

FREQUENTLY ASKED QUESTIONS – Section 46 of the Commons Act 2006 (Unauthorised Agricultural Activities)

It should be noted that this list is by no means exhaustive, and it is only designed to provide pointers to what action might be taken. Each case will need to be looked at individually and those seeking recourse through the use of section 46 will need to ask themselves specific questions as to whether or not the activity can be classed as agricultural and demonstrate that all attempts have been made to resolve issues and disputes.

The answers provided below have no legal standing, in case of doubt please refer to the Commons Act 2006 or consult your own legal advisor.

All references to “section 46” should be read as section 46 of the Commons Act 2006.

Q. 1. The rights holders on the common have too many sheep, is this activity one that would fall under Section 46.

A. The assumption in this case is that those grazing the sheep have a right of common to which they have entitlement through an entry in the commons register. Even though they are exceeding their rights there would need to be evidence that this activity is proving detrimental to others with rights over the land, those that own the land or the public interest. If none of these groups are effected there would be no appetite to pursue a case of alleged over grazing through the use of section 46. It would be a case for the land owner or other rights holders to resolve in conjunction with the individual who is actively over grazing. Welsh Government would only take a judgement and step in if the scale of the problem was out of proportion to the area of common land

Q.2. Our common is seriously overgrazed, can section 46 be used to resolve this issue?

A. If it can be proved that a person causing the common to be seriously overgrazed is undertaking this activity without the legal entitlement to do so then it may be possible to enforce using the powers under section 46. However those affected by this activity (rights holders / owners) will first need to demonstrate that all other avenues have been explored and every attempt has been made to resolve any disputes formally through mediation.

Q. 3. One of the commoners only has rights for cattle; however he does not own any cattle and grazes sheep on the common instead. Can section 46 be used to remove the sheep and insist that the common is only used for the grazing of cattle by this commoner?

A. No this would be a case for other rights holders and the owner to address. As the owner of the sheep is a rights holder and although he may be acting outside the terms of his entitlement he is exercising his right of common.

Other rights holders would need to consider the impact the animals are having and whether the fact that sheep rather than cattle are being grazed is detrimental to the common land. It would not however be appropriate to use section 46 in this case.

Q. 4. The owner of the common grazes a lot of animals on the common which means that despite a number of commoners having rights there is not enough grazing for these rights to be exercised in full. Can section 46 be used to stop the owner putting so many animals on the common?

A. In general terms, the owner of the common is only authorised to exercise his right to pasture his own animals on the common, provided he does not interfere with the rights of the commoners in doing so. Section 46 can only be used where an unauthorised activity is taking place and so the specific rights of the owner will have to be considered in such a scenario before coming to a decision on the applicability of Section 46.

Q. 5. The common is under grazed and as a result it is over grown and causing difficulties for those using the common for recreational purposes.

A. It would not be appropriate to use section 46 in this scenario; the Welsh Ministers can't force commoners to activate their rights.

Q.6. We have a number of commoners who do not exercise their rights, and other commoners have taken advantage of this and graze in excess of their rights. Can section 46 be used to stop this unauthorised borrowing of rights?

A. In order to do so you would need to prove that the borrowing of rights to graze in excess of their quota of livestock is detrimental to the interests of persons with rights over the land, those who own or occupy the land or to the public interest. In the first instance unauthorised borrowing of rights should be formalised under *The Temporary Severance (Wales) Order 2012*.

Q. 7. Our common has recently experienced an influx of sheep, we don't know who they belong too, and can we use section 46 to have them removed.

A. No. section 46 can only be used in such circumstances where the owner is known. In order for Welsh Ministers to issue a notice of enforcement details of the person to whom the notice is to be served are required.

Q. 8. Our common has a historic monument of national importance which attracts a lot of visitors. The common is also used for grazing both cattle and sheep and visitors don't like walking amongst the animals. In addition the animals foul the areas near the historic site which is off putting for visitors. Can we use section 46 to remove all the animals from the common so that we can attract a greater number of visitors to view our historic monument?

A. No, section 46 could not be used for this purpose. Those with rights of common have a right to graze livestock on the common; to remove animals that are lawfully grazing via this means would not be legal or possible.

Q. 9. Villagers who houses back on to the common have been cutting grass on the common / village green to make a football pitch can we use a section 46 to stop them as this is destroying the grazing for our sheep.

A. No, cutting grass for a football pitch is not an agricultural activity so is outside the scope of the 2006 Act. You would need to seek other methods of recourse.

Q. 10. People from the village are constantly using the common as a dumping ground for their garden waste, can we use section 46 to stop this activity

A. No. This is not an agricultural activity; those with rights would need to mediate with those villagers responsible for the dumping of rubbish.

Q. 11. Residents living near the common use the land for walking their dogs many of which roam free and cause a danger to sheep on the common. Can we use section 46 to stop these people walking their dogs on the common land?

