



# Historic Environment (Amendment) (Scotland) Act 2011 2011 asp 3

## PART 2

### MODIFICATIONS OF THE ANCIENT MONUMENTS AND ARCHAEOLOGICAL AREAS ACT 1979

#### *Works affecting scheduled monuments: enforcement*

#### **6 Works affecting scheduled monuments: enforcement**

(1) After section 9 of the 1979 Act insert—

#### *“Scheduled monument enforcement notices*

#### **9A Power to issue scheduled monument enforcement notice**

- (1) Where it appears to the Scottish Ministers that—
  - (a) any works have been, or are being, executed to a scheduled monument or to land in, on or under which there is a scheduled monument, and
  - (b) the works are such as to involve a contravention of section 2(1) or (6),they may, if they consider it expedient having regard to the effect of the works on the character of the monument as one of national importance, serve a notice under this section (in this Act referred to as a “scheduled monument enforcement notice”).
- (2) A scheduled monument enforcement notice must specify the alleged contravention and must (either or both)—
  - (a) specify any works falling within subsection (1) which the Scottish Ministers require to cease,
  - (b) require steps falling within subsection (3) and specified in the notice to be taken.
- (3) Those steps are—
  - (a) for restoring the monument or land to its former state,

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- (b) if the Scottish Ministers consider that restoration to its former state would not be reasonably practicable or would be undesirable, for executing such further works specified in the notice as they consider are required to alleviate in a manner acceptable to them the effect of the works which were carried out without scheduled monument consent, or
  - (c) for bringing the monument or land to the state it would have been in if the conditions of any scheduled monument consent for the works had been complied with.
- (4) In considering whether restoration is undesirable under subsection (3)(b), the Scottish Ministers are to have regard to the desirability of preserving—
- (a) the national importance of the monument,
  - (b) its features of historical, architectural, traditional, artistic or archaeological interest.
- (5) Where further works of a kind mentioned in subsection (3)(b) have been carried out on a monument or land, scheduled monument consent is treated as having been granted in respect of the works carried out on that monument or land.

### **9B Scheduled monument enforcement notices: further provisions**

- (1) A scheduled monument enforcement notice—
- (a) must specify the date on which it is to take effect and, subject to section 9C(3), takes effect on that date, and
  - (b) must specify the period (the “period for compliance”) within which—
    - (i) any works required to cease must cease,
    - (ii) any steps required to be taken must be taken,
 and may specify different periods for different works or steps.
- (2) Where different periods apply to different works or steps, references in this Act to the period for compliance with a scheduled monument enforcement notice, in relation to any works or step, are to the period within which the works are required to cease or the step is required to be taken.
- (3) The date specified in the notice under subsection (1)(a) must be at least 28 days after the date on which the notice is served.
- (4) A copy of a scheduled monument enforcement notice must be served—
- (a) on the owner, the lessee and the occupier of the monument to which it relates and of the land in, on or under which the monument is situated,
  - (b) on any other person having an interest in the monument or land, being an interest which in the opinion of the Scottish Ministers is materially affected by the notice.
- (5) The Scottish Ministers may, at any time—
- (a) withdraw a scheduled monument enforcement notice (without prejudice to their power to issue another), or
  - (b) waive or relax any requirement of such a notice and, in particular, extend the period for compliance.

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- (6) The Scottish Ministers must, immediately after exercising the powers conferred by subsection (5), give notice of the exercise to every person who has been served with a copy of the scheduled monument enforcement notice or would, if the notice were reissued, be served with a copy of it.
- (7) The Scottish Ministers must—
  - (a) publish by electronic means (as for example by means of the internet) a list containing particulars of any monument in respect of which a scheduled monument enforcement notice has been served, and
  - (b) on request, provide a copy of a scheduled monument enforcement notice.

