



# Regulatory Impact Statement

Proposed Fair Trading Amendment  
(Commercial Agents) Regulation 2021

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# Contents

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<b>CONTENTS</b>	<b>2</b>
<b>BACKGROUND AND SCOPE OF CONSULTATION</b>	<b>5</b>
Reforms to commercial agents licensing	5
Industry overview	6
<b>CONSULTATION PROCESS</b>	<b>7</b>
Public consultation	7
How to make a submission	7
Matters outside the scope of this consultation process	7
Confidential submissions	8
Evaluation of submissions	8
Approval and commencement of the Regulation	8
<b>LICENSING FRAMEWORK COMPARISON</b>	<b>9</b>
Current licensing under the CAPI Act	9
Licensing requirements under the Amendment Act	9
<b>OBJECTIVES OF THE REGULATION</b>	<b>10</b>
Objective	10
Options for achieving objectives	10
<b>PREFERRED OPTION FOR ACHIEVING THE ACT'S OBJECTIVES</b>	<b>12</b>
Preferred option	12
Criteria used to assess the regulatory options	12
Summary assessment	13
<b>DISCUSSION OF THE DRAFT REGULATION</b>	<b>15</b>
How to read the draft Regulation	15
Regulation of Commercial Agents (Part 2B)	15
<b>APPENDIX 1 – LIST OF TARGETED STAKEHOLDERS</b>	<b>24</b>
<b>APPENDIX 2 – IMPACT ASSESSMENT – OPTIONS FOR ACHIEVING ACT'S OBJECTIVES</b>	<b>25</b>
Assessment of Option 1 - Make the Regulation	25
Assessment of Option 2 - Commence the Act without the Regulation	26

<b>Assessment of Option 3 - Do not commence the Amendment Act</b>	<b>28</b>
<b>APPENDIX 3 – REGULATION-MAKING POWERS</b>	<b>30</b>
<b>APPENDIX 4 – LIST OF DISCUSSION QUESTIONS IN THIS RIS</b>	<b>32</b>

## Background and scope of consultation

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### Reforms to commercial agents licensing

Commercial agents are people who conduct activities including debt collection, process serving, and repossession of goods. NSW Police Force is currently responsible for the regulation of commercial agents and private inquiry agents under the *Commercial Agents and Private Inquiry Agents Act 2004* (CAPI Act).

In November 2014, the NSW Legislative Assembly's Legal Affairs Committee published its report on Debt Recovery in NSW (the Report).<sup>1</sup> The Committee received 35 submissions from government agencies, the courts, professional associations, community legal centres, financial institutions and private individuals.

The Report found that the CAPI Act had not kept up to date with changes to the industry, imposed unnecessary costs and burdens and is, in part, duplicated by federal consumer law and credit protection legislation.

The Report recommended:

- the NSW Government introduce negative licensing for commercial agents who have no face-to-face contact with debtors, while positive licensing is retained for field agents.
- responsibility for the oversight and licensing of commercial agents and private inquiry agents be transferred from the NSW Police Force to NSW Fair Trading.

In response to the Report, the Government introduced the *Fair Trading Amendment (Commercial Agents) Act 2016* (the Amendment Act). The purpose of the Amendment Act is:

- to repeal the CAPI Act, and
- amend the *Fair Trading Act 1987* (FT Act) to provide a new system of licensing of commercial agents, overseen by NSW Fair Trading.

The oversight of private inquiry agents will remain with NSW Police Force through the commencement of the *Security Industry Amendment (Private Investigators) Act 2016* (Private Investigators Act).

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<sup>1</sup> Legislative Assembly of New South Wales – Legal Affairs Committee *Debt Recovery in New South Wales* – Report 2/55 November 2014. Report available at [www.parliament.nsw.gov.au/la/papers/Pages/taled-paper-details.aspx?pk=44482](http://www.parliament.nsw.gov.au/la/papers/Pages/taled-paper-details.aspx?pk=44482)

## Industry overview

The scope of the CAPI Act includes both commercial agents and private investigators. It is difficult to estimate the number of commercial agents currently operating in NSW as data on the number of licences held is collected by licence types and subclasses rather than for the number of individuals, noting individuals can hold multiple licence types.

There are 1,454 master licences under commercial agent subclasses held under the CAPI Act, and 2,729 operator licenses. The total number of commercial agent licences is 4,183. However, these figures do not reflect the number of individual commercial agents operating in NSW and the number of commercial agent licences will be much lower than these totals.

The broad category of commercial agent licences includes three licence subclasses (process serving, debt collection and repossession of goods) while private inquiry agent licences include two subclasses.

Many licensees hold multiple subclasses that include combinations of commercial agent and private inquiry agent subclasses. The number of field agents who have face-to-face customer contact is not known.

### Number of licenses held for commercial agent categories

Licence Category	Process Serving	Debt Collection	Repossession of Goods	Total licences for subcategory
<b>Master licence</b>				
Individual (nil employee)	209	174	171	554
Owner Operator (nil employee)	112	104	87	303
1 to 10 employees	181	216	135	532
More than 10 employees	18	35	12	65
<i>Total</i>	<i>520</i>	<i>529</i>	<i>405</i>	<i>1,454</i>
<b>Operator licence</b>				
<b>Probationary</b>	110	105	80	295
<b>1 Year</b>	126	194	98	418
<b>5 Year</b>	715	734	567	2,016
<i>Total</i>	<i>951</i>	<i>1033</i>	<i>745</i>	<i>2,729</i>
<b>Total commercial agent licenses</b>	<b>1,471</b>	<b>1,562</b>	<b>1,150</b>	<b><u>4,183</u></b>

# Consultation process

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## Public consultation

The draft Regulation and this Regulatory Impact Statement (RIS) are publicly available on the NSW Government's Have Your Say website: [www.haveyoursay.nsw.gov.au/commercial-agents](http://www.haveyoursay.nsw.gov.au/commercial-agents). They will be available for at least 28 days.

