



New South Wales

Commercial Agents and Private Inquiry Agents Act 2004 No 70

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New South Wales

Commercial Agents and Private Inquiry Agents Act 2004 No 70

Act No 70, 2004

An Act to make provision with respect to the licensing and regulation of commercial agents and private inquiry agents; and for related purposes.
[Assented to 28 September 2004]

The Legislature of New South Wales enacts:

Part 1 Preliminary

1 Name of Act

This Act is the *Commercial Agents and Private Inquiry Agents Act 2004*.

2 Commencement

- (1) This Act commences on a day or days to be appointed by proclamation, subject to subsection (2).
- (2) Schedule 3.1 and 3.3 commence on the commencement of Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

3 Objects

The objects of this Act are:

- (a) to protect the public in relation to commercial agent and private inquiry agent activities (that is, process serving, debt collection, repossession of goods, surveillance of persons and investigation of persons), and
- (b) to provide for the licensing of persons carrying out, and persons carrying on business in relation to, commercial agent and private inquiry agent activities, and
- (c) to establish standards to be observed by licensees in relation to commercial agent and private inquiry agent activities, and
- (d) to ensure that licensees are accountable for their acts and omissions in relation to commercial agent and private inquiry agent activities.

4 Definitions

- (1) In this Act:

authorised inspector means a police officer or a person appointed as an authorised inspector under section 35.

commercial agent means the holder of a master licence or operator licence with respect to one or more commercial agent activities.

commercial agent activity means debt collection, process serving or repossession of goods.

Commissioner means the Commissioner of Police.

debt collection means:

- (a) any activity carried out by a person on behalf of a second person (not being his or her employer) in the exercise of the second person's rights under a debt owed by a third person, or
- (b) any activity carried out by a person on his or her own behalf in the exercise of rights acquired from a second person (otherwise than in the course of an acquisition or merger of business interests) under a debt owed by a third person,

being an activity that involves finding the third person or requesting, demanding or collecting from the third person money due under the debt.

disqualified corporation means:

- (a) a corporation that has been convicted or found guilty of a major offence, or
- (b) a corporation that has a disqualified individual as one of its directors or one of the persons concerned in its management.

disqualified individual means:

- (a) an individual who does not have the qualifications, training or experience required by the regulations with respect to the activities to which the individual's licence or application for a licence relates, or
- (b) an individual who, not being an Australian citizen, is prohibited from engaging in employment to carry out commercial agent activities or private inquiry agent activities, or
- (c) an individual who, in the opinion of the Commissioner, is not a fit and proper person to hold a licence, or
- (d) an individual who has been convicted or found guilty of a major offence, or

- (e) in relation to a master licence or an application for a master licence:
 - (i) an individual who does not comply with the requirements of the regulations with respect to membership of an approved industry association with respect to the activities to which such a licence relates, or
 - (ii) an individual who is an undischarged bankrupt, or the subject of a deed of arrangement, under the *Bankruptcy Act 1966* of the Commonwealth, or
- (f) an individual who is a director of a disqualified corporation or is concerned in the management of a disqualified corporation.

investigation of persons means any activity carried out by a person on behalf of a second person (not being his or her employer), being an activity that involves finding a third person or investigating a third person's business or personal affairs.

licensee means the holder of a master licence or operator licence.

major offence means:

- (a) an offence involving violence, fraud, dishonesty or theft, being an offence punishable by imprisonment, or
- (b) an offence involving the unlawful possession or use of a firearm or other weapon, or
- (c) an offence involving the unlawful possession or use of a drug, or
- (d) an offence under Part 2 of the *Listening Devices Act 1984*, or under corresponding provisions of the law of the Commonwealth or of another State or Territory, or
- (e) an offence under the *Telecommunications (Interception) Act 1979* of the Commonwealth, or
- (f) any other offence declared by the regulations to be a major offence for the purposes of this Act.

master licence means a licence referred to in section 6 (1).

minor offence means:

- (a) an offence under section 55 of the *Fair Trading Act 1987*, or under a corresponding provision of a law of the Commonwealth or another State or Territory, or
- (b) an offence under this Act or the regulations, or

- (c) any other offence declared by the regulations to be a minor offence for the purposes of this Act.

operator licence means a licence referred to in section 12 (1).

private inquiry agent means the holder of a master licence or operator licence with respect to one or more private inquiry agent activities.

private inquiry agent activity means investigation of persons or surveillance of persons.

process serving means any activity carried out by a person on behalf of a second person (not being his or her employer), being an activity that involves serving legal process on a third person in relation to legal proceedings to which the second and third persons are, or are intended to be, parties, regardless of which jurisdiction the legal proceedings are, or are intended to be, held in.

Register of Licensees means the Register of Licensees referred to in section 21.

repossession of goods means any activity carried out by a person on behalf of a second person (not being his or her employer), being an activity that involves finding goods held by a third person or requesting, demanding or seizing such goods.

surveillance of persons means any activity carried out by a person on behalf of a second person (not being his or her employer), being an activity that involves the surveillance of a third person.

- (2) For the purposes of paragraph (a) of the definition of ***disqualified corporation*** and paragraph (d) of the definition of ***disqualified individual*** in subsection (1), any conviction that is more than 10 years old, and any finding of guilt that is more than 5 years old, are to be ignored.
- (3) Notes included in this Act do not form part of this Act.

Part 2 Licensing of persons for commercial and private inquiry activities

Division 1 Master licences

5 Offence to carry on business without master licence

- (1) A person must not carry on business in relation to any commercial agent activity or private inquiry agent activity unless he or she does so in accordance with a master licence for that activity.

Maximum penalty: 1,000 penalty units (in the case of a corporation) or 500 penalty units or imprisonment for 12 months, or both (in the case of an individual).

- (2) This section does not apply to any person who is a member of:
- (a) a class of persons referred to in Schedule 1, or
 - (b) a class of persons declared by the regulations to be a class of persons to whom this section does not apply,
- in respect of any activity carried out by that person in his or her capacity as a member of that class.
- (3) For the purposes of this section, a person carries on business in relation to an activity if, and only if, the person:
- (a) carries out that activity for fee or reward, or
 - (b) represents that he or she is willing to carry out that activity for fee or reward,
- otherwise than as the holder of an operator licence for that activity employed with, or seeking employment with, the holder of a master licence for that activity.

6 Application to master licences of Licensing and Registration (Uniform Procedures) Act 2002

- (1) The Commissioner may grant the following licences for the purposes of this Act:
- (a) master licences for process serving,
 - (b) master licences for debt collection,
 - (c) master licences for repossession of goods,
 - (d) master licences for surveillance of persons,
 - (e) master licences for investigation of persons.

- (2) Part 2 of the *Licensing and Registration (Uniform Procedures) Act 2002 (the applied Act)* applies to and in respect of a master licence, subject to the modifications and limitations prescribed by or under this Act.

Note. See clause 3 of Schedule 4, which temporarily suspends the provisions of the applied Act in relation to the making of applications by way of electronic communication.

- (3) For the purposes of applying Part 2 of the applied Act to a master licence, a master licence may be amended under that Act.
- (4) A master licence is a fixed-term licence for the purposes of Part 2 of the applied Act.
- (5) Subject to this section, the regulations may make provision for or with respect to such matters concerning master licences as are relevant to the operation of Part 2 of the applied Act.

7 Grounds for refusing master licence

- (1) An application for a master licence must be refused if the applicant is a disqualified individual or disqualified corporation.
- (2) An application for a master licence may be refused:
- (a) if the applicant has been convicted or found guilty of a minor offence, or
 - (b) if the Commissioner is of the opinion that the grant of the licence would be contrary to the public interest.

8 Duration of master licence

A master licence has effect for 5 years from the date on which it is granted.

9 Conditions of master licence

A master licence may be issued subject to such conditions as the Commissioner considers appropriate.

10 Cancellation of master licence

- (1) The Commissioner must cancel a master licence if the licensee becomes a disqualified individual or disqualified corporation.
- (2) The Commissioner may cancel a master licence if the licensee:
- (a) contravenes a condition of the licence, or
 - (b) is convicted or found guilty of a minor offence.

