

c2016-093
CDP--Christian Democratic Party (Fred Nile Group)

LEGISLATIVE COUNCIL

Fair Trading Amendment (Commercial Agents) Bill 2016

First print

Proposed amendments

No. 1 **Retention of positive licensing scheme**

Pages 3–6, Schedule 1, lines 2 on page 3 to 24 on page 6. Omit all words on those lines. Insert instead:

[1] **Part 5**

Insert after Part 4:

Part 5 Regulation of commercial agents

Division 1 Preliminary

59 Definitions

In this Part:

commercial agent activity—see section 60.

commercial agent licence or *licence* means a commercial agent licence issued by the Secretary under section 60E.

commercial agent rules means the rules prescribed by the regulations under section 60K.

disqualified person—see section 60A.

exclusion order—see section 60G.

officer of a corporation has the same meaning as in the *Corporations Act 2001* of the Commonwealth.

relevant offence—see section 60A.

restriction order—see section 60G.

show cause notice—see section 60F.

60 Commercial agent activity

(1) In this Part, *commercial agent activity* means any of the following activities:

(a) *debt collection*, which is:

(i) any activity carried out by a person on behalf of a second person (not being his or her employer) in the exercise of

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- the second person's rights under a debt owed by a third person, or
- (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,
- being an activity that involves finding the third person or requesting, demanding or collecting from the third person money due under the debt,
- (b) **process serving**, 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,
- (c) **repossession of goods**, 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.
- (2) For the purposes of this Part:
- (a) if a commercial agent activity is carried out by an employee of a person, the activity is taken to have been carried out by the person, and
- (b) if a corporation carries out a commercial agent activity, each officer of the corporation is taken to have carried out the commercial agent activity.

60A Disqualified persons

- (1) A person is a **disqualified person** for the purposes of this Part if:
- (a) the person is a natural person who is under 18 years of age, or
- (b) the person is an undischarged bankrupt or is taking advantage of the laws in force for the time being relating to bankruptcy, or
- (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
- (d) the person has been convicted, within the last 5 years, of a relevant offence and a sentence of imprisonment or a fine of \$500 or more has been imposed on the person following that conviction, or
- (e) the person is subject to an exclusion order that is in force against the person, or
- (f) the person is a controlled member of a declared organisation within the meaning of the *Crimes (Criminal Organisations Control) Act 2012*.
- (2) In this Part:
- relevant offence** means any of the following offences whether occurring in New South Wales or elsewhere:
- (a) an offence involving violence, firearms, weapons, fraud, drugs or dishonesty,
- (b) an offence against section 12DJ (Harassment and coercion) of the *Australian Securities and Investments Commission Act 2001* of the Commonwealth,

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- (c) an offence against section 50 (Harassment and coercion) or 168 (Harassment and coercion) of the ACL,
 - (d) any other offence declared by the regulations to be a relevant offence for the purposes of this section,
- but does not include an offence that the regulations declare not to be a relevant offence.

Division 2 Carrying out commercial agent activities

60B Disqualified person must not carry out commercial agent activity

- (1) A person must not carry out a commercial agent activity if the person is a disqualified person.
- (2) A person that is a corporation must not carry out a commercial agent activity if an officer of the corporation is a disqualified person.
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).

60C Field agents and employers of field agents require licence

- (1) A person must not do any of the following for the purposes of carrying out a commercial agent activity unless the person holds a commercial agent licence:
 - (a) approach or attempt to approach the person who is the subject of the commercial agent activity,
 - (b) enter or attempt to enter any premises at which the subject of the commercial agent activity resides, works or otherwise regularly frequents,
 - (c) approach or attempt to approach any property owned by or in the possession of the subject of the commercial agent activity.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).
- (2) A person (the *employer*) must not employ a person (the *employee*) to carry out a commercial agent activity that requires the employee to hold a commercial agent licence unless the employer holds a commercial agent licence.
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).
- (3) A person who is carrying out a commercial agent activity under a commercial agent licence must produce the licence for inspection if requested to do so by an investigator or by a person who is the subject of the commercial agent activity.
Maximum penalty: 50 penalty units.
- (4) An officer of a corporation is not required to hold a commercial agent licence merely because the corporation is required to hold a commercial agent licence.
- (5) No more than 1 partner in a firm that carries out commercial agent activities is required to hold a commercial agent licence.
- (6) In this section, the person who is the *subject* of a commercial agent activity means the person from whom a debt is to be recovered or goods are to be repossessed or on whom process is to be served.