A public notice about the release of the Regulation and RIS has been published in the NSW Government Gazette, the Daily Telegraph and the Sydney Morning Herald. Copies have been sent directly to the stakeholders listed at **Appendix 1**.

## How to make a submission

Interested organisations and individuals are invited to provide a submission on any matter relevant to the draft Regulation, whether or not it is addressed in this RIS.

We would prefer to receive submissions through the Have Your Say website and request that any documents provided to us are produced in an 'accessible' format. Accessibility is about making documents more easily available to those members of the public who have some form of impairment (visual, physical, cognitive).

Further information on how you can make your submission accessible is contained at <http://webaim.org/techniques/word/>.

Submissions can also be made by email or mail:

Email to: [commercialagentsregulation@customerservice.nsw.gov.au](mailto:commercialagentsregulation@customerservice.nsw.gov.au)

Mail to: Fair Trading Amendment (Commercial Agents) Regulation 2021  
Better Regulation Division, Regulatory Policy  
4 Parramatta Square  
12 Darcy Street  
PARRAMATTA NSW 2150

The closing date for submissions is **Sunday, 7 November 2021**.

## Matters outside the scope of this consultation process

This RIS only deals with matters within the scope of the draft consultation Fair Trading Amendment (Commercial Agents) Regulation 2019 (draft Regulation), as it implements the Amendment Act.

The Amendment Act and the Private Investigators Act are not within the scope of the consultation process.

## **Confidential submissions**

We will make all submissions publicly available on the Have Your Say website. If you do not want your personal details or part of your submission published, you must state this clearly in your submission and tell us why. Automatically generated confidentiality statements are not enough.

Even if you state that you do not want us to publish certain information, we may need to release that information by law. For example, to comply with the *Government Information (Public Access) Act 2009*. We will also provide all submissions to the Legislation Review Committee of NSW Parliament. This is a statutory requirement.

## **Evaluation of submissions**

We will carefully consider each submission and, if necessary, will amend the draft Regulation to address issues raised in the consultation process. If we need more information, we may consult with key stakeholders before finalising the Regulation.

## **Approval and commencement of the Regulation**

Once the Regulation has been finalised, we will submit it to the Governor for approval. The final Regulation will then be published on the NSW Government website for legislation at [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au) prior to commencing.

It is proposed the Amendment Act and draft Regulation will commence on **1 July 2022**. This will allow a six-month implementation window for the further development and finalisation of digital licensing infrastructure to support the Amendment Act and draft Regulation. This timing will also allow the industry to prepare for the changes.

It is intended that the Private Investigators Act will commence on the same date.

## Licensing framework comparison

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### Current licensing under the CAPI Act

As noted in the Background, within each of the broader Master and Operator licence classes, the current licensing system establishes:

- three licence subclasses for commercial agents and
- two subclasses for private inquiry agents.

The licence subclasses for commercial agents are for process serving, debt collection and repossession of goods. Many licensees hold multiple subclasses, including combinations of commercial agent and private inquiry agent subclasses.

### Licensing requirements under the Amendment Act

The licensing structure was simplified under the Amendment Act. Under section 60C of the Amendment Act, only field agents and employers of field agents are required to obtain a licence before carrying out commercial agent activity.

A field agent is a person who approaches a person or enters a premises at which a person resides works, lives, owns, or frequents, for the purposes of carrying out commercial agent activity.

Commercial agents who are not field agents are not required to hold a licence but must not be a disqualified person (s60B) and must comply with the Commercial Agent Rules (s60K).

### Comparison between current and new licensing frameworks

Agent type	Amendment Act	CAPI Act (for comparison)
<b>Field agent</b> carrying out commercial agent activity	<b>Commercial agent licence required</b>	Master licence: licensees are entitled to carry on a business and carry out operator activities Operator licence: licensees are entitled to carry out commercial agent activity/ private inquiry agent activity.
<b>Other person</b> carrying out commercial agent activity	<b>No licence required</b>	Different licence types issued for different operator activity, including process serving, debt collection, repossession of goods. No distinction between field agents and other agents.

# Objectives of the Regulation

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## Objective

The primary objective of the draft Regulation is to provide the detail needed for the operation of the amendments contained in the Amendment Act. This includes the necessary detail to support requirements relating to commercial agents that must be licensed as they have face-to-face contact with consumers, as field agents, and rules of conduct requirements that apply to all commercial agents regardless of whether they are required to hold a licence.

The Amendment Act does not set out specific objectives, however, it is suggested that the overall objectives of the Amendment Act are to:

- offer protection to consumers who are subject to the activities of commercial agents, for example by:
  - setting expectations of an appropriate standard of conduct
  - providing mechanisms to discipline commercial agents who are found to have acted unprofessionally or incompetently
  - promoting a better understanding of commercial agent-related issues in the community
- improve administrative efficiency by ensuring that the commercial agent industry is not subject to unnecessary and costly red-tape, and that Government regulation is focused on those areas where regulation is necessary to protect the community.

