



New South Wales

Fair Trading Amendment (Commercial Agents) Bill 2016

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are:

- (a) to repeal the *Commercial Agents and Private Inquiry Agents Act 2004* so that persons who carry out **commercial agent activities** (being debt collection, repossession and process serving) are no longer required to hold a licence, and
- (b) to amend the *Fair Trading Act 1987* to provide for a negative licensing scheme that permits anyone other than certain disqualified persons to carry out commercial agent activities.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 repeals the *Commercial Agents and Private Inquiry Agents Act 2004* and the regulations under that Act.

Schedule 1 Amendment of Fair Trading Act 1987 No 68

Schedule 1 [1] inserts proposed Part 5 into the *Fair Trading Act 1987* (the **principal Act**), which comprises proposed sections 59–60F.

Proposed section 59 sets out a number of definitions used in the proposed Part.

Proposed section 60 sets out the activities that are commercial agent activities, being debt collection, process serving and the repossession of goods and sets out the circumstances in which corporations and directors of corporations are taken to have carried out commercial agent activities.

Proposed section 60A sets out the persons who are disqualified persons.

Proposed section 60B creates offences (with a maximum penalty of \$110,000 in the case of a corporation or \$22,000 or imprisonment for 12 months, or both, in the case of an individual) if a person who is a disqualified person carries out a commercial agent activity or if a corporation, that has a director who is a disqualified person, carries out a commercial agent activity.

Proposed section 60C provides that the Secretary (being the Commissioner for Fair Trading, Department of Finance, Services and Innovation or if there is no person employed as Commissioner for Fair Trading—the Secretary of that Department) may give a person a show cause notice if the Secretary is of the opinion that the person carried out a commercial agent activity in contravention of the principal Act or the commercial agent rules. A show cause notice requires the person to show cause why the person should not be prohibited from carrying out commercial agent activities.

Proposed section 60D provides that the Secretary may, after giving a show cause notice to a person and taking into consideration any submissions made in relation to the matter, make an exclusion order or a restriction order. An exclusion order prohibits the person from carrying out commercial agent activities. A restriction order places conditions, restrictions or limitations on the person in relation to the carrying out of commercial agent activities. A person who is subject to an order can apply for an administrative review of the decision to make the order. Failure to comply with a restriction order is an offence with a maximum penalty of \$110,000 in the case of a corporation or \$22,000 or imprisonment for 12 months, or both in the case of an individual (failure to comply with an exclusion order is an offence under proposed section 60B).

Proposed section 60E permits the regulations under the principal Act to prescribe rules of conduct for the carrying out of commercial agent activities including by prohibiting certain practices. It is an offence (with a maximum penalty of \$11,000 in the case of a corporation or \$5,500 in the case of an individual) if a person fails to comply with the commercial agent rules when carrying out a commercial agent activity or if a director of a corporation fails to take all reasonable steps to ensure that the corporation complies with the commercial agent rules when carrying out a commercial agent activity.

Proposed section 60F provides that proposed Part 5 does not apply to certain persons including police officers, government employees, legal practitioners, company auditors and employees of insurance companies and financial institutions.

Schedule 1 [2] inserts savings and transitional provisions consequent on the repeal of the *Commercial Agents and Private Inquiry Agents Act 2004* (the *CAPI Act*). Those provisions provide that no compensation is payable by the Crown because of the enactment and operation of the proposed Act, the repeal of the CAPI Act and the deregulation of the commercial agent industry. Those provisions also provide for a refund of a proportion of commercial agent licence fees, the withdrawal of applications and appeals under the CAPI Act, dealing with unclaimed trust money that has been notified to the Commissioner of Police and the circumstances in which persons (whose licences under the CAPI Act have been cancelled or suspended) will be taken to be disqualified persons.

Schedule 2 Amendment of other Acts

Schedule 2 amends a number of Acts consequential on the repeal of the *Commercial Agents and Private Inquiry Agents Act 2004*.



New South Wales

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New South Wales

Fair Trading Amendment (Commercial Agents) Bill 2016

No. , 2016

A Bill for

An Act to repeal the *Commercial Agents and Private Inquiry Agents Act 2004* and to amend the *Fair Trading Act 1987* with respect to the regulation of persons carrying out debt collection, repossessions and process serving.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Fair Trading Amendment (Commercial Agents) Act 2016</i> .	3
2 Commencement	4
This Act commences on a day or days to be appointed by proclamation.	5
3 Repeal	6
(1) The <i>Commercial Agents and Private Inquiry Agents Act 2004</i> and the regulations under that Act are repealed.	7 8
(2) A reference in this section to the <i>Commercial Agents and Private Inquiry Agents Act 2004</i> is, if this section commences after the commencement of Schedule 2 [2] to the <i>Security Industry Amendment (Private Investigators) Act 2016</i> , to be construed as a reference to the <i>Commercial Agents Act 2004</i> .	9 10 11 12