- (3) Subject to subsection (4), action is not to be taken under this section unless the Commissioner:
 - (a) has caused notice of the proposed action to be given to the licensee, and
 - (b) has given the licensee at least 28 days within which to make written submissions to the Commissioner in relation to the proposed action, and
 - (c) has taken any such submission into consideration.
- (4) While considering whether to take action under this section, the Commissioner may suspend a master licence for up to 35 days.
- (5) The suspension or cancellation of a master licence takes effect when written notice of it is served on the licensee.

Division 2 Operator licences

11 Offence to carry on activities without operator licence

- (1) A person must not carry out any commercial agent activity or private inquiry agent activity unless he or she does so:
 - (a) in accordance with an operator licence for that activity, and
 - (b) in the course of his or her employment with the holder of a master licence for that activity.

Maximum penalty: 500 penalty units or imprisonment for 12 months, or both.

- (2) This section does not apply to a person who holds a master licence in respect of the activity concerned.
- (3) This section does not apply to a person who is a member of:
 - (a) a class of persons referred to in Schedule 1, or
 - (b) a class of persons declared by the regulations to be a class of persons to whom this section does not apply,

in respect of any activity carried out by that person in the ordinary course of employment in his or her capacity as a member of that class.

12 Application to operator licences of Licensing and Registration (Uniform Procedures) Act 2002

- (1) The Commissioner may grant the following licences for the purposes of this Act:
 - (a) operator licences for process serving,
 - (b) operator licences for debt collection,
 - (c) operator licences for repossession of goods,
 - (d) operator licences for surveillance of persons,
 - (e) operator licences for investigation of persons.
- (2) Part 2 of the *Licensing and Registration (Uniform Procedures) Act 2002* (**the applied Act**) applies to and in respect of an operator licence, subject to the modifications and limitations prescribed by or under this Act.

Note. See clause 3 of Schedule 4, which temporarily suspends the provisions of the applied Act in relation to the making of applications by way of electronic communication.
- (3) For the purposes of applying Part 2 of the applied Act to an operator licence:
 - (a) an application for the granting of an operator licence may only be made by an individual aged 18 years or more, and
 - (b) an operator licence may be amended under that Act.
- (4) An operator licence is a fixed-term licence for the purposes of Part 2 of the applied Act.
- (5) Subject to this section, the regulations may make provision for or with respect to such matters concerning operator licences as are relevant to the operation of Part 2 of the applied Act.

13 Grounds for refusing operator licence

- (1) An application for an operator licence must be refused if the applicant is a disqualified individual.
- (2) An application for an operator licence may be refused:
 - (a) if the applicant has been convicted or found guilty of a minor offence, or
 - (b) if the Commissioner is of the opinion that the grant of the licence would be contrary to the public interest.

14 Duration of operator licence

Subject to section 16 (1), an operator licence has effect for either one year or 5 years from the date on which it is granted, as specified in the licence.

15 Conditions of operator licence

Subject to section 16 (2), an operator licence may be issued subject to such conditions as the Commissioner considers appropriate.

16 Probationary licences

- (1) A person's first operator licence is a probationary licence, and has effect for one year from the date on which it is granted.
- (2) A person's first operator licence is to be issued subject to a condition to the effect that the licensee may carry out the activities authorised by the licence only under the immediate supervision of the holder of a master licence or the holder of an operator licence that is not subject to such a condition.

17 Cancellation of operator licence

- (1) The Commissioner must cancel an operator licence if the licensee becomes a disqualified individual.
- (2) The Commissioner may cancel an operator licence if the licensee:
 - (a) contravenes a condition of the licence, or
 - (b) is convicted or found guilty of a minor offence.
- (3) Subject to subsection (4), action is not to be taken under this section unless the Commissioner:
 - (a) has caused notice of the proposed action to be given to the licensee, and
 - (b) has given the licensee at least 28 days within which to make written submissions to the Commissioner in relation to the proposed action, and
 - (c) has taken any such submissions into consideration.
- (4) While considering whether to take action under this section, the Commissioner may suspend an operator licence for up to 35 days.
- (5) The suspension or cancellation of an operator licence takes effect when written notice of it is served on the licensee.

Division 3 Additional provisions concerning debt collection

18 Trust accounts, records and receivership

Schedule 2 applies to the holder of a master licence for debt collection and to money held by the holder of such a licence.

19 Licensee not to charge debtor for expenses of debt collecting

- (1) A licensee must not request, demand or collect from a person (the *debtor*) any payment for the costs or expenses incurred by the licensee in connection with the collection from that person of money due under a debt.

Maximum penalty: 100 penalty units.

- (2) Any money received from the debtor by a licensee in contravention of subsection (1) may be recovered by the debtor from the licensee, as a debt, in any court of competent jurisdiction.
- (3) This section does not limit any right that the person to whom the debt is payable (the *creditor*) may have at law with respect to the recovery from the debtor of the creditor's costs in recovering the debt.

Division 4 General

20 Commissioner's determinations reviewable by Administrative Decisions Tribunal

A licensee against whom action is taken under this Part may apply to the Administrative Decisions Tribunal for a review of the Commissioner's determination to take such action.

21 Register of Licensees

- (1) The Commissioner is to establish and maintain a Register of Licensees for the purposes of this Act, and for the purposes of Part 2 of the *Licensing and Registration (Uniform Procedures) Act 2002*, as applied by this Act.
- (2) The Commissioner is to ensure that the Register of Licensees is made available to the public on payment of such fee as is prescribed by the regulations.

- (3) The regulations may make provision with respect to:
- (a) the particulars to be recorded in the Register of Licensees, and
 - (b) the manner and form in which the Register of Licensees is to be maintained.

22 Evidentiary certificates

A certificate:

- (a) that is signed by the Commissioner, and
- (b) that certifies that, on a specified date or during a specified period, the particulars contained in the Register of Licensees as to specified matters were as so specified,

is admissible in any proceedings and is evidence of the matters so certified.

Note. See also section 26 of the *Licensing and Registration (Uniform Procedures) Act 2002* with respect to evidentiary certificates.

23 Act does not confer any additional power, authority or immunity

This Act does not confer on a licensee any power, authority or immunity that would not be available to the licensee apart from this Act.

Part 3 General offences

24 Persons not to be employed by licensees

- (1) The holder of a master licence must not employ a person to carry out any commercial agent activity or private inquiry agent activity unless the person is the holder of an operator licence for that activity.

Maximum penalty: 200 penalty units.

- (2) The holder of a master licence must not employ a disqualified individual in any capacity in the business carried on by the licensee under the licence.

Maximum penalty: 200 penalty units.

- (3) In proceedings for an offence against this section, it is a sufficient defence if the defendant establishes that he or she used all due diligence to ensure that the employee concerned was not a person whose employment would contravene this section.

25 Harassment

- (1) A licensee must not:
- (a) leave, in or outside any premises, any notice, vehicle or other object on which there is writing that indicates or suggests that the notice, vehicle or other object is issued by, or belongs to, a commercial agent or private inquiry agent so as to cause a person visiting or passing by the premises to infer that the licensee is visiting the occupier of the premises in connection with commercial agent activities or private inquiry agent activities, or
 - (b) send or deliver to, or leave with, any person any document likely to cause the person receiving it to infer that there would be left in or outside premises occupied by the person a notice, vehicle or object on which there is writing that indicates or suggests that the notice, vehicle or other object is issued by, or belongs to, a commercial agent or private inquiry agent, or
 - (c) visit any premises, or communicate (whether by telephone or otherwise) with the occupant of any premises, with unreasonable frequency or at unreasonable times, or
 - (d) disclose to a person's employer the fact that the person is a debtor, except where that fact is disclosed by the holder of a licence with respect to debt collection:

- (i) with the person's consent, or
- (ii) by or in connection with the execution of legal process for enforcement of a judgment against the person, being process the execution of which directly involves the employer, or
- (e) threaten a person with disclosure, to the person's employer, of the fact that the person is a debtor, except where the threat is made by the holder of a licence with respect to debt collection by or in connection with the execution of legal process referred to in paragraph (d) (ii).

Maximum penalty: 200 penalty units (in the case of a corporation) and 100 penalty units or imprisonment for 6 months, or both (in the case of an individual).

- (2) In any proceedings for an offence arising by virtue of a disclosure in contravention of subsection (1) (d), the absence of any consent mentioned in subsection (1) (d) (i) is to be presumed until the court is satisfied to the contrary.