## Options for achieving objectives

The primary objective of the draft Regulation is to provide the administrative detail to support the operation of the Amendment Act. This will provide clear expectations on acceptable practices to improve protection and safeguards for people subject to commercial agent activity.

There are three options for achieving this objective:

### **Option 1: Make the draft Regulation**

The provisions of the draft Regulation would support the operation of the Amendment Act, which establishes the regulatory framework for regulating commercial agent activity.

### **Option 2: Commence the Amendment Act without the draft Regulation**

Do not make a regulation to support the Amendment Act when the CAPI Act and *Commercial Agents and Private Inquiry Agents Regulation 2017* (2017 Regulation) are

repealed. Under this option, the Amendment Act would commence without the necessary supporting administrative detail.

This option would significantly restrict the effectiveness and operation of the Amendment Act. It would also require either further amendments to the FT Act, or more reliance on non-regulatory administrative procedures and voluntary industry regulation and standards.

**Option 3: Do not commence the Amendment Act**

Do nothing. By neither commencing the Amendment Act nor making the draft Regulation, the status quo would be retained. This would mean that the current CAPI Act and 2017 Regulation would remain in force. It would also mean that the recommendations of the 2014 Legal Affairs Committee would remain unfulfilled, and the current unsatisfactory approach to regulating commercial agents would continue.

## Preferred option for achieving the Act's objectives

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### Preferred option

**Option 1 is the preferred option.** While there may be some costs associated with this option, making the Regulation is integral to the effective operation of the Amendment Act. As doing so is consistent with the intention of Parliament, this option is the preferred option.

The draft Regulation:

- sets out provisions for disqualification as a commercial agent
- provides further grounds under which a person may be deemed not fit and proper for licensing, and
- provides for the administration of a commercial agent public register as well as the particulars to be recorded in the register.

The draft Regulation also prescribes the rules of conduct a commercial agent must follow in the course of their work.

**Option 2 is not supported.** Commencing the Amendment Act without the administrative and legislative support of the draft Regulation would mean that the Amendment Act could not effectively operate. It would, require industry to develop costly self-regulation systems and processes. Further amendments to the FT Act would likely be needed to provide the detail that would be lacking if there were no regulation. For example, the Amendment Act does not provide rules of conduct for commercial agents. If it were to be commenced without the accompanying regulation, such rules of behaviour would need to be inserted into the FT Act.

**Option 3 is not supported.** The 2014 Legislative Assembly Legal Affairs Committee inquiry into debt collection identified that the current regime is unduly onerous, imposes unnecessary costs and delays, and does not appear to have adapted to changes in the modern debt collection industry. The Committee further expressed concerns that the burdensome licensing requirements associated with the CAPI Act could encourage debt collection businesses to relocate to other jurisdictions. This is not a satisfactory outcome and would be contrary to the decision of Parliament when it gave its assent to the Amendment Act.

### Criteria used to assess the regulatory options

The following criteria have been used to evaluate the three options:

- The extent to which the option:

- supports the operation of the Amendment Act
- offers consumer protection
- improves administrative efficiency
- The cost effectiveness of the option, in terms of costs and benefits to business, consumers and government.

## Summary assessment

A high-level assessment of the impacts of each option is provided below.

This is based on a more detailed assessment at **Appendix 2**.

### Impact of each option

Option	Costs	Benefits	Net impact
<b>1. Make the regulation</b>	<p><b>Low-Medium</b></p> <ul style="list-style-type: none"> <li>● Licensing, compliance and administrative costs for industry participants (lower compared to under CAPI Act)</li> <li>● Implementation, administration, and enforcement costs for Government (lower compared to under CAPI Act)</li> </ul>	<p><b>High</b></p> <ul style="list-style-type: none"> <li>● Reduced regulatory requirements for businesses</li> <li>● Partial deregulation likely to reduce existing costs for industry participants and Government over time</li> <li>● Reduced administrative burden and increased public confidence by clarifying requirements of the Act</li> </ul>	<b>Positive</b>
<b>2. Commence Amendment Act with no regulation</b>	<p><b>High</b></p> <ul style="list-style-type: none"> <li>● High compliance cost for industry and Government to interpret legislative provisions in the absence of guiding Regulation</li> <li>● Lack of clear regulation may necessitate legislative amendment to the FT Act</li> <li>● Hinders objective of Parliament</li> </ul>	<p><b>Low</b></p> <ul style="list-style-type: none"> <li>● Partial deregulation of industry reduces existing licensing costs for industry</li> <li>● Government licence processing costs reduced over time</li> <li>● Reduces regulatory requirements for businesses</li> <li>● Benefits significantly reduced by lack of administrative detail</li> </ul>	<b>Negative</b>

	<ul style="list-style-type: none"> <li>• Difficult to administer the Amendment Act without regulatory support</li> <li>• Difficult to enforce the Amendment Act without regulatory support</li> </ul>		
<b>3. Maintain status quo</b>	<p style="text-align: center;"><b>High</b></p> <ul style="list-style-type: none"> <li>• Higher cost of administering current regulatory framework</li> <li>• Higher costs for industry</li> <li>• Some regulatory measures are duplicated in other laws</li> <li>• Opportunity cost of not introducing an improved and updated regulatory scheme</li> <li>• Low public confidence in current scheme, which does not reflect modern practices and standards</li> <li>• Complicates the commencement of new Private Investigators Act.</li> </ul>	<p style="text-align: center;"><b>Medium</b></p> <ul style="list-style-type: none"> <li>• No additional costs for consumers, industry or Government</li> <li>• Opportunity cost of lower regulatory requirements for businesses</li> <li>• Opportunity cost of lower ongoing costs to Government from partial deregulation</li> <li>• Government and public will not be required to adapt to new scheme</li> </ul>	<b>Negative</b>

# Discussion of the draft Regulation

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## How to read the draft Regulation

This RIS provides a guide to the provisions set out in the draft Regulation. The draft Regulation can be read in conjunction with the Amendment Act under which it sits. The Amendment Act contains key definitions used in this draft Regulation, including definitions for commercial agent activity and debt collection. The Amendment Act can also be referenced to understand the main requirements and administrative processes.

