The Legislative Reform (Duchy of Lancaster) Order 2015

Explanatory Document
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Chapter 1 : Introduction

1.1 This explanatory document is laid before Parliament in accordance with section 14 of the Legislative and Regulatory Reform Act 2006 (“LRRA”) together with the proposed Legislative Reform (Duchy of Lancaster) Order 2015 (“the draft Order”) which the Chancellor of the Duchy of Lancaster (the “Minister”) seeks to make under section 1 of that Act.

1.2 The draft Order will widen the Duchy’s ability to spend money from capital in pursuing planning permission for development sites and in promoting large capital projects. Currently all such expenditure has, at least in the first instance, to be paid out of the income account, which adversely impacts the net income of the Duchy.

1.3 A full impact assessment as to the effect that the draft Order would have on the costs of business, the voluntary sector and the public sector has been deemed unnecessary by the Minister because there will be no impact outside the Duchy of Lancaster.

Chapter 2 : Relevant Background

The Duchy of Lancaster

2.1 The Duchy does not have a single identifiable founding document such as a Company’s Memorandum and Articles of Association, a Trust Deed, a Charter or a Statute, from which it is possible to identify the Duchy’s constitution.

2.2 In 1399 Henry Bolingbroke succeeded John of Gaunt as Duke of Lancaster and returned from exile in France to claim his inheritance and shortly afterwards the Crown. One of his first acts as King Henry IV was to promote a Charter, dated 14th October 1399, the object of which was to keep separate the estates of the Crown and those of the Duchy. This Charter was granted in Parliament and established the Duchy as a separate inheritance of the Monarch, which it continues to be to this day.

2.3 In 1461 a further Charter was implemented which remains the authority for such powers as the Duchy has to administer itself and to deal with its assets.

Relevant Legislation

2.4 The possessions of the Duchy of Lancaster were, however, brought within the restrictions upon alienation imposed upon Crown land generally by the Crown Lands Act 1702 which provided that all dispositions of Crown freeholds, including Duchy assets, were void and placed strict limitations on the powers of leasing.

2.5 Since 1702 the restrictions on dispositions in the 1702 Act have been partially relaxed but still mean that any application of Duchy assets including capital money can only be made pursuant to statutory authority. The Duchy assets are now held and managed subject to the powers of investment and application set out, in the main, in the following statutes:-
2.6 **The Duchy of Lancaster Act 1817 (the 1817 Act)** (also referred to as Viscount Gage’s Act). This Act authorised expenditure of capital monies, which arose from the disposal of Duchy assets, upon improvement of Duchy property and authorised the sale of stock to raise additional funds for that purpose. The Act specifies expenditure on the “division, inclosure, drainage, embankment and other improvement of any messuages, lands or tenements …” belonging to the Sovereign in Right of the Duchy. This expenditure must also be certified by the Duchy Surveyor General as “proper, necessary, advantageous and beneficial” to the possessions of the Sovereign in Right of the Duchy, under the 1817 Act.

2.7 **The Duchy of Lancaster Lands Act 1855** authorised the application of capital monies in the purchase of lands which in the judgement of the Chancellor and the Council of the Duchy are deemed convenient to be held with the other possessions of the Duchy. The Act also authorises the sale of Duchy land which in the judgement of the Chancellor and the Council is not deemed convenient to be held with other possessions of the Duchy. The Act expressly provides that monies raised from such sales should be invested in the investments authorised by the Duchy of Lancaster Act 1808 or used in accordance with the powers set out in the 1817 Act or in the purchase of land authorised by the Duchy of Lancaster Lands Act 1855 Act.

2.8 **The Duchy of Lancaster Act 1920** broadened the powers of investment authorised by the Duchy of Lancaster Act 1808 which have subsequently been extended by two later Acts, the Trustee Act 1961 and the Trustee Act 2000.

2.9 The position today is still that capital funds arising from sales of Duchy land must either be invested in accordance with the Trustee Act 2000 or spent on the physical improvements to land permitted by the 1817 Act or in the purchase of land permitted by The Duchy of Lancaster Lands Act 1855.

**The Impact of the Duchy of Lancaster Act 1817**

2.10 The 1817 Act allows the Duchy to spend capital monies on certain restricted improvements to land. The Act authorises capital monies held by or on behalf of the Duchy to be:

“applied and appropriated in or towards payment, satisfaction and discharge of any sum or sums of money or expenses which shall be incurred in the division, inclosure, drainage, embankment or other improvement of any messuages, lands or tenements belonging to His Majesty, His heirs or successors in right of his said Duchy.”

As a result, although the Duchy can spend capital monies on physical improvements to Duchy land, it cannot spend capital monies on wider development costs, such as planning costs.
Chapter 3 : The Legislative Reform Order

What is the objective of the draft Order?

