 4 REVIEW OF ACTION POINTS FROM PREVIOUS MEETING
(of 8 May 2024) | <i>Paper</i> | <i>For info</i> |
| 5 MATTERS ARISING FROM PREVIOUS MINUTES | <i>Oral</i> | <i>Standing Item</i> |
| 6 PROPOSED CHANGES TO TIER 3 (T3) PROCEDURES | <i>Paper</i> | <i>For approval</i> |
| 7 REVIEW OF CROFTING COMMISSION GOVERNANCE | <i>Paper</i> | <i>For discussion</i> |
| 8 RESUMPTION APPLICATIONS | <i>Paper</i> | <i>For decision</i> |
| 9 DATE OF NEXT MEETING
21 August 2024 – St Kilda | | |
| 10 ANY URGENT BUSINESS | | |
| 11 EXCLUSION OF THE PRESS AND PUBLIC | | |

**Not included in public copy*

APOLOGIES – ORAL

DECLARATIONS OF INTEREST – ORAL

CROFTING COMMISSION MEETING

26 June 2024

Report by the Chief Executive

Review of Action Points from 8 May and 23 January 2024

ACTION POINTS FROM 8 MAY 2024

ITEM	ACTION	RESPONSIBLE OFFICER	DEADLINE	DATE COMPLETED	COMMENTS
1	The wording of the action point to be amended as per the Board agreement.	CEO/PA	ASAP	09/05/2024	Changed as agreed by the Board (action 4 from 20/03/2024)
2	The CEO to bring a paper to the June board detailing a proposal for a formal Board led review of Governance, to include the wider organisational structure.	CEO	For June Board	June 2024	Paper being presented in June Board, will be completed once this has happened.
3	New entry on the strategic risk register relating to succession to be created with CEO as the owner.	DOP	ASAP	12/06/2024	
4	CEO to include as an agenda item for the next sponsor meeting to discuss next steps.	CEO	Next sponsor meeting	June 2024	References combining registration of common grazing with assessments of peatland for restoration by Nature Scot
5	A draft training plan is to be produced and taken to the AFC prior to presentation to the Board for agreement.	CEO	By next AFC	June 2024	CEO to discuss with vice chair of AFC
6	Head of Policy, Development and Grazings to share the data behind the land matching service update paper to the Board.	Head of PDGC	ASAP	08/05/2024	Sent via email on 08/05/2024 at 12:48
7	Question to be clarified at next sponsor meeting and update given at the next Board meeting as part of the action points item.	CEO	For June Board	June 2024	References a query around funding for peatland restoration and CAGS.
8	Commissioner Thin to share On Board guidance with Director of Operations for onward cascade to all Board members and Commission ET and SMT.	Commissioner Thin / DOP	ASAP	09/05/2024	Sent via email on 09/05/2024 at 09:53
9	The Convener to propose to the Minister that the post for the new Convener be advertised externally.	Convener	ASAP	11/06/2024	
10	Convener to write to chair of the Cross-Party Group to personally offer apologies for the Convener and CEO not being able to attend and the reasons why and note that Commissioner Rod Mackenzie will attend to represent the Convener.	Convener	ASAP	10/05/2024	

ACTION POINTS FROM 23 JANUARY 2024

ITEM	ACTION	RESPONSIBLE OFFICER	DEADLINE	DATE COMPLETED	COMMENTS
5	A dialogue is started with SF/WCC with a view to making amendments to the WCC so that it is clear that woodland creation on land subject to crofting tenure can be validated and is eligible for the creation of carbon units	DF	Begin by May		
6	Separately, a dialogue is started with Scottish Forestry in order to facilitate SFGS applications by grazings committees, should committees wish to go down the subsidy route rather than the private/WCC route. Currently it is understood that applications are at a very low level.	DF	Begin by May		Run together with 5 above
9	Position Papers to be drafted on key regulatory areas during the next 12 months.	CEO	After 'Vision' paper		

MATTERS ARISING FROM PREVIOUS MINUTES – ORAL

CROFTING COMMISSION MEETING

26 June 2024

Report by the CEO

Proposed changes to Tier Three (T3) procedures.

SUMMARY

This paper sets out proposals to change the Tier Three procedures to ensure better alignment with the governance of the Commission.