### **9C Appeal against scheduled monument enforcement notice**

- (1) A person on whom a scheduled monument enforcement notice is served or any other person having an interest in the monument to which it relates or the land in, on or under which it is situated may, at any time before the date specified in the notice as the date on which it is to take effect, by summary application appeal to the sheriff on any of the grounds in subsection (2).
- (2) Those grounds are—
  - (a) that the matters alleged to constitute a contravention of section 2(1) or (6) have not occurred,
  - (b) that those matters (if they occurred) do not constitute such a contravention,
  - (c) that—
    - (i) works to the monument or land were urgently necessary in the interests of safety or health,
    - (ii) it was not practicable to secure safety or health by works of repair or works for affording temporary support or shelter, and
    - (iii) the works carried out were limited to the minimum measures immediately necessary,
  - (d) that copies of the notice were not served as required by section 9B(4),
  - (e) that the period for compliance for any works or step falls short of what should reasonably be allowed.
- (3) Where an appeal is brought under this section the notice is of no effect until the appeal is withdrawn or finally determined.
- (4) In determining an appeal under this section the sheriff may uphold or quash the notice.
- (5) The sheriff may uphold a notice despite copies of it not having been served as required by section 9B(4) if satisfied that any person on whom a copy should have been, but was not, served has not been substantially prejudiced by the failure.

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### **9D Execution of works required by scheduled monument enforcement notice**

- (1) If any steps specified in the scheduled monument enforcement notice have not been taken within the period for compliance with the notice, the Scottish Ministers may—
  - (a) enter on the land in, on or under which the scheduled monument is situated and take those steps, and
  - (b) recover from the person who is then the owner or lessee of the monument or land any expenses reasonably incurred by them in doing so.
- (2) Where a scheduled monument enforcement notice has been served in respect of a monument—
  - (a) any expenses incurred by the owner, lessee or occupier of a monument or the land in, on or under which it is situated for the purpose of complying with it, and
  - (b) any sums paid by the owner or lessee of a monument or land under subsection (1) in respect of expenses incurred by the Scottish Ministers in taking steps required by it,
 are to be treated as incurred or paid for the use and at the request of the person who carried out the works to which the notice relates.
- (3) If on a complaint by the owner of any scheduled monument or land it appears to the sheriff that the occupier of the monument or land is preventing the owner from carrying out work required to be carried out by a scheduled monument enforcement notice, the sheriff may by warrant authorise the owner to enter the land and carry out the work.
- (4) If the Scottish Ministers take steps under subsection (1) they may sell any materials removed by them from the monument or land unless those materials are claimed by the owner within 3 days of their removal.
- (5) After selling the materials the Scottish Ministers must pay the proceeds to the owner less the expenses recoverable by them from the owner.
- (6) Where the Scottish Ministers seek, under subsection (1), to recover any expenses from a person on the basis that the person is the owner of the scheduled monument or land, and the person proves that—
  - (a) the person is receiving the rent in respect of the monument or land merely as trustee, tutor, curator, factor or agent of some other person, and
  - (b) the person has not, and since the date of the service of the demand for payment has not had, in the person's hands on behalf of that other person sufficient money to discharge the whole demand of the Scottish Ministers,
 the person's liability is limited to the total amount of the money which the person has or has had in the person's hands on behalf of that other person.
- (7) If by reason of subsection (6) the Scottish Ministers have not recovered the whole of any such expenses from a trustee, tutor, curator, factor or agent they

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may recover any unpaid balance from the person on whose behalf the rent is received.

- (8) Any person who wilfully obstructs a person acting in the exercise of powers under subsection (1) is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

### **9E Offence where scheduled monument enforcement notice not complied with**

- (1) Where, after the end of the period for compliance with a scheduled monument enforcement notice, any works required by the notice to cease have not ceased or any step required by the notice has not been taken, the person who is for the time being owner of the scheduled monument or of the land in, on or under which it is situated is in breach of the notice.
- (2) If at any time the owner of the monument or land is in breach of a scheduled monument enforcement notice the owner is guilty of an offence.
- (3) An offence under this section may be charged by reference to any day or longer period of time.
- (4) A person may, in relation to the same scheduled monument enforcement notice, be convicted of more than one offence under this section by reference to different days or different periods.
- (5) In proceedings against any person for an offence under this section, it is a defence for the person to show that—
- (a) the person did everything the person could be expected to do to secure that all works required by the notice to cease were ceased or that all the steps required by the notice were taken, or
  - (b) the person was not served with a copy of the notice and was not aware of its existence.
- (6) A person guilty of an offence under this section is liable—
- (a) on summary conviction, to a fine not exceeding £20,000, and
  - (b) on conviction on indictment, to a fine.
- (7) In determining the amount of any fine to be imposed, the court is in particular to have regard to any financial benefit which has accrued or appears likely to accrue to the person in consequence of the offence.

