

Magistrates Court (Urban Forest Infringement Notices) Regulation 2023

Subordinate law SL2023–28

made under the

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

EXPLANATORY STATEMENT

OVERVIEW

The Magistrates Court (Urban Forest Infringement Notices) Regulation 2023 (the Regulation) is being made in accordance with part 3.8 of the *Magistrates Court Act 1930* and will enable infringement notices to be issued for certain offences against the *Urban Forest Act 2023*.

Infringement notices are intended to provide an alternative to prosecution. The ability to issue infringement notices for offences against the Urban Forest Act will encourage compliance with the legislation and will allow for immediate action to be taken against people who are breaching the law.

The Urban Forest Act repealed the *Tree Protection Act 2005* and provides a more comprehensive framework for the protection of trees to support a sustainable urban forest.

The Regulation enables authorised persons under section 111 of the Urban Forest Act to issue infringement notices and reminder notices. Under the Magistrates Court Act a person authorised to issue an infringement notice for an offence has the discretion to decide whether or not to issue a notice.

CONSISTENCY WITH HUMAN RIGHTS

During the development of the Regulation due regard was given to its compatibility with human rights as set out in the *Human Rights Act 2004*.

Rights engaged

The Bill engages the following sections of the Human Rights Act:

- section 22 – Right to be presumed innocent until proven guilty (limited).

Rights Limited

Right to be presumed innocent until proven guilty

Nature of the right and the limitation

The infringement notices progressed by the Regulation limit the right to be presumed innocent until proven guilty under s 22(1) of the Human Rights Act. This right is limited as there is no requirement for the defendant to prove a fault element, such as intention or recklessness and the prosecution need only show that the defendant did the prohibited act.

This Regulation introduces infringement notices for the following offences in the Urban Forest Act, which have been carried over from the Tree Protection Act with some additional offences added relating to new provisions of the Urban Forest Act:

- engaging in conduct that damages or is likely to damage a protected tree (s 16(5)),
- doing prohibited groundwork in (a) the protection zone for a protected tree; or (b) a declared site (s 17(4)),
- contravening a condition of an application for approval of tree damaging activity (s 33 (1)),
- failure to comply with a tree reparation direction (s 49 (1)),
- contravening a tree management plan (s 90 (1)),
- contravening a tree protection condition of development approval (s 109 (2)).
- interfering with a seized thing to which access has been restricted (s 118 (5))
- failure to comply with a direction to give personal details (s 120 (1)).

The use of strict liability offences is an established and common approach to enforcing offences in regulatory contexts. While this does limit rights in criminal proceedings, strict liability offences and corresponding infringement notices exist within the constraints of the education-focused compliance framework in the Act and the general protections of criminal law.

While an infringement notice scheme offers the opportunity for a person to pay the infringement notice rather than face prosecution, it does not prevent them from choosing to challenge the notice and instead face prosecution in court, so the minimum guarantees in criminal proceedings under s 22(2) and rights to a fair trial under s 21 of the Human Rights Act remain available and are not undermined by the possibility of an infringement notice scheme.

Legitimate purpose

The objective sought to be achieved by the Regulation is enhanced compliance with the Urban Forest Act. The Urban Forest Act seeks to give effect to actions in the Urban Forest Strategy 2021-2045 (the Strategy) and to provide a legislative framework for managing trees on private and public land in line with the objective of enhancing Canberra's tree canopy to reach a target of 30 per cent canopy coverage by 2045. This target was set out in the Strategy, ACT Climate Change Strategy 2019-2045 and the Living Infrastructure Plan. The Urban Forest Act seeks

to strengthen the management of the ACT's urban forest so that government, business and the community work together to protect trees in their general conduct and in their design and development decisions. This in turn will contribute towards having a resilient and sustainable urban forest with good canopy cover.

Rational connection between the limitation and the purpose

The means proposed to achieve this objective is to introduce offences to discourage prohibited behaviours that cause damage to trees and reduce the canopy coverage. These include strict liability offences to facilitate enforcement of that prohibition, for which the infringement notices penalties are set out in the Regulation.