26 Production of licence on demand

A licensee who is carrying on business under a master licence, or carrying out activities under an operator licence, must produce the licence for inspection on demand made by an authorised inspector or by any person with whom the licensee has dealings when carrying out any commercial agent activity or private inquiry agent activity.

Maximum penalty: 50 penalty units.

27 Obstruction of authorised inspectors

A person must not obstruct or hinder an authorised inspector in the exercise of the inspector's functions under this Act.

Maximum penalty: 100 penalty units.

28 Penalty notices

- (1) An authorised inspector may serve a penalty notice on a person if it appears to the inspector that the person has committed an offence against this Act or the regulations, being an offence prescribed by the regulations as a penalty notice offence.
- (2) A penalty notice is a notice to the effect that, if the person served does not wish to have the matter determined by a court, the person

can pay, within the time and to the person specified in the notice, the amount of the penalty prescribed by the regulations for the offence if dealt with under this section.

- (3) A penalty notice may be served personally or by post.
- (4) If the amount of penalty prescribed for an alleged offence is paid under this section, no person is liable to any further proceedings for the alleged offence.
- (5) Payment under this section is not to be regarded as an admission of liability for the purpose of, and does not in any way affect or prejudice, any civil claim, action or proceeding arising out of the same occurrence.
- (6) The regulations may:
 - (a) prescribe an offence for the purposes of this section by specifying the offence or by referring to the provision creating the offence, and
 - (b) prescribe the amount of penalty payable for the offence if dealt with under this section, and
 - (c) prescribe different amounts of penalties for different offences or classes of offences.
- (7) The amount of a penalty prescribed under this section for an offence is not to exceed the maximum amount of penalty that could be imposed for the offence by a court.
- (8) This section does not limit the operation of any other provision of, or made under, this or any other Act relating to proceedings that may be taken in respect of offences.

29 Offences by corporations

- (1) If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision if the person knowingly authorised or permitted the contravention.
- (2) A person may be proceeded against and convicted under a provision pursuant to subsection (1) whether or not the corporation has been proceeded against or has been convicted under the provision.
- (3) Nothing in this section affects any liability imposed on a corporation for an offence committed by the corporation under this Act or the regulations.

Part 4 Administration

Division 1 Power to require information and documents

30 Power to require information and documents

- (1) The Commissioner may, by notice in writing served on any licensee, require the licensee to do either or both of the following within such time as is specified in the notice:
 - (a) to furnish the Commissioner with such information as the licensee possesses in connection with the licensee's activities under the licence,
 - (b) to produce to the Commissioner such documents as the licensee possesses in connection with the licensee's activities under the licence.
- (2) A licensee must not fail to comply with a requirement under this section.

Maximum penalty: 100 penalty units.

Note. The furnishing of false or misleading information and the production of false or misleading documents are offences under Division 3 of Part 5 of the *Crimes Act 1900*.

- (3) A licensee is not excused from furnishing information or producing a document pursuant to a requirement under this section on the ground that to do so may tend to incriminate the licensee, but any information so furnished or document so produced is not admissible in evidence against the licensee in any criminal proceedings other than proceedings for an offence under Division 3 of Part 5 of the *Crimes Act 1900*.
- (4) In this section, a reference to a *licensee* includes a reference to a former licensee.

Division 2 Power to enter premises

31 Power to enter premises

- (1) An authorised inspector:
 - (a) may enter any premises from which business is carried on under a master licence, other than any part of premises used for residential purposes, and

(b) may inspect, and take copies of or extracts from, any document that relates to the carrying on of business at or from the premises,

for the purpose of ascertaining whether the provisions of this Act and the regulations are being complied with.

(2) The power of entry conferred by subsection (1) may only be exercised while business is being carried on, or during the hours that business is usually carried on, at or from the premises.

32 Manner in which power of entry to be exercised

(1) The powers conferred on an authorised inspector by this Division may not be exercised in relation to any premises unless:

(a) the inspector is in possession of a certificate of authority, issued in accordance with the regulations, that evidences his or her authority to exercise those powers, and

(b) the occupier of the premises has been given at least 24 hours' notice that those powers are to be exercised.

(2) Subsection (1) (b) does not apply:

(a) if the occupier of the premises consents to those powers being exercised, or

(b) if giving notice that those powers are to be exercised would defeat the purpose for which they are to be exercised.

(3) Reasonable force may be used for the purpose of effecting entry under this Division.

33 Damage to be minimised

(1) In exercising the powers conferred by this Division, an authorised inspector must do as little damage as possible.

(2) The Commissioner must compensate all interested parties for any damage caused by an authorised inspector as a consequence of the exercise of the powers conferred by this Division.

(3) Subsection (2) does not apply to the extent to which the occupier of the premises has obstructed or hindered the authorised inspector in the exercise of the powers conferred by this Division.

34 Search warrants

- (1) An authorised inspector may apply to an authorised justice for a search warrant if the inspector has reasonable grounds for believing that a provision of this Act or the regulations is being or has been contravened in or on any premises.
- (2) An authorised justice to whom such an application is made may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising an authorised inspector named in the warrant:
 - (a) to enter the premises, and
 - (b) to search the premises for evidence of a contravention of this Act or the regulations.
- (3) Part 3 of the *Search Warrants Act 1985* applies to a search warrant issued under this section.
- (4) In this section, *authorised justice* has the same meaning as in the *Search Warrants Act 1985*.

Division 3 General

35 Authorised inspectors

- (1) The regulations may prescribe classes of persons from whom authorised inspectors may be appointed under this section.
- (2) The Commissioner may, from a class of persons so prescribed, appoint any person as an authorised inspector.

36 Delegation of functions

The Commissioner may delegate to any person any of the Commissioner's functions under this Act, other than this power of delegation.

37 Exclusion of personal liability

Anything done or omitted to be done:

- (a) by the Commissioner, or a person acting under the direction of the Commissioner, or

(b) by an authorised inspector,

does not subject the Commissioner, person or authorised inspector personally to any action, liability, claim or demand if the thing was done, or omitted to be done, in good faith for the purpose of executing this Act.

38 Service of documents

- (1) A document that is authorised or required by this Act or the regulations to be served on a person may be served:
 - (a) in the case of an individual:
 - (i) by delivering it to the person personally, or
 - (ii) by sending it by post to the address specified by the person for the giving or service of documents or, if no such address is specified, the residential or business address of the person last known to the person giving or serving the document, or
 - (iii) by sending it by facsimile transmission to the facsimile number of the person, or
 - (b) in the case of a body corporate:
 - (i) by leaving it with a person apparently of or above the age of 16 years at, or by sending it by post to, the head office, a registered office or a principal office of the body corporate or to an address specified by the body corporate for the giving or service of documents, or
 - (ii) by sending it by facsimile transmission to the facsimile number of the body corporate.
- (2) Nothing in this section affects the operation of any provision of a law or of the rules of a court authorising a document to be served on a person in any other manner.

Part 5 Miscellaneous

39 Regulations

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) In particular, the regulations may make provision for or with respect to the following:
 - (a) the manner in which holders of master licences are to carry on business in relation to commercial agent activities and private inquiry agent activities,
 - (b) the manner in which holders of operator licences are to carry out commercial agent activities and private inquiry agent activities,
 - (c) the information to be displayed by the holder of a master licence at the premises from which he or she carries on business,
 - (d) the information to be included in correspondence sent by the holder of a master licence in connection with the business he or she carries on under the licence,
 - (e) the records to be kept by licensees for the purposes of this Act.
- (3) A regulation may exempt any person or class of persons from the operation of any specified provision of this Act, either unconditionally or subject to conditions.
- (4) A regulation may create offences punishable by a maximum penalty of 100 penalty units.

40 Repeal

The *Commercial Agents and Private Inquiry Agents Act 1963* is repealed.

41 Amendment of Acts

Each Act listed in Schedule 3 is amended as set out in that Schedule.

42 Savings, transitional and other provisions

Schedule 4 has effect.

