

HISTORIC ENVIRONMENT (AMENDMENT) (SCOTLAND) ACT 2011

EXPLANATORY NOTES

THE ACT – SECTION BY SECTION

Part 2 – Modifications of the Ancient Monuments and Archaeological Areas Act 1979

Section 6 – Works affecting scheduled monuments: enforcement

14. Section 6(1) inserts new sections 9A to 9O into the 1979 Act. This establishes enforcement powers for Scottish Ministers to protect scheduled monuments. New sections 9A to 9F allow scheduled monument enforcement notices to be served, new sections 9G to 9N allow stop notices and temporary stop notices to be served and new section 9O makes provision for interdict proceedings to be raised.

New section 9A – Power to issue scheduled monument enforcement notice

15. Subsection (1) allows Scottish Ministers to serve a scheduled monument enforcement notice in respect of unauthorised works carried out to a scheduled monument or to land in, on or under which there is a scheduled monument, or in respect of a breach of conditions in scheduled monument consent. This subsection also makes it clear that it is a matter of discretion for the Scottish Ministers to issue such an enforcement notice and that Scottish Ministers are required to have regard to the effects of the works on the character of the monument as one of national importance.
16. Subsections (2) and (3) require a scheduled monument enforcement notice to specify the works that are to cease and/or the steps that must be taken to either restore the monument or land to its former state, alleviate the effects of the unauthorised works or to bring the monument or land into a state fully compatible with the terms of the scheduled monument consent.
17. Subsection (4) sets out that in considering whether restoration would be undesirable, the Scottish Ministers must have regard to the desirability of preserving the national importance of the monument or its features of historical, architectural, traditional, artistic or archaeological interest.
18. Subsection (5) sets out that where further works are carried out under the terms of subsection (3)(b) scheduled monument consent is deemed to have been granted for such works.

New section 9B – Scheduled monument enforcement notices: further provisions

19. Subsections (1) to (7) set out detailed procedures (e.g. on content and service) relating to scheduled monument enforcement notices. Subsections (1) to (3) require that the notice must specify the effective date and the time period within which works must cease or steps must be taken (“the period for compliance”) and provide for a minimum 28 day period between service of the notice and the date on which it is to take effect.

Subsection (4) sets out the persons on whom a copy of the notice must be served. Subsection (5) provides Scottish Ministers with the power to withdraw an enforcement notice or waive or relax any requirement of such a notice, including extending the period for compliance. Where that power is exercised, subsection (6) requires notification to be given and specifies on whom such notification must be served. Subsection (7) sets out that the Scottish Ministers must keep a list of monuments in respect of which enforcement notices have been served which must be published electronically. Copies of the notices must also be provided on request.

New section 9C – Appeal against scheduled monument enforcement notice

20. This section sets out the process and grounds for an appeal against an enforcement notice. In particular, subsection (1) provides for a right of appeal to the sheriff for the person on whom the 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. An appeal must be made before the date it takes effect under section 9B(1). Subsection (2) sets out the grounds of appeal. Subsection (3) states that the notice is of no effect until the appeal is withdrawn or finally determined. Subsection (4) sets out that a sheriff has the power to determine an appeal against a scheduled monument enforcement notice by upholding or quashing the notice.

New section 9D – Execution of works required by scheduled monument enforcement notice

21. Section 9D gives Scottish Ministers power to enter the land in, on or under which the scheduled monument is situated to undertake any works which have not been carried out within the period for compliance with the notice and provides for the recovery of expenses incurred in carrying out such works from the owner or lessee of the monument or land.
22. Subsection (3) provides a power for the sheriff to authorise by warrant an owner of the scheduled monument or land to go on the land and carry out the works where prevented to do so by the occupier.
23. Subsections (4) and (5) allow the removal from the monument or land of materials by the Scottish Ministers and their subsequent sale after a period of 3 days during which they are unclaimed by the owner, requiring any proceeds from such a sale, less expenses, to be paid to the owner. Subsections (6) and (7) limit liability for recovery of expenses from owners receiving rent in respect of the monument or land merely as a trustee, tutor, curator, factor or agent of some other person. If the owner does not have, and had not since the demand for payment from the Scottish Ministers had, sufficient money to discharge the whole demand, his liability for expenses is limited to the amount which he has, or has had, in his hands on behalf of that other person. Where Scottish Ministers have not recovered the whole of any such expenses from an owner recovery of any unpaid balance from the person on whose behalf the rent is received is allowed.
24. Subsection (8) makes it a criminal offence to wilfully obstruct the Scottish Ministers from carrying out works required by the enforcement notice under the powers available under subsection (1).

