

Australian Capital Territory

Magistrates Court (Agents Infringement Notices) Amendment Regulation 2019 (No 1)

Subordinate law SL2019–18

made under the

Magistrates Court Act 1930

EXPLANATORY STATEMENT

Overview

The Regulation amends the *Magistrates Court (Agents Infringement Notices) Regulation 2003* to make changes consequential to the *Red Tape Reduction Legislation Amendment Act 2017* (Red Tape Act).

In August 2017, section 115 of the *Agents Act 2003* (Agents Act) was amended by the Red Tape Act to make it an offence for current licenced agents to fail to comply with the trust account auditing requirement of the Agents Act. This brought offence provisions for current licensed agents in line with those for former licensed agents and personal representatives of a licensed agent. The amendment was intended to allow infringement notices to be issued to current licensed agents in respect of breaches of the trust account auditing requirements.

As part of this amendment, section 115 of the Agents Act was redrafted such that the offence provision, which was previously in subsection 115(2), was moved to subsection 115(1). Due to an oversight, the *Magistrates Court (Agents Infringement Notices) Regulation 2003* was not updated to reflect this change.

The Regulation ensures that infringement notices may be issued to current licenced agents in respect of breaches of the trust account auditing requirements.

Human Rights Implications

As it concerns a strict liability offence, the Regulation might be seen to engage the presumption of innocence. In a strict liability offence, there is no requirement to establish a fault element, such as intention, knowledge, recklessness, or negligence. Strict liability offences arise in a regulatory context where for reasons such as consumer protection and public safety, the public interest in ensuring that regulatory schemes are observed requires the sanction of criminal penalties. In particular, where

a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental, or fault, element can justifiably be excluded. Section 22(1) of the *Human Rights Act 2004* provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

This Regulation does not create a new offence; it facilitates the administration of a strict liability offence already contained in the Agents Act. Without the ability to issue infringement notices, the only option available to the commissioner for fair trading is to apply to ACAT for occupational discipline orders. This is a serious response, and this Regulation provides a method to achieve the policy purpose that is less restrictive on human rights.

Detail

Clause 1 – Name of regulation

This is a technical clause that establishes the name of the Regulation as the *Magistrates Court (Agents Infringement Notices) Amendment Regulation 2019 (No 1)*.

Clause 2 – Commencement

This is a formal provision specifying when the Regulation will commence. The Regulation will commence on the day after its notification day.

Clause 3 – Legislation amended

This clause provides that the Regulation amends the *Magistrates Court (Agents Infringement Notices) Regulation 2003*.

Clause 4 – Schedule 1, item 17, column 2

This clause substitutes the existing reference to subsection 115(2) of the *Agents Act 2003* in item 17 with the correct reference to subsection 115(1) of that Act.