

COMMONS ACT 2006

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Registration

Registration of rights of common

Section 9 and Schedule 1: Severance

61. **Section 9** effects a prohibition on the severance of rights of common. Before the passing of the 1965 Act, most rights of common were attached to the land farmed by the commoner (the dominant tenement). The reason was that, at common law, the numbers of animals which could be grazed on the common by the commoner was determined by the capacity of the dominant tenement to accommodate animals over the winter (known as rules of 'levancy and couchancy'). Typically the common was not grazed in winter and dates were established when animals were allowed on to the common and when they had to be removed. Livestock usually had to be over-wintered on commoners' own farms which imposed a natural ceiling on their grazing rights. Such rights, while not explicitly quantified, were thus subject to a theoretically measurable constraint. It was therefore not possible to trade in a right of common separately from the land owned by the commoner, as the right could not exist independently of the dominant tenement because it was defined by reference to the dominant tenement. The courts adopted a rule that any purported severance of unquantified rights from the holding to which they were attached would extinguish the rights.
62. Section 15 of the 1965 Act required that, for the purposes of registration, all commoners register the actual number of animals in respect of which they claimed rights of grazing. This meant that, once rights of grazing had been quantified and registered, the capacity of the commoner's own holding to over-winter stock ceased to be relevant. In *Bettison v. Langton*¹, the House of Lords determined that a consequence of the quantification of grazing rights as required by section 15 of the 1965 Act was to enable a commoner to dispose of rights of common independently from the land to which they were traditionally attached (or, alternatively, to sell the land and retain the rights). This is known as 'severance'. Rights which have been severed become 'rights held in gross' and may be freely bought and sold as an incorporeal asset.
63. The problem with grazing rights which have been severed is that the local link between the commoners and the land over which the grazing rights are exercised may be lost since the owner of the rights can sell them to anyone, including farmers who live far away from the common. This can cause management difficulties for common land where some right holders have no close contact with the common and those who manage it.

¹ *Bettison and another v. Langton and others* [2001] 1 AC 27.

*These notes refer to the Commons Act 2006 (c.26)
which received Royal Assent on 19 July 2006*

64. **Section 9** prohibits further severance of rights of common, subject to the exceptions specified in Schedule 1 or in any other Act². Section 9, and therefore the exceptions in Schedule 1, apply only to registered rights of common which would otherwise (apart from section 9) be capable of being severed. They do not, therefore, apply to rights of common which remain unquantified (such as a right to gather firewood or to dig peat for the hearth), nor are they likely to apply to ‘appendant rights’ (which the courts have held not to be severable, regardless of whether the right is quantified).
65. *Subsections (3) and (4)* make provision about any disposition of rights of common attached to land or any disposition of land to which rights of common are attached by which rights are purported to be severed, so that the severance is of no effect. *Subsections (3) and (4)* only apply to dispositions made after the commencement of section 9. *Subsection (3)* provides that an instrument (such as a conveyance) which purports to effect the severance of a right of common from the dominant tenement, is to be void to the extent that it would effect severance. So where a conveyance provides that the rights attached to a dominant tenement are to be conveyed from X to Y (but X remains the owner of the dominant tenement), the conveyance will be void to the extent to which it conveys the rights, and the rights will remain attached to X’s dominant tenement. *Subsection (4)* also provides that a disposition of the dominant tenement by which the rights are purported to be reserved to the vendor has effect so that the rights are conveyed with the land, notwithstanding the terms of the conveyance.
66. *Subsection (5)* provides that the apportionment of rights of common must be *pro rata*. To the extent that any instrument purports to apportion otherwise than *pro rata*, it will be void. This means that, where a dominant tenement is divided into two or more parcels in separate ownership (for example, on a sale of a farm in two separate lots), the rights attached to the original dominant tenement are assigned proportionately to the separate parcels according to the area of each parcel relative to the area of the original dominant tenement. The reason for this is that non-*pro rata* apportionment is a form of severance. For example, a commoner might own land to which 100 rights to graze cattle are attached. That commoner sells half that land to X and half the land to Y, but purports to assign 75 of the rights as attached to X’s land and 25 as attached to Y’s land. In that case the instrument of sale will be void to the extent that it purports to convey more (or for that matter less) than half the rights of common with each of the two parcels of land.
67. *Subsection (6)* provides that this section does not affect rights of common which were permanently severed by an instrument made before, or pursuant to a contract in writing made before, 28 June 2005, the day following the date of introduction of the Commons Bill into Parliament, and *subsection (7)* specifies that the section is deemed to have come into force on that date. The purpose of this is to prevent commoners from severing rights of common after the date of introduction but before the Bill received Royal Assent. *Subsection (7)* also enables orders under paragraph 2 of Schedule 1 (which permits temporary severance by way of the letting or licensing of rights of common) to have effect from the same date. Such an order cannot be made until after Royal Assent, but a draft statutory instrument intended to have retrospective effect was published in draft soon after the date of introduction.
68. **Schedule 1** sets out the exceptions to the prohibition on severance contained in section 9. Paragraph 1 contains a limited exception to the prohibition in relation to rights acquired by a commons council (established under Part 2), Natural England and the Countryside Council for Wales, provided that the transfer of the severed rights to any such body is duly registered in accordance with sub-paragraph (6) (see also the transitional provision in section 57). This exception will enable the continued acquisition of rights of common in furtherance of nature conservation. (Natural England is a new integrated agency created under the Natural Environment and Rural Communities Act 2006 which is

