



New South Wales

# Fair Trading Amendment (Commercial Agents) Regulation 2021

under the

Fair Trading Act 1987

*[The following enacting formula will be included if the Regulation is made:]*

Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Fair Trading Act 1987*.

Minister for Better Regulation and Innovation

## Explanatory note

The object of this Regulation is to amend the *Fair Trading Regulation 2019* to—

- (a) insert Part 2B to regulate commercial agents, including in relation to the following—
  - (i) persons taken to be disqualified persons for the purposes of the *Fair Trading Act 1987*,
  - (ii) grounds on which the Secretary may determine a person is not a fit and proper person to hold a commercial agent licence,
  - (iii) modification of the *Licensing and Registration (Uniform Procedures) Act 2002*, Part 2,
  - (iv) information to be kept on the Register maintained by the Secretary for the purposes of the *Fair Trading Act 1987*, Part 5, and
- (b) prescribe further penalty notice offences, and
- (c) prescribe rules of conduct for the carrying out of commercial agent activities.

Fair Trading Amendment (Commercial Agents) Regulation 2021 [NSW]

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## **Fair Trading Amendment (Commercial Agents) Regulation 2021**

under the

Fair Trading Act 1987

### **1 Name of Regulation**

This Regulation is the *Fair Trading Amendment (Commercial Agents) Regulation 2021*.

### **2 Commencement**

This Regulation commences on the day on which it is published on the NSW legislation website.

## Schedule 1 Amendment of Fair Trading Regulation 2019

### [1] Part 2B

Insert after Part 2A—

### Part 2B Regulation of commercial agents

#### 11G Disqualified persons—the Act, section 60A(2) and Schedule 5, clause 55

- (1) For the purposes of the Act, section 60A(2), definition of *relevant offence*, paragraph (d), the following offences are declared to be relevant offences—
  - (a) an offence against the *Crimes Act 1900*, Part 4,
  - (b) an offence against the *Surveillance Devices Act 2007*, Part 2 or 5 or against corresponding provisions of a law of another State or Territory that provide for the authorisation of the use of surveillance devices.
- (2) For the purposes of the Act, Schedule 5, clause 55, a person who was the holder of one or more of the following licences under the *Commercial Agents and Private Inquiry Agents Act 2004* that was cancelled under that Act, before its repeal, are taken to be disqualified persons for the purposes of the Act, Part 5—
  - (a) for a licence that was cancelled under section 10(1)—
    - (i) a master licence for process serving,
    - (ii) a master licence for debt collection,
    - (iii) a master licence for repossession of goods,
  - (b) for a licence that was cancelled under section 17—
    - (i) an operator licence for process serving,
    - (ii) an operator licence for debt collection,
    - (iii) an operator licence for repossession of goods.

#### 11H Fit and proper person—the Act, section 60D(3)(d)

- (1) For the purposes of the Act, section 60D(3)(d), the following grounds are prescribed—
  - (a) the person has been convicted of—
    - (i) an offence against the *Crimes Act 1900*, Part 3, Division 10, 10A, 14, 14A or 15 or section 93T or 351A or against corresponding provisions of a law of the Commonwealth or of another State or Territory, or
    - (ii) an offence against the *Crimes (Domestic and Personal Violence) Act 2007*, section 13, or
    - (iii) an offence against the *Privacy Act 1988* of the Commonwealth,
  - (b) the person is a mentally incapacitated person,
  - (c) the person is disqualified from holding a licence, permit or other authority under legislation administered by the Minister,
  - (d) the person has failed to pay a monetary penalty imposed on the person under the Act, Part 5 or has failed to comply with a direction given by the Secretary under the Part and the failure continues,
  - (e) the person was the holder of a master licence for debt collection or a master licence for repossession of goods under the repealed Act that was, before its repeal—

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- (i) cancelled under the repealed Act, section 10(1), or
- (ii) suspended under the repealed Act, section 10(4) and the period of the suspension has not expired,
- (f) the person was the holder of an operator licence for process serving, an operator licence for debt collection or an operator licence for repossession of goods under the repealed Act that was, before its repeal—
  - (i) cancelled under the repealed Act, section 17(1), or
  - (ii) suspended under the repealed Act, section 17(4) and the period of the suspension has not expired.