The provisions in the draft Regulation can be read without needing to reference the *Fair Trading Regulation 2019* (FT Regulation), which the draft Regulation amends.

## Regulation of Commercial Agents (Part 2B)

### Disqualification from carrying out commercial agent activities

The Amendment Act sets out the reasons a person can be disqualified from carrying out commercial agent activity.

These include being convicted of a harassment or coercion offence, or an offence involving violence, firearms, fraud, drugs or dishonesty, as well as persons who are bankrupt or subject to an exclusion order.

Clause 11G(1) of the draft Regulation provides further offences that are declared to be relevant offences for the purpose of disqualifying a person from carrying out commercial agent activity under the Amendment Act. These are an offence against the *Crimes Act 1900*, Part 4 (stealing and similar offences), and an offence against the *Surveillance Devices Act 2007*, Part 2 (regarding the installation, use and maintenance of surveillance devices) or Part 5 (regarding compliance and monitoring), or against corresponding provisions of a law of another State or Territory. Examples of offences under these sections include knowingly installing a listening or optical surveillance device to overhear or record a private conversation to which the person is not a party, and knowingly using or communicating information obtained from the use of a surveillance device. The declared relevant offences are based on the CAPI Act.

The inclusion of these offences as relevant offences for the purposes of disqualification acknowledges the associated risk to consumers.

In addition, clause 11G(2) provides that persons that held one or more of the following licences under the CAPI Act that was cancelled during the operation of the CAPI Act would also be disqualified under the Amendment Act:

- master licence for process serving, debt collection or for repossession of goods
- operator licence for process serving, debt collection or for repossession of goods.

**1. Do you agree with the additional reasons and offences for disqualification included in the draft Regulation? If not, please explain why.**

**Grounds for determining whether a person is fit and proper**

The Amendment Act provides that a person also may not hold a commercial agents licence if the Fair Trading Commissioner finds that they are not a fit and proper person. This determination could be made on grounds such as suspension of a commercial agent or other licence in another State or Territory, or conviction of a relevant offence within the previous 10 years.

Clause 11H of the draft Regulation provides further grounds the Fair Trading Commissioner may consider when determining if a person is a fit and proper person to hold a commercial agent licence. The grounds covered by the Regulation have been modelled on those used in other NSW Fair Trading legislation, as well as the CAPI Act for consistency and to avoid unnecessary confusion.

This provision allows the Fair Trading Commissioner to consider whether the licence applicant:

- has committed offences of a particular nature under the *Crimes Act 1900* (for example, participation in criminal groups, kidnapping, sexual offences against adults or children), stalking or intimidation offence under the *Crimes (Domestic and Personal Violence Act) 2007* or an offence under the *Commonwealth Privacy Act 1988*)
- is mentally incapacitated as defined under the *Mental Health Act 2007*
- is disqualified from holding any other licence administered by the Minister for Better Regulation
- failed to pay a monetary penalty imposed under Part 5 of the Amendment Act or failed to comply with a direction under that Part
- held a master or operator licence for debt collection, process serving or repossession of goods under the CAPI Act that was suspended or cancelled.

- 2. Are there any other grounds which the Fair Trading Commissioner should be able to consider when determining if a person is fit and proper to hold a licence to carry out commercial agent activity? If so, please specify the grounds and explain why.**

### **Application of *Licensing and Registration (Uniform Procedures) Act 2002* (the Licensing Act)**

Part 2 of the Licensing Act provides the framework for uniform or consistent licensing procedures within NSW. The rules under the Licensing Act can be changed or limited under the relevant legislation applying to a specific licensing scheme. This includes time limits on the licensing authority for determining a licence application.

Clause 11I of the draft Regulation modifies Part 2 of the Licensing Act for the purposes of the Amendment Act. This section provides that where an applicant for a commercial agent licence has been charged with a particular offence (including an offence listed in 11H or an offence involving fraud or dishonesty), the Fair Trading Commissioner may await the outcome of proceedings on the charge before determining an application for a commercial agent licence.

This modification is consistent with other licencing legislation within the NSW Fair Trading portfolio and allows the Fair Trading Commissioner to assess licence applications in light of all the relevant details about an applicant's criminal history.

- 3. Are the changes to Part 2 of the Licensing Act as prescribed in clause 11I suitable? If not, please explain why.**
- 4. Do you have any other views on the application of the Licensing Act to this legislation?**

### **Register of Commercial Agents**

The Amendment Act requires the Fair Trading Commissioner to maintain and publish certain information about licensed commercial agents in a register. This information includes licence applications refused or cancelled, prosecutions taken against commercial agents, and exclusion or restriction orders that have been issued.

In addition, clauses 11J-11L of the draft Regulation provide further details around what the Register is to record.

Under these clauses, the Register must contain the name and business address of all licensees (field agents). Where the licensee is a corporation, the Register must contain the

name, business address and ACN of that corporation, including the names and business addresses of each officer of the corporation.