2.11 The Minister’s objective in seeking a Legislative Reform Order is to remove the legislative burden imposed by the 1817 Act on capital expenditure in order to maximise charges to capital. The draft Order is intended to make clear that the costs of improvement under section 25 include all development costs.

Why is the change needed?

2.12 The 1817 Act prevents the Duchy from using its capital account to pay for the costs of developing its land or property, where it is not the cost of a physical improvement. This means that when the Duchy undertakes such a development the relevant costs must be paid from the Duchy’s income account.

Where a development is sold the money that is raised enters the Duchy’s capital account. This can then be used to balance the Duchy’s income account that had previously funded the costs of the development.

As a result of this the Duchy’s income account will be in deficit until the development is completed and sold. The Duchy’s income account is also used to fund the other activities and costs of the Duchy. Funding development projects by using the income account means that the Duchy is restricted in the number and scale of the developments it can undertake. This impacts on the profitability of the Duchy because large development projects can create large amounts of profit when sold.

The table below illustrates how this process works. In each year there is a certain amount of money spent on development projects (“Expenditure” column). This money comes from the Duchy’s income account. Then a certain amount of money is raised by the development projects. This enters the capital account (“Recovery” column). This money is then used to reimburse the income account. In several years, the amount spent by the income account was more than the amount it is reimbursed.

For instance, in 2007/2008 the Duchy spent £871,000 on planning and development but was able to recover only £161,000. This meant that the income account was in deficit by £710,000.
2.13 It is the view of the Minister that this system creates “an obstacle to efficiency, productivity and profitability” as defined in section 1(3) of the LRRA.

**How does the draft Order achieve the objective?**

2.14 The Duchy of Lancaster Act 1817 provides the Duchy with the power to spend capital in restricted circumstances namely, on the division, inclosure, drainage, embankment or other improvement carried out to land and property owned by the Duchy.

Article 2 of the draft Order amends the Act so that the power to spend capital is broadened to include any development of Duchy land or property (but not maintenance or repair) and the costs incurred by the Duchy in bringing forward and promoting land for development.

**Who will be affected by the change?**

2.15 The change will affect Her Majesty the Queen as the Duke of Lancaster and future Dukes of Lancaster.

**Chapter 3 : Duties of the Minister**

**Consultation**

3.1 The Minister considered and approved a private consultation document submitted to Her Majesty the Queen, as Duke of Lancaster, His Royal Highness the Prince of Wales and His Royal Highness Prince William as future Dukes of Lancaster. The Minister considered that the Treasury should also be included in the consultation.
3.2 Having considered the consultation responses the Minister concluded that the draft Order should laid before both Houses of Parliament.

**Removal of a burden**

3.3 The draft Order will reduce the burden of the 1817 Act so that the power of the Duchy to spend capital on improvements to land is widened to include any development of Duchy land or property (but not maintenance or repair) and the costs incurred by the Duchy in bringing forward and promoting land for development.

3.4 The Minister considers the burden to be “an obstacle to efficiency, productivity or profitability” as defined in section 1(3) of the LRRA and that it is therefore appropriate to use the order making powers in section 1 of the LRRA, for the purpose of “removing or reducing any burden, or the overall burdens, resulting directly or indirectly for any person from any legislation”.

**Parliamentary Procedure**

3.5 The proposals will only affect the Duchy of Lancaster and have no wider application. They do not make it easier for the Duchy to recover possession of land for development purposes which powers already exist as a matter of general law. The proposals do not remove any existing security of tenure for Duchy tenants nor do they have an impact on any current protections that are available to all occupiers of let land. The Minister therefore recommends that the negative resolution procedure apply to the draft Order because the proposal is limited to and only affects the Duchy which has requested the change.

3.6 The Minister is laying before Parliament the documents required by section 14(1) of the LRRA. The Minister is satisfied that the preconditions in section 3(2) are satisfied.

**Preconditions**

3.7 By section 3(1) of the LRRA the Minister may not make provision under section 1(1) unless he considers that the conditions in section 3(2) of the LRRA, where relevant, are satisfied in relation to that provision. The conditions are:

**Section 3(2)(a) : the policy objective intended to be secured by the provision could not be satisfactorily secured by non-legislative means**

3.8 The Minister considers that a non-legislative solution could not achieve the objectives described in paragraph 2.11 above because the restrictions on capital spend are contained in primary legislation which can only be amended by further primary legislation or by an LRO.

**Section 3(2)(b) : The effect of the provision is proportionate to the policy objective**

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1. The draft Order and the explanatory document
3.9 The Minister considers that the draft Order will remove a burden from the 1817 Act but will not place the Duchy at an advantage over other land owners. The Minister believes that the requirement in the 1817 Act for certification by the Duchy Surveyor General, referred to in paragraph 2.6 of this document, ensures that the measure is proportionate to the objective.

