

Magistrates Court (Work Health and Safety Infringement Notices) Amendment Regulation 2023 (No 1)

Subordinate law SL2023–2

made under the

Magistrates Court Act 1930, section 321 (Regulation-making power)

EXPLANATORY STATEMENT

OVERVIEW OF THE REGULATION

The *Magistrates Court (Work Health and Safety Infringement Notices) Amendment Regulation 2023 (No 1)* includes additional offences against the *Work Health and Safety Act 2011 (WHS Act)* and *Work Health and Safety Regulation 2011 (WHS Regulation)*, for which the work safety regulator may issue an infringement notice.

Infringement Notice

Infringement notices are an effective regulatory tool used for certain objectively based offences. They are issued by the work health and safety regulator on identification of an alleged Work Health and Safety (WHS) breach as an alternative to having the matter prosecuted through the courts. Infringement notices also provide a more timely regulatory tool to deter non-compliance.

The following key principles apply in setting infringement notice penalties in the ACT:

- the offence must be a strict liability offence with no proof of intention or other mental element for the offence;
- evidence of the commission of the offence is to be readily apparent without further inquiry; and
- under the *Guide for Framing Offences*, the ACT Government has a longstanding policy that the nominal amount in the infringement notice should not exceed 20% of the maximum fine stipulated in the offence.

CONSULTATION ON THE PROPOSED APPROACH

ACT Government directorates and agencies including WorkSafe ACT and the Justice and Community Safety Directorate have been consulted in the development of this Regulation.

As the additional infringement notice penalties are existing offences under WHS laws further external consultation was not required. This amendment does not change current standards and obligations of Persons Conducting a Business or Undertaking (PCBUs) but rather introduces another tool through which compliance against certain offences may be regulated.

CONSISTENCY WITH HUMAN RIGHTS

All amendment regulations must be compatible with the *Human Rights Act 2004* (HRA). During the development of this Amendment Regulation, consideration was given to its compatibility with the HRA.

Section 28(1) of the HRA provides that human rights may be subject to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

The regulatory impact of this Amendment Regulation, to deter unsafe work practices, are considered demonstrably justifiable pursuant to section 28 of the HRA.

Rights engaged

The Amendment Regulation engages and promotes the right to life under section 9 of the HRA.

The Amendment Regulation engages and promotes the right to work under section 27B of the HRA.

The Amendment Regulation also engages and may limit the right to privacy and reputation under section 12 of the HRA.

The Amendment Regulation engages and may limit the right to be presumed innocent until proven guilty according to law under section 22(1) of the HRA.

Rights Promoted

The Amendment Regulation engages and promotes the HRA right to life (section 9), and the right to work (section 27B). The right to work safeguards just and favourable conditions of work, including safe and healthy working conditions, free from discrimination. Relevantly, under the WHS Act workers are protected from harm to their health, safety and welfare through the elimination or minimisation of risks arising from work.

This amendment regulation introduces additional infringement notice penalties as a greater deterrent against non-compliance with WHS laws. Infringement notice penalties are an effective regulatory tool where the work safety regulator has

identified an alleged WHS breach. Allowing the expansion of this effective compliance tool will positively engage the greater protection of worker rights, and right to life where an unsafe practice may pose a fatal risk.

Rights Limited

1. Nature of the right and the limitation (s28(a) and (c))

Public Register

This amendment regulation engages and may limit the right to privacy and reputation under section 12 of the HRA. The WHS Regulation, section 698A, states that the regulator must keep a register, available for public inspection, for the following kinds of license:

- high risk work
- asbestos removal or asbestos assessor, and
- a major hazard facility

The register must include the following:

(a) if the licensee operates a business in relation to the licence—

(i) the registered business name and any trading name; and

(ii) the ABN or ACN;

(b) the licence type and number;

(d) the expiry date for the licence;

If the licensee has been given an infringement notice under the *Magistrates Court (Work Health and Safety Infringement Notices) Regulation 2011* information about the infringement notice is included in a public register. This amendment regulation expands on the number of offences against which an infringement notice may be issued and, if issued, information about the notice will also be included on the public register. This engages and may limit the right to privacy and reputation of licensees whose reputation may be scrutinised due to being issued an infringement notice. Particularly where, in some cases, the business or trading name is the full name of the licensee.

Presumption of Innocence

The Amendment regulation also engages and may limit the right to be presumed innocent until proved guilty according to law under section 22(1) of the HRA.

Infringement notices are on-the-spot fines and are not a substitution for prosecution and trial. They instead provide an alternative to proceeding with a prosecution if the person pays a nominal amount of the potential fine for the offence. Under an

infringement notice scheme, the alleged offender does not undergo a prosecution or trial where the full right to presumed innocence until proven guilty is upheld.

2. *Legitimate purpose (s28(b))*

The purpose of the *Work Health and Safety Act 2011* is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work. Compliance with this Act is secured through effective and appropriate compliance and enforcement measures.