Other details to be recorded include whether the licence holder is a member of a partnership, their licence number and any details or conditions associated with the licence, including the status of the licence (current, expired, suspended, or cancelled).

The draft Regulation also requires the following information to be recorded in the Register: convictions, exclusion orders, cancelled licences and the details of any person who has had a licence application rejected on the basis that they are not a fit and proper person to hold a licence.

**5. Do you agree with the information set out in the draft Regulation for inclusion in the Register? If not, please explain why or explain what details you think should be included.**

The draft Regulation provides that records of convictions, exclusion orders, restriction orders and cancelled licences under the Act should be kept on the Register for a period of 10 years from the day that they are entered into the Register.

**6. Do you agree that 10 years is an appropriate timeframe for convictions, exclusion orders, restriction orders and cancelled licences to be kept on the Register? If not, what would be an appropriate period and why?**

**7. Do you agree that the 10 year period for records of convictions, exclusion orders, restriction orders and cancelled licences to be kept on the Register should begin *from the date that they are entered in the register*, rather than from the day that the relevant offence or conduct is committed? If not, please explain why.**

## **Schedule 2 Commercial Agent Rules**

Schedule 2 of the draft Regulation sets out the rules of conduct that all commercial agents (whether field agents or otherwise) must abide by.

### ***Commercial agent activity***

Schedule 2 of the draft Regulation defines a commercial agent as someone who carries out commercial agent activity, whether or not they hold a commercial agent licence. Commercial agent activity in the Regulation has the same meaning as in Part 5 of the Amendment Act.

This includes:

- debt collection (requesting, demanding or collecting money from a third person on behalf of a second person)
- process serving (serving legal process documents to a third person on behalf of a second person), and
- repossession of goods (finding, requesting or seizing goods held by a third person on behalf of a second person).

### ***Overview of rules***

The rules include a range of behaviours, including both positive duties (such as the requirement to act in accordance with client's instructions and the law) and prohibitions on certain behaviours (including physical assault, intimidation and misleading conduct).

These provisions of the Regulation provide safeguards and protections to consumers subject to commercial agent activity by ensuring that commercial agents do not engage in behaviour that may be inappropriate or harmful to the consumer.

A breach of the Commercial Agent Rules could result in the commercial agent being issued with a restriction or exclusion order (s60G of the Amendment Act).

A person who contravenes an exclusion or restriction order is guilty of an offence, for which the maximum penalty under the Act is \$22,000, or 12 months imprisonment, or both, for an individual, or \$110,000 for a corporation.

The rules require commercial agents to:

- have appropriate knowledge and understanding of the Amendment Act and other relevant laws
- act in accordance with client instructions
- not act for any person where to do so would result in a conflict between the commercial agent's and the client's interests
- take reasonable steps to ensure employees comply with any orders issued by the Fair Trading Commissioner
- not use, or threaten to use, physical force or violence
- not enter a private residence without consent
- not use coercive, intimidating or unconscionable conduct
- not carry out debt collection where the debt cannot be the subject of demand, and provide evidence of the debt when requested by the person liable for the debt
- not contact a person outside of reasonable hours or by a method that the person has requested the commercial agent not use

- not make false or misleading statements regarding the debt or any legal consequences resulting from the debt
- not demand or collect payment for the cost of the commercial activity from a person who is the subject of that activity
- not disclose to a third party that the consumer is subject to commercial agency activity, unless with the consent of the person who is subject to the debt or as reasonably necessary to carrying out commercial agent activity, or with another lawful excuse
- comply with trust accounting obligations
- keep trust account records in accordance with the rules
- comply with obligations surrounding unclaimed trust money
- not employ or engage disqualified persons, and notify the Fair Trading Commissioner within seven days of becoming aware that a person employed or engaged to carry out commercial activity is a disqualified person
- take all reasonable steps to resolve a complaint.

Some of these rules are discussed in more detail below.

### ***Contacting persons***

Rule 10 of the Commercial Agent Rules provides that a commercial agent must not contact a person outside “reasonable hours” unless they have first made all reasonable efforts to contact the person during reasonable hours. The hours prescribed in the draft Regulation reflect the *Debt collection guideline: for collectors and creditors* published by the Australian Securities & Investments Commission (ASIC).<sup>2</sup>

Contact by telephone - person not at their place of business or employment	Face-to-face contact - not at person’s place of business or employment	Contact with person at person’s place of business or employment
7.30am–9.00pm on weekdays, except public holidays	9.00am–9.00pm on any day of the week, except public holidays	9.00am–5.00pm on weekdays

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<sup>2</sup> This guide is available here on the Australian Competition and Consumer Commission (ACCC) website: <https://www.accc.gov.au/system/files/Debt%20collection%20guideline%20for%20collectors%20and%20creditors%20-%20April%202021.pdf>

9.00am–9.00pm on weekends, except public holidays		
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**8. Do you agree with the limits on contact hours? If not, what alternatives would you suggest? Please explain why.**

***Money held on trust***

The Commercial Agent Rules require a commercial agent who receives money on behalf of a client to hold the money in a trust account for that purpose (rule 14). The agent must also, as soon as practicable after the client directs, pay the money to the person for whose benefit the money is being held, or otherwise disburse the money in accordance with the client’s instructions.

These provisions are intended to simplify the current requirements (under the CAPI Act), without comprising the regulatory outcomes.