(2) In this clause—

*repealed Act* means the *Commercial Agents and Private Inquiry Agents Act 2004*.

**11I Application of Licensing and Registration (Uniform Procedures) Act 2002—the Act, section 60E(3)**

- (1) For the purposes of the Act, section 60E(3), the *Licensing and Registration (Uniform Procedures) Act 2002*, Part 2 is modified as set out in subclause (2).
- (2) If an applicant for a commercial agent licence has been charged with one or both of the following offences, the Secretary may await the outcome of proceedings on the charge before determining an application for a commercial agent licence—
  - (a) an offence involving fraud or dishonesty,
  - (b) an offence against an Act, or a provision of an Act, specified in clause 11H(a).

**11J Register—commercial agent licences—the Act, section 60J(1)**

For the purposes of the Act, section 60J(1), the Secretary must enter and keep in the Register the following particulars for each commercial agent licence issued under the Act—

- (a) if the licence holder is an individual—the name and business address of the licence holder,
- (b) if the licence holder is a corporation—
  - (i) the name, business address and Australian Company Number of the corporation, and
  - (ii) the name and business address of each officer of the corporation,
- (c) whether the licence holder is a member of a partnership that carries on business,
- (d) the number of the licence,
- (e) the dates of issue and expiry of the licence,
- (f) whether the licence is current, expired, suspended or cancelled,
- (g) a condition of the licence under the Act, section 60E(4)(f), if any.

**11K Register—licence applications refused—the Act, section 60J(1)**

- (1) For the purposes of the Act, section 60J(1), the Secretary must enter and keep in the Register particulars of an application for a commercial agent licence that is refused on the grounds the applicant is not a fit and proper person to hold a licence.

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- (2) The Secretary must remove the particulars from the Register in the following circumstances—
- (a) on the subsequent grant of a licence to the person,
  - (b) if a licence is not granted—on the expiration of the period of 10 years after the application was refused if the Secretary is of the opinion it is no longer necessary or desirable to retain the information.

**11L Register—convictions, exclusion orders, restriction orders and cancellation of licences—the Act, section 60J(1)**

- (1) For the purposes of the Act, section 60J(1), the Secretary must enter and keep in the Register the following particulars—
- (a) for each conviction for an offence against the Act—
    - (i) the name and business address of the person convicted, and
    - (ii) the nature of the conviction and sentencing order made,
  - (b) for each exclusion order or restriction order made under the Act, Part 5—
    - (i) the name and business address of the person subject to the exclusion order or restriction order, and
    - (ii) details of the exclusion order or restriction order.
  - (c) for each licence cancelled under the Act, Part 5—
    - (i) the name and business address of the person whose licence has been cancelled, and
    - (ii) the date on which it was cancelled, and
    - (iii) the reason for which it was cancelled.
- (2) The Secretary must remove the particulars from the Register on the expiration of the period of 10 years after the particulars were entered.

**11M Commercial agent rules—the Act, section 60K(1)**

For the purposes of the Act, section 60K(1), the commercial agent rules set out in Schedule 2 are prescribed as the commercial agent rules to be observed in the course of carrying out commercial agent activities.

**[2] Schedule 1 Penalty notice offences**

Insert under the heading **Offences under the *Fair Trading Act 1987*** in appropriate order—  
[The heading row in the table below is to assist consultation only and will be deleted in the final draft as headings are already included in the table of penalty notice offences in the *Fair Trading Regulation 2019*, Schedule 1.]

