



New South Wales

Fair Trading Amendment (Commercial Agents) Regulation 2022

under the

Fair Trading Act 1987

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

ELENI PETINOS, MP
Minister for Fair Trading

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 that a person is not a fit and proper person to hold a commercial agent licence,
 - (iii) 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—
 - (i) further penalty notice offences, and
 - (ii) fees for licence applications, renewals, restorations and replacements, and
 - (iii) rules of conduct for the carrying out of commercial agent activities.

Fair Trading Amendment (Commercial Agents) Regulation 2022

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1 Name of Regulation

This Regulation is the *Fair Trading Amendment (Commercial Agents) Regulation 2022*.

2 Commencement

This Regulation commences on the day on which the *Fair Trading Amendment (Commercial Agents) Act 2016*, Schedule 1 commences and is required to be 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—Act, s 60A(2)

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 3, Division 10, 10A, 14, 14A or 15, section 93T, Part 4 or section 351A or against corresponding provisions of a law of the Commonwealth or of another State or Territory,
- (b) an offence against the *Crimes (Domestic and Personal Violence) Act 2007*, section 13 or against corresponding provisions of a law of the Commonwealth or of another State or Territory, or
- (c) an offence against the *Privacy Act 1988* of the Commonwealth, section 13G,
- (d) an offence against the *Security Industry Act 1997* or against corresponding provisions of a law of the Commonwealth or of another State or Territory,
- (e) an offence against the *Surveillance Devices Act 2007*, Part 2 or 5 or against corresponding provisions of a law of the Commonwealth or of another State or Territory that provide for the authorisation of the use of surveillance devices.

11H Fit and proper person—Act, s 60D(3)(d)

- (1) For the purposes of the Act, section 60D(3)(d), the following grounds are prescribed—
 - (a) the person is a mentally incapacitated person,
 - (b) the person is disqualified from holding a licence, permit or other authority under legislation administered by the Minister,
 - (c) 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 to pay the penalty or comply with the direction continues,
 - (d) the person has been the holder of a commercial agent licence issued under the Act that—
 - (i) has, within the previous 5 years, been cancelled and the person has not held a licence since the cancellation, or
 - (ii) is suspended and the period of the suspension has not expired,
 - (e) the person was the holder of a master licence for process serving, a master licence for debt collection or a master licence for repossession of goods under the repealed Act that was, within the previous 5 years before its repeal—
 - (i) cancelled under the repealed Act, section 10(1) and the person has not held a licence since the cancellation, 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, within the previous 5 years before its repeal—
 - (i) cancelled under the repealed Act, section 17(1) and the person has not held a licence since the cancellation, 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 Fees for commercial agent licences—Act, s 60E(5)

- (1) The application fees payable for the purposes of the Act are listed in Schedule 2, Part 1.
- (2) An amount specified for an application fee in Schedule 2, Part 1, Column 3 under the heading **Processing component** is taken to be a fee to cover the costs incurred by the Secretary in processing the application.

Note— This amount is consequently a **processing fee** for the purposes of the *Licensing and Registration (Uniform Procedures) Act 2002*, Part 2. If an application is refused or withdrawn, the applicant is entitled to a refund of all fees paid, other than the processing fee.
- (3) The total application fee is set out in Schedule 2, Part 1, Column 4.

11J Register—commercial agent licences—Act, s 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 and licences cancelled—Act, s 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) particulars of each 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,
 - (b) 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 in the following circumstances—
 - (a) for an application that is refused—
 - (i) on the subsequent grant of a licence to the applicant, or
 - (ii) 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,
 - (b) for a licence that is cancelled—on the expiration of the period of 10 years after the date on which the licence was cancelled.

11L Register—convictions, exclusion orders and restriction orders—Act, s 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.
- (2) The Secretary must remove the particulars from the Register on the expiration of the period of 10 years after the date on which—
 - (a) the person was convicted, or
 - (b) the order was made.

11M Commercial agent rules—Act, s 60K(1)

For the purposes of the Act, section 60K(1), the commercial agent rules set out in Schedule 3 are prescribed as the commercial agent rules to be observed in the course of carrying out commercial agent activities.

[2] Clause 15

Insert after clause 14—

15 Provision consequent on enactment of Fair Trading Amendment (Commercial Agents) Act 2016 No 52—Act, Schedule 5, cl 1A(4)

- (1) For the purposes of the Act, Schedule 5, clause 1A(4), on the commencement of the *Fair Trading Amendment (Commercial Agents) Act 2016*, a person is taken to hold a commercial agent licence under the Act if—
 - (a) the person held, under the repealed Act, a master licence or an operator licence for debt collection, process serving or repossession of goods that was in force on 30 June 2022, and
 - (b) from 30 June 2022 the person has carried out one or more commercial agent activities, and

- (c) for the purposes of carrying out a commercial agent activity, the person has engaged in conduct that would otherwise constitute an offence under the Act, section 60C.
- (2) A licence held under subsection (1) is taken to expire on whichever date is the sooner of the following—
- (a) the expiry of the period during which the licence granted under the repealed Act would, but for the repeal of that Act, have had effect,
- (b) 30 June 2023.
- (3) In this clause—
repealed Act means the *Commercial Agents and Private Inquiry Agents Act 2004*.

