

COMMONS ACT 2006

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Registration

Registration of rights of common

52. Sections 6 to 13 and Schedule 1 make provision about dispositions such as the creation, variation or surrender of rights of common. Sections 6, 7, 12 and 13 and paragraphs 1 and 3 of Schedule 1 include provisions that a registrable disposition of rights of common (*i.e.* a disposition requiring an entry in a commons register to be made or amended) shall operate at law only where the disposition complies with such requirements as to form and content as regulations may prescribe, and where the disposition is registered. It is intended under these provisions to make regulations requiring each type of registrable disposition of a right of common to be made in a prescribed form. There are further powers in section 24 to make regulations about applications to a commons registration authority under these sections, the determination of such applications, and the consequential amendments required to the register.

Section 6 Creation

53. It was not possible under the 1965 Act to register the creation of new rights of common over registered land. Section 6 makes it impossible, apart from by statute, to create a new right other than by express grant and then only if the newly created right is attached to land (*i.e.* there must be a dominant tenement in relation to such a right). It will not be possible to create new rights of common over an existing registered town or village green. The section therefore makes it impossible to create a right by reservation or prescription, or to create a new right in gross. The effect of creating a right of common over unregistered land will be to cause the land to become registrable as common land.
54. *Subsection (6)* provides that the creation of a new right of common consisting of a right to graze animals is not to be registered if in the opinion of the commons registration authority the land over which the right is exercisable would be unable to sustain the exercise of that right taken with any other rights exercisable over that land.

Section 7 Variation

55. *Subsection (1)* provides that a right of common is to be regarded as varied if it is altered as specified in paragraphs (a) to (c). A variation includes an alteration in the quantification of the right (for example, the number of animals that may be grazed by virtue of a right), as well as an alteration in respect of the land over which the right is exercisable so as to introduce new land in addition to or in substitution for all or part of the land over which it was formerly exercisable. But *subsection (2)* provides that the right may be varied so as to become exercisable over new land only if that land is not already registered as a town or village green. *Subsection (5)* places a restriction on the power to vary a right of common consisting of the right to graze animals, similar to the restriction contained in section 6(6). A variation does not include a reduction in

the land over which a right is exercisable (other than in the circumstances described in *subsection (1)(a)*) — it may be possible to effect such an alteration by means of surrender under section 13.

Section 8 Apportionment

56. **Section 8** enables regulations to be made regarding the amendment of the commons registers where rights of common are to be apportioned. Apportionment occurs where land to which rights of common are attached (the dominant tenement) is divided into two or more parcels in separate ownership (*e.g.* where the owner sells only part of the land and retains the remainder). Generally, it is not intended that the apportionment of rights of common should be registered. Instead, rights will be shown as attached to the dominant tenement with which they were associated when an entry in respect of those rights was last made in the register. Subsequent changes to the dominant tenement will not be recorded (but see *subsection (5)* of section 9 for provision with regard to *pro rata* apportionment).
57. This is best illustrated by an example. Assume a common subject to rights to graze 100 sheep, where the register shows that the rights are divided equally between farms A and B, each dominant tenement having the right to graze 50 sheep attached to it. The owner of Farm A dies and the farm is divided equally between that owner's two children. Two new dominant tenements A1 and A2 come into being and the operation of Part 1 of the Act will ensure that to each is attached the right to graze 25 sheep. Farm B is sold to a developer who in turn sells it off in 50 plots of equal size, each with a house built on it. Each of those plots will have the right to graze one sheep. The register will show a common subject to two separate rights to graze sheep attached to the two 'historic' dominant tenements, A and B. The register would in each case identify the rights and identify the land to which they were attached. At the conclusion of the events described above, the owners of the new dominant tenements formerly comprised in farms A and B will be able to trace their entitlement to exercise their rights of common by reference to the historic dominant tenements subsisting in the register. For example, each owner of a house built on farm B will be able to show that they occupy 1/50th part of the area of the historic dominant tenement B, and (applying the rules of *pro rata* apportionment) therefore each has attached to it 1/50th of the rights recorded as attached to historic dominant tenement B. It will be possible to show that each owner is entitled to exercise the rights by virtue of the attachment of the rights to their house (the attachment will be shown in the commons register), and ownership of the house (which may be registered in the register of title to land kept by the Land Registry). The common law principle is that a right of common attached to land belongs to the owner for the time being of that land.
58. Any principle by which a right of common may be extinguished owing to the development of the dominant tenement so that it is incapable of benefiting from the right is abolished by section 13(3). In Defra's view, any fractional right which may arise in consequence of the rules of *pro rata* apportionment would be unexercisable, but (by virtue of section 13(3)) would not cease to exist.
59. However, where the rights attached to land which forms part of a historic dominant tenement are to be surrendered, varied or severed in accordance with the provisions in Part 1, it will be necessary to amend the register to record the previous apportionment of the rights. *Subsection (2)* enables regulations under *subsection (1)* to require the register to be amended in these circumstances.
60. *Subsection (3)* provides that, where the commons register has not been amended to reflect an apportionment of rights, the rights which arise as a result of that apportionment are to be treated as if they were separately registered. This provision is intended to ensure that each of the rights arising as a result of the apportionment is treated for the purposes of Part 1 of the Act as if it were registered, so that, for example, application may be made under section 12 to surrender and extinguish the

right notwithstanding that the right is not itself reflected in an individual entry in the register at the time of the application.

