

2008

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**MAGISTRATES COURT (BUILDING INFRINGEMENT NOTICES)
REGULATION 2008**

SUBORDINATE LAW SL2008-10

EXPLANATORY STATEMENT

Presented by
Mr Simon Corbell MLA
Attorney General

OVERVIEW

Part 3.8 of the *Magistrates Court Act 1930* provides that offences prescribed under a regulation made under that Act can be dealt with by way of an infringement notice. The *Magistrates Court (Planning and Development Infringement Notices) Regulation 2008* is to be made under that Act and will enable infringement notices to be issued for prescribed offences under the *Planning and Development Act 2007*, and for prescribed offences under the *Planning and Development Regulation 2008*.

Under the *Magistrates Court Act 1930* a person authorised to issue an infringement notice for an offence has discretion to decide if or not to issue the notice. The regulation will enable the following kinds of offences to be dealt with by way of an infringement notice for each offence if a respective notice is duly issued and continues to have force—

- a certifier under the *Building Act 2004* issues a building approval for work in the absence of a relevant required development approval under the *Planning and Development Act 2007* existing;
- a certifier under the *Building Act 2004* issues a building approval in respect of defective plans in the absence of a relevant required development approval under the *Planning and Development Act 2007* existing, and if the plans were not defective that development approval would have been required for the work.

SUMMARY OF CLAUSES

Section 1—Name of regulation—provides that the regulation is called—*Magistrates Court (Building Infringement Notices) Regulation 2008*.

Section 2—Commencement—provides that the regulation commences upon the commencement of the *Building Legislation Amendment Act 2007*, schedule 1, part 1.1, amendment 1.46, and provides in a note that the naming and commencement provisions automatically commence on the notification day (see *Legislation Act*, s 75 (1)).

It is necessary to delay commencement of the regulation until the commencement of the above-mentioned amendment 1.46, as that amendment has the effect of inserting into the *Building Act 2004*, new offence provision that the regulation relies upon and refers to.

Section 3—Purpose of Regulation—provides that the purpose of the regulation is to allow for infringement notices under the *Magistrates Court Act 1930*, part 3.8 for certain offences against the *building legislation*.

The dictionary to the regulation defines what that term means—

building legislation means—the *Building Act 2004* and the *Building (General) Regulation 2008*.

However, the *Building Legislation Amendment Act 2007*, has provisions, which when commenced, will amend the *Building Act 2004*. It is intended that references in the regulation to the *Building Act 2004* mean that Act as amended by the *Building Legislation Amendment Act 2007*.

Section 4—Dictionary—provides that the dictionary at the end of the regulation is part of the regulation. The dictionary defines certain terms used in the regulation. A definition in the dictionary applies to the entire regulation unless the definition, or another provision of the regulation, provides otherwise or the contrary intention otherwise appears (see Legislation Act, s 155 and s 156 (1)).

Section 5—Notes—provides that a note included in the regulation is, in law, not part of the regulation; it is purely explanatory. See the Legislation Act, s 127 (1), (4) and (5) for the legal status of notes.

Section 6—Administering authority—provides that the *construction occupations registrar* is the administering authority in relation to the issue of infringement notices under the regulation. Under the *Legislation Act 2001*, dictionary, part 1, that term is defined as follows—

construction occupations registrar means the Australian Capital Territory Construction Occupations Registrar under the *Construction Occupations (Licensing) Act 2004*.

Section 7—Infringement notice offences—provides that The *Magistrates Court Act 1930*, part 3.8 applies to an offence against a provision of the building legislation mentioned in the regulation at schedule 1, column 2.

Section 8—Infringement notice penalties—provides that the penalties for an offence under a relevant infringement notice for an individual is prescribed in schedule 1, column 4, of the regulation and that the respective penalty for a corporation in that circumstance is 5 times the amount prescribed in column 4. For example if schedule 1, column 4, prescribes an amount of \$1000, the amount payable by an individual under the notice is \$1000 and the amount payable by a corporation is 5 x \$1000 = \$5000.

The section also prescribes that the cost of service a relevant reminder notice under the *Magistrates Court Act 1930*, for a relevant infringement notice offence is \$34. That is the amount payable by the person to whom the reminder notice is issued.