3. *Rational connection between the limitation and the purpose (s28(d))*

Public Register

This potential limitation on the right to privacy and reputation has a legitimate purpose as it further safeguards and protects workers from unsafe work practices through the introduction of an additional regulatory tool to ensure compliance with WHS laws.

The public register license condition under the WHS Regulation was established on 1 February 2021. The publication of information about a license holder's non-compliance with WHS obligations acts as an importance deterrence to systemic and repeated non-compliance.

Under the WHS Act, workers are protected from harm to their health, safety and welfare. The WHS Act requires that persons conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of workers through the elimination or minimisation of risks arising from work.

Taking timely action to penalise alleged WHS breaches, including failures in eliminating or minimising risks, acts as an effective deterrent against unsafe work practices which pose serious risks to worker's welfare. For instance, sections 446(1) and 446(3) of the WHS Regulation relates to a duty to limit use of equipment on asbestos or asbestos containing material. Compliance with this section is crucial to addressing the significant harm that asbestos exposes to workers.

Presumption of Innocence

Infringement notice schemes have been supported by Australian Law Reform Commission Report No 95: Principled Regulation. The ACT Government's policy for infringement notices, as set out in the *Guide for Framing Offences*, is informed by the Australian Law Reform Commission's report. This policy is established to ensure infringement notices meet a legitimate purpose with full consideration and justification when approving offences as an infringement notice offence.

In the case of WHS laws, infringement notice penalties work as an important regulatory tool to ensure compliance and protection of worker rights to safety. They provide the work safety regulator with the appropriate means to meet their functions under the WHS Act and undertake compliance and enforcement action.

4. Proportionality (s28(e))

Public Register

In developing this amendment regulation consideration has been given to the proportionality of potential human rights limitations to the importance of protecting worker safety.

On balance, any limitation on the right to privacy and reputation is justified through the protection of the right to life and the right to work. Where an alleged breach of safety obligations has occurred, it is the practice of the ACT's regulatory system to make this publicly known to meet community and social expectations. This supports the principle of deterrence against non-compliance by upholding and focussing on safety compliance in the services delivered by licensees. It is important to note that the public register, and publication of all information including trading names, are already online at the WorkSafe ACT website. This Amendment Regulation will only impact the register when licensees have allegedly breached their WHS obligations and been issued with an infringement notice for the alleged breach.

The type of information included on the public register is reasonable and proportionate to achieving the policy objective of protecting worker safety. The information included on the register is circumscribed according to this purpose. The register focuses on the license type and basic business information. This is the minimum information needed for the register to be an effective deterrent against non-compliance.

Given the importance of ensuring compliance with laws that protect the health and safety of workers and other people, the limitation on privacy and reputation caused by the establishment of the public register is the only reasonable and proportionate means to uphold this regulatory framework and achieve the policy objective.

Presumption of Innocence

The limitation on the right to presumption of innocence is proportionate in the context of infringement notice schemes within the regulatory system. These schemes serve a legitimate purpose when used appropriately and with suitable offences.

A thorough assessment, including consultation with the work safety regulator, has been undertaken in line with the *Guide for Framing Offences* to ensure the additional offences against which an infringement notice may be issued are necessary to

ensure appropriate compliance and enforcement. This includes the general application of strict liability to each physical element of each offence under the WHS Act and WHS Regulations. The expansion of this scheme is the mechanism required to uphold the ACT's work health and safety regulatory framework.

Paying an infringement notice is not a plea of guilt or an acceptance of guilt. The *Magistrates Court Act 1930* section 122(e) provides that if a person wishes to dispute liability for the offence, the issue may be referred to the Magistrates Court. Where this occurs the Government and prosecuting agency is responsible for proceeding with prosecution or dropping the allegation. This offers an avenue for review and provides some agency for the alleged offender to preserve their right to innocence until proved guilty. On balance, given the option to dispute liability for the offence, the expansion of WHS infringement notices is necessary to ensure the ACT WHS regulatory framework continues to protect worker health and safety.

CLAUSE NOTES

Clause 1 Name of regulation

Clause 1 establishes the name of the *Magistrates Court (Work Health and Safety Infringement Notices) Amendment Regulation 2023 (No 1)*.

Clause 2 Commencement

This clause provides the commencement of the regulation. The regulation, other than schedule 1, commences on 20 March 2023. Schedule 1 commences immediately after the commencement of the *Work Health and Safety Amendment Regulation 2022 (No 1)*, schedule 1.

Clause 3 Legislation Amended

This clause provides that the regulation amends the *Magistrates Court (Work Health and Safety Infringement Notices) Regulation 2011*.