60D Fit and proper person

- (1) A person may hold a commercial agent licence only if the person is a fit and proper person to hold the licence.
- (2) A person is not a fit and proper person to hold a commercial agent licence if:
 - (a) the person is a disqualified person, or
 - (b) the Secretary makes a finding that the person is not a fit and proper person to hold a licence.
- (3) The Secretary may determine that a person is not a fit and proper person to hold a commercial agent licence on such grounds as the Secretary sees fit, including, but not limited to, the following grounds:
 - (a) the person has been authorised to carry out a commercial agent activity under a licence (however described) of another State or Territory and that licence:
 - (i) is suspended, or
 - (ii) has, within the previous 5 years, been cancelled and the person has not held a licence since the cancellation,
 - (b) the person has been authorised to carry out an activity under another Act administered by the Minister and that authorisation:
 - (i) is suspended, or
 - (ii) has, within the previous 5 years, been cancelled and the person has not held an authorisation since the suspension,
 - (c) the person has, within the previous 10 years, been convicted of a relevant offence,
 - (d) any ground prescribed by the regulations.
- (4) A corporation is not a fit and proper person to hold a commercial agent licence unless the corporation and each officer of the corporation is a fit and proper person to hold the licence.
- (5) A partner in a firm is not a fit and proper person to hold a commercial agent licence unless the partner and each other partner in the firm is a fit and proper person to hold a licence.

60E Issue of commercial agent licence

- (1) A person may apply to the Secretary for a commercial agent licence.
- (2) The Secretary may issue a commercial agent licence to a person for a fixed term of 1 or 3 years.
- (3) Part 2 of the *Licensing and Registration (Uniform Procedures) Act 2002* (the **Licensing Act**) applies to and in respect of a commercial agent licence, subject to the modifications and limitations prescribed by this Act or the regulations.
- (4) For the purpose of applying Part 2 of the Licensing Act to a commercial agent licence:
 - (a) the licence may be amended but not transferred under that Act, and
 - (b) the references to 2 weeks, 4 weeks and 8 weeks in section 9 (1) (a), (b) and (c) of that Act are each to be read as references to 6 weeks, and
 - (c) an application for restoration of a licence under section 10 of that Act may not be made more than 3 months after the date on which the licence expires, and
 - (d) an application is not required to be advertised, and

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- (e) the reference to 14 days in section 24 (1) of that Act (as to the period within which changed particulars must be notified) is to be read as a reference to 7 days, and
 - (f) the licence may be granted subject to such conditions as the Secretary thinks fit and the Secretary may subsequently impose, vary or revoke conditions at any time, and
 - (g) the licence is subject to any restriction order made under this Part against the holder the licence.
- (5) The regulations may make provision for or with respect to such matters concerning a licence as are relevant to Part 2 of the Licensing Act including prescribing fees for applications.

Division 3 Enforcement

60F Secretary may require person to show cause

- (1) The Secretary may, by the giving of a notice (a *show cause notice*) to a person, require the person to show cause why the Secretary should not, for the reason specified in the notice:
 - (a) make an exclusion order or restriction order against the person, or
 - (b) cancel a licence held by the person.
- (2) 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.
- (3) 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.
- (4) The Secretary:
 - (a) is to consider any submission made within the period specified in the show cause notice, and
 - (b) may conduct such inquiries, or make such investigations, in relation to the matters to which the notice relates as the Secretary thinks appropriate.

60G Exclusion orders and restriction orders

- (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:
 - (a) that prohibits the person from carrying out commercial agent activities (an *exclusion order*), or
 - (b) that imposes conditions, restrictions or limitations on the person in relation to the carrying out of commercial agent activities (a *restriction order*).
- (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.
- (3) An order made under this section remains in force for an indefinite period or for the period specified in the order.
- (4) 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).

Note. Contravention of an exclusion order is an offence under section 60B.

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- (5) More than one order may be given to a person under this section.
 - (6) Section 88 applies to the giving of an order under this section.

60H Cancelling commercial agent licence

- (1) The Secretary must, after giving a show cause notice to a person and taking into consideration any submissions made in relation to the matter, cancel a commercial agent licence held by the person if satisfied that the person is not a fit and proper person to hold the licence.
- (2) The Secretary must cancel a licence if the holder of the licence is a disqualified person and is not required to give the person a show cause notice before doing so.

Note. The making of an exclusion order against a person would require any licence held by the person to be cancelled.

Division 4 Miscellaneous

60I Administrative review by Tribunal

- (1) A person may apply to the Tribunal for an administrative review under the *Administrative Decisions Review Act 1997* of a decision by the Secretary:
 - (a) to refuse to grant a commercial agent licence to the person, or
 - (b) to impose, vary or revoke a condition on a licence granted to the person, or
 - (c) to cancel a licence held by the person, or
 - (d) to make an exclusion order or restriction order against the person.
- (2) Section 53 (Internal reviews) of the *Administrative Decisions Review Act 1997* does not apply in relation to a decision referred to in subsection (1).