BACKGROUND

An essential principle of good regulation is that equivalent applications should always produce the same outcome when put through the same regulatory system. The Tier Three process applied until now has the potential to have perceived flaws in terms of governance and outcomes. These have been raised by more than one Commissioner.

TIER THREE AND THE COMMISSIONERS

Tier Three (T3) Casework Group members make a decision on behalf of the Crofting Commission as a corporate body and as established by statute. Any decision(s) will be the decision(s) of the Commission as a public body.

Until March this year, complex cases were escalated to a T3 Casework Group made up of three Commissioners for a decision to be made on behalf of the Commission. In addition, after a decision was made, the grounds for supporting that decision were then drawn up by staff after the event. One concern was that if a different three Commissioners had been chosen, they might arrive at a different outcome. As such, we now propose moving to a process where all the Commissioners sit to hear T3 cases on behalf of the Commission thus taking these concerns away.

In addition, it could be perceived that by writing up the grounds for a decision afterwards, staff might just be seen to be justifying a decision after it had been made. As such, the process should now be changed in that when the case goes to a T3 meeting, legal advice and, where appropriate, draft grounds, go with it for the Commissioners to discuss and take into consideration.

PROPOSED CHANGE

It is proposed that T3 decisions will now be taken by a Casework Group comprising all Commissioners and that these meetings will be arranged to take place on the same day as existing Board meetings. In addition, the process should now be changed in that when a case goes to a T3 meeting, where appropriate, draft grounds go with it for the Commissioners to discuss and take into consideration when making a decision on behalf of the Commission. It is recognised, though, that this may sometimes involve multiple sets of grounds where different outcomes are possible, and that it may not always be possible to finalise all grounds during the T3 meeting.

IMPACT

Overall, this will address the perception that different groups of Commissioners (on behalf of the Commission as a body corporate) might have come to different conclusions. In addition, it will also allow the T3 casework group to make a decision on behalf of the Commission, with legal advice and any relevant grounds and material considerations to enable a decision having been presented to them as part of the papers. What this means in practice is that cases elevated to a Tier 3 level will (other than those that through the existing scheme have to be elevated as a matter of course) be those that:

- 1) The staff cannot decide due to a conflict of interest (for example, where the Commission's solicitor has in the past acted for one of the parties – this happens only occasionally and with decreasing frequency);
- 2) Those where there are two or more valid outcomes based on the facts and circumstances of the case; and
- 3) Those that the staff cannot apply the Commission policy clearly and / or risk appetite to without further guidance. In this case, a pre-escalation review will be undertaken by the Commission's executive team as a final check that the case is not appropriate for a T2 decision.

In all these cases, all material evidence and any grounds will be supplied. Given the nature of these, it is correct that no recommendations be made by Commission staff. As a result, if this process is followed, it is expected that significantly less will be elevated to T3, hence in most instances, the end-to-end application time will be reduced on average.

As noted, the only other referrals to Tier 3 will be those that have to be elevated as a matter of course as outlined in the existing scheme of delegation. These will, though, normally come with a recommendation, as well as the grounds and material evidence.

LAND COURT

A further argument in support of this process change has also come from the Land Court in a meeting with Lord Duthie, the new Chair of the Court, and he suggested that in addition to a decision and the supporting grounds, there should be a note of the reasons behind it (i.e. the discussion and any options considered that were integral to reaching the decision and grounds) included in the final direction issued by the Commission. By including such information in the finalised grounds of the meeting, it will make the process even more robust.

This change would also reflect more clearly the decision-making process that is followed in the Land Court thus aligning us more closely with other bodies that may hear evidence of such cases. Although it is likely that the Commission is not expected to follow such a high standard as it is not a court of law, the Commission is nevertheless bound by general public and administrative law principles to give fully reasoned decisions. It is also bound to follow the principles of natural justice and to exercise its discretion reasonably.

ANNEX

See link below for Annex A that outlines a proposed updated law, policies and procedures for T3 meetings.

<https://www.crofting.scotland.gov.uk/userfiles/file/appendices/20240626/6-Annex-A.pdf>

SUMMARY

The Board has expressed a wish to accept more risk in the regulatory decision-making process if it results in more efficient processing of casework. However, Commissioners have also raised possible governance issues with the current Tier 3 process. The changes proposed here will address these concerns and also, through the process now required to escalate a case to T3, more are expected to be decided at T2 thus helping with the efficient discharge of cases going forward.