43 Review of Act

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

Schedule 1 Persons not required to be licensed

(Sections 5 and 11)

Any police officer of New South Wales

Any police officer of the Australian Federal Police

Any police officer of any other State or Territory

Any member of the Australian Defence Force

Any officer or employee of the Public Service of New South Wales, the Commonwealth or of any other State or Territory

Any officer or employee of a public authority of New South Wales, the Commonwealth or of any other State or Territory

Any legal practitioner or legal practitioner's clerk

Any registered company auditor within the meaning of the *Corporations Act 2001* of the Commonwealth

Any insurance company registered under the *Insurance Act 1973* of the Commonwealth, any person carrying on the business of an insurance loss adjuster on behalf of an insurance company so registered and any employee of any such insurance company or of any person carrying on any such business

Any officer or employee of an authorised deposit-taking institution within the meaning of the *Banking Act 1959* of the Commonwealth

Schedule 2 Trust accounts, records and receivership in relation to debt collection

(Section 18)

Part 1 Trust accounts

Division 1 Preliminary

1 Interpretation

(1) In this Part:

licensee means the holder of a master licence for debt collection, and includes a person who has ceased to be a licensee and the personal representative of a licensee who has died.

trust money means money received for or on behalf of any person by a licensee, whether personally or through the holder of an operator licence for debt collection employed by the licensee, in connection with the licensee's business as a licensee.

(2) A reference to money received for or on behalf of a person by a licensee extends:

- (a) in the application of this Part to a person who has ceased to be a licensee, to money received by that person for or on behalf of any other person in connection with his or her business as a licensee, and
- (b) in the application of this Part to the personal representative of a licensee who has died, to money received by the licensee or personal representative for or on behalf of a person in connection with the business carried on by the licensee.

Division 2 Payment of trust money into trust account

2 Trust money to be paid into trust account

(1) Money received for or on behalf of any person by a licensee in connection with the licensee's business as a licensee:

- (a) is to be held by the licensee or (if the licensee is employed by a corporation) by the corporation, exclusively for that person, and
- (b) is to be paid to the person or disbursed as the person directs, and

- (c) until so paid or disbursed is to be paid into and retained in a trust account (whether general or separate) at an authorised deposit-taking institution in New South Wales.
- (2) If the licence is held by a corporation, the trust account is to be in the name of the corporation and in any other case is to be in the name of the licensee or of the firm of licensees of which the licensee is a member.
- (3) The words “Trust Account” are to appear in the name of the trust account and in the description of the trust account in the books and records of the licensee and also on all cheques drawn on the trust account.
- (4) When opening a trust account at an authorised deposit-taking institution for the purpose of complying with this clause, the licensee concerned must ensure that the authorised deposit-taking institution is notified in writing that the account is a trust account required by this Act.

Maximum penalty: 100 penalty units.

3 Trust money not available to pay licensee’s debts

- (1) Trust money is not available for the payment of the debts of the licensee to any other creditor of the licensee, or liable to be attached or taken in execution under the order or process of any court at the instance of any other creditor of the licensee.
- (2) This clause does not take away or affect any just claim or lien that any licensee may have against or upon trust money.

4 Licensee to notify trust account becoming overdrawn

A licensee must, within 5 days after becoming aware that a trust account of the licensee has become overdrawn, notify the Commissioner in writing of:

- (a) the name and number of the account, and
- (b) the amount by which the account is overdrawn, and
- (c) the reason for the account becoming overdrawn.

Maximum penalty: 100 penalty units.

Division 3 Responsibilities of authorised deposit-taking institutions

5 Protection of authorised deposit-taking institutions from liability

- (1) An authorised deposit-taking institution:
- (a) does not incur liability, and is not obliged to make inquiries, in relation to any transaction concerning an account of a licensee kept with the institution or with some other financial institution, and
 - (b) is, in relation to any such transaction, taken not to have any knowledge of a right of any person to money credited to such an account,

unless it would incur such a liability, be obliged to make such inquiries or be taken to have that knowledge in relation to an account kept with it in respect of a person absolutely entitled to the money held in that account.

- (2) This clause does not relieve an authorised deposit-taking institution from any liability or obligation that it would have apart from this Act.
- (3) An authorised deposit-taking institution at which a licensee keeps an account for clients' money does not, as regards any liability that the licensee has to the institution (other than a liability relating to that account), have a right to any of the money held in that account, whether by way of set-off, counterclaim, charge or otherwise.

Division 4 Unclaimed trust money

6 Unclaimed trust money held by licensee

- (1) A licensee who in the month of January in a year holds in a trust account kept by the licensee money that was received by the licensee more than 2 years before that month must furnish to the Commissioner in that month a statement (an *unclaimed money statement*) showing particulars of:
- (a) the money so held, and
 - (b) each person for whom or on whose behalf the money is held, and
 - (c) the address last known to the licensee of each of those persons.

- (2) A statement under this clause is to be in the form approved by the Commissioner.

7 Unclaimed trust money held by former licensee or personal representative

- (1) A former licensee, or the personal representative of a deceased licensee, who holds money in a trust account kept under this Act must furnish to the Commissioner a statement giving particulars of:
- (a) the money held in the trust account as at the date on which the statement is furnished, and
 - (b) the names of the persons for whom or on whose behalf the money is held, and
 - (c) the address of each of those persons last known to the person furnishing the statement.
- (2) A statement under this clause is to be furnished within 3 months after the date on which the person ceased to be a licensee or became the personal representative of the deceased licensee.
- (3) A statement under this clause is to be in the form approved by the Commissioner.
- (4) The regulations may exempt money or a class of money from the operation of this clause.

8 Disposal of unclaimed money in trust accounts

- (1) When the Commissioner receives an unclaimed money statement under this Division, the Commissioner is to:
- (a) send by post to each person for whom or on whose behalf any money referred to in the statement is held a notice (an *individual notice*) in writing addressed to the person at the person's address shown in the statement stating the particulars of the money held for or on behalf of that person, and
 - (b) cause notification to be published in the Gazette (a *Gazette notification*) stating the particulars of the money held for or on behalf of each of those persons.
- (2) Each individual notice and the Gazette notification is to state that, if the money is not paid out of the trust account in which it is held within 3 months after the date of publication of the Gazette notice, the person holding the money will be required to pay it to the Commissioner.

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- (3) At any time after the expiration of that 3 months the Commissioner may, by a notice in writing served personally or by post on the person by whom the money is held, require that person:
- (a) to pay to the Commissioner any money referred to in the Gazette notification that has not been previously paid by that person out of the trust account in which it is held, and
 - (b) to furnish to the Commissioner, within such period as may be specified in the notice to the person, a statement showing particulars of any payments made out of the money referred to in the Gazette notification since the unclaimed money statement was made.
- (4) The Commissioner must pay any money received by the Commissioner under this clause into the Consolidated Fund.
- (5) When the Commissioner makes a payment into the Consolidated Fund, the Commissioner is to give the Treasurer a statement containing the following particulars:
- (a) the name and last known address of each person for whom or on whose behalf the money received by the Commissioner was held,
 - (b) the amount held in respect of each of those persons,
 - (c) the date of gazettal of the Gazette notification in respect of that money,
 - (d) the name and address of each licensee who furnished an unclaimed money statement to the Commissioner in respect of that money.
- (6) A person who fails to comply with the requirements of any notice served on the person under this clause is guilty of an offence.

Maximum penalty: 50 penalty units.

9 Repayment of unclaimed trust money

The Treasurer must, on application made to the Treasurer by a person entitled to money paid into the Consolidated Fund under this Division, pay the money to the person.

Part 2 Records

Division 1 Keeping and inspection of records

10 Licensee's records

- (1) In this Part:

licensee means the holder of a master licence for debt collection, and includes a person who has ceased to be a licensee and the personal representative of a licensee who has died.

licensee's records means:

- (a) records required to be kept by a licensee by or under this Act that are in the possession, custody or control of the licensee, and
 - (b) records and documents in the possession, custody or control of a licensee that relate to any account (whether or not a trust account) kept by the licensee in connection with the licensee's business as a licensee or to any transaction by or with the licensee in connection with the licensee's business as a licensee.
- (2) If records or documents that were licensee's records are in the possession, custody or control of a person as a former licensee, as the personal representative of a deceased licensee, or as a result of the transfer of the business of the licensee or otherwise, those records or documents are still *licensee's records* for the purposes of this Part.
- (3) This Part extends to records in the possession, custody or control of a person even when the records are located outside the State.