New section 9E – Offence where scheduled monument enforcement notice not complied with

25. Section 9E sets out that where an enforcement notice has not been complied with within the period for compliance, the owner for the time being of the monument or of the land in, on or under which it is situated is in breach of the notice and is guilty of an offence and sets out the penalties. It is a defence to show that a person did everything they could be expected to do to ensure compliance with the notice or that they were not served with a copy of the notice and did not know of its existence.

New section 9F – Effect of scheduled monument consent on scheduled monument enforcement notice

26. Section 9F applies where a scheduled monument enforcement notice has been issued, and scheduled monument consent is then granted under new section 2(3A) of the 1979 Act (inserted by section 2 of the Act) for the retention of works or of works which do not comply with a condition in the original scheduled monument consent. In such cases, the notice ceases to have effect in so far as it requires the works to cease, steps to be taken involving the works not being retained or compliance with that condition.

New section 9G – Stop notices

27. Inserted section 9G gives the Scottish Ministers power to issue a stop notice in relation to unauthorised works to a scheduled monument 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.
28. Subsections (1) and (2) set out the circumstances in which Scottish Ministers may issue a stop notice. Subsection (1) requires that the Scottish Ministers must consider it expedient for the works to cease before the expiry of the period for compliance with a scheduled monument enforcement notice. Subsections (2) and (4) provide the power to serve a stop notice prohibiting the execution of “relevant works” and make it clear that a stop notice may be served at the same time as or after a copy of the scheduled monument enforcement notice has been served but may not be served after the enforcement notice has taken effect.
29. Subsection (3) clarifies that “relevant works” means any works specified in the enforcement notice as works that the Scottish Ministers require to cease and associated works.
30. Subsection (5) sets out that a stop notice must specify the date that it is to come into effect. The date must not be earlier than 3 days (unless the Scottish Ministers consider there are special reasons for specifying an earlier date) after the date, nor later than 28 days after the date, when the notice is served.
31. Subsection (6) sets out that Scottish Ministers may serve the notice 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 enforcement notice.
32. Subsection (7) allows Scottish Ministers to withdraw a stop notice at any time by notice which must be served on all persons who were served with the original stop notice. It also sets out that the notice withdrawing the stop notice must be displayed for 7 days in place of all or any site notices publicising a stop notice.

New section 9H – Stop notices: supplementary provisions

33. Subsection (1) sets out the circumstances in which a stop notice ceases to have effect. Subsection (3) sets out how Scottish Ministers may publicise the serving of a stop notice by displaying a site notice and provides what such a notice must state.

New section 9I – Compensation for loss due to stop notice

34. Subsection (1) sets out that where a stop notice ceases to have effect a person with an interest in the scheduled monument or the land in, on or under which the monument is situated is entitled to compensation in respect of any loss or damage that can be attributed to the matters in subsection (2). Those matters are the prohibition in the stop notice or the prohibition of works which cease to be relevant works due to the waiving or relaxing of a requirement in the scheduled monument enforcement notice. For the purposes of determining if compensation is payable a stop notice is taken to have ceased to have effect in the circumstances specified in subsection (3). Essentially these are where the stop notice is withdrawn or the associated enforcement notice is quashed or

withdrawn. Subsection (4) clarifies that any compensation payable includes any sum payable in respect of a breach of contract caused by taking action necessary to comply with the stop notice. No compensation is, however, payable in the circumstances set out in subsection (5). The compensation provisions in section 9I are caught by section 47 of the 1979 Act which provides that any question of disputed compensation shall be referred to and determined by the Lands Tribunal.