By comparison, the CAPI Act provides detailed obligations on commercial agents to keep and audit trust records. The audit must be performed by a qualified auditor and lodged with the Commissioner of Police. Similar requirements are not included in the draft Regulation in line with the lighter-touch approach to regulation under the new framework.

**9. Do you agree with the requirements in the draft Regulation relating to trust money? If not, please explain why.**

***Keeping of trust account records***

Rule 15 of the Commercial Agent Rules requires that a person operating as a commercial agent must keep a record, either in hard copy or electronically, of information relating to the commercial agent activity including:

- the name and address of any persons on behalf of whom the commercial agent is carrying out the commercial agent activity
- the reference number of the person on whose behalf the money is held (if any)
- any payment arrangements made when carrying out debt collection
- any changes to the records including creation, amendment or deletion, and
- the trust account number.

These records must be in English and be able to be produced on demand. Records must be maintained in permanent legible form for a period of no less than 3 years.

Under the CAPI Act, a commercial agent is required to record the full details of all transactions made in connection with their business and must keep those records at their place of business. The *Commercial Agents and Private Inquiry Agents Regulation 2017* provides further detail in relation to debt collection, including that records must be backed up at intervals of no more than one month.

**10. Are the requirements relating to keeping trust account records clear and appropriate? If not, please explain why, including any suggested changes to the proposed requirements.**

### ***Dealing with unclaimed trust money***

Rule 17 of the Commercial Agent Rules provides that a person who holds money in a trust account under rule 14 for more than two years must make reasonable efforts to identify and locate the owner of the money, and ensure the money is paid to the owner.

The two year period before money is taken to be unclaimed money is the same under the CAPI Act.

Under the CAPI Act, if a commercial agent holds any unclaimed money on 30 June of any year, they have 4 months (or longer at the discretion of the Commissioner of Police (Commissioner) to:

- lodge a return in respect of that money to the Commissioner, and
- pay the amount of the unclaimed money to the Commissioner.

**11. Do you think the obligations on commercial agents in relation to unclaimed trust money are appropriate? If not, what changes would you make to this provision?**

### ***Handling of complaints***

Rule 19 of the Commercial Agent Rules provides that a commercial agent who receives a complaint about the agent's conduct or the conduct of the agent's business or employees must take all reasonable steps to resolve the complaint to the complainant's satisfaction.

In addition, under the FT Act, NSW Fair Trading can:

- receive complaints, investigate and take action to deal with complaints
- provide guidance about the rights and obligations affecting consumers.

**12. Is the requirement that a commercial agent take all reasonable steps to resolve a complaint clear and appropriate? If not, please explain why.**

**13. Do you think the Commercial Agent Rules are clear and appropriate? If not, please explain why or propose any changes.**

### **Schedule 1 – Penalty notice offences**

A penalty infringement notice is a notice that is served on a person who appears to have committed a prescribed offence under an Act or a Regulation. A person who has been served with a penalty infringement notice may elect to pay the fine, or to defend the matter in court. The penalty infringement amount is typically lower than the maximum penalty that may be issued by the court.

The draft Regulation proposes such penalty notice offences. These proposed penalty notices aim to strike the balance between the penalty notice amounts under the FT Act and the CAPI Act for similar offences.

Higher penalties are proposed for more serious contraventions – for example, obstruction of investigators, contravention of a restriction order, requirements applying to officers of a corporation (where the expectation is higher) and carrying on work without a licence or while disqualified.

**14. Are the proposed penalty infringement amounts appropriate? If not, what would you propose instead?**

## Appendix 1 – List of targeted stakeholders

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A copy of the draft Regulation and this RIS has been provided to current licence holders, industry bodies and other key stakeholders. These include:

### Industry bodies

- The Institute of Mercantile Agents
- The Australian Collectors & Debt Buyers Association.

### Consumer advocates

- Community Legal Centres NSW
- Financial Rights Legal Centre
- Public Interest Advocacy Centre
- Legal Aid NSW.

### Government and authorities

- NSW Police Force
- NSW Department of Communities and Justice
- NSW Treasury.

## Appendix 2 – Impact assessment – options for achieving Act’s objectives

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### Assessment of Option 1 - Make the Regulation

This option would result in the draft Regulation being made and commenced in parallel with the repeal of the CAPI Act, the commencement of the Amendment Act, and the commencement of the Private Investigators Act.

#### Costs

The costs of this option are low-medium.

This option will result in commercial agents who operate as field agents continuing to incur existing licensing costs. However, commercial agents who do not operate as field agents will not require licensing and accordingly, the licensing costs for these agents will no longer apply.

Under this option, the commercial agent industry will continue to incur some compliance and administrative costs, however these are reduced under the Amendment Act and draft Regulation. Costs to commercial agents are therefore comparatively low.

The costs to the Government are medium. The framework for regulatory administration and operation of commercial agents will be transferred to NSW Fair Trading from NSW Police Force at a cost. This requires new licensing infrastructure to be designed and implemented. Other technological infrastructure will also have to be designed and implemented within NSW Fair Trading such as the commercial agent register. The Government will also incur costs relating to training NSW Fair Trading staff to administer the Amended FT Act and ensure proper enforcement and compliance measures. However, these initial costs will gradually be offset by the reduction in regulatory costs associated with the partial deregulation of the commercial agent industry as it pertains to the licensing of commercial agents.

#### Benefits

This approach is consistent with the intention of Parliament as reflected in the provisions of the Amendment Act. In some instances, the draft Regulation is the only means of achieving the efficient operation of substantive provisions of the Amendment Act. In other instances, the draft Regulation will complement relevant provisions of the Amendment Act by expanding its operation or providing further clarity to its application.