Clause 4 Schedule 1, part 1.1, new items 2A and 2B

This clause inserts sections 43(1) and 43(2) of the WHS Act into Schedule 1, part 1.1. It provides that infringement notices may be issued against offences relating to the requirements for regulated work to be carried out by workers who are authorised to do so.

Breaches of sections 43(1) and 43(2) of the WHS Act may result in serious risks to the safety of workers or other people. The ability to issue infringement notices for these offences offers an option for early intervention and deterrence. A matter under these sections that warrants more serious intervention may be prosecuted through the courts in instances where the work safety regulator has deemed this as the more appropriate course.

Sections 43(1) and 43(2) of the WHS Act have higher maximum penalties than some other infringement notice offences, due to the significant safety risks that breaches may involve. The infringement penalty amount is set at 20% of the maximum penalty amount in line with the *ACT Guide for Framing Offences*.

Clause 5 Schedule 1, part 1.1, new item 13A

This clause inserts section 210(1) of the WHS Act into Schedule 1, part 1.1. It provides that an infringement notice may be issued against an offence relating to display of notices.

Clause 6 Schedule 1, part 1.2, new item 8A

This clause inserts section 50(3) of the WHS Regulation into Schedule 1, part 1.2. It provides that an infringement notice may be issued against an offence relating to monitoring airborne contaminant levels.

Clause 7 Schedule 1, part 1.2, new items 56A and 56B

This clause inserts sections 225(2) and 225(5) of the WHS Regulation into Schedule 1, part 1.2. It provides that infringement notices may be issued against certain offences relating to scaffolds.

Clause 8 Schedule 1, part 1.2, new item 86A

This clause inserts section 302 of the WHS Regulation into Schedule 1, part 1.2. It provides that an infringement notice may be issued against an offence relating to requirements for review of safe work method statements.

Clause 9 Schedule 1, part 1.2, new item 89A

This clause inserts section 303(4) of the WHS Regulation into Schedule 1, part 1.2. It provides that an infringement notice may be issued against an offence relating to requirements to keep safe work method statements.

Clause 10 Schedule 1, part 1.2, new items 104A to 104E

This clause inserts sections 330(1), 330(3), 330(4), 339(1) and 339(3) of the WHS Regulation into Schedule 1, part 1.2. It provides that infringement notices may be issued against certain offences relating to data sheets for hazardous chemicals.

Clause 11 Schedule 1, part 1.2, new items 106A and 106B

This clause inserts section 346(1) and 346(3) of the WHS Regulation in Schedule 1, part 1.2. It provides that an infringement notice may be issued against certain offences relating to requirements to keep a hazardous chemicals register.

Clause 12 Schedule 1, part 1.2, new item 107A

This clause inserts section 376 of the WHS Regulation into Schedule 1, part 1.2. It provides that an infringement notice may be issued against an offence relating to a duty to give health monitoring reports to the work safety regulator.

Clause 13 Schedule 1, part 1.2, new items 109A and 109B

This clause inserts sections 388(2) and 388(3) of the WHS Regulation into Schedule 1, part 1.2. It provides that infringement notices may be issued against certain offences relating to records of workers likely to be exposed to carcinogens.

Clause 14 Schedule 1, part 1.2, new items 114A to 114C

This clause inserts sections 409(1), 415(1) and 415(2) of the WHS Regulation into Schedule 1, part 1.2. This clause provides that infringement notices may be issued against certain offences relating to lead risk work.

Clause 15 Schedule 1, part 1.2, new items 116A to 116C

This clause inserts sections 418B, 418BAA and 419(1) of the WHS Regulation into Schedule 1, part 1.2. It provides that infringement notices may be issued against certain offences relating to work with asbestos, asbestos containing material (ACM), engineered stone or other crystalline silica material.

Clause 16 Schedule 1, part 1.2, new items 131A and 131B

This clause inserts sections 446(1) and 446(3) of the WHS Regulation into Schedule 1, part 1.2. It provides that infringement notices may be issued against offences relating to the use of certain equipment on asbestos or ACM.

Clause 17 Schedule 1, part 1.2, new item 134A

This clause inserts section 458 of the WHS Regulation into Schedule 1, part 1.2. It provides that an infringement notice may be issued against an offence relating to a duty to ensure asbestos removal work is carried out by a licensed asbestos removalist.

Clause 18 Schedule 1, part 1.2, new items 150A and 150B

This clause inserts sections 555(4) and 555(5) of the WHS Regulation into Schedule 1, part 1.2. It provides that infringement notices may be issued against offences relating to determined major hazard facility safety assessments.

Schedule 1 Other amendment

Schedule 1 inserts sections 418D(1), 418D(4), and 418D(5) of the WHS Regulation into Schedule 1, part 1.2. This provides that infringement notices may be issued against offences which relate to a duty to train workers about crystalline silica awareness.

These sections have been notified in the *Work Health and Safety Amendment Regulation 2022 (No 1)* and do not commence until 1 July 2023.