<b>Provision</b>	<b>Penalty for an individual</b>	<b>Penalty for a corporation</b>
Section 20	\$1,100	\$1,100
Section 23(1)	\$1,100	\$1,100
Section 60B	\$1,100	\$1,100
Section 60C(1)	\$1,100	\$1,100
Section 60C(2)	\$1,100	\$1,100
Section 60C(3)	\$550	\$1,100
Section 60G(4)	\$1,100	\$1,100
Section 60K(3)	\$550	\$1,100

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Provision	Penalty for an individual	Penalty for a corporation
Section 60K(4)	\$550	\$1,100
Section 60K(5)	\$1,100	\$1,100

[3] **Schedule 2**

Insert after Schedule 1—

## **Schedule 2 Commercial agent rules**

clause 11M

### **1 Definitions**

In this Schedule—

*commercial agent* means a person who carries out a commercial agent activity, whether or not the person holds a commercial agent licence.

*commercial agent activity* has the same meaning as in the Act, Part 5.

*disqualified person* has the same meaning as in the Act, section 60A.

### **2 Knowledge of Act, Regulation, Schedule and other relevant laws**

- (1) A commercial agent must have a knowledge and an understanding of the Act, Part 5, this Regulation, Part 4A and this Schedule and all other laws relevant to carrying out commercial agent activities as may be necessary to enable the person to carry out the commercial agent activity lawfully.
- (2) Other relevant laws include laws relating to fair trading, competition and consumer protection, credit activities, bankruptcy, anti-discrimination and privacy.

### **3 Act in accordance with client's instructions**

A commercial agent must act in accordance with a client's instructions unless it would be contrary to the following provisions or otherwise unlawful to do so—

- (a) the Act, Part 5,
- (b) this Regulation, Part 4A,
- (c) this Schedule.

### **4 Conflicts of interest**

A commercial agent must not accept instructions to act, or continue to act, as a commercial agent for a client if doing so would place the commercial agent's interests in conflict with the client's interests.

### **5 Agent must ensure employee's compliance with exclusion orders and restriction orders**

If a commercial agent is notified by the Secretary an exclusion order or a restriction order has been made with respect to an employee of the commercial agent who is employed to carry out a commercial agent activity, the commercial agent must immediately take all reasonable steps to ensure the employee complies with the exclusion order or restriction order while the employee continues in employment with the agent.

## **6 Physical force or violence**

A commercial agent must not use, or threaten to use, physical force or violence in the course of carrying out a commercial agent activity.

## **7 Entering private residence**

A commercial agent must not, for the purpose of carrying out a commercial agent activity, enter, attempt to enter or threaten to enter a private residence without the consent of the owner or occupant of the residence.

## **8 Coercive, intimidating or unconscionable conduct**

A commercial agent must not, in the course of carrying out a commercial agent activity, engage in—

- (a) harassment or stalking or other coercive or intimidating conduct with the intention of causing physical or mental harm or of arousing apprehension or fear, or
- (b) unconscionable conduct.

## **9 Debts that cannot be subject of demand**

- (1) A commercial agent must not carry out a commercial agent activity that is debt collection—
  - (a) if the commercial agent knows or ought reasonably to know—
    - (i) a statutory limitation period applying to the collection of, or liability for, the relevant debt has expired, or
    - (ii) the grounds on which the relevant debt is claimed are unsubstantiated, or
    - (ii) there are other grounds on which liability for the relevant debt is excluded or can be denied, and
  - (b) unless the commercial agent believes on reasonable grounds the person from whom collection of the relevant debt is sought is liable for the debt.
- (2) A commercial agent must provide to the person from whom collection of a debt is sought evidence of the grounds on which the commercial agent holds the belief that the person is liable for the debt when requested by the person to do so.

