

EXPLANATORY MEMORANDUM TO
THE COMMONS (SEVERANCE OF RIGHTS) (ENGLAND) ORDER
2006

2006 No. 2145

1. This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Description**

- 2.1 The Order enables limited exceptions to the prohibition on the severance of rights of common introduced by section 9 of the Commons Act 2006. Severance occurs when a person entitled to rights of common (a ‘commoner’) disposes of those rights independently from the land to which they are attached.

- 2.2 The Order permits the temporary severance of rights of common to graze animals from the land to which they are attached by enabling the leasing or licensing of the rights to a third party for no more than two years (article 2(1)(a)). Owners of land to which rights are attached who lease or licence that land, may retain to themselves the entitlement to exercise those rights (article 2(1)(b)).

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

- 3.1 The Order comes into force on 9 September 2006 and has effect from 28 June 2005 in order that any temporary leases or licences of rights of common to graze animals for a period of two years or less which were entered into after that date do not become unlawful upon the Act coming into force.
- 3.2 The retrospective application of the Order derives from the power conferred in section 9(7) of the Commons Act 2006.

4. **Legislative Background**

- 4.1 Section 9 of the Commons Act 2006 prohibits severance of rights of common, whether the severance is temporary (*e.g.* where the rights are licensed by the commoner to a third party) or permanent (*e.g.* where the rights are sold to one person, and the land to which the rights are attached is sold to another). The section applies only to rights of common which are (i) attached to land, and (ii) which may be severed under the law as it currently stands (*i.e.* following the judgment of the House of Lords in *Bettison and another v. Langton and others* [2001] 1 AC 27).
- 4.2 Section 9 provides that it is to have retrospective effect, so that the prohibition on severance is to be effective from the date of publication of the Bill (28 June 2005) following its introduction into the House of Lords. In effect, any conveyance or other transaction contrary to section 9 purported to have been made after that date is deemed

void in law. Section 9 does not affect any severance which gives effect to a contract made before 28 June 2005.

4.3 Paragraph 2 of Schedule 1 to the Commons Act 2006 enables the making of an order to prescribe exceptions to the general prohibition on severance, so as to permit temporary severance. Section 9(2) provides that an order made under this paragraph may have retrospective effect, so that the exceptions will apply from the same date as the prohibition.

4.4 The Order is the first exercise of delegated powers conferred under the Commons Act 2006.

5. Extent

5.1 This instrument applies to England.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 A right of common is a right, which one or more persons may have, to take or use some portion of that which another man's soil naturally produces (such as rights of grazing or to collect firewood). Most rights of common remain attached to the land farmed or held by the commoner. The rights may be exercised over the common, (which will be owned by someone other than the commoner). Traditionally, rights of grazing were quantified by reference to the capacity of the commoner's own land to support his livestock over the winter, so that a similar number might be turned out onto the common during the summer. The courts adopted a rule that any purported severance of unquantified rights from the land to which they were attached would extinguish the rights.

7.2 In 2001, the House of Lords determined that a consequence of the quantification of grazing rights on registration under the Commons Registration Act 1965 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'. Severance causes management difficulties for common land where some right holders have no close contact with the common and those who manage it.

7.3 Following public consultation in 2002, the *Common Land Policy Statement 2002* contained the Government's proposals for legislation relating to common land, including, in paragraph 99:

“The [2000] consultation paper invited views on whether there should be a prohibition on the creation of new common rights in gross (*i.e.* independently of a land holding) and the severance of rights from the land holding to which they were originally attached. There was strong support for this. Respondents generally took the view that the link between

holdings and rights should not be severable. We therefore propose to legislate to prohibit the severance of rights... .”

- 7.3 The Commons Act 2006 received Royal Assent on 19 July 2006 and gives effect to the *Common Land Policy Statement*. Section 9 prohibits further severance of rights of common. The prohibition on severance is subject to exceptions, which are set out in Schedule 1, including, in paragraph 2, provision for an order to enable the temporary licensing of rights.
- 7.4 In July 2005, Defra published a draft of regulations which it proposed to make immediately after Royal Assent, which would have the same effect as the present Order, and a guidance note on the effect of section 9 and the draft regulations.
- 7.5 Severance was the subject of much debate in both Houses during the Parliamentary stages of the Commons Bill (see, in particular, the statement of the then Minister for Sustainable Farming and Food, Lord Bach, in Lords Grand Committee, Hansard, 25 October 2005, cols. GC308–309). During debate, Ministers said they would consider enabling the continued leasing of rights on a long-term basis in areas where there is substantial stakeholder support, for example, where the practice is long-standing or traditional. Defra plans to consult early in 2007 on a further order which would allow for temporary severance of rights only in particular cases or classes of cases where an exception to the general prohibition can be justified in the public interest. The present order would then be revoked.
- 7.6 Defra has received very little comment on the draft order published on the website and referred to in Parliament. Some commoners’ representatives have said that a maximum two-year let is too short. But to prescribe a longer period would effectively negate the prohibition on severance, which has widespread support. Where long term leases can be justified, then provision can be made for that purpose in a subsequent order, should a case be made. Provision for two-year lets in the present order will enable existing arrangements to ‘tick over’ until the long-term position is settled after consultation.
- 7.7 The Order enables the temporary licensing or letting of rights of common to which section 9 applies, and which are also rights to graze animals (article 2). The Order therefore does not permit the licensing or letting of other rights of common (such as a right to gather firewood or to cut peat), nor does it apply to ‘appendant rights’ (which the courts have held not to be severable, regardless of whether the right is quantified).

8. Impact

- 8.1 A Regulatory Impact Assessment (RIA) was prepared for the Commons Bill. Copies of the RIA were deposited in the House libraries and are available on the Defra website.
- 8.2 The RIA found data hard to come by, estimated that the costs (almost entirely to farmers) of the prohibition on severance would amount to £0.4 million over twenty years, but was unable to quantify the clear environmental benefits which lie behind stakeholder support for the prohibition. It is still more difficult to estimate the savings which this order would secure, in terms of a relaxation of the prohibition on severance, but it may significantly reduce the costs identified above, but with only a very marginal impact on the environmental benefits achieved by prohibition generally.

8.3 No separate RIA has been prepared for the order itself as it has no impact on the costs of business.

8.4 The impact on the public sector is negligible.

9. Contact

9.1 Hugh Craddock at the Department for Environment, Food and Rural Affairs, Tel: 020 7238 5663 or e-mail: hugh.craddock@defra.gsi.gov.uk can answer any queries regarding the instrument. Further information about severance, and the Commons Act 2006 generally, is also available on the Defra website, at: www.defra.gov.uk/wildlife-countryside/issues/common/index.htm .