

Magistrates Court (Public Unleased Land Infringement Notices) Amendment Regulation 2023 (No 1)

Subordinate law SL2023–31

made under the

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

EXPLANATORY STATEMENT

OVERVIEW

The Magistrates Court (Public Unleased Land Infringement Notices) Amendment Regulation 2023 (No 1) (the Amendment Regulation) amends the Magistrates Court (Public Unleased Land Infringement Notices) Regulation 2013 to reflect a new offence introduced under the *Public Unleased Land Act 2013*. This new offence was established through the *Electoral and Road Safety Legislation Amendment Act 2023*.

The new public unleased land offence at section 28(2) of the Public Unleased Land Act relates to new restrictions on electoral signs, particularly political corflutes, through the Public Unleased Land (Movable Signs) Code of Practice 2023 (No 1) (the Code). Clauses 6(4)(a), 7(1)(a)(ii) and 9 of the Code contain details relating to the new offence.

The new restrictions introduce a maximum number of signs per prospective candidate and entity on public unleased land during elections, currently set at 250 signs in the Code, and ban the placement of electoral signs on or alongside designated public roads at elections and referendums, currently set in the Code as public roads with a speed limit of 90km/h or more, regardless of whether a temporary speed limit is applied to the road such as for road works.

These restrictions give effect to part of Agreed Legislative Reform item no. 18 of the Parliamentary and Governing Agreement of the 10th Legislative Assembly (PAGA) to ‘further restrict roadside electoral advertising including further regulation of roadside corflutes’.

The Code is established under section 27 of the Public Unleased Land Act and accompanied by an existing offence at section 28(1) of 10 penalty units for breaching any of the other requirements in the Code (or 50 penalty units where the breach relates to insurance requirements).

The new offence expands the offence at section 28(1) to introduce new section 28(2) for breaching the Code where it applies to the new maximum number of signs and designated public roads. This offence is set at 20 penalty units, reflecting the higher environmental and road safety concerns associated with the high volume of electoral corflutes seen during election campaigns.

The Code already regulates electoral signs, particularly in relation to restrictions on timing, size, placement, and location. The *Electoral Act 1992* also regulates electoral advertising, including requiring all publications to display authorisation information to identify the responsible person for the advertisement. The new offence builds on this existing regulatory framework with the aim of reducing the overall quantity of corflutes on public land during campaign periods.

CONSISTENCY WITH HUMAN RIGHTS

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

Rights engaged

The Amendment Regulation limits the following sections of the Human Rights Act:

- Section 16 – Right to freedom of expression.
- Section 22 – Right to be presumed innocent until proven guilty.

Rights Limited

Nature of the right and the limitation

Right to freedom of expression

The right to freedom of expression includes political expression through print, such as electoral corflutes.

The new movable electoral sign offence under the Public Unleased Land Act may reduce the overall number of electoral corflutes used by candidates, parties, lobby groups, and other individuals and entities during election campaigns. The maximum number of signs allowed and designated public roads where signs are prohibited are detailed at clauses 6(4)(a), 7(1)(a)(ii) and 9 of the Code.

The current maximum number of electoral signs per candidate and entity in the Code is 250, including party and issue-based signs. This maximum number only applies to elections, not referendums. The designated public roads are currently set in the Code as all public roads with a usual speed limit of 90km/h or more, regardless of temporary speed limits applied in certain circumstances such as road works or events. This applies to both elections and referendums and does not include roads considered as ‘designated areas’ in the Code, which electoral signs are already prohibited from unless given express approval by the National Capital Authority.

This limits the right to freedom of expression under section 16 of the Human Rights Act and also engages the implied Australian Constitutional right to freedom of political communication.

Right to be presumed innocent until proven guilty

The strict liability offence at new section 28(2) of the Public Unleased Land Act engages rights in criminal proceedings, specifically the right to be presumed innocent until proven guilty under section 22 of the Human Rights Act. The offence relates to non-compliance with the Code specifically where the maximum number of electoral signs on public land per candidate and entity is exceeded and where electoral signs are placed adjacent to designated public roads. The maximum number of signs restriction applies only to elections, while the restrictions on designated public roads apply to both elections and referendums.