New section 9J – Penalties for contravention of stop notice

35. New section 9J sets out the circumstances in which a person is guilty of an offence for contravening a stop notice and makes provision in relation to the contravention and the offence including allowing for conviction for any number of offences with reference to different days or periods. Subsection (6) sets out the applicable penalties, and subsection (7) imposes a requirement on the court to have regard to any financial benefit which might accrue to the convicted person as a result of the execution of the works which constituted the offence.

New section 9K – Temporary stop notices

36. New sections 9K to 9N cover the operation of the new system of temporary stop notices. While a stop notice is always issued in relation to a scheduled monument enforcement notice, a temporary stop notice may be issued even if no enforcement notice is in place. In new section 9K (temporary stop notices) subsection (1) sets out the circumstances in which Scottish Ministers may issue temporary stop notices. The Scottish Ministers have to consider that the works are unauthorised or fail to comply with a condition attached to consent and to consider there is a reason for stopping the works immediately having regard to the effect of the works on the character of the monument as one of national importance.
37. Subsection (2) requires that the notice must be in writing and specify the works which are to stop, prohibit execution of the works and set out Scottish Ministers' reasons for issuing the notice.
38. Subsection (3) states that notice may be served on a person who either appears to be executing or causing to be executed works and/or a person who has an interest in the scheduled monument or the land in, on or under which the monument is situated.
39. Subsection (4) states that the Scottish Ministers must display a copy of the notice and a statement on the effect of section 9M (relating to offences) on the land in, on or under which the monument is situated or on the monument (except where doing so damages it).
40. Subsections (5) to (7) set out when the notice starts and ceases to have effect. It has effect for a period of 28 days beginning with the day it is displayed under subsection (4), although a shorter period may be specified in the notice. Subsection (8) provides that if the notice is withdrawn before 28 days (or any shorter period specified) the notice ceases to have effect at that point.

New section 9L – Temporary stop notices: restrictions

41. In new section 9L subsections (1) and (2) prohibit the issue of further temporary stop notices unless another enforcement action has been taken e.g. the service of an enforcement notice.

New section 9M – Temporary stop notices: offences

42. In new section 9M, subsections (1) to (4) set out the circumstances in which a person is guilty of an offence for contravening a temporary stop notice and allow for conviction to be made for any number of offences with reference to different days or periods.

- 43. Subsection (5) sets out the statutory defence under this section, which is that the notice was not served on the accused and that he did not know, and could not reasonably have known, of its existence.
- 44. Subsections (6) and (7) set out the penalties for offences under these new sections, including a requirement for the court to have regard to any financial benefit which might accrue to the convicted person as a result of the execution of the works which constituted the offence.

New section 9N – Temporary stop notices: compensation

- 45. Subsection (1) sets out who is entitled to compensation in respect of any loss or damage which can be directly attributed to the notice being served. Subsection (2) limits the entitlement to compensation to particular circumstances. These are that the works in the notice are authorised by scheduled monument consent granted on or before the date the temporary stop notice is first displayed, and/or the Scottish Ministers withdraw the notice other than following such grant of scheduled monument consent. Subsection (3) applies subsections (4) and (5) of new section 9I to compensation under this section which provide details of what the compensation may cover and sets out the circumstances when no compensation is payable under this section. New section 9N will be caught by section 47 of the 1979 Act which provides that any question of disputed compensation shall be referred to and determined by the Lands Tribunal.

New section 9O – Interdicts restraining unauthorised works on scheduled monuments

- 46. New section 9O sets out that whether or not Scottish Ministers have exercised any of their powers under this Act they may restrain or prevent any actual or apprehended breaches of the controls provided by the Act by applying for an interdict.
- 47. Subsection (2) of section 6 of the Act amends section 6 of the 1979 Act to give persons duly authorised by the Scottish Ministers rights of entry to ascertain whether a scheduled monument enforcement notice, stop notice or temporary stop notice should be served or has been complied with, or whether offences in relation to a scheduled monument under specified provisions of the 1979 Act have been committed.