² The only enactment known to permit severance in certain circumstances is contained in section 33 of the Greenham and Crookham Commons Act 2002.

*These notes refer to the Commons Act 2006 (c.26)
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expected to assume the functions of English Nature, part of the Countryside Agency and the Rural Development Service of Defra.)

69. Where rights are to be acquired by either Natural England or the Countryside Council for Wales, sub-paragraph (2) provides that notice must be given of its intention to the owner of the land and (where there is no commons council established under Part 2 of the Act) any voluntary commoners' association or other body representing the commoners in accordance with sub-paragraph (3). Sub-paragraph (4) provides that if a commons council has been established under Part 2, that council must consent to the acquisition of the rights.
70. The exception to the prohibition on severance in paragraph 2 permits the temporary severance of rights in accordance with an order made by the appropriate national authority or, where a commons council has been established in relation to a common, any rules which may have been made by the council. An order (or rules) may, for example, enable a commoner to lease or license rights of common for a maximum period specified in the order, so that the rights are severed from the land only for so long as the lease or licence endures. Sub-paragraph (2) explains that such an order (or rules) may relate to particular commons or particular classes of persons, and sub-paragraph (4) enables an order to prescribe the form or content of any instrument of letting or licensing. Rules made by a commons council about the leasing or licensing of attached rights of common are to take precedence over provision in an order (sub-paragraph (3)).
71. [Paragraph 3](#) permits the permanent severance of rights in accordance with an order made by the appropriate national authority. Sub-paragraph (2) provides that an order may be made only in relation to particular land or descriptions of land (such as all commons within a defined locality), and may restrict the transfer of rights to particular persons or descriptions of persons (such as persons who are already entitled to exercise rights of common over the same common).
72. Sub-paragraph (3) provides that the appropriate national authority, before making an order under paragraph 3, must consult bodies representing owners and commoners affected by the order. For example, the appropriate national authority would need to consult any (voluntary) commoners' association, any statutory commons council, and any common owners' association.
73. Sub-paragraph (4) enables an order under paragraph 3 to provide that, in any particular case, a right is not to be severed unless the owner of the common (over which the right is exercisable) has been notified, and has given his consent. However, sub-paragraph (5) enables the order to provide for notice and consent to be deemed to have been given in certain circumstances: for example, the order may provide that notice may be posted on the land if the owner cannot be identified, or that the consent of the owner may be deemed if he does not object to the proposed severance within a specified period. Sub-paragraph (6) enables the order to also provide that the consent of the owner may be deemed if consent is unreasonably withheld, and that the order may provide in what circumstances consent is to be regarded as unreasonably withheld and for the resolution of any dispute arising.
74. Where the right is transferred to a person who is already entitled to rights of common over the same land (or substantially the same land) as the right to be severed, by virtue of his ownership of a dominant tenement to which those rights of common are attached, the order may by virtue of sub-paragraph (8) require the transferee to apply for the severed right to be registered as attached to the same dominant tenement in order for the severance to be effective.
75. [Section 9](#) and Schedule 1 must be read with section 57 which makes transitional provision in relation to the early commencement of section 9 and Schedule 1.

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76. [Part 1](#) of Schedule 6 repeals two provisions contained in local enactments which prohibit the severance of rights of common (section 8 of the Dartmoor Commons Act 1985 and section 33(1) of the Greenham and Crookham Commons Act 2002), and section 9 replaces those local provisions with a nationally consistent measure.