This will likely require changes to be made to the existing Scheme of Delegation. Any changes will be brought forward as a separate paper for approval at a future Board meeting.

Impact:	Comments
Financial	The shift to more decisions at T2 may result in the potential for more cases to be appealed which, if lost, could result in some financial impact for the Commission.
Legal/Political	As above, there could be a small increase in cases being appealed due to increased decision making of complex cases at T2, which may involve additional legal work and resource implications on the Commission solicitor.
HR/staff resources	More work may have to be undertaken prior to T3 meetings but overall this should lead to greater efficiencies as a whole.

<p>RECOMMENDATION</p> <p>The Board is invited approve these changes.</p>
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Date 7 June 2024

Author Gary Campbell, CEO

CROFTING COMMISSION MEETING

26 June 2024

Report by the CEO

Review of Crofting Commission Governance

SUMMARY

This paper sets out proposals regarding a potential review of the governance of the Crofting Commission.

BACKGROUND

It is essential that the Commission has robust governance procedures and then adheres to them. These procedures should incorporate the role of the Board as a non-exec Board of an executive NDPB, the role of Commissioners in their executive capacity in carrying out actions on behalf of the Commission and the actions of Commission staff. The relationship with, and actions of the SG Sponsor division should also form part of any review. The requirement for a review has been raised by more than one Commissioner.

OPERATIONAL GOVERNANCE

Commissioners

In the Crofting Commission, the Board members have two distinct roles (1) a non-exec role as required by the SG (as we are considered to be an executive NDPB) and (2) a separate and very distinct executive role as Commissioners that make up the Crofting Commission. For example, case decisions made by the Commissioners are made as part of the members' executive role in carrying out the functions of the Commission, as opposed to overseeing it as a non-exec Board would. Any governance review would, therefore, have to look at these two distinct aspects that affect Commissioners. Furthermore, any governance review of the non-exec roles should include a review of the relationship between the Commission and the SG Ministers.

Staff

Staff are employed directly by SG and are therefore governed by the Civil Service Code. In terms of their relationship with the Commission (and as part of that, the Commissioners), this should be included in any governance review of either the non-exec or exec role of the Commissioners.

STRATEGIC -v- OPERATIONAL GOVERNANCE

Strategic governance is a matter of the Board and the Commissioners in their role as NDPB Board members. Strategic governance should include the relationship between SG and the Commission. Operational governance for the staff is covered by the civil service code. There is, however, an area of operational governance that impacts on both staff and Commissioners – this arises when Commissioners are undertaking executive work as the Crofting Commission.

OPERATIONAL GOVERNANCE AND THE COMMISSIONERS

In the first few months of 2024, steps have been taken to address issues that Commissioners have raised regarding this:

- **Tier three (T3) processes**

These have now been reviewed and new procedures put in place. These should address the issues raised in terms of the perception that different T3 panels may come to different outcomes and the further perception that staff could influence which cases would be heard by which Commissioners. The process has also been streamlined in accordance with the Board's appetite for risk meaning that more cases should be decided at T1 and T2 within the scheme of delegation. As part of this change, review dates for effectiveness monitoring have been included.

- **Commissioner/staff contact**

It has now been agreed that any substantive contact will be made via the Convener and CEO.

STRATEGIC GOVERNANCE

There is an opportunity to undertake a review of strategic governance in the Commission. This should include:

- The relationship with the SG and Ministers and the management of such.
- The management structure in terms of the control that the Board/Commissioners have over the staff employed to work on behalf of the Commission.

A number of issues have arisen in late 2023 / early 2024 that have highlighted potential deficiencies in these areas. This has been recognised by the Board of the Commission, the staff executive team and SG staff.

SUMMARY

At present, there are other ongoing matters that make it inappropriate for a strategic governance review to take place. It is therefore proposed that this work is brought back to the Board in the form of a paper outlining a suggested way forward once these other matters are concluded. In terms of operational governance, steps have already been taken to address issues that have been raised and review dates have been included within this implementation.