The draft Regulation provides greater certainty for industry, consumers and the public on the standards of conduct expected from commercial agents and penalties for those found to have breached those standards.

For example, the draft Regulation:

- declares certain offences (“relevant offences”) that render a person to be disqualified from participating in commercial agent activity
- provides Commercial Agent Rules for the effective and acceptable performance of commercial agent activities
- prescribes additional provisions concerning commercial agent licences as are relevant to Part 2 of the *Licensing and Registration (Uniform Procedures) Act 2002* including application fees
- provides additional requirements for details relating to a commercial agent for the purposes of maintaining a commercial agent register.

### **Conclusion**

With demonstrated benefits for consumers and industry and a low-medium cost imposition on Government and industry, the overall benefit of this option is **positive**. This option is **supported**.

## **Assessment of Option 2 – Commence the Act without the Regulation**

This option would result in the Amendment Act being commenced without a regulation being made to support its operation. The commencement of the Act without an accompanying regulation would frustrate the operation of the Act as intended by Parliament.

However, the Act provides that certain matters are to be detailed through regulation.

Therefore, commencing the Act without the draft Regulation may require future amendments to the Act to address the gaps that would be created by the absence of the draft Regulation.

### **Costs**

This option is not feasible. In addition, the costs of this option are high.

The Act requires that a range of matters be prescribed by regulation. To not inform these matters would result in the absence of regulatory provisions required to support the objectives of the Act. It would also hinder the achievement of the objectives referred to in this RIS.

Many of the provisions in the draft Regulation are not addressed at all under the Amendment Act. For example, the draft Regulation contains the Commercial Agent Rules that apply to all commercial agents. These provisions ensure that commercial agents do not engage in any prohibited practices in their dealings with consumers. In the event that the rules are breached, they can be subject to a restriction or exclusion order under section 60G of the Act, or have their licences cancelled under section 60H. The Act would otherwise be silent on these matters if the draft Regulation is not made.

Not making the draft Regulation would result in failure to adequately address important issues such as requirements around what constitutes a fit and proper person, what offences preclude a person from partaking in commercial agent activity, information relating to the public register, and the rules of conduct for commercial agents. This would make it extraordinarily difficult for regulators to carry out their enforcement functions. It would also likely result in commercial agents incurring costs in trying to work out how to comply with the Act.

It is also unlikely that the absence of a regulation would result in any reduction in costs for the commercial agent industry, as industry bodies would continue to need to develop appropriate codes of practice and implement monitoring and inspection systems to ensure compliance with those codes. Commercial agents currently have established industry body groups that have expressed the difficulty in dealing with the lack of clarity regarding prohibited practices particularly when operating nationally. A higher level of industry integrity and public confidence can be assured by prescribing legally acceptable commercial agent conduct and procedures.

The lack of clarity and certainty in the Amendment Act commencing without a supporting Regulation may necessitate legislative amendments to the FT Act. This would require the Government to engage in extensive consultation with stakeholders and further parliamentary processes, and unnecessary costs as well as a prolonged sense of public uncertainty.

### **Benefits**

The overall benefits of this option are low. The improved and updated provisions of the Act would provide substantial benefits to industry and consumers involved in the commercial agent process. Regulatory costs for commercial agents would fall as some previous regulatory requirements, such as the licensing of non-field agents, would no longer apply. There would be minor reductions for government in enforcement and administration costs as a result of no longer having to administer the provisions of the 2017 Regulation. It is difficult to quantify these benefits as they will depend on the amount of current commercial agents

and private inquiry agents under the CAPI Act that choose to operate as licensees under the Act.

However, these benefits would be largely negated by the costs associated with an uncertain regulatory environment. This would include the need to provide assistance to commercial agents and consumers in the ensuing uncertain regulatory environment and the need to respond to the increased risk of improper conduct by commercial agents.

### **Conclusion**

The overall costs of this option significantly outweigh the overall benefits, resulting in an overall negative impact. Accordingly, this option is **not supported**.

## **Assessment of Option 3 – Do not commence the Amendment Act**

This option would result in a continuation of the existing licensing system for commercial agents under the CAPI Act, contrary to the intention of Parliament to commence the Amendment Act.

### **Costs**

This option is not feasible. In addition, the costs of this option are high.

The NSW Government has considered the 2014 Legal Affairs Committee Report into Debt Recovery in New South Wales and assessed that the current status quo is not acceptable. In light of the findings of this report (that the CAPI Act does not reflect current industry practice and is overly burdensome), the NSW Government passed legislation in 2016 to address these concerns.

Continuing with the status quo involves a number of costs, including costs for Government associated with maintaining the existing and burdensome CAPI Act, given the small number of persons licensed under this Act and the lack of evidence of systematic problems in the industry.

Finally, there is a risk that, should the CAPI Act continue, commercial agents will prefer to operate in other jurisdictions, leaving a possible gap in consumer protection available for industry participants.

### **Benefits**

The benefits of this option are medium. There would be no additional costs associated for commercial agents to comply with the existing regulatory regime. Similarly, this option would mean that industry and Government would not have to adapt to a new system. However, this must be compared against a high opportunity cost of lower regulatory requirements for

businesses under the Amendment Act, as well as the opportunity cost of lower ongoing costs to Government from partial deregulation under the new regulatory framework.

### **Conclusion**

The overall costs of this option significantly outweigh the overall benefits, resulting in an overall negative impact. Accordingly, this option is **not supported**.