### **9F Effect of scheduled monument consent on scheduled monument enforcement notice**

- (1) If, after the issue of a scheduled monument enforcement notice, consent is granted under section 2(3A)—
- (a) for the retention of any work to which the notice relates, or
  - (b) permitting the retention of works without complying with some condition subject to which a previous scheduled monument consent was granted,
- the notice ceases to have effect in so far as such work is or such works are required by the notice to cease, or in so far as it requires steps to be taken

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involving the works not being retained or, as the case may be, for complying with that condition.

- (2) The fact that a scheduled monument enforcement notice has wholly or partly ceased to have effect under subsection (1) does not affect the liability of any person for an offence in respect of a previous failure to comply with it. Stop notices

### **9G Stop notices**

- (1) Subsection (2) applies where the Scottish Ministers consider it expedient that any relevant works should cease before the expiry of the period for compliance with a scheduled monument enforcement notice.
- (2) The Scottish Ministers may, when they serve the copy of the scheduled monument enforcement notice or afterwards, serve a notice (in this Act referred to as a “stop notice”) prohibiting the execution of the relevant works to the scheduled monument to which the enforcement notice relates, or to land in, on or under which the monument is situated, or to any part of the monument or land specified in the stop notice.
- (3) In this section and sections 9H and 9I, “relevant works” means any works specified in the scheduled monument enforcement notice as works which the Scottish Ministers require to cease and any works carried out as part of, or associated with, such works.
- (4) A stop notice may not be served if the scheduled monument enforcement notice has taken effect.
- (5) A stop notice must specify the date when it is to come into effect, and that date—
- (a) must not be earlier than 3 days after the date when the notice is served, unless the Scottish Ministers consider that there are special reasons for specifying an earlier date and a statement of those reasons is served with the stop notice, and
  - (b) must not be later than 28 days from the date when the notice is first served on any person.
- (6) A stop notice may be served by the Scottish Ministers on any person who appears to them to have an interest in the monument or the land in, on or under which it is situated or who is executing, or causing to be executed, the relevant works specified in the scheduled monument enforcement notice.
- (7) The Scottish Ministers may at any time withdraw a stop notice (without prejudice to their power to serve another) by notice which must be—
- (a) served on all persons who were served with the stop notice, and
  - (b) publicised by displaying it for 7 days in place of all or any site notices (within the meaning of section 9H(3)).

### **9H Stop notices: supplementary provisions**

- (1) A stop notice ceases to have effect when—
- (a) the scheduled monument enforcement notice to which it relates is withdrawn or quashed,

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- (b) the period for compliance expires, or
  - (c) notice of the withdrawal of the stop notice is served under section 9G(7),whichever occurs first.
- (2) Where a requirement of the scheduled monument enforcement notice to which a stop notice relates is waived or relaxed by virtue of section 9B(5) so that the scheduled monument enforcement notice no longer relates to any relevant works, the stop notice ceases to have effect in relation to those works.
- (3) Where a stop notice has been served in respect of a scheduled monument the Scottish Ministers may publicise it by displaying on the land in, on or under which the monument is situated or on the monument (except where doing so might damage it) a notice (in this section and in sections 6 and 9J referred to as a “site notice”)—
  - (a) stating that a stop notice has been served on a particular person or persons,
  - (b) indicating its requirements, and
  - (c) stating that any person contravening it may be prosecuted for an offence under section 9J.
- (4) A stop notice is not invalid by reason that a copy of the scheduled monument enforcement notice to which it relates was not served as required by section 9B if it is shown that the Scottish Ministers took all such steps as were reasonably practicable to effect proper service.