A. No. Dog walking is not an agricultural activity. Section 4 of The Countryside Access (Exclusions or Restrictions of Access) (Wales) Regulations 2003 and section 23 of The Countryside and Rights of Way Act 2000 contain provisions allowing the restriction of dogs onto Access Land. Common land or moorland managed for the breeding and shooting of grouse can have restrictions, in respect of the exercising of dogs, placed on it during specified periods of time. Similarly owners of land used for lambing may also restrict the right of access in respect of the exercising of dogs in any field or inclosure on land where sheep are kept. However as such fields and inclosures are unlikely to be registered common land it is unlikely that this exclusion could be used for common land pasturing sheep.

Q.12. Every year the local residents build a 5 November bonfire on the common and let off fireworks. These activities frighten the stock; can we use section 46 to stop such public activities taking place?

A. No. This is not an agricultural activity. There are no specific laws against having a bonfire however it is illegal to have a bonfire on some publicly owned common land. If your common is privately owned and mediation attempts have failed between the owner / rights holders and the villagers you may need to consider the laws that deal with nuisance. It is an offence to dispose of domestic waste in a way that is likely to cause pollution or harm to human health which includes the burning of plastic, rubber or painted materials. You should refer to the Environmental Protection Act 1990.

Q. 13. Some of the commoners are cutting down trees and removing the wood for burning on domestic stoves. Is this allowed or can we use section 46 to stop this activity?

A. No section 46 would not be appropriate for this scenario as the cutting down of trees is not regarded as an agricultural activity. Commons that have wooded areas may well have rights in conjunction with this land. Many commoners have rights of estovers, in other words the right to remove wood from the common. The owner of the common is entitled to fell and remove those trees growing naturally on the common. In cases where the trees completely exclude the ability of commoners to exercise their rights of common they may fell trees however if the trees only partly exclude commoners from exercising their rights they would need to invoke legal proceedings for nuisance.

Q. 14. Our common is the destination of off roaders and quad bikers, can we use section 46 to control these activities.

A. No, these sort of anti social activities fall outside the scope of the Act.

The Law of Property Act 1925 provides that the public have rights of access over common and waste land however such rights do not include any right to draw or drive upon the land a carriage, cart, truck or other vehicle, or to camp or light any fires on such land – whether this Act could be used in conjunction with off roading / quad biking would need to be determined. In addition The Countryside and Rights of Way Act 2000 determines that without lawful authority a person may not drive a mechanically propelled vehicle on common land, moorland or land of any other description, not being land forming part of a road. Nor may a person drive a mechanically propelled vehicle on any road being used as a footpath, bridleway or restricted byway.

Q.15. Commoners regularly burn the gorse on the common can section 46 be used to stop this happening?

A. Firstly you will need to determine the principle purpose for the activity. If the burning of the moorland is to improve the heather on a grouse moor this would be regarded as an activity associated with a sporting purpose. The raising of game birds (Grouse, pheasants etc) for sporting purposes is not considered an agricultural activity. The rearing of livestock includes any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in farming the land. Where the raising and keeping of birds for sporting purposes is considered the primary activity it would be for economic reward and the fact that birds are usually eaten afterwards would be very much a secondary purpose and therefore not considered an agricultural activity.

If the act of burning is for the purposes of the production of better keep or grazing for the keeping of sheep then this could be considered as an agricultural activity and where done to excess or unlawfully and outside the terms of an individuals rights of common this activity could fall to be regulated.

Q. 16. A group of commoners are rearing game on the common is this allowed or can section 46 be invoked to stop such activities.

A. You would firstly need to ascertain for what purpose the game are being reared. If they are being kept for the purpose of the production of food or feathers then it may be possible to show that this is an unlawful agricultural activity. However it would depend on numbers and you would need to show that the rearing of the birds was having a detrimental effect to other rights holders. If the birds were being raised for sporting purposes it would not be appropriate to use section 46 as the raising for sport would be considered an economic activity rather than an agricultural activity despite the fact that the birds are usually eaten afterwards, very much a secondary purpose. Other methods of recourse would need to be explored.

Q. 17. Commoners are consistently leaving animals on the common and not removing them by a certain date. Can they be forced to move them on a particular date through the use of section 46?

A. Animals not removed by a specific date suggest a failure to comply with local rules rather than a persons registered rights. Animals might be required to be removed in accordance with non-statutory rules of an Association, where a person fails to comply it would be a matter for the Association to resolve. It would not be appropriate to use section 46 and embroil Welsh Ministers in what is basically a local dispute.