11 Licensee to make and keep certain records

- (1) A licensee must make the following records:
- (a) a record containing full particulars of all transactions by or with the licensee in connection with his or her business as a licensee,
 - (b) such other records relating to the licensee's business as a licensee as may be required by the regulations.
- (2) A record required by this clause must be kept for at least 3 years after it is made.

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- (3) The record must be kept:
- (a) by the licensee at the licensee's place of business (while the licensee remains a licensee), or
 - (b) if the licensee ceases to be a licensee, by the former licensee in his or her possession, custody or control unless the former licensee authorises some other person to have possession, custody or control of the record, or
 - (c) by any other person who obtains possession, custody or control of the record whether as a result of being the personal representative of a deceased licensee or by transfer of the business of the licensee or otherwise.
- (4) The regulations may make provision for the manner and form in which a record required by this clause is to be kept.
- (5) An entry in a record made under this clause and kept at a licensee's place of business is presumed, unless the contrary is proved, to have been made by or with the authority of the licensee.
- (6) A person who contravenes a provision of this clause is guilty of an offence.

Maximum penalty: 50 penalty units.

12 Inspection of records of financial institutions

- (1) An authorised inspector may serve on an authorised deposit-taking institution with which a licensee has deposited any money in any account (whether the licensee's own account or a general or separate trust account) a notice, in a form approved by the Commissioner and signed by the authorised inspector:
- (a) certifying as to the reason for serving the notice, as provided by this clause, and
 - (b) requiring the authorised deposit-taking institution to produce to the authorised inspector for inspection the records of the institution relating to the account.
- (2) Each of the following is a reason for serving a notice under this clause:
- (a) the licensee cannot be located,
 - (b) the licensee has left the State,
 - (c) the licensee or any other person required to do so has failed to furnish any authority or order on the institution in accordance with a requirement under this Division,

- (d) the licensee has ceased to be a licensee,
 - (e) the licensee has contravened a provision of Part 1 of this Schedule.
- (3) An authorised inspector may take copies of or extracts from, or make notes from, any records produced to the authorised inspector under this clause and for that purpose may take temporary possession of those records.

13 Power to take possession of records to be used as evidence

- (1) An authorised inspector to whom any record is produced under this Part may take possession of the record if the authorised inspector considers it necessary to do so for the purpose of obtaining evidence or protecting evidence from destruction.
- (2) If an authorised inspector takes possession of any record under this clause, the record may be retained by the inspector until the completion of any proceedings (including proceedings on appeal) in which the record may be evidence.
- (3) The person from whom the record was taken must be provided, within a reasonable time after the record is taken, with a copy of the record certified by an authorised inspector as a true copy.
- (4) A copy of a record provided under this clause is, as evidence, of equal validity to the record of which it is certified to be a copy.

Division 2 Audit of licensee's records

14 Requirement for audit

- (1) A person who is a licensee, a former licensee or the personal representative of a deceased licensee must, within 3 months after the end of the audit period applicable to the person:
 - (a) cause the records and documents relating to any money held during that period in a trust account kept by the person in accordance with this Act to be audited by a person qualified to act as an auditor for the purposes of this Division, and
 - (b) lodge the auditor's report on the audit with the Commissioner.
- (2) The Commissioner may in a particular case or class of cases by order in writing extend the period of 3 months under subclause (1).
- (3) The person must retain a copy of the auditor's report on the audit for a period of 3 years after the date on which the report was made.

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- (4) The auditor's report is to be in a form approved by the Commissioner and is to be signed by the auditor.

Maximum penalty: 100 penalty units (in the case of a corporation) and 50 penalty units (in the case of an individual).

15 Audit period

- (1) The audit period applicable to a person is the year ending on 30 June or such other period as the Commissioner may fix in respect of the person under this clause.
- (2) The Commissioner may by order in writing served on a person fix some other period as the audit period applicable to the person.
- (3) Such an order may be made on the application of the person or on the Commissioner's own initiative.
- (4) Such an order may be made with such limitations as to time or circumstances, and subject to such conditions, as the Commissioner considers appropriate.

16 Statutory declaration required when no trust money held or received

A licensee who in the course of the audit period applicable to the licensee neither received nor held any money for or on behalf of any other person must, within the period of 3 months after that day, make and lodge with the Commissioner a statutory declaration to that effect.

Maximum penalty: 100 penalty units.

17 Audit obligations of partners

If the provisions of this Division are complied with by any one of the licensees in a partnership of licensees in relation to the audit of the records and documents of the partnership, each of those partners is taken to have complied with those provisions.

18 Qualifications of auditors

- (1) A person is qualified to act as an auditor for the purposes of this Division if the person:
- (a) is a registered company auditor within the meaning of the *Corporations Act 2001* of the Commonwealth, or

- (b) is a person who has been nominated by the person whose records and documents are to be audited and who has been approved by the Commissioner by order in writing.
- (2) Such a person is not qualified to act as an auditor for the purposes of this Division if the person:
 - (a) is, or has at any time within 2 years before the last day of the period in respect of which the audit is to be made been, an employee or partner of the person whose records or documents are to be audited, or
 - (b) is a licensee, or a shareholder in a corporation that is a licensee and that has not more than 20 shareholders.

19 Duties of auditors

- (1) If an auditor in the course of making an audit for the purposes of this Division discovers that any breach of this Act or the regulations has been committed, that there is any discrepancy relating to the trust account to which the audit relates or that the records or documents concerned are not kept in such a manner as to enable them to be properly audited, the auditor must:
 - (a) fully set out the facts so discovered by the auditor in the report made by the auditor for the purposes of the audit, and
 - (b) forward a copy of the report to the Commissioner.
- (2) An auditor, or an assistant of an auditor, appointed to make an audit for the purposes of this Division must not communicate any matter which may come to the auditor's knowledge in the course of the audit to any person except:
 - (a) in the course of the auditor's duties as an auditor or assistant of an auditor, or
 - (b) in accordance with this clause.
- (3) An auditor's report under this Division (including under this clause) relating to documents or records of any person, and any statutory declaration lodged with the Commissioner under this Division, are to be made available by the Commissioner for inspection by an auditor appointed to carry out for the purposes of this Division any subsequent audit of the records or documents of that person.

Division 3 Freezing of accounts

20 Definitions

In this Division:

account means:

- (a) a trust account in a licensee's name with a financial institution, or
- (b) an account in a licensee's name or in which a licensee has an interest with a financial institution, or
- (c) another account to which trust money is deposited.

financial institution includes an authorised deposit-taking institution.

holder of an account means the licensee or other person authorised to operate on the account.

licensee includes a former licensee and the personal representative of a deceased licensee.

trust money means money received for or on behalf of any person by a licensee (whether or not the money is deposited in a trust account required to be kept by a licensee).

21 Commissioner may freeze licensee's accounts in particular cases

- (1) A direction under this Division may be given when it appears to the Commissioner that any of the following persons has, or may have, stolen, misappropriated or misapplied trust money:
 - (a) a licensee,
 - (b) the person in charge of a licensee's business,
 - (c) an employee of a licensee.
- (2) The Commissioner may by direction in writing direct that:
 - (a) all or part of the amount to the credit of a specified account be paid to the Commissioner, or
 - (b) an amount must not be drawn from a specified account other than with the Commissioner's written approval, or
 - (c) a specified account may be operated only under specified conditions.

- (3) The direction must be given to each holder of the account and the financial institution at which the account is kept, and must identify the account to which it relates.
- (4) Any amount paid to the Commissioner pursuant to such a direction must be paid into the Consolidated Fund.

22 Financial institution must comply with direction

- (1) A financial institution to which a direction under this Division is given (whether or not the direction has been given to anyone else) must not, while the direction is in force:
 - (a) pay a cheque or other instrument drawn on the account concerned unless the cheque or instrument is also signed by the Commissioner or a person authorised by the Commissioner for the purposes of this clause, or
 - (b) give effect to another transaction on the account that is not authorised because of the direction.

Maximum penalty: 500 penalty units.

- (2) The signature of the Commissioner or authorised person on a cheque or other instrument is sufficient evidence of the Commissioner's approval to draw an amount from the account to honour the cheque or other instrument.
- (3) A manager or principal officer in charge of an office or branch of the financial institution where an account is kept, or another officer of the financial institution, must not knowingly permit a contravention of this clause by the financial institution.