Section 3(2)(c) : The provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it

3.10 The Minister considers that this precondition is not a relevant condition because the draft Order will have no impact on the public interest as there is no person adversely affected by it. The Minister believes that the interests of future Dukes of Lancaster are adequately protected by the requirement in the 1817 Act for certification by the Duchy Surveyor General.

Section 3(2)(d) : The provision does not remove any necessary protections

3.11 The Minister considers that the draft Order does not remove any necessary protections. This is because the key principle that capital money may not be paid to the Duke of Lancaster is not affected. The draft Order simply widens the scope of the costs which may be recovered out of capital money. The requirement in the 1817 Act for certification by the Duchy Surveyor General remains. Such expenditure must serve to enhance the capital value of the Duchy. The structure and governance of the Duchy is now very different to what it was in 1817 and adequate checks and balances have been put in place since 1817 to render this restricted ability to expend capital unnecessary and disadvantageous.

Section 3(2)(e) : The provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise

3.12 The Minister considers that the draft Order does not prevent any person from continuing to exercise any rights or freedoms which that person might reasonably expect to continue to exercise.

Section 3(2)(f) : The provision is not of constitutional significance

3.13 The Minister considers that these proposals are not are not of constitutional significance and that the draft Order does not make significant constitutional change. The Duchy of Lancaster is an estate privately owned by Her Majesty the Queen as the Duke of Lancaster and is distinct from the Crown. Under the proposals Her Majesty The Queen will be acting in Her private capacity as the Duke of Lancaster.

3.14 The Chancellor of the Duchy is responsible to the Sovereign (as Duke of Lancaster) for the administration of the Duchy. The appointment to the post of Chancellor is made by Her Majesty the Queen as the Duke of Lancaster on the recommendation of the Prime Minister. The Chancellor is however answerable to the Sovereign personally and not to Parliament.
In recent years the Chancellor has been a member of the government but he or she does not have to be. The current Chancellor seeks to make the Order in his capacity as a Minister of the Crown but the proposals do not relate to the Crown or the government.

Compatibility with the European Convention on Human Rights

3.15 The Minister considers that the provisions of the draft Order are compatible with the Convention rights.

Compatibility with the obligations arising from membership of the European Union

3.16 The Minister considers that the provisions of the draft Order are compatible with all the requirements of membership of the European Union.

Territorial extent

3.17 The draft Order, like the 1817 Act, extends to the United Kingdom. The Minister is satisfied that the effect of the draft Order will be limited to England and Wales, but that the consent of the Welsh Assembly is not required and that the draft Order will have no implications for Scotland or Northern Ireland.

Chapter 4 : Consultation

4.1 Section 13 of the LRRA imposes an obligation on the Minister to consult organisations or specified bodies affected by the proposals. The Minister considers that the organisations or bodies referred to in subsections (1)(a) to (d) are not affected by the proposals.

4.2 The Minister considered, under subsection (1)(a), if there are any organisations representative of interests substantially affected by the proposals. The Minister considered that although in the main any land which the Duchy would bring forward for development is likely to be agricultural land occupied by farm tenants, their interests would not be substantially affected because the proposals do not make it easier for the Duchy to recover possession of land for development purposes. The proposals would not remove any security of tenure from Duchy tenants nor the current protections available to all tenants of agricultural land. The Minister therefore concluded that there were no organisations which it would be necessary to consult under subsection (1)(a).

4.3 In accordance with subsection (1)(e) the Minister considered it appropriate to consult Her Majesty the Queen, as Duke of Lancaster, and His Royal Highness the Prince of Wales and His Royal Highness Prince William as the future Dukes. The Minister also considered it appropriate to consult the Treasury.

4.4 The Minister therefore consulted Her Majesty the Queen as Duke of Lancaster, His Royal Highness the Prince of Wales and His Royal Highness Prince William as future Dukes.
of Lancaster in accordance with section 13 of the LRRA during October and November 2014 and the Treasury in November 2014.

4.5 The Duchy also posted details of the consultation on its website and invited comments from the general public but none were received. The consultation sought views on whether or not the proposals are considered to be necessary and acceptable and whether a Legislative Reform Order is an appropriate mechanism for making this change.

4.6 Her Majesty the Queen, and their Royal Highnesses the Prince of Wales and Prince William have responded to the consultation and expressed their agreement to the proposal. The Treasury have also been consulted and has expressed its consent to the proposal.

4.7 The Minister considered an Impact Assessment to be unnecessary and such an assessment did not form part of the consultation.

4.8 No changes were made to the draft Order as a result of the consultation.

4.9 In light of the consultation responses received, the Minister considers that the proposals should be implemented as set out in the draft Order which should be laid before Parliament under the negative resolution procedure.