### **9I Compensation for loss due to stop notice**

- (1) Where a stop notice ceases to have effect a person who, when the notice is first served, has an interest (whether as owner or occupier or otherwise) in the scheduled monument to which the notice relates or the land in, on or under which the monument is situated is entitled to be compensated by the Scottish Ministers in respect of any loss or damage falling within subsection (2).
- (2) That is loss or damage directly attributable to—
  - (a) the prohibition contained in the stop notice, or
  - (b) in a case within subsection (3)(b), the prohibition of such of the works prohibited by the stop notice as cease to be relevant works.
- (3) For the purposes of this section, a stop notice ceases to have effect when—
  - (a) the scheduled monument enforcement notice is quashed,
  - (b) a requirement of the scheduled monument enforcement notice is waived or relaxed by virtue of section 9B(5) so that any works the execution of which are prohibited by the stop notice cease to be relevant works,
  - (c) the scheduled monument enforcement notice is withdrawn by the Scottish Ministers otherwise than in consequence of the grant by them of scheduled monument consent for the works to which the notice relates, or
  - (d) the stop notice is withdrawn.
- (4) The loss or damage in respect of which compensation is payable under this section in respect of a prohibition includes any sum payable in respect of a

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breach of contract caused by the taking of action necessary to comply with the prohibition.

- (5) No compensation is payable under this section—
- (a) in respect of the prohibition in a stop notice of any works which, at any time when the notice is in force, are such as to involve a contravention of section 2(1) or (6), or
  - (b) in the case of a claimant who was required to provide information under section 57 (power to require information as to interests in land) in respect of any loss or damage suffered by the claimant which could have been avoided if the claimant had provided the information or had otherwise co-operated with the Scottish Ministers when responding to the notice.

### **9J Penalties for contravention of stop notice**

- (1) A person who contravenes a stop notice after a site notice has been displayed, or after the stop notice has been served on the person, is guilty of an offence.
- (2) Contravention of a stop notice includes causing or permitting its contravention.
- (3) An offence under this section may be charged by reference to any day or longer period of time.
- (4) A person may, in relation to the same stop notice, be convicted of more than one offence under this section by reference to different days or different periods.
- (5) It is a defence in any proceedings under this section that—
  - (a) the stop notice was not served on the accused, and
  - (b) the accused had no reasonable cause to believe that the works were prohibited by the stop notice.
- (6) A person guilty of an offence under this section is liable—
  - (a) on summary conviction, to a fine not exceeding £20,000, and
  - (b) on conviction on indictment, to a fine.
- (7) In determining the amount of the fine, the court is in particular to have regard to any financial benefit which has accrued or appears likely to accrue to the person in consequence of the offence.

### *Temporary stop notices*

### **9K Temporary stop notices**

- (1) Where it appears to the Scottish Ministers that—
  - (a) any works have been, or are being, executed to a scheduled monument or to land in, on or under which there is a scheduled monument,
  - (b) the works are such as to involve a contravention of section 2(1) or (6), and
  - (c) it is expedient that the works are (or any part of the works is) stopped immediately,



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they may, if they consider it expedient to do so having regard to the effect of the works on the character of the monument as one of national importance, issue a temporary stop notice.

- (2) The notice must be given in writing and must—
  - (a) specify the works in question,
  - (b) prohibit execution of the works (or so much of the works as is specified in the notice), and
  - (c) set out the Scottish Ministers' reasons for issuing the notice.
- (3) A temporary stop notice may be served on any of the following—
  - (a) a person who appears to the Scottish Ministers to be executing, or causing to be executed, the works,
  - (b) a person who appears to the Scottish Ministers to have an interest in the scheduled monument or the land in, on or under which the monument is situated (whether as owner or occupier or otherwise).
- (4) The Scottish Ministers must display on the land in, on or under which the monument is situated or on the monument (except where doing so might damage it)—
  - (a) a copy of the notice, and
  - (b) a statement as to the effect of section 9M.
- (5) A temporary stop notice has effect from the time a copy of it is first displayed in pursuance of subsection (4).
- (6) A temporary stop notice ceases to have effect at the end of the period of 28 days starting on the day the copy notice is so displayed.
- (7) But if a shorter period starting on that day is specified in the notice, the notice instead ceases to have effect at the end of that shorter period.
- (8) And if the notice is withdrawn by the Scottish Ministers before that period of 28 days (or, as the case may be, that shorter period) expires, the notice ceases to have effect on being so withdrawn.

### **9L Temporary stop notices: restrictions**

- (1) A second or subsequent temporary stop notice must not be issued in respect of the same works unless the Scottish Ministers have in the meantime taken some other enforcement action in relation to the contravention of section 2(1) or (6) which is constituted by the works.
- (2) In subsection (1), “enforcement action” includes obtaining the grant of an interdict under section 9O.