## Appendix 3 – Regulation-making powers

The following table sets out the regulation making powers in the Amended FT Act. It also identifies the powers that are used in the draft Regulation.

Section in the Act	Regulation making power under the Act	Clause in draft Regulation	Scope of the draft Regulation
s60A(2)(d)	Provides for further offences to be declared 'relevant offences' for the purpose of disqualifying a person from commercial agent activity	cl 11G	Prescribes further offences to be relevant offences: <ul style="list-style-type: none"> <li>Part 4 of the <i>Crimes Act 1900</i>,</li> <li>Part 2 or 5 of the <i>Surveillance Devices Act 2007</i> or corresponding provisions from another State or Territory</li> </ul>
s60A(2)	Provides for offences to be declared not to be relevant offences	-	Not prescribed
s60D(3)(d)	Provides for further grounds on which the Secretary may declare a person not fit and proper for commercial agent licensing	cl 11H	Prescribes further grounds on which the Secretary may declare a person not fit and proper to hold a commercial agent license. These include that a person has been convicted of certain offences, is mentally incapacitated, or was disqualified under the CAPI Act
s60E(3)	Provides for further modifications to the <i>Licensing and Registration (Uniform Procedures) Act 2002</i> (Licensing Act) as it applies to the FT Act	cl 11I	Modifies the <i>Licensing and Registration (Uniform Procedures) Act 2002</i> , Part 2 to allow the Secretary to await the outcome of proceedings of certain offences before determining an application for a commercial agent licence
s60E(5)	Provides for provisions concerning licensing as are relevant to Part 2 of the Licensing Act, including prescribing fees for application.	-	Not prescribed

Section in the Act	Regulation making power under the Act	Clause in draft Regulation	Scope of the draft Regulation
s60J(1)	Provides further matters to be maintained on the Register of commercial agents	cl 11J cl 11K cl 11L	<p>Prescribes the particulars for each commercial agent licence to be included on the Register.</p> <p>Prescribes that the particulars of a commercial agent licence that has been refused, and the conditions under which these details may be removed from the register.</p> <p>Prescribes the particulars of convictions, exclusion orders, restriction orders and cancelled licenses to be kept on the Register.</p>
s60J(2)	Provides that the Register or parts of the Register may be published for public access	-	Not prescribed. Addressed in section 17AA in the FT Act.
s60K(1)	Provides that the Regulation may prescribe rules of conduct for the carrying out of commercial agent activities	cl 11M and Schedule 2	Prescribes the Commercial Agent Rules to be observed when carrying out commercial agent activities. These rules address standards of behaviour including conflicts of interest, coercive or intimidating conduct, reasonable hours to contact a person, and confidentiality
s60M(h)	Prescribes additional classes of persons the Part does not apply to	-	Not prescribed
S67(2)	Penalty notice offences	Schedule 1	Prescribes penalty notice amounts for offences under the regulations
s92	General regulation making power	-	Not used
Sch 5	Provides for transitional licensing arrangements, including provisions consequent on repeal of CAPI Act	11G2	Disqualified persons include a person who was disqualified from holding licences under the CAPI Act

## Appendix 4 – List of discussion questions in this RIS

Questions	Clause	Page
1. Do you agree with the additional reasons and offences for disqualification included in the draft Regulation? If no, please explain why.	Clause 11G(1)	16
2. Are there any other grounds which the Fair Trading Commissioner should be able to consider when determining if a person is fit and proper to hold a licence to carry out commercial agent activity? If so, please specify the grounds and explain why.	Clause 11H	17
3. Are the changes to Part 2 of the Licensing Act as prescribed in clause 11I suitable? If not, please explain why.	Clause 11I	17
4. Do you have any other views on the application of the Licensing Act to this legislation?	Clause 11I	17
5. Do you agree with the information set out in the draft Regulation for inclusion in the Register? If not, please explain why or explain what details you think should be included.	11J-11L	18
6. Do you agree that 10 years is an appropriate timeframe for convictions, exclusion orders, restriction orders and cancelled licences to be kept on the Register? If not, what would be an appropriate period and why?	11J-11L	18
7. Do you agree that the 10 year period for records of convictions, exclusion orders, restriction orders and cancelled licences to be kept on the Register should begin <i>from the date that they are entered in the register</i> , rather than from the day that the relevant offence or conduct is committed? If not, please explain why.	11J-11L	18
8. Do you agree with the limits on contact hours? If not, what alternatives would you suggest? Please explain why.	Sch 2 Rule 10	21

Questions	Clause	Page
9. Do you agree with the requirements in the draft Regulation relating to trust money? If not, please explain why, including any issues that you feel the Regulation has not adequately addressed.	Sch 2 Rule 14	21
10. Are the requirements relating to keeping trust account records clear and appropriate? If not, please explain why, including any suggested changes to the proposed requirements.	Sch 2 Rule 15	22
11. Do you think the obligations on commercial agents in relation to unclaimed trust money are appropriate? If not, what changes would you make to this provision?	Sch 2 Rule 17	22
12. Is the requirement that a commercial agent take all reasonable steps to resolve a complaint clear and appropriate? If not, please explain why.	Sch 2 Rule 19	23
13. Do you think the Commercial Agent Rules are clear and appropriate? If not, please explain why or propose any changes.	Sch 2	23
14. Are the proposed penalty infringement amounts appropriate? If not, what would you propose instead?	Sch 1	23
15. Do you have any other feedback on the options proposed under the draft Regulation or Regulation Impact Statement?	-	-