Q. 18. My neighbour insists on putting supplementary feed out on the common can I use section 46 to stop him doing so?

A. No, this is not an appropriate use of section 46. As a general rule commoners who are in agri-environment schemes or graze commons that have SSSI status are not allowed to supplementary feed their livestock. In periods of severe weather where welfare is an issue the Countryside Council for Wales can advise. Supplementary feed may be put on land outside an agri-environment scheme however commoners should be aware of the damage this can cause and should move feeding areas whenever possible, remove leftover forage to reduce the damage to the sward, and avoid feeding near or on archaeological features.

Those with rights of common wishing to supplement their feeding during periods of adverse weather are advised to inform landowners of their intention to do so when they know that landowners restrict the practice.

Q. 19. We have a problem over uncastrated animals left on the common; can section 46 be used to remove these animals?

A. No, you would need to resort to the Commons Act 1908 which provides the powers in respect of the turning out of entire animals on commons. These Regulations determine the times at which and the conditions under which entire animals or entire animals of a type, description or age may be present

on the common. The Regulations also give provision for the removal of any animal found on the common in contravention of the Regulations.

Q. 20. We have a commoner who grazes lamas / alpacas on the common, we don't think they have rights to do so; can section 46 be used to remove these animals?

A. Depending on the specifics of the case it is possible that this would be regarded as an unlawful agricultural activity however you would need to seek clarification as to the roll of the animals concerned and then evidence the steps that you had taken to seek the removal of these animals from the common land. You would not be able to seek recourse through the use of section 46 unless all other avenues of mediation had failed.

It may be argued that as grazing is an agricultural activity these animals are performing a benefit to the common as a whole which will in time benefit the rest of the livestock on the common land.

The type of animals for which rights may be exercised are limited. Rights have historically been confined to animals needed for the purposes of ploughing the land (horses and oxen) and animals needed to manure the arable land (cattle and sheep). Other animals such as pigs, goats, lamas etc can not be used in the exercise of rights in respect of ploughing / manuring. However there is a historic right of pannage which allows for the turning out of pigs into woodlands to enable them to feed on acorns and beech mast. This right is usually limited to appropriate times of year when the acorns and beech mast will be on the ground.

Part 1 of the Commons Act 2006 includes a section on variation where the owner of the common and the commoner may agree to vary a right of common. This variation could include the right to graze any animal however a Commons Registration Authority could refuse this variation if they are of the opinion that the land over which the right is to be varied cannot sustain the exercise of the right.

Q. 21. Our common is used for the grazing of recreational ponies, the numbers fluctuate and when they are high they are proving detrimental to the rearing of other stock. Can we use section 46 to round these ponies up and remove them from the common?

A. Depending on the specifics of the case it is possible that this would be regarded as an unlawful agricultural activity however you would need to seek clarification as to the roll of the animals concerned and then evidence the steps that you had taken to seek the removal of these animals from the common land. You would not be able to seek recourse through the use of section 46 unless all other avenues of mediation had failed. In addition you would need to know who the animals belong too, historically many commons have been the dumping ground for horses of all types, and you would not be able to use section 46 unless you can identify the owner of the animals.

It may be argued that as grazing is an agricultural activity these animals are performing a benefit to the common as a whole which will in time benefit the rest of the livestock on the common land. In order to demonstrate that they are providing benefits they would need to be turned out on the land on a permanent basis i.e. they would need to be feeding from the land, this could then be demonstrated as an agricultural activity and if so could fall under section 46 to regulate if it can be demonstrated that they are unlawfully grazing. If the horses are turned on the common on an ad hoc basis for an occasional grazing it would not be relevant to say that they were on the common for agricultural purposes and as such other forms of legal recourse would need to be sought.

In order to define the status of the horse it may be useful to refer to the following guidance:

- The working horse – horses kept or bred for the purpose of its use on the farm, i.e. for agricultural purpose.
- The racehorse – horses used for sport or recreational purposes, not kept for agricultural production so therefore not classed as agriculture but may well be a grazing horse.
- The recreational horse – horses used for recreation and pleasure, not kept for agricultural production so therefore not classed as agriculture but may well be a grazing horse
- The grazing horse – the use of land as grazing land is an agricultural use so that the use of land for the grazing of any of the types of horses mentioned is agricultural, but not the keeping of them. This would include the semi-feral ponies found on the hills and commons across Wales whose presence and ability to graze benefits Welsh wildlife and the landscape in which they roam.
- Horsemeat – the breeding and keeping of horses for food production is agriculture.

Q. 22 Local horse riders use the common for recreational purposes however the herds of wild ponies, in particular the stallions and colts, are causing problems to these riders and we are very concerned that there is going to be a serious accident on our common. Can we use section 46 to remove the stallions, colts off the common?

A. It would not be appropriate to use section 46 in these cases; commoners with rights would need to resort to the Commons Act 1908 which provides the powers in respect of the turning out of entire animals on commons. These Regulations determine the times at which and the conditions under which entire animals or entire animals of a type, description or age may be present on the common. The Regulations also give provision of the removal of any animal found on the common in contravention of the Regulations.