Maximum penalty: 100 penalty units or imprisonment for 12 months, or both.

- (4) A person to whom a direction is given does not incur a civil liability to another person by reason only of complying with the direction.

23 Account not to be operated unless Commissioner allows

After a direction under this Division has been given to the holder of an account, the holder must not (while the direction remains in force) sign a cheque or other instrument drawn on the account

unless the cheque or other instrument has first been signed by the Commissioner or a person authorised by the Commissioner to sign the cheque or instrument.

Maximum penalty: 100 penalty units or imprisonment for 12 months, or both.

24 Commissioner may operate account

- (1) The Commissioner or a person authorised in writing by the Commissioner (an *authorised person*) may operate on an account that is the subject of a direction under this Division if the holder of the account refuses to operate the account.
- (2) A statutory declaration made by the Commissioner or authorised person to the effect that the account holder is refusing to operate on the account is sufficient evidence to the licensee's financial institution of that fact.

25 Withdrawal of direction

- (1) A direction remains in force until it is withdrawn.
- (2) The Commissioner may withdraw a direction under this Division at any time.
- (3) When a direction is withdrawn, the Commissioner is to give all persons who were given the direction a notice that the direction has been withdrawn. Failure to give notice does not affect the withdrawal of the direction.

Part 3 Receivership

26 Definitions

In this Part:

associate, in relation to a licensee, has the meaning given to it by clause 27.

failure to account has the meaning given to it by clause 28.

licensee includes:

- (a) a firm of licensees, and
- (b) a former licensee, and
- (c) in relation to anything done or omitted by a licensee—a deceased licensee and a deceased former licensee, and

- (d) except in relation to anything done or omitted by a licensee—the personal representative of a deceased licensee or a deceased former licensee.

property, in relation to a licensee, means:

- (a) money or other property received by the licensee on behalf of another person in the conduct of the licensee's business, or
- (b) interest, dividends, income, profits or other property derived from or acquired with money or other property referred to in paragraph (a), or
- (c) documents and records of any description relating to anything referred to in paragraph (a) or (b) or to the licensee's business, or
- (d) any means by which any records referred to in paragraph (c) that are not written may be reproduced in writing,

and, in relation to a licensee whose business is under management, includes any property of the business.

receivable property means property of a licensee or an associate of a licensee that is the subject of an order appointing a receiver, and includes property that, but for its having being taken, paid or transferred unlawfully or in breach of trust, would be receivable property.

receiver means a receiver appointed by the Supreme Court under this Part.

relevant associate means a licensee's associate of whose property a receiver has been appointed under this Part.

relevant licensee means a licensee of whose property a receiver has been appointed.

27 Associates of a licensee

- (1) In this Part, a reference to a licensee's associate is a reference to:
- (a) a partner of the licensee, or
- (b) an employee or agent of the licensee, or
- (c) a corporation, or a member of a corporation, partnership, syndicate or joint venture, in which the licensee or a person referred to in paragraph (a), (b) or (d) has a beneficial interest, or

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- (d) a person who bears a prescribed relationship to the licensee or to a person referred to in paragraphs (a)–(c), or
 - (e) a corporation that (if a person referred to in paragraphs (b)–(d) is a corporation) is a subsidiary of the person within the meaning of the *Corporations Act 2001* of the Commonwealth, or
 - (f) a person declared by the regulations to be an associate of the licensee or belonging to a class of persons so declared.
- (2) For the purposes of subclause (1) (d), a person bears a prescribed relationship to a licensee or other person if the relationship is that of:
- (a) a spouse, or
 - (b) a de facto partner who is living or has lived with him or her as his or her wife or husband on a bona fide domestic basis although not married to him or her, or
 - (c) a child, grandchild, sibling, parent or grandparent, whether derived through paragraph (a) or (b) or otherwise, or
 - (d) a kind prescribed by the regulations for the purposes of this clause.

28 Failure to account

- (1) In this Part, *failure to account* means a failure by a licensee to account for, pay or deliver money or other valuable property:
- (a) that has been received by or entrusted to the licensee, or an associate of the licensee, in the course of the carrying on of the licensee's business, and
 - (b) that is, in the case of money or other valuable property received by or entrusted to an associate of the licensee, under the direct or indirect control of the licensee,
- being a failure that arises from an act or omission of the licensee or associate.
- (2) The reference in the definition of *failure to account* in subclause (1) to money or other valuable property received by or entrusted to a licensee includes a reference to money or other valuable property that is received by or entrusted to the licensee as trustee, agent, bailee or stakeholder, or in any other capacity.

29 Supreme Court may appoint receiver

- (1) The Supreme Court may, on the application of the Commissioner, appoint a receiver of all or any of the property of a licensee and may make the appointment whether or not the licensee has been notified of the application or is a party to the proceedings.
- (2) Such an application may be made by the Commissioner only if:
 - (a) the licensee has made a request to the Commissioner for the appointment of a receiver, or
 - (b) the licensee's licence has been suspended or cancelled, or
 - (c) the Commissioner is of the opinion that there has been, or that there may have been, a failure to account by the licensee, or
 - (d) the Commissioner is of the opinion that a person is unable to obtain payment or delivery of property held by the licensee because the licensee:
 - (i) is mentally or physically infirm, or
 - (ii) is bankrupt, has applied to take the benefit of any law for the relief of bankrupt or insolvent debtors, has compounded with his or her creditors or has made an assignment of his or her remuneration for their benefit, or
 - (iii) is an inmate within the meaning of the *Crimes (Administration of Sentences) Act 1999*, or
 - (iv) has died, or
 - (v) has abandoned his or her business,

and the Commissioner is of the opinion that it is necessary for the application to be made in order to protect the interests of other persons.

- (3) The Commissioner may publicly notify the appointment of a receiver of all or any property of a licensee.
- (4) The Supreme Court is not to require the Commissioner or any other person, as a condition of granting an application under this clause, to give any undertaking as to damages or costs.

30 Receivership may extend to property of licensee's associate

If, on the application of a receiver, the Supreme Court is satisfied that all or any of the property of a licensee's associate should be declared to be receivable property, the Court may appoint the receiver to be the receiver of all or any of that property.

31 Order to be served

- (1) On the appointment of a receiver, the Commissioner is to cause a copy of the order of appointment to be served on:
 - (a) the relevant licensee or relevant associate, and
 - (b) any other person on whom the Supreme Court directs a copy of the order to be served.
- (2) The Supreme Court may give directions as to the manner of service and may dispense with service if it thinks fit.

32 Receiver may take possession of property

- (1) A receiver may take possession of receivable property of the relevant licensee or relevant associate.
- (2) A person in possession, or having control, of receivable property must permit the receiver to take possession of the property if required by the receiver to do so.
- (3) If a person fails to comply with such a requirement, the Supreme Court may, on the application of the receiver, order the person to deliver the property to the receiver.
- (4) If, on the application of a receiver, the Supreme Court is satisfied that such an order has not been complied with, the Court:
 - (a) may order the seizure of any receivable property located on premises specified in the order, and
 - (b) may make such further order in the matter as it thinks fit.
- (5) An order under subclause (4) (a) authorises:
 - (a) any police officer, or
 - (b) the receiver, or a person authorised by the receiver, together with any police officer, to enter the premises specified in the order and to search for, seize and remove any property that appears to be receivable property.
- (6) An application by a receiver under subclause (3) may be made:
 - (a) in the case of property in the possession, or under the control, of the relevant licensee or relevant associate—in the name of the receiver, or
 - (b) in any other case—in the name of the relevant licensee or relevant associate.

- (7) A receiver must, as soon as possible, return property seized under this clause if it transpires that it is not receivable property.

33 Information about receivable property

- (1) A person who has information relating to receivable property, or property that a receiver believes on reasonable grounds to be receivable property, must give the information to the receiver if required by the receiver to do so.

Maximum penalty: 100 penalty units.

- (2) A licensee who has any such information may not refuse to comply with such a requirement merely because the information was obtained in confidence from a client or former client of the licensee.
- (3) A person who complies with a requirement under this clause is not, merely because of that compliance, subject to any liability, claim or demand.
- (4) Information given to a receiver under this clause is not admissible as evidence in any legal proceedings, other than:
- (a) proceedings taken by a receiver for the recovery of receivable property, or
 - (b) proceedings taken under this Part, or
 - (c) proceedings taken under Part 1 of this Schedule against a licensee:
 - (i) if the information was given to the receiver otherwise than by the licensee, or
 - (ii) if the information was given to the receiver by the licensee and is given in evidence in those proceedings with the licensee's consent.