Impact:	Comments
Financial	Possible external review costs
Legal/Political	Possible change to the relationship and reporting between the Commission and SG.
HR/staff resources	n/a

RECOMMENDATION

The Board is invited to approve that operational governance has been substantively addressed (with a review to be undertaken at the end of 2024) hence no further work is needed at this time. In addition, the Board is invited to approve that discussions should take place with SG re the appropriate timing and resourcing of a comprehensive review of strategic governance issues at a mutually agreed future date.

Date 31 May 2024

Author Gary Campbell, CEO

CROFTING COMMISSION MEETING

26 June 2024

Report by the Chief Executive

Resumption Applications

SUMMARY

Short paper to obtain directions from the Board on the Commission's approach to resumption applications.

BACKGROUND

Since 2010, the Commission has had a statutory right to oppose or support a resumption application to the Scottish Land Court under section 20(1A) of the Crofters (Scotland) Act 1993. The effect of a resumption order is to remove the land subject to the order from crofting tenure. The land is usually removed permanently, but the Court has a power to resume land temporarily where the development has a finite duration, such as a wind farm.

Officials are recommending increasing the extent of resumption applications it would consider opposing from 0.15 ha (the current threshold) to **0.5 ha**. This is proposed in order to ensure better use of staff resources. Only a very small number of applications in excess of 0.5 ha would be considered for opposing (see below). In fact, only four resumption applications have been opposed by the Commission in the last five years, but it is thought that the opposition achieved a beneficial outcome for the croft.

The Commission's official policy on this is set out here:

<https://www.crofting.scotland.gov.uk/userfiles/file/appendices/20240626/8-Annex-A.pdf>

For completeness, the Commission can also support a resumption application if it so wishes.

CURRENT POSITION

The Commission will consider opposing resumption applications which breach a parameter of 0.15 ha for house sites and/or cause concern due to their extent, location and purpose. To date, the Commission has opposed several resumption applications where it has had concerns about either (or both) the extent or purpose of the resumption application. In all applications the Commission has opposed, the resumption application has either been withdrawn, modified or the matter is currently sisted. The drawback of such opposition is that it can involve the Commission as an interested party in the resumption application, with the accompanying legal time and expenses. The benefits of such opposition are that it gives the Commission an opportunity to influence the outcome of resumption applications that are for an ill-defined purpose or are excessive in extent, thereby retaining additional land within crofting tenure. This land could be let and/or tenanted in future by a crofter.

This paper is not suggesting a change in policy, but a slight change in approach as to how that policy is implemented in a practical sense. The paper is also recommending aligning the agreed approach more closely with the current practice, which is to use the power to oppose only in a very small number of cases.

Impact:	Comments
Financial	See below.
Legal/Political	The Commission will be considering and opposing fewer resumption applications. This could draw criticism from some crofters who are of the view that resumption applications should be opposed more routinely.
HR/staff resources	Less staff time will be spent considering any resumption applications. Although the time saved will be small (up to an hour a week), over the course of a year this could amount to several days of work which will be used elsewhere.

RECOMMENDATION

To note the contents of this paper and discuss procedures for opposing resumption applications, with a recommendation from officials that the Commission will not even consider opposing any resumption application for under 0.5 ha (a change from the current 0.15 ha).

Most applications in excess of 0.5 ha will not be opposed. Many applications (for instance for a sports centre, car park, renewable energy development or housing development) will be in excess of 0.5 ha but the Commission would not consider opposing them. It is only where the Commission has serious concerns about the purpose applied for or the extent applied for that it will consider opposing such an application, and any decision to do so would be done on a case-by-case basis taking account of all the individual facts and circumstances. It is recommended that there could be occasions, which will likely be exceptional, where the Commission is able positively to affect the outcome of an application in a way that retains land within crofting tenure.

If accepted, this recommendation will reduce the amount of staff time spent considering resumption applications. It is not considered that it is a good use of staff time to be considering any resumption applications that are under 0.5 ha. It is also recommended that the approach agreed with the Board reflects the current practice of opposing only a very small number of applications.

Date 5 June 2024

Author David Findlay, Solicitor

DATE OF NEXT MEETING

21 August 2024 - St Kilda

ANY URGENT BUSINESS

EXCLUSION OF PRESS & PUBLIC