[3] Schedule 1 Penalty notice offences

Insert under the heading **Offences under the *Fair Trading Act 1987*** in appropriate order—

Section 20(3)(a)	\$550	\$1,100
Section 23(1)	\$550	\$1,100
Section 60B	\$1,100	\$5,500
Section 60C(1)	\$1,100	\$5,500
Section 60C(2)	\$1,100	\$5,500
Section 60C(3)	\$550	\$1,100
Section 60G(4)	\$1,100	\$5,500
Section 60K(3)	\$550	\$1,100
Section 60K(4)	\$550	\$1,100
Section 60K(5)	\$550	\$1,100

[4] Schedules 2 and 3

Insert after Schedule 1—

Schedule 2 Fees

clause 111

Part 1 Fees payable

Item	Column 1	Column 2	Column 3	Column 4
	Type of fee	Fixed component—in fee units	Processing component—in fee units	Total—in fee units
1	Application for grant of licence by individual—			
	(a) for 1 year	2.78	1.11	3.89
	(b) for 3 years	6.56	1.11	7.67
	(c) for 5 years	11.11	1.11	12.22

Item	Column 1	Column 2	Column 3	Column 4
	Type of fee	Fixed component—in fee units	Processing component—in fee units	Total—in fee units
2	Application for grant of licence by corporation—			
	(a) for 1 year	8.50	3.50	12.00
	(b) for 3 years	20.00	3.50	23.50
	(c) for 5 years	33.50	3.50	37.00
3	Application for renewal or restoration of licence by individual—			
	(a) for 1 year	2.78	0.55	3.33
	(b) for 3 years	6.56	0.55	7.11
	(c) for 5 years	11.11	0.55	11.66
4	Application for renewal or restoration of licence by corporation—			
	(a) for 1 year	8.50	1.67	10.17
	(b) for 3 years	20.00	1.67	21.67
	(c) for 5 years	33.50	1.67	35.17
5	Application for replacement of licence	0.55	nil	0.55

Part 2 Adjustment of fees for inflation

1 Definitions

In this Part—

CPI number means the Consumer Price Index (All Groups Index) for Sydney published by the Australian Bureau of Statistics in the latest published series of that index.

financial year means a period of 12 months commencing on 1 July.

2 Calculation of fee unit for purposes of Regulation

- (1) For the purposes of this Regulation, a **fee unit** is—
- in the financial year 2022–23—\$100, and
 - in each subsequent financial year—the amount calculated as follows—

$$\$100 \times \frac{A}{B}$$

where—

A is the CPI number for the March quarter in the financial year immediately preceding the financial year for which the amount is calculated.

B is the CPI number for the March quarter of 2017.

- (2) The amount of a fee unit is to be rounded to the nearest cent, and an amount of 0.5 cent is to be rounded down.

- (3) However, if the amount of a fee unit calculated for any financial year is less than the amount that applied for the previous financial year, then the amount for the previous financial year applies instead.

3 Rounding of fee amounts

The amount of a fee calculated by reference to a fee unit, including the amount of a component of a fee, is to be rounded to the nearest dollar, and an amount of 50 cents is to be rounded down.

4 Notice of indexed fees

- (1) As soon as practicable after the CPI number for the March quarter is first published by the Australian Statistician, the Secretary is required to—
- (a) notify the Parliamentary Counsel of the amount of the fee unit for the next financial year so that notice of the amount can be published on the NSW legislation website, and
 - (b) give public notice on an appropriate government website of the actual amounts of the fees applying in each financial year resulting from the application of the amount of a fee unit calculated under this Part.
- (2) This Part operates to change an amount of a fee that is calculated by reference to a fee unit and that change is not dependent on the notification or other notice required by this clause.

Schedule 3 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 following provisions—
- (a) the Act, Part 5,
 - (b) this Regulation, Part 2B,
 - (c) this Schedule,
 - (d) 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 2B,
- (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 that 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 dwelling

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 dwelling without the consent of the owner or occupant of the dwelling.

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
 - (iii) 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) This clause applies to commercial agents carrying out a commercial agent activity that is debt collection.
- (2) A commercial agent must not contact a person—
 - (a) by a method that 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 requested the commercial agent not to contact the person again, unless the contact is solely for the purpose of advising the person that 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*)—

Contact by telephone—person not at person's place of business or employment	Contact in person—not at person's place of business or employment	Contact in person—at person's place of business or employment
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		

- (3) However, 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.
- (4) In this clause—
telephone includes person to person audio or audio visual electronic communication.

11 Acting with honesty

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

- (1) 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.
- (2) If the commercial agent activity is debt collection—this section does not limit a right that the person to whom the debt the subject of the commercial agent activity is payable (the *creditor*) may have at law in relation to the recovery from the debtor of the creditor's costs of recovering the debt.

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 to be paid into account

- (1) A commercial agent must deposit all money received in connection with carrying out a commercial agent activity into an account with an authorised deposit-taking institution opened and held by the agent for that purpose.
- (2) However, if the commercial agent 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 held by the agent for that purpose.
- (3) 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 must maintain a record containing full particulars of all transactions in relation to an account, including a trust account, held with an authorised deposit-taking institution in connection with a commercial agent activity.
- (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 or this Regulation 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 (*unclaimed money*), the commercial agent must make reasonable efforts to—

- (a) identify and locate the owner of the unclaimed money, and
- (b) if the owner has been identified and located—ensure the unclaimed money is paid to the owner as soon as practicable after locating the owner.

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.