60J Register

- (1) The Secretary is to maintain a Register for the purposes of this Part and is to enter and keep in the Register particulars of such of the following as the regulations may require:
 - (a) commercial agent licences,
 - (b) licence applications refused,
 - (c) prosecutions taken for offences under this Part and the result of those prosecutions,
 - (d) exclusion orders and restriction orders made,
 - (e) commercial agent licences cancelled,
 - (f) any other matter prescribed by the regulations.
- (2) The regulations may require all or part of the Register to be published on the internet for public access.
- (3) Any part of the Register not published on the internet may be inspected by a person on payment of such reasonable fee (if any) as the Secretary may determine.

60K Commercial agent rules

- (1) The regulations may prescribe rules of conduct for the carrying out of commercial agent activities including by prohibiting certain practices.
- (2) Without limiting subsection (1), the rules may deal with the following matters:

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- (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, exposing a person to ridicule or employing or otherwise using disqualified persons),
 - (b) money held on trust including the keeping of trust accounts and the audit of those accounts,
 - (c) the keeping of records,
 - (d) the provision of information to the Secretary,
 - (e) the handling of complaints,
 - (f) advertising,
 - (g) the employment or use of persons.
- (3) A person must not carry out a commercial agent activity unless the person does so in compliance with the commercial agent rules.
 - (4) An employer must take all reasonable steps to ensure that an employee does not carry out a commercial agent activity in the course of their employment unless the employee does so in compliance with the commercial agent rules.
 - (5) Each officer 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.
- Maximum penalty: 100 penalty units (in the case of a corporation) or 50 penalty units (in the case of an individual).

60L Exchange of information

- (1) The Secretary may request and receive information from a law enforcement officer or regulatory officer for the purpose of assisting the Secretary in the exercise of functions under this Part.
- (2) The Secretary may enter into agreements and other arrangements for the sharing or exchange of information as authorised by this section.
- (3) In this section, **law enforcement officer** and **regulatory officer** have the same meanings as they have in section 219 of the *Property, Stock and Business Agents Act 2002*.

60M Part does not apply to certain persons

This Part does not apply to or in respect of the following:

- (a) a police officer of New South Wales, the Commonwealth or any other State or Territory,
- (b) a member of the Australian Defence Force,
- (c) an officer or employee of the Public Service, or a public authority, of New South Wales, the Commonwealth or any other State or Territory,
- (d) a law practice or an Australian legal practitioner or a person undertaking practical legal training under the supervision of an Australian legal practitioner,
- (e) a registered company auditor within the meaning of the *Corporations Act 2001* of the Commonwealth,
- (f) a general insurer within the meaning of the *Insurance Act 1973* 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,

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- (g) an officer or employee of an authorised deposit-taking institution,
 - (h) a person of a class prescribed by the regulations.

60N Review of Part

- (1) The Minister is to review this Part to determine whether the policy objectives of the Part remain valid and whether the terms of the Part remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the commencement of this Part.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

No. 2 **No compensation for deregulation**

Page 7, Schedule 1 [2], line 7. Omit “commercial agents”. Insert instead “certain commercial agents”.

No. 3 **Retention of positive licensing scheme**

Page 8, Schedule 1 [2], line 4. Insert “or not to be a fit and proper person” after “disqualified person”.

No. 4 **Retention of positive licensing scheme**

Page 8, Schedule 1 [2]. Insert after line 4:

Applications for licences under Part 5 by former licence holders

- (1) The regulations may modify (or remove the need for) the application process for a licence under Part 5 of this Act in the case of a person whose commercial agent licence ceases to have effect because of the repeal of the CAPI Act.
- (2) In such a case, the regulations may deem the person to be the holder of a licence under Part 5, or may require the Secretary to issue a licence to the person under that Part, unconditionally or subject to conditions and for such period (being no more than 3 years) as may be prescribed.

No. 5 **Prescribed activities**

Page 9, Schedule 2.2, lines 9–12. Omit all words on those lines. Insert instead:

- (d) carrying out commercial agent activities within the meaning of Part 5 (Regulation of commercial agents) of the *Fair Trading Act 1987*,

No. 6 **Retention of positive licensing scheme**

Page 9, Schedule 2.5. Insert after line 21:

Insert in alphabetical order of Act name:

Fair Trading Act 1987

section 60E (2), commercial agent licence