Schedule 1	Amendment of Fair Trading Act 1987 No 68	1
[1] Part 5		2
	Insert after Part 4:	3
Part 5	Regulation of commercial agents	4
59	Definitions	5
	In this Part:	6
	<i>commercial agent activity</i> —see section 60.	7
	<i>commercial agent rules</i> means the rules prescribed by the regulations under section 60E.	8 9
	<i>director</i> of a corporation includes a person who is concerned in the management of the corporation.	10 11
	<i>disqualified person</i> —see section 60A.	12
	<i>exclusion order</i> —see section 60D.	13
	<i>restriction order</i> —see section 60D.	14
	<i>show cause notice</i> —see section 60C.	15
60	Commercial agent activity	16
(1)	In this Part, <i>commercial agent activity</i> means any of the following activities:	17
(a)	<i>debt collection</i> , which is:	18
(i)	any activity carried out by a person on behalf of a second person (not being his or her employer) in the exercise of the second person’s rights under a debt owed by a third person, or	19 20 21
(ii)	any activity carried out by a person on his or her own behalf in the exercise of rights acquired from a second person (otherwise than in the course of an acquisition or merger of business interests) under a debt owed by a third person,	22 23 24 25
	being an activity that involves finding the third person or requesting, demanding or collecting from the third person money due under the debt,	26 27 28
(b)	<i>process serving</i> , which is any activity carried out by a person on behalf of a second person (not being his or her employer), being an activity that involves serving legal process on a third person in relation to legal proceedings to which the second and third persons are, or are intended to be, parties, regardless of which jurisdiction the legal proceedings are, or are intended to be, held in,	29 30 31 32 33 34
(c)	<i>repossession of goods</i> , which is any activity carried out by a person on behalf of a second person (not being his or her employer), being an activity that involves finding goods held by a third person or requesting, demanding or seizing such goods.	35 36 37 38
(2)	If a commercial agent activity is carried out by an employee or agent of a corporation, the activity is taken to have been carried out by the corporation.	39 40
(3)	If a corporation carries out a commercial agent activity, each director of the corporation is taken to have carried out the commercial agent activity.	41 42

60A	Disqualified persons	1
(1)	A person is a <i>disqualified person</i> for the purposes of this Part if:	2
(a)	the person is under 18 years of age, or	3
(b)	the person is an undischarged bankrupt or is taking advantage of the laws in force for the time being relating to bankruptcy, or	4
(c)	the person is a corporation that is the subject of a winding up order or for which a controller or administrator has been appointed, or	5
(d)	the person has in the last 5 years been convicted in New South Wales or elsewhere of a disqualifying offence and a sentence of imprisonment or a fine of \$500 or more was imposed for that offence, or	6
(e)	the person is subject to an exclusion order that is in force against the person, or	7
(f)	the person is a controlled member of a declared organisation within the meaning of the <i>Crimes (Criminal Organisations Control) Act 2012</i> .	8
(2)	In this section:	9
	<i>disqualifying offence</i> means:	10
(a)	an offence involving violence, fraud, drugs or dishonesty, being an offence punishable by imprisonment for 3 months or more, or	11
(b)	an offence against section 12DJ (Harassment and coercion) of the <i>Australian Securities and Investments Commission Act 2001</i> of the Commonwealth, or	12
(c)	an offence against section 50 (Harassment and coercion) of the ACL, or	13
(d)	any other offence declared by the regulations to be a disqualifying offence for the purposes of this section,	14
	but does not include an offence that the regulations declare not to be a disqualifying offence.	15
60B	Disqualified person must not carry out commercial agent activity	16
(1)	A person must not carry out a commercial agent activity if the person is a disqualified person.	17
(2)	A person that is a corporation must not carry out a commercial agent activity if a director of the corporation is a disqualified person.	18
	Maximum penalty: 1,000 penalty units (in the case of a corporation) or 200 penalty units or imprisonment for 12 months, or both (in the case of an individual).	19
60C	Secretary may require person to show cause	20
(1)	The Secretary may, if of the opinion that a person who has carried out a commercial agent activity has contravened this Act or the commercial agent rules, give the person a notice (a <i>show cause notice</i>).	21
(2)	A show cause notice requires the person to whom the notice was given to show cause why the person should not, for the reason specified in the notice, be prohibited from carrying out commercial agent activities.	22
(3)	The show cause notice must be in writing and must specify the period (being at least 14 days after the notice is given) in which the person may show cause.	23
(4)	The person to whom a show cause notice has been given may, within the period specified in the notice, make a written submission to the Secretary in relation to the matters to which the notice relates.	24