## **10 Contacting persons**

- (1) A commercial agent carrying out a commercial agent activity must not contact a person—
  - (a) by a method the person has expressly requested the commercial agent not to use unless the commercial agent has exhausted all other available methods of contacting the person, or
  - (b) after the person has expressly instructed the commercial agent not to contact the person again unless the commercial agent activity is debt collection and the contact is solely for the purpose of advising the person the creditor intends to take further action to recover the relevant debt from the person, or
  - (c) outside the hours shown in the following table (*reasonable hours*)—

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<b>Contact by telephone—person not at person's place of business or employment</b>	<b>Face-to-face contact—not at person's place of business or employment</b>	<b>Contact with person at person's place of business or employment</b>
7:30am–9pm on weekdays, except public holidays	9am–9pm on any day of the week, except public holidays	9am–5pm on weekdays
9am–9pm on weekends, except public holidays		

- (2) A commercial agent may contact a person outside reasonable hours if the commercial agent has made all reasonable efforts to contact the person during reasonable hours and has failed to do so.

## **11 Honesty, fairness and professionalism**

A commercial agent must not misinform or otherwise mislead or deceive a person in the course of carrying out a commercial agent activity, including by impersonating another person or misrepresenting the commercial agent's identity.

## **12 Costs of carrying out commercial agent activity**

A commercial agent must not request, demand or collect from a person who is the subject of a commercial agent activity a payment for the costs or expenses incurred by the commercial agent in connection with carrying out the commercial agent activity.

## **13 Confidentiality**

- (1) A commercial agent must not disclose, either expressly or by implication, that a person is the subject of a commercial agent activity to another person unless the disclosure is—
- (a) made with the consent of the person who is the subject of the commercial agent activity, or
  - (b) reasonably necessary to the carrying out of the commercial agent activity by the commercial agent, or
  - (c) made with another lawful excuse.
- (2) A commercial agent must not threaten a person with disclosure to another person that the person is the subject of a commercial agent activity unless the threat relates to a disclosure that is permitted under subclause (1).

## **14 Money held on trust**

- (1) If a commercial agent receives money in connection with carrying out a commercial agent activity and is instructed by the commercial agent's client to hold the money on trust, the agent must, as soon as practicable, pay the money into a separate trust account opened and kept by the agent for that purpose.
- (2) A commercial agent who holds money on trust must, as soon as practicable after being directed to do so by the commercial agent's client and in accordance with the client's instructions—
- (a) pay the money to the person for whose benefit the money is held, or



- (b) otherwise disburse the money.

## **15 Account records to be kept by agent**

- (1) A commercial agent who keeps an account, including a trust account, with an authorised deposit-taking institution in connection with a commercial agent activity must maintain a record containing full particulars of all transactions in relation to the account.
- (2) The record may be kept in hard copy or electronic form.
- (3) Information must be able to be produced from the record on demand in permanent legible form in the English language.
- (4) In the case of a trust account—the commercial agent must also maintain a record, compiled in chronological sequence, of all changes, including creation, amendment or deletion, to the following information—
  - (a) the name and address of the person for whose benefit the money is held,
  - (b) the code reference number, if any, of the person for whose benefit the money is held,
  - (c) the trust account number.
- (5) The record of changes must disclose details of the information before and after the change.

## **16 Records to be kept for at least 3 years**

A record required to be kept by the Act, this Regulation or this Schedule must be kept for a period of not less than 3 years from the date on which the record was created.

## **17 Unclaimed trust money**

If money has been held by a commercial agent for more than 2 years in a trust account kept by the commercial agent under clause 14, the commercial agent must make reasonable efforts to—

- (a) identify and locate the owner of the money, and
- (b) ensure the money is paid to the owner of the money.

## **18 Agent must not employ or engage disqualified persons**

- (1) A commercial agent must take all reasonable steps to ensure the commercial agent does not employ or otherwise engage a disqualified person to carry out a commercial agent activity.
- (2) A commercial agent must notify the Secretary in writing within 7 days of becoming aware a person employed or otherwise engaged by the commercial agent to carry out a commercial agent activity is a disqualified person.

## **19 Complaints**

A commercial agent must take all reasonable steps to resolve a complaint made to the commercial agent concerning the carrying out of a commercial agent activity by the commercial agent or an employee or agent of the commercial agent.