The new offence is set at 20 penalty units and is strict liability, with infringement notices of \$440 at the time this Amendment Regulation was created. This is double the existing offence for breaching other non-insurance related provisions in the Code under section 28(1), which does not cover the new maximum number of electoral signs and the placement of electoral signs on designated public roads.

The existing offence at section 28(1) relates to all provisions in the Code other than the maximum number of electoral signs and designated public roads where electoral signs are not permitted. This existing offence for the remaining provisions in the Code does not apply to the new offences at section 28(2) and their corresponding provisions at clauses 6(4)(a), 7(1)(a)(ii) and 9 of the Code.

Strict liability offences place the evidential burden on the defendant as there is no requirement for authorised officers to prove a fault element. It must be established that the defendant was aware of and understood their legal obligations.

Legitimate purpose

The new offence and the Code serve the broader purpose of upholding litter and pollution reduction, visual amenity, accessibility, road safety, and fairness.

The main purpose of limiting the number of movable electoral signs per candidate and entity is to reduce excessive waste production, environmental pollution and road safety risks posed by the influx of corflute signs during electoral campaign periods. While reducing the overall number of corflutes from reaching landfills and from becoming litter is the primary environmental objective, reuse and recycling of corflutes will also continue to be encouraged.

The purpose of restricting movable electoral signs from designated public roads at or exceeding 90km/h usual speed limits is to both reduce the overall number of corflute signs and to also address safety risks associated with vehicles stopping to install/remove signs, signs blowing into the path of moving traffic, and driver distraction due to a sudden influx of electoral corflutes over the campaign period. While some existing restrictions in the Code already address road and pedestrian safety more generally, such as spacing limits from verges, this new restriction directly targets the issue of road safety in higher speed traffic areas.

Rational connection between the limitation and the purpose

The new offence at section 28(2) of the Public Unleased Land Act may reduce the overall number of corflutes being produced at each ACT and federal election. This reduces waste production, pollution of our environment, and road safety risks in higher-risk traffic areas.

The maximum number of signs is anticipated to place higher value on each sign, meaning more care will be taken in their strategic placement for quality of visibility over quantity and ensuring they stay in place rather than become litter. The maximum number of signs only applies to elections as referendum campaign periods do not pose the same volume of signs as election campaigns.

Public unleased land is defined in the Public Unleased Land Act as unleased territory land which the public is entitled to use or is otherwise open to be used by the public. Public roads are defined as including the street, road, lane, thoroughfare, footpath, or place that is public unleased land. The new restriction in the Code for electoral signs adjacent to designated public roads includes all public unleased land alongside or in clear view of the public road.

The two restrictions are interdependent to achieve the intended environmental and road safety objectives. Higher-speed traffic areas have high visibility and have proven popular for large quantities of corflutes in previous elections. Applying the maximum number of 250 signs without restricting their placement along higher-speed roads could result in candidates further concentrating their limited signs in these high-visibility areas, increasing the associated road safety risks. Restricting signs from designated public roads without a maximum number of signs could result in the same quantities of signs being printed as in previous campaigns with higher concentrations of signs being placed on all remaining permitted roads, which leads to more litter and doesn't address growing concerns around waste reduction.

The purpose of making the new offences strict liability is to provide an effective deterrent. Where the person or entity authorising the signs is clearly or repeatedly breaching the maximum number of signs and/or the location restriction on designated public roads, the strict liability offence at section 28(2) ensures responsive enforcement during the campaign where the person or entity may have otherwise considered breaching the Code to be worth the advantage over competitors.

The purpose of a higher penalty amount for the maximum sign limit and designated public road restrictions compared to all other non-insurance related restrictions in the Code is to reflect the greater environmental and road safety objectives.