34 Stop order on account

- (1) A receiver who believes on reasonable grounds that money held in an account with an authorised deposit-taking institution is receivable property may serve on the institution concerned an order (in this clause referred to as a *stop order*) prohibiting operations on the account by any person other than the receiver or a person authorised by the receiver.
- (2) A stop order may be served by leaving it with the manager, accountant or other person appearing to be in charge at the branch of the authorised deposit-taking institution at which the account is

kept, but has no effect unless there is annexed to it a copy of the order appointing the receiver.

- (3) An authorised deposit-taking institution served with a stop order:
 - (a) must permit the receiver, or a person authorised by the receiver, to operate on the account to which the order relates, and
 - (b) must not permit any withdrawal from the account otherwise than by, or by the authority of, the receiver.
- (4) A receiver may transfer money from an account the subject of a stop order to another account with the authorised deposit-taking institution in the name of the receiver to be dealt with as receivable property.
- (5) The authorised deposit-taking institution has the same obligations and protections:
 - (a) in relation to an account the subject of a stop order, and
 - (b) in relation to an account to which money in such an account is transferred,as if the receiver were the relevant licensee or relevant associate.

35 Improper dealing with property

A person must not, with intent to defeat the purposes of this Part:

- (a) operate on an account at an authorised deposit-taking institution, or
- (b) destroy or conceal receivable property or property that is likely to become receivable property, or
- (c) destroy or conceal any document that identifies or indicates the location of receivable property or property that is likely to become receivable property, or
- (d) move receivable property, or property that is likely to become receivable property, from one place to another, or
- (e) deliver possession of receivable property, or property that is likely to become receivable property, to another person, or
- (f) deliver control of receivable property, or property that is likely to become receivable property, to another person.

Maximum penalty: 100 penalty units.

36 Recovery of compensation for disposal of receivable property

- (1) If receivable property has at any time been taken by, or paid or transferred to, a person unlawfully or in breach of trust in circumstances in which:
- (a) the person knew or believed at the time that the taking, payment or transfer was unlawful or in breach of trust, or
 - (b) there was no consideration for the taking, payment or transfer, or
 - (c) there was inadequate consideration for the taking, payment or transfer, or
 - (d) the person became indebted or otherwise liable to the relevant licensee or relevant associate, or to a client of the licensee, as a result of the taking, payment or transfer,

the receiver may recover from the person, as a debt, the amount taken, paid or transferred, the amount of the inadequacy, the amount of the debt or the value of the property taken or transferred, as appropriate.

- (2) A person from whom an amount is recovered under subclause (1) is not liable to any other person in respect of the amount.
- (3) If receivable property has at any time been paid or transferred unlawfully or in breach of trust to, or for the benefit of, a person in respect of a cause of action the person claims to have against another person, the receiver:
- (a) may recover from the person as a debt the amount of the payment or the value of the property, or
 - (b) to the extent to which the full amount or value is not recovered from the person under paragraph (a)—may take such proceedings in relation to the claimed cause of action as the person could have taken.
- (4) If a receiver takes proceedings under subclause (3) (b) in relation to a cause of action claimed by a person, the receiver may not later take proceedings under subclause (3) (a) to recover property paid or transferred to the person in respect of the same cause of action.
- (5) If receivable property is used unlawfully or in breach of trust to discharge a debt or liability of a person, the receiver may recover from the person as a debt the amount that was required for the discharge of the debt or liability, reduced by the value of any consideration provided by the person for the discharge.

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- (6) Recovery proceedings under this clause may be taken in the name of the receiver or in the name of any other person who, had the receiver not been appointed, would have been entitled to take the proceedings.

37 Receiver may give certificate

- (1) A receiver, or a person authorised by the Commissioner, may give a certificate as to any one or more of the following:
- (a) the receipt of property by a licensee or a licensee's associate, the nature and value of the property received, the date of its receipt by the licensee or associate and the identity of the person from whom it was received,
 - (b) the taking or transfer of property, the nature and value of the property, the date of its taking or transfer and the identity of the person by whom it was taken or to whom it was transferred,
 - (c) the payment of money, the amount of money paid, the date of the payment and the identity of the person who received the payment,
 - (d) the entries made in the records of a licensee or a licensee's associate and the truth or falsity of the entries,
 - (e) the use of property unlawfully or in breach of trust.
- (2) A certificate under this clause is admissible in any proceedings taken by a receiver under this Part and is evidence of the matters specified in the certificate.

38 Receiver taken to be beneficially entitled to property

- (1) Proceedings taken under this Part in the name of a receiver in relation to any property may be so taken as if the receiver were beneficially entitled to the property.
- (2) If receivable property has been taken by, or paid or transferred to, a person or otherwise used unlawfully or in breach of trust, a receiver may take proceedings in the name of the receiver as if the receiver were beneficially entitled to the property at the time the property was so taken, paid, transferred or used.

39 Receiver may deal with property

- (1) A receiver may deal with receivable property in any manner in which the relevant licensee or relevant associate could, had the receiver not been appointed, have dealt with it.
- (2) A receiver must, as soon as possible after receiving receivable property, vest the property in the person on whose behalf it was held by the relevant licensee or relevant associate.

40 Other powers of receiver

- (1) A receiver may:
 - (a) prove, grant, claim or draw a dividend in respect of a debt that is receivable property, and
 - (b) take proceedings to recover damages for a tort committed in relation to receivable property, and
 - (c) give a receipt for money that is receivable property, and
 - (d) employ a person to advise or act in relation to receivable property, in the name of the receiver or in the name of the relevant licensee or relevant associate.
- (2) A receipt given to a person under subclause (1) (c) discharges the person from any responsibility to see to the application of the money for which the receipt was given.
- (3) A receiver is not, in the exercise of his or her functions as a receiver, a personal representative of a deceased licensee.

41 Notice to claim receivable property

- (1) A receiver may give notice to:
 - (a) the relevant licensee or relevant associate, or
 - (b) any other person,that any claim the licensee, associate or other person has to receivable property must be submitted to the receiver within one month after the giving of the notice or within such longer period as is stated in the notice.
- (2) A claim submitted in response to such a notice must state:
 - (a) full particulars of the property, and
 - (b) the grounds of the claim.

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- (3) A receiver may disregard a claim made by a licensee, a licensee's associate or any other person who has been given a notice under this clause if the claim is not made in accordance with the notice.
 - (4) The relevant licensee or relevant associate is not entitled:
 - (a) to enforce a claim to receivable property, or
 - (b) except against a client—to the benefit of a lien against a document that is receivable property, unless all other enforceable claims against the property have been satisfied and the expenses of the receivership paid.

42 Lien on receivable property

- (1) If a licensee claims a lien on receivable property for an amount in respect of remuneration, the receiver may serve on the licensee a written notice requiring the licensee to provide to the receiver, within a specified period of not less than one month:
 - (a) particulars sufficient to identify the property, and
 - (b) a detailed itemised account relating to the amount in respect of which each lien is claimed.
- (2) If the licensee requests the receiver in writing to allow access to such records as may be reasonably necessary to enable the preparation of the itemised account, the time allowed for providing the itemised account does not begin to run until access to those records is provided.
- (3) If a requirement of a notice under this clause is not complied with, the receiver may disregard the claim in dealing with the property claimed to be subject to a lien.
- (4) In this clause:
remuneration means remuneration by way of commission, fee, gain or reward for services performed by a licensee in his or her capacity as a licensee and includes any sum as reimbursement for expenses or charges incurred in connection with services performed by a licensee in his or her capacity as a licensee.

43 Examination by receiver

- (1) The Supreme Court may, on the application of a receiver, make such order as it thinks fit for the examination by the receiver of a licensee or other person in relation to receivable property.