(5)	The Secretary:	1
(a)	is to consider any submission made within the period specified in the show cause notice, and	2 3
(b)	may conduct such inquiries, or make such investigations, in relation to the matters to which the notice relates as the Secretary thinks appropriate.	4 5 6
60D	Exclusion orders and restriction orders	7
(1)	The Secretary may, after giving a show cause notice to a person and taking into consideration any submissions made in relation to the matter, make an order:	8 9
(a)	that prohibits the person from carrying out commercial agent activities (an <i>exclusion order</i>), or	10 11
(b)	that imposes conditions, restrictions or limitations on the person in relation to the carrying out of commercial agent activities (a <i>restriction order</i>).	12 13 14
(2)	An order made under this section comes into force when a copy of the order is given to the person subject to the order.	15 16
(3)	The Secretary may, if he or she considers it appropriate to do so, publicly notify the making of an exclusion order against a person.	17 18
(4)	An order made under this section remains in force for an indefinite period or for the period specified in the order.	19 20
(5)	A person who contravenes a restriction order is guilty of an offence. Maximum penalty: 1,000 penalty units (in the case of a corporation) or 200 penalty units or imprisonment for 12 months, or both (in the case of an individual).	21 22 23 24
	Note. Contravention of an exclusion order is an offence under section 60B.	25
(6)	A person subject to an exclusion order or a restriction order may apply to the Tribunal for an administrative review under the <i>Administrative Decisions Review Act 1997</i> of the decision of the Secretary to make the order.	26 27 28
(7)	More than one order may be given to a person under this section.	29
(8)	Section 88 applies to the giving of an order under this section.	30
60E	Commercial agent rules	31
(1)	The regulations may prescribe rules of conduct for the carrying out of commercial agent activities including by prohibiting certain practices.	32 33
(2)	Without limiting subsection (1), the rules may deal with the following matters:	34
(a)	prohibited practices (including, but not limited to, the use of physical force, harassment, coercion, misrepresentation, making unreasonable threats, entering premises illegally, impersonating a Government employee or exposing a person to ridicule),	35 36 37 38
(b)	the keeping of records,	39
(c)	the provision of information to the Secretary,	40
(d)	the handling of complaints,	41
(e)	advertising,	42
(f)	the employment of disqualified persons.	43
(3)	A person must not carry out a commercial agent activity unless the person does so in compliance with the commercial agent rules.	44 45

(4)	Each director of a corporation must take all reasonable steps to ensure that the corporation does not carry out a commercial agent activity unless it does so in compliance with the commercial agent rules.	1
	Maximum penalty: 100 penalty units (in the case of a corporation) or 50 penalty units (in the case of an individual).	2
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60F	Part does not apply to certain persons	6
	This Part does not apply to or in respect of the following:	7
(a)	a police officer of New South Wales, the Commonwealth or of any other State or Territory,	8
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(b)	a member of the Australian Defence Force,	10
(c)	an officer or employee of the Public Service, or a public authority, of New South Wales, the Commonwealth or of any other State or Territory,	11
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(d)	a law practice or an Australian legal practitioner or a person undertaking practical legal training under the supervision of an Australian legal practitioner,	14
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		16
(e)	a registered company auditor within the meaning of the <i>Corporations Act 2001</i> of the Commonwealth,	17
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(f)	a general insurer within the meaning of the <i>Insurance Act 1973</i> of the Commonwealth, a loss adjuster (being a person carrying on the business of an insurance loss adjuster on behalf of a general insurer) or an employee of a general insurer or loss adjuster,	19
		20
		21
		22
(g)	an officer or employee of an authorised deposit-taking institution,	23
(h)	a person of a class prescribed by the regulations.	24
[2]	Schedule 5 Savings and transitional provisions	25
	Insert at the end of the Schedule, with appropriate Part and clause numbering:	26
Part	Provisions consequent on enactment of Fair Trading Amendment (Commercial Agents) Act 2016	27
		28
	Definitions	29
	In this Part:	30
	CAPI Act means the <i>Commercial Agents and Private Inquiry Agents Act 2004</i> .	31
	commercial agent licence means the following licences under the CAPI Act:	32
(a)	master licences for process serving,	33
(b)	master licences for debt collection,	34
(c)	master licences for repossession of goods,	35
(d)	operator licences for process serving,	36
(e)	operator licences for debt collection,	37
(f)	operator licences for repossession of goods.	38
	No compensation	39
(1)	The purpose of this clause is to exclude the payment of compensation by or on behalf of the Crown for any deregulation of the commercial agent industry.	40
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(2)	Compensation for deregulation is:	1
(a)	compensation because of the enactment or operation of the <i>Fair Trading Amendment (Commercial Agents) Act 2016</i> , including the repeal of the CAPI Act, or for any consequence of that enactment or operation, or	2 3 4 5
(b)	compensation because of the removal of the requirement for commercial agents to hold a licence or for any consequence of that removal, or	6 7 8
(c)	compensation because of any statement or conduct relating to a matter referred to in paragraph (a) or (b) or to the deregulation of the commercial agent industry in connection with any such matter.	9 10 11
(3)	Compensation for deregulation is not payable by or on behalf of the Crown.	12
(4)	This clause applies to or in respect of any event, act, omission, statement or conduct whether occurring before or after the commencement of this clause.	13 14
(5)	In this clause:	15
	compensation includes damages or any other form of monetary compensation.	16
	conduct includes a representation of any kind:	17
(a)	whether made verbally or in writing, and	18
(b)	whether negligent, false, misleading or otherwise.	19
	the Crown means the Crown within the meaning of the <i>Crown Proceedings Act 1988</i> , and includes an officer, employee or agent of the Crown.	20 21
	Refund of licence fee for unused period of licence	22
(1)	This clause applies to any commercial agent licence that ceases to have effect because of the repeal of the CAPI Act.	23 24
(2)	The Commissioner of Police is to refund to the holder of a licence a proportion of the licence fee paid for the licence that is equivalent to the remaining period for which the licence would have been in force had the CAPI Act not been repealed.	25 26 27 28
(3)	Subclause (2) does not apply to any part of a fee that was declared to be a processing fee for the purposes of Part 2 of the <i>Licensing and Registration (Uniform Procedures) Act 2002</i> .	29 30 31
	Current applications, reviews and appeals	32
(1)	Any application for a commercial agent licence that has not been finally determined before the repeal of the CAPI Act is taken to have been withdrawn and any application fee paid is to be refunded.	33 34 35
(2)	Any review or appeal in relation to a commercial agent licence (including a review or appeal in relation to an application for a licence) that has not been finally determined before the repeal of the CAPI Act is taken to have been withdrawn.	36 37 38 39
	Unclaimed trust money	40
	Subject to the regulations, Division 4 of Part 1 of Schedule 2 to the CAPI Act continues to apply in respect of any money referred to in an unclaimed money statement furnished, before the repeal of that Act, to the Commissioner of Police under clause 6 of that Schedule.	41 42 43 44