Section 9—Contents of infringement notices—other information—provides for additional information, other than the offence and penalty, which must be provided in a relevant infringement notice. The additional information is as follows—

for an infringement notice served on a company registered under the *Corporations Act 2001* (Commonwealth)—the company's ACN;

for an infringement notice served on a person who is a partner in a partnership—the partnership's name.

The requirement is additional to the requirement under the *Magistrates Court Act 1930*, s 121 (1) (c).

It is intended that the term *ACN* means, for a company registered under the *Corporations Act 2001* (Commonwealth), the Australian company number assigned to the company under that Act.

Section 10—Contents of infringement notices—identifying authorised person— provides that the infringement notice must fully identify the authorised person. Such identification could be by stating the authorised person’s full name or the person’s surname and initials, or by stating a unique number given, for the regulation, to the authorised person by the administering authority.

Section 11—Contents of reminder notices—identifying authorised person— provides that a reminder notice must fully identify the authorised person. Such identification could be by stating the authorised person’s full name or the person’s surname and initials, or by stating a unique number given, for the regulation, to the authorised person by the administering authority.

Section 12—Authorised people for infringement notice offences—prescribes who may serve a relevant infringement notice and a relevant reminder notice under the regulation. An *inspector* is so prescribed, as defined in the section.

The section also defines the key terms used in the section.

It is intended that an authorised person who is an *inspector* because they are a deputy registrar appointed under the *Construction Occupations (Licensing) Act 2004*, section 106, for the construction occupation of *builder* is not restricted to issuing infringement notices under the regulation only to entities licensed in the occupation of “builder”. It is intended that such an authorised person can also issue such notices to an entity licensed as a building surveyor, for example.

It is intended that an authorised person who is an *inspector* because they are a deputy registrar appointed under the *Construction Occupations (Licensing) Act 2004*, section 106, for the construction occupation of *building surveyor* is not restricted to issuing infringement notices under the regulation only to entities licensed in the occupation of “building surveyor”.

It is intended that an authorised person who is an *inspector* because they are a deputy registrar appointed under the *Construction Occupations (Licensing) Act 2004*, section 106, without a limitation on the appointment in respect of a particular occupation is taken to be so appointed in respect of the occupations that include the above-mentioned *building surveyor* and *builder* occupations.

It is intended that an authorised person who is an *inspector* because they are a deputy registrar appointed under the *Construction Occupations (Licensing) Act 2004*, section 106, for construction occupations that include *building surveyor* or *builder* is taken to be so appointed in respect of the occupations of the above-mentioned *building surveyor* and *builder* occupations.

Schedule 1— The infringement notice penalty amounts prescribed in the regulation schedule 1, column 4, are intended to represent 20% of the respective maximum penalty provided for the offence for an individual (except for Part 1.2), which reflects general legal policy in the absence of compelling reasons to depart from that magnitude of penalty.

The infringement notice penalty for the offence prescribed at Part 1.2 of schedule 1, being section 49 of the *Building General (Regulation) 2008*, is \$1000 for an individual, which corresponds with the respective full maximum penalty for the relevant offence. This penalty level is a departure from the principle that infringement notice penalties should be set at 20% of the maximum penalty for the offence. The departure is considered necessary for the following reasons:

- An infringement notice penalty of 20% of the maximum would be \$200, which is considered manifestly inadequate to deter against the commission of the offence;
- The offence prescribed by Part 1.2, being section 49 of the *Building (General) Regulation 2008*, is only intended to be contained in the Regulation as an interim measure. The offence mirrors the offence at section 50B (2) (b) (i) of the *Building Legislation Amendment Act 2007*, except that the section 49 offence provides more detail in the offence grounds. It is intended that the section 49 offence is more suited to infringement notices than the section 50B (2) (b) (i) offence, and the Government intends to remove the offence from the Regulation and place it in the Act proper, at which point the maximum penalty in the Act will be 50 penalty units, with an infringement notice of 20% of this figure (i.e. \$1000);
- The offence can only apply to a surveyor, and not the public at large. After consultation with the relevant industry, the industry has expressed its strong support for inspectors being given the option to pursue alleged breaches of the section by way of infringement notice instead of a court based prosecution.