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.
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

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

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)
which received Royal Assent on 19 July 2006*

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 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.
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.

Section 10 Attachment

77. The existence of rights in gross can render the management of a common more difficult. At common law, it is impossible to convert a right in gross into an attached right. Section 10 enables rights of common held in gross to be attached to land. It is immaterial whether a right has previously been severed from a dominant tenement, or has always existed in gross. The right may be attached to a new dominant tenement on an application to the commons registration authority. An application for the attachment of a right of common to land must be made by the owner of the right, and the person entitled to occupy the land, if different, must consent to the application (*subsection (2)*).

Section 11 Re-allocation of attached rights

78. **Section 11** enables a right of common attached to a dominant tenement to be concentrated on part of the dominant tenement where another part is to be developed for non-agricultural use. For example, suppose a commoner owns land (the dominant tenement) to which a right to graze 100 sheep is attached. If one tenth of the land

is developed for a new road, the effect of the *pro rata* rules of apportionment (see paragraph 6666 above) would be that a right to graze 10 sheep would attach to the owner of the road. The effect of a successful application under section 11 will be that the developed land will cease to have any rights attached to it, and the land which remains undeveloped will enjoy all of the rights which formerly attached to the whole of the dominant tenement.

79. The section provides that the owner of the dominant tenement to which rights are attached may apply to the commons registration authority to exclude part of the dominant tenement from the register. An application may be made where the relevant part is not used for agricultural purposes, or has planning permission for non-agricultural use. An application may also be made where the land is subject to a compulsory purchase order which has been confirmed, but before the land is vested in the acquiring authority.
80. It will be possible for the appropriate national authority to make regulations under *subsection (5)* which provide what is and is not to be regarded as use of the land for agricultural purposes. It is expected, for example, that regulations will provide that land maintained in Good Agricultural and Environmental Condition in accordance with the cross-compliance conditions of the Single Payment Scheme³ is to be regarded as in agricultural use, regardless of whether the land is actually in productive use.
81. It is intended that applications should be made under this section while the commoner remains in control of the entire dominant tenement. So, for example, he may apply after the grant of planning permission for development of part of the dominant tenement, but before he disposes of that land to a developer. However, regulations made under section 24(2)(n) could enable an amendment to be made to the register in consequence of an application under the new section even where the application land has ceased to be owned by the applicant since the date of the application.

Section 12 Transfer of rights in gross

82. **Section 12** requires the transfer of any right of common held in gross (that is, a change in the ownership of a right which is not attached to any land) to comply with such requirements as to form and content as regulations may provide, and the transfer shall not operate at law until it has been registered.

Section 13 Surrender and extinguishment

83. At common law, a right of common could cease to exist by being surrendered by its owner (usually by a deed of release) or by being extinguished by operation of law. Section 13 requires the surrender of any right of common to be effected in a prescribed form, and delays the effect of the surrender until the right has been deleted from the commons registers. *Subsection (3)* provides that any other common law mechanism by which registered rights of common may cease to exist is abolished. These mechanisms are believed to comprise:
 - Unity of ownership (or unity of seisin): where the common land and the right come into the same ownership (typically, where the dominant tenement to which a right is attached is acquired by the owner of the common), then the right is extinguished. The effect of *subsection (3)* is that rights acquired by the owner of the common will be exercisable by that person in the same way as the rights were exercisable by their former owner.
 - Abandonment: where the owner of the rights can be shown to have irrevocably turned away from the use of the rights.

³ The Single Payment Scheme is a simplified Common Agricultural Policy subsidy system which provides payments generally in proportion to the area of eligible land farmed by the claimant, who must undertake to maintain that land in accordance with the standards of Good Agricultural and Environmental Condition: see Council Regulation (EC) No. 1782/2003.

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- Implied release: where a collective release of rights can be inferred over part of the common, typically where that part is inclosed by encroachment and the commoners acquiesce in the loss.
 - Alteration to the common, comprising destruction of the common land (such as where the land is reclaimed by the sea) or exhaustion of the product (such as peat which is subject to rights of turbary).
 - Alteration to the dominant tenement, comprising the demolition (without replacement) of a building to which rights (particularly rights of turbary) are attached, or the conversion of land to which rights (such as grazing) are attached to a use incapable of benefiting from the right (such as a reservoir).
84. These mechanisms are considered to be either redundant or of doubtful relevance where the existence of common land, and rights of common, is recorded in statutory registers. The powers in section 13 will provide a mechanism to extinguish rights of common.