The short-term surge in movable electoral signs in an election period means Transport Canberra and City Services (TCCS) must prioritise education and enforcement during the six weeks preceding polling day and the days afterwards. If TCCS is not responsive to non-compliance in a timely manner, risk of further non-compliance grows during the high-pressure election period. Use of strict liability offences for the new restrictions enables timely enforcement through formal warnings and infringement notices.

Proportionality

The right to freedom of expression and the Australian Constitutional right to freedom of political communication through the form of movable signs may continue to be exercised under the new offences. Other forms of political expression remain available in addition to the ongoing option of movable electoral signs on public land. The restrictions to electoral signs balance the right to freedom of expression with the need to facilitate the broader use of public unleased land for everyone. Policy considerations such as litter and pollution reduction, visual amenity, accessibility, road safety, and fairness underpin the Code in addition to freedom of expression.

There is a pre-existing regulatory framework established for electoral advertising in the ACT, particularly under the Code and the Electoral Act. For example, the Code already sets out timing, size, placement, spacing and location restrictions for movable electoral signs. Both pieces of legislation rely on the use of strict liability offences as effective deterrents and to facilitate prompt enforcement action where education and awareness have failed.

These existing provisions in the Code are supported by the existing strict liability offence at section 28(1). This existing offence is set at 10 penalty units and will continue to apply to the existing electoral sign restrictions in the Code. However, it will not apply to the new electoral sign restrictions under the new offence at section 28(2); specifically, the provisions relating to the maximum number of electoral signs permitted and the placement of these signs at designated public roads. Existing provisions such as the size of electoral signs, distance from the kerb, and placement in designated areas (areas specified in the Code as having special characteristics of the National Capital) will continue to be addressed by the smaller offence at section 28(1).

The new offence for a maximum electoral sign limit and restricting electoral signs from designated public roads is set at 20 penalty units (\$440 infringement notice), compared to 10 penalty units (\$220 infringement notice) for all other provisions in the Code other than relating to insurance, which is 50 penalty units. The higher penalty for the new number and location limits is necessary to not only reflect the more significant environmental and road safety implications but to deter candidates and parties from viewing the penalties as simply the cost of business within a six-week election period. The higher penalty for the new offences reduces risk of candidates and parties accepting infringement notices as a compromise for greater visibility over competitors.

The Code limits candidates/prospective candidates to a maximum 250 signs, including party and issues-based signs, and prohibits their placement alongside roads with a usual speed limit of 90km/h or more, regardless of temporary speed limits such as road works. This does not include roads within designated areas at clause 8 of the Code.

The new offence at section 28(2) of the Public Unleased Land Act does not specify the maximum number of signs permitted or the types of designated public roads. This is to allow flexibility for these restrictions to be amended in future by

disallowable instrument in the Code following ongoing feedback, such as from candidates.

Implementation of the amended Code will be subject to standard scrutiny processes of disallowable instruments and may be disallowed by the ACT Legislative Assembly or subjected to further amendments if required.

A cross-agency education and awareness campaign will accompany the new offence as part of the broader communications campaign for the Electoral and Road Safety Legislation Amendment Act implementation, including website updates outlining the new restrictions, standard election briefings and materials for parties and candidates/prospective candidates, and ongoing proactive and reactive operations by TCCS in administering the Public Unleased Land Act. For example, a Candidate Information Handbook and a copy of the Code are provided to candidates at the commencement of an election period in addition to candidate briefings and other education materials, and an escalating enforcement framework is used that prioritises education and formal warnings. The higher penalty for the offence at section 28(2) will be made clear to candidates through the TCCS and ACT Electoral Commission webpages, the Code, the Candidate Handbook, and other materials. Being a disallowable instrument, the Code will also be publicly available on the ACT Legislation Register under the Public Unleased Land Act.

Where a warning fails to correct non-compliance, an infringement notice may be issued to the responsible candidate or prospective candidate, party, or entity. There is an existing enforcement framework in place for electoral movable signs under the Code by TCCS. Authorised officers identify the individual, party or entity advertised on the corflute sign using the authorisation information required for all electoral matter in other legislation, e.g., the Electoral Act, the *Referendum (Machinery Provisions) Act 1994*, the *Commonwealth Electoral Act 1918* (Cwlth), and the *Referendum (Machinery Provisions) Act 1984* (Cwlth)).