In particular, the strict liability offences listed in this Regulation are appropriate for infringement notices as they relate to damage to trees (either directly or via prohibited groundworks in their protection zone), contravening approval conditions, tree management plans or tree reparation directions, and non-compliance with enforcement (either via interfering with a seized thing or failing to provide personal details when directed). These offences relate directly to tree harm, commitments to avoid, minimise or, where possible, repair tree harm, and efforts to enforce breaches of the legislation. As infringement notices may be issued in a timely manner, they are an important tool in deterring and stopping such harms from continuing once they are identified. This is particularly valuable for tree protection as actions that breach these offences may cause long-term irreparable adverse impacts to trees which contribute to an overall decline of the urban forest.

Proportionality

Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. Strict liability offences arise in a regulatory context where reasons such as public standards, environmental protection, safety, community wellbeing and the public interest in ensuring that regulatory schemes are observed require the sanction of criminal penalties. In particular, where a defendant can reasonably be expected to know what the requirements of the law are, the mental, or fault element can justifiably be excluded.

A less restrictive approach (namely, not creating infringement notices for these offences) would still enable enforcement but would not be as effective as a deterrent and would only be feasible to enforce for larger-scale breaches. Deterrence is the most effective solution as environmental harms often occur on a long-term ecological systems level where local action to reverse or repair them is not possible or practicable. A less restrictive approach would not induce the wide-scale behavioural change that is needed to protect and promote a sustainable ACT urban forest.

The infringement notice offences and penalties in the Regulation are considered reasonable and proportionate for the following reasons.

Where the Urban Forest Act makes it a strict liability offence to contravene a condition of an application for approval of tree damaging activity (s 33), to fail to comply with a tree reparation direction (s 49), to contravene a tree management plan (s 90), or to contravene a tree protection condition of development approval (s 109),

the person this approval or direction is issued to is made aware of their obligations by the approval or direction. The conditional tree damaging activity, conditional development approval, approved tree management plan or issued tree reparation direction would outline what activities are not permitted in relation to the protected tree in question. It would also oblige the recipient of the direction or conditional approval to make any person they engage to work on or near the tree, such as a tradesperson, aware of what conduct is prohibited or required in relation to the tree. An additional safeguard is that the offences against ss 49, 90 and 109 do not apply if the person has a reasonable excuse, for example, if the person directed to do an activity in relation to the tree lost access to the tree and was thus unable to comply.

There are additional strict liability offences in ss 16(5) and 17(4) for engaging in conduct that damages or is likely to damage a protected tree and doing prohibited groundwork in the protection zone for a protected tree or a declared site. The infringement penalties for these offences have been set at \$1600 for registered and remnant trees and \$1200 for public or regulated trees. These are 20% and 15% of the 50 penalty units for these offences in the Urban Forest Act, which is in line with the Guide to Framing Offences and which is set at two staggered amounts to reflect the different levels of environmental harm of these offences.

An inherent safeguard against the limitation on the right to the presumption of innocence is the availability of the defence of mistake of fact. This would allow anyone charged with an offence under ss 16(5) and 17(4) to challenge the assertion that tree damage or prohibited groundwork had occurred. This defence would be a safeguard for third parties like tradespeople or visitors who may be lawfully on the property and inadvertently breach offence provisions because they are not aware, for example, that the tree is protected by virtue of it being planted under a Canopy Contribution Agreement.

For the majority of protected trees, their status as protected trees will be publicly available information, so the risk of inadvertent breach is very low. Within the built-up urban area protected trees comprise every tree on public land and any tree on private land that is over 8m in height, 8m in width or 1m in trunk circumference at 1.4m above natural ground level. Within the broader urban forest protected trees include registered trees and remnant trees. Registered trees are listed on the ACT Tree Register, which is a public webpage. Remnant trees are identifiable by species and size, in particular their trunk circumference. Within the urban area, these trees would already be protected by their location or their size as public or regulated trees. Within future urban areas and areas subject to an estate development plan, those planning developments are required to detail existing trees in their plans and receive approval before conducting works. Remnant trees are identifiable by government in assessing these plans through such factors as tree species, size and the history of the area; this would be communicated clearly in a tree management plan approval.

The highest risk of inadvertent breach of this provision would be trees that are protected under a Canopy Contribution Agreement, as these trees would typically be on leased land and be smaller than the minimum size of regulated trees. To limit this risk, ACT Government is implementing the following information-sharing steps.