Persons whose commercial agent licence has been cancelled or suspended

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The regulations may prescribe circumstances in which a person, whose commercial agent licence was cancelled or suspended under the CAPI Act, is taken to be a disqualified person for the purposes of Part 5 of this Act.

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Schedule 2	Amendment of other Acts	1
2.1	Civil and Administrative Tribunal Act 2013 No 2	2
	Schedule 5 Occupational Division	3
	Omit “ <i>Commercial Agents and Private Inquiry Agents Act 2004</i> ” from clause 4 (1).	4
2.2	Crimes (Criminal Organisations Control) Act 2012 No 9	5
	Section 27 Prohibition on carrying on of certain activities when interim control order or control order takes effect	6 7
	Omit paragraph (d) of the definition of <i>prescribed activity</i> in section 27 (6). Insert instead:	8
	(d) carrying out commercial agent activities or being a director of a corporation that carries out commercial agent activities within the meaning of Part 5 (Regulation of commercial agents) of the <i>Fair Trading Act 1987</i> ,	9 10 11 12
2.3	Fines Act 1996 No 99	13
	Schedule 1 Statutory provisions under which penalty notices issued	14
	Omit “ <i>Commercial Agents and Private Inquiry Agents Act 2004</i> , section 28”.	15
2.4	Law Enforcement (Powers and Responsibilities) Act 2002 No 103	16
	Schedule 2 Search warrants under other Acts	17
	Omit “ <i>Commercial Agents and Private Inquiry Agents Act 2004</i> , section 34”.	18
2.5	Licensing and Registration (Uniform Procedures) Act 2002 No 28	19
	Schedule 1 Licences to which Part 2 of Act applies	20
	Omit the matter relating to the <i>Commercial Agents and Private Inquiry Agents Act 2004</i> .	21
2.6	Road Transport Act 2013 No 18	22
[1]	Sections 55 (d), 56 (1) (a) (iv) and 57 (1) (d) (ii)	23
	Omit the provisions.	24
[2]	Schedule 4 Savings, transitional and other provisions	25
	Insert at the end of the Schedule, with appropriate Part and clause numbering:	26
Part	Provisions consequent on enactment of Fair Trading Amendment (Commercial Agents) Act 2016	27 28
	Use of photographs in certain criminal proceedings	29
	Despite the repeal of section 57 (1) (d) (ii), a photograph to which Part 3.5 of this Act applies (and any photographic image or other matter contained in any database of such photographs) may be released by the Authority for the purposes of the conduct of any criminal proceedings in relation to the holder of an operator licence under the <i>Commercial Agents and Private Inquiry Agents Act 2004</i> .	30 31 32 33 34 35

2.7 Sheriff Act 2005 No 6	1
Section 14 Process serving	2
Omit the section.	3