The Code defines ‘electoral advertising signs’ as movable signs containing any printed electoral matter to which provisions in relevant ACT and Commonwealth legislation apply. For example, section 292 of the Electoral Act states a person commits an offence if they disseminate electoral matter that does not include:

- a. the first and last name of the individual who authorised, or authored, the matter; and
- b. a statement to the effect that the named person authorised, or is the author of, the matter; and
- c. a statement that the matter is disseminated for the relevant party, candidate, prospective candidate, or entity (e.g. lobby group) where applicable.

The offence at new section 28(2) relates to restricting electoral signs from designated public roads, which are prescribed in the Code as roads with a usual speed limit at or exceeding 90km/h. The definition of ‘designated public road’ at clause 9 of the Code is separate to the definition of ‘designated area’ at clause 8, which means areas with special characteristics of the National Capital. Sections of roads meeting the criteria of a designated public road but that are within a

designated area are not included as a designated public road and so will continue to be covered by the existing smaller offence at section 28(1).

The existing arrangements prohibiting electoral signs from designated areas will continue unchanged by the Bill and associated amendments to the Code, which will make this distinction clear to ensure candidates, prospective candidates, parties, and other entities publishing political advertising on public unleased land understand that a higher penalty applies to designated public roads.

The explanatory statement to the amendments for the Code clearly set out:

- a. a summary of the new restrictions (e.g. a maximum 250 signs per candidate and prohibiting signs from roads with a standard speed limit of 90km/h or higher) and a clear and simple breakdown of their application;
- b. that the new electoral sign restrictions have a higher infringement notice penalty apply compared to other electoral restrictions (\$440 instead of \$220);
- c. the distinction between 'designated public roads' and 'designated areas'; and
- d. that the definition of 'electoral matter' is linked to existing definitions in other ACT and Commonwealth legislation and requires identifying information to be considered an electoral sign for the purposes of enforcement.

As the new offences are strict liability, the defence of reasonable mistake of fact is available.

The Amendment Regulation and the subsequent amendments to the Code have been developed together to apply the definition of 'electoral matter' only where signs meet the objective components of the definition and self-identify as electoral signs through authorisation information at section 292 of the Electoral Act or other ACT and Commonwealth legislation. This aligns with current enforcement practice for the existing electoral sign provisions and ensures there is no subjective or mental element in applying the strict liability offences.

SUMMARY OF CLAUSES

Clause 1 Name of regulation

This clause states that the name of the amendment regulation is the Magistrates Court (Public Unleased Land Infringement Notices) Amendment Regulation 2023 (No 1).

Clause 2 Commencement

This clause provides that the commencement of the amendment regulation matches the commencement of the Electoral and Road Safety Legislation Amendment Act 2023, section 84. This is the section containing the new offence at section 28(2) of the *Public Unleased Land Act 2013*, which commences 14 days after the Electoral and Road Safety Legislation Amendment Act is notified.

Clause 3 Legislation amended

This clause sets out that the amendment regulation amends the Magistrates Court (Public Unleased Land Infringement Notices) Regulation 2013. This piece of legislation sets out the infringement amounts for various offences contained in the Public Unleased Land Act.

Clause 4 Schedule 1, new item 6A

This clause amends the existing schedule in the Magistrates Court (Public Unleased Land Infringement Notices) Regulation 2013 to also include row 6A for the infringement notice amount for the new offence at section 28(2).

This amendment to the schedule outlines an offence penalty amount of \$440 for infringement notices issued under new section 28(2) of the Public Unleased Land Act. This offence corresponds to the new restrictions in the Public Unleased Land (Movable Signs) Code of Practice 2023 (No 1) (the Code) for the maximum number of electoral signs per candidate and entity and the prohibiting of electoral signs from being placed on designated public roads at clauses 6(4)(a), 7(1)(a)(ii) and 9 of the Code.