Firstly, the tree owner will be aware that the tree is protected as they will be a signatory to the Canopy Contribution Agreement. Such agreements will include a standard clause that the tree owner must notify people accessing the site, prior to gaining access, of the trees and their protection status. This includes people such as tradespeople, utility providers and home occupiers that are not the property owner, for example, tenants.

Secondly, Canopy Contribution Agreements may, where appropriate, be issued with additional conditions. Such conditions may include for signage to be erected near the tree or for representatives of a multi-unit dwelling or commercial site to notify all lot owners at the time of tree planting and to provide continually accessible information such as common property signage or information accessible to owners and tenants, such as on a resident portal, for the duration of the protection period.

Thirdly, where trees that are protected under a Canopy Contribution Agreement change ownership before the protection obligations expire, new owners will be made aware of this agreement and the remaining duration of the tree's protection via details on the lease. For multi-unit and commercial sites, the Canopy Contribution Agreement will require that the protection period be noted in the Unit or Commercial Title Rules, as these are included with each contract for sale and for new tenants/occupants. These conditions will ensure that information about a protected tree must be provided to the people most likely to conduct or authorise works to or near the tree so that they are on notice of their obligations around the protected tree.

Finally, information on trees protected under Canopy Contribution Agreements will be made publicly available on ACTmapi. This information will be provided at a block and section level to protect the privacy of tree owners.

The Urban Forest Act was notified on 11 April 2023 and is scheduled to commence on 1 January 2024, along with the commencement of this Regulation. Prior to the commencement date a public education program will be undertaken to alert the community and businesses, such as arborists, about the new laws to ensure they are aware of their obligations. Appropriate safeguards, such as mail-outs to third parties e.g. new property owners, will be implemented to ensure people likely to have the most regular dealings with protected trees are aware of their status so they do not inadvertently breach provisions of the Bill.

SUMMARY OF CLAUSES

Clause 1 Name of regulation

This clause provides that the name of the regulation is the Magistrates Court (Urban Forest Infringement Notices) Regulation 2023.

Clause 2 Commencement

This clause provides for the commencement of the regulation on the commencement of the Urban Forest Act.

Clause 3 Dictionary

This clause provides that the dictionary at the end of the regulation is part of the regulation. The dictionary defines certain terms used in the regulation.

Clause 4 Notes

This clause provides that a note found in the regulation is explanatory and is not part of the regulation.

Clause 5 Purpose of regulation

This clause provides that the purpose of the regulation is to provide for infringement notices under the Magistrates Court Act, part 3.8, for certain offences against the Urban Forest Act.

Clause 6 Administering authority

This clause provides that the administering authority for an infringement notice offence under the regulation is the director-general for the Urban Forest Act.

Clause 7 Infringement notice offences

This clause provides that the Magistrates Court Act, part 3.8, applies to an offence against a provision of the Urban Forest Act mentioned in the regulation in schedule 1, column 2.

Clause 8 Infringement notice penalties

This clause provides that the penalties for the offences against the Urban Forest Act are listed in column 4 of schedule 1. Penalties for an offence by a corporation are five times that applicable for an individual.

This regulation also provides that the cost for the issue of a reminder notice for an infringement notice offence is \$34.

Clause 9 Contents of infringement notices – identifying authorised person

This clause provides that an infringement notice must identify the authorised person who served the notice. An authorised person may be identified in the notice by their

full name, or surname and initials. Alternatively, the infringement notice may identify the authorised person by any unique number given to them by the administering authority.

Clause 10 Contents of infringement notices – other information

This clause specifies that infringement notices served on a company must include the company's ACN.

Clause 11 Contents of reminder notices – identifying authorised person

This clause provides that a reminder notice must identify the authorised person who served the notice. An authorised person may be identified in the notice by their full name, or surname and initials. Alternatively, the reminder notice may identify the authorised person by any unique number given to them by the administering authority.

Clause 12 Authorised people for infringement notice offences

This clause provides that an authorised person under the Urban Forest Act, section 111 may serve infringement notices and reminder notices for infringement notice offences.

Schedule 1

This schedule outlines the offence penalty and infringement penalties for offences under the Urban Forest Act 2023.

Dictionary

This is the dictionary for the Regulation.