### **9M Temporary stop notices: offences**

- (1) A person who contravenes a temporary stop notice—
  - (a) which has been served on the person, or
  - (b) a copy of which has been displayed in pursuance of section 9K(4),is guilty of an offence.

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- (2) Contravention of a temporary stop notice includes causing or permitting its contravention.
- (3) An offence under this section may be charged by reference to a day or to a longer period of time.
- (4) A person may, in relation to the same temporary stop notice, be convicted of more than one offence under this section by reference to different days or different periods.
- (5) It is a defence in any proceedings under this section that—
  - (a) the temporary stop notice was not served on the accused, and
  - (b) the accused did not know, and could not reasonably have been expected to know, of its existence.
- (6) A person guilty of an offence under this section is liable—
  - (a) on summary conviction, to a fine not exceeding £20,000,
  - (b) on conviction on indictment, to a fine.
- (7) In determining the amount of the fine, the court is in particular to have regard to any financial benefit which has accrued or appears likely to accrue to the convicted person in consequence of the execution of the works which constituted the offence.

### **9N Temporary stop notices: compensation**

- (1) A person who, at the date on which a temporary stop notice is first displayed in pursuance of section 9K(4), has an interest (whether as owner or occupier or otherwise) in the scheduled monument to which the notice relates or the land in, on or under which the monument is situated is entitled to be compensated by the Scottish Ministers in respect of any loss or damage directly attributable to the prohibition effected by that notice.
- (2) But subsection (1) applies only if the circumstances are as set out in one or both of the following paragraphs—
  - (a) the works specified in the notice are authorised by scheduled monument consent granted on or before the date mentioned in that subsection,
  - (b) the Scottish Ministers withdraw the notice other than following such grant of scheduled monument consent as is mentioned in paragraph (a).
- (3) Subsections (4) and (5) of section 9I apply to compensation payable under this section as they apply to compensation payable under that section; and for the purpose of that application references in subsection (5) of that section to a stop notice are to be references to a temporary stop notice.

### *Interdicts*

### **9O Interdicts restraining unauthorised works on scheduled monuments**

- (1) Whether or not they have exercised or propose to exercise any of their other powers under this Act, the Scottish Ministers may seek to restrain or prevent

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any actual or apprehended breach of any of the controls provided by or under this Act on the execution of works affecting scheduled monuments by means of an application for interdict.

(2) On an application under subsection (1) the court may grant such interdict as it thinks appropriate for the purpose of restraining or preventing the breach.

(3) In this section “the court” means the Court of Session or the sheriff.”.

(2) In section 6 of the 1979 Act (powers of entry), after subsection (3) insert—

“(3A) Any person duly authorised in writing by the Scottish Ministers may at any reasonable time enter any land—

- (a) to ascertain whether a scheduled monument enforcement notice, a stop notice or a temporary stop notice should be served in relation to a scheduled monument in, on or under that or any other land,
- (b) for the purposes of displaying—
  - (i) a site notice,
  - (ii) a notice under section 9G(7) in place of a site notice, or
  - (iii) a copy of a temporary stop notice, and a statement as to the effect of section 9M, under section 9K(4),
- (c) to ascertain whether a scheduled monument enforcement notice, a stop notice or a temporary stop notice has been complied with,
- (d) to ascertain whether any offence has been, or is being, committed with respect to any scheduled monument in, on or under that or any other land under section 2(1) or (6), 9E, 9J or 9M.”.

(3) In subsection (1) of section 61 of that Act (interpretation), in the appropriate places in alphabetical order insert—

““period for compliance” is to be construed in accordance with section 9B(1) and (2);”,

““scheduled monument enforcement notice” has the meaning given by section 9A(1) of this Act;”,

““site notice” has the meaning given in section 9H(3);”,

““stop notice” has the meaning given in section 9G(2) of this Act;”,

““temporary stop notice” means a notice issued under section 9K(1) of this Act;”.

#### Commencement Information

**11** S. 6 in force for specified purposes at 30.6.2011 by S.S.I. 2011/174, art. 2, Sch.

**12** S. 6 in force in so far as not already in force at 1.12.2011 by S.S.I. 2011/372, art. 2, Sch.

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