- (2) On an examination under this clause:
 - (a) the licensee or other person may be represented by a solicitor or barrister, and
 - (b) the Supreme Court may put, or allow to be put, to the licensee or other person such questions as it thinks fit.
- (3) The licensee or other person may be examined on oath or affirmation.
- (4) The licensee or other person is compellable to answer all questions asked in the course of the examination, including any question to which an objection is made on the ground that the answer would tend to incriminate the licensee or other person.
- (5) An answer given by a licensee or other person to a question to which such an objection is made is not admissible in any criminal proceedings other than proceedings relating to the falsity of the answer.

44 Property not dealt with by receiver

- (1) If receivable property under the control of the receiver has not been dealt with in accordance with this Part, the receiver must cause notice of that fact to be given to the Commissioner and:
 - (a) if the Commissioner so requires within one month after the notice is given—must transfer and deliver the property to the Commissioner, or
 - (b) if no such requirement is made—must transfer and deliver the property to the relevant licensee or relevant associate.
- (2) If property other than money is transferred or delivered to the Commissioner under this clause, the Commissioner:
 - (a) must deal with it as the Supreme Court directs, and
 - (b) if the property is sold—must treat the proceeds as money paid to the Commissioner under this clause.
- (3) The Commissioner must apply money paid to the Commissioner under this clause:
 - (a) firstly—towards the satisfaction of wholly or partly unsatisfied claims against the relevant licensee, and
 - (b) secondly—in payment of the expenses of the receivership.

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- (4) Any money paid to the Commissioner under this clause that is surplus to the requirements of this clause must be paid to the relevant licensee or relevant associate.

45 Investment of money by receiver

- (1) A receiver may invest receivable property in any manner in which trustees are authorised by the *Trustee Act 1925* to invest trust funds.
- (2) Income received from an investment under this clause, and any profit made on the sale of such an investment, is receivable property.

46 Supreme Court may review expenses of receivership

- (1) If, on the application of the relevant licensee, the Supreme Court is satisfied that the expenses of the receivership are excessive, the Supreme Court may order the taking of accounts between the Commissioner and the receiver.
- (2) After the taking of accounts, the Supreme Court:
- (a) may relieve the relevant licensee from payment of any amount in excess of that determined by the Supreme Court to be fairly payable, or
 - (b) if the receiver has been paid, or allowed on account, an amount that includes such an excess—may order the receiver to repay the excess.

47 Receivable property not to be attached

The receivable property of a relevant licensee or relevant associate is not liable to be taken in execution of any judgment, order or other process of any court or tribunal.

48 Applications for directions by receiver, licensee etc

- (1) A receiver, a licensee or a licensee's associate who holds receivable property, or a person who claims receivable property so held, may apply to the Supreme Court for directions as to the performance of the receiver's functions.
- (2) On an application under this clause, the Supreme Court may give such directions as it thinks fit.

49 Supreme Court may give general directions to receiver

- (1) The Supreme Court:
 - (a) may authorise a receiver to do such things in the exercise of the receiver's functions as the Supreme Court considers appropriate, and
 - (b) may give directions for the exercise of any such authority.
- (2) A receiver must exercise any authority so conferred in accordance with any direction so given.

50 Receiver to report to Supreme Court and Commissioner

- (1) A receiver must, at such times and in respect of such periods as the Supreme Court directs, submit reports on the receivership to the Supreme Court and the Commissioner.
- (2) A report is to deal with such matters as the Supreme Court directs and with such other matters as the receiver considers appropriate to include in the report.
- (3) On the conclusion of a receivership, the receiver must lodge with the Supreme Court all of the receiver's records that relate to the receivership.
- (4) Unless the Supreme Court orders their destruction, records lodged under this clause are to remain in the custody of the Court.

51 Termination of appointment of receiver

- (1) The Supreme Court:
 - (a) may terminate the appointment of a receiver, and
 - (b) may, if it thinks fit, appoint a new receiver either immediately or at any time within the next 14 days.
- (2) The former receiver must transfer or deliver the receivable property:
 - (a) if a new receiver is appointed—to the new receiver in accordance with any directions given by the Supreme Court, or
 - (b) if a new receiver is not appointed and if the relevant licensee or relevant associate so requires by notice in writing served on the receiver—to the licensee or associate.

Maximum penalty: 50 penalty units.

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- (3) The receivable property must, in accordance with any directions given by the Supreme Court, be transferred or delivered as soon as possible after the former receiver's appointment is terminated.
 - (4) A former receiver is not required to comply with the requirements of this clause unless:
 - (a) the expenses of the receivership have been paid to the Commissioner, or
 - (b) the Commissioner otherwise directs in relation to those expenses.
 - (5) Subject to any direction given by the Supreme Court, a former receiver may transfer or deliver receivable property to the relevant licensee or relevant associate without having been given a notice under subclause (2) (b).

52 Obstruction of receivers

A person must not hinder, obstruct or delay a receiver in the exercise of his or her functions under this Part.

Maximum penalty: 100 penalty units.

Schedule 3 Amendment of Acts

(Section 41)

3.1 Commercial Agents and Private Inquiry Agents Act 2004

[1] Section 34 Search warrants

Omit “authorised justice” wherever occurring in section 34 (1) and (2).

Insert instead “authorised officer”.

[2] Section 34 (3) and (4)

Omit the subsections. Insert instead:

- (3) Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* applies to a search warrant issued under this section.
- (4) In this section, **authorised officer** has the same meaning as in the *Law Enforcement (Powers and Responsibilities) Act 2002*.

3.2 Fines Act 1996 No 99

Schedule 1 Statutory provisions under which penalty notices issued

Insert in alphabetical order of Acts:

Commercial Agents and Private Inquiry Agents Act 2004,
section 28

3.3 Law Enforcement (Powers and Responsibilities) Act 2002 No 103

Schedule 2 Search warrants under other Acts

Insert in alphabetical order of Acts and statutory instruments:

Commercial Agents and Private Inquiry Agents Act 2004,
section 34

3.4 Licensing and Registration (Uniform Procedures) Act 2002 No 28

Schedule 1 Licences to which Part 2 of Act applies

Insert in alphabetical order of Acts:

Commercial Agents and Private Inquiry Agents Act 2004

section 6 (1) (a), master licence for process serving

section 6 (1) (b), master licence for debt collection

section 6 (1) (c), master licence for repossession of goods

section 6 (1) (d), master licence for surveillance of persons

section 6 (1) (e), master licence for investigation of persons

section 12 (1) (a), operator licence for process serving

section 12 (1) (b), operator licence for debt collection

section 12 (1) (c), operator licence for repossession of goods

section 12 (1) (d), operator licence for surveillance of persons

section 12 (1) (e), operator licence for investigation of persons

3.5 Regulatory Reduction Act 1996 No 107

Schedule 1 Amendment of Acts

Omit Schedule 1.2.

3.6 Search Warrants Act 1985 No 37

Section 10 Definitions

Insert in alphabetical order of Acts in the list of provisions in the definition of *search warrant*:

section 34 of the *Commercial Agents and Private Inquiry Agents Act 2004*,

Schedule 4 Savings, transitional and other provisions

(Section 42)

Part 1 General

1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:
this Act
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
 - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
 - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

Part 2 Provisions consequent on enactment of this Act

2 Definitions

In this Part:

the 1963 Act means the *Commercial Agents and Private Inquiry Agents Act 1963*.

3 Electronic applications for licences

- (1) Despite Part 2 of the *Licensing and Registration (Uniform Procedures) Act 2002* (as applied by sections 6 and 12 of this Act), an application referred to in section 12 of that Act may not be made by means of electronic communication.
- (2) Subclause (1) does not limit the effect of the *Electronic Transactions Act 2000*.

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- (3) This clause ceases to have effect on a day to be appointed by proclamation.

4 Licences under 1963 Act

- (1) A commercial agent's licence under the 1963 Act, including a licence arising under clause 5 (1), is taken to be a master licence for process serving, debt collection and repossession of goods.
- (2) A private inquiry agent's licence under the 1963 Act, including a licence arising under clause 5 (1), is taken to be a master licence for surveillance of persons and investigation of persons.
- (3) A subagent's licence under the 1963 Act that authorises its holder to act as subagent for a licensed commercial agent, including a licence arising under clause 5 (2), is taken to be an operator licence for process serving, debt collection and repossession of goods.
- (4) A subagent's licence under the 1963 Act that authorises its holder to act as subagent for a licensed private inquiry agent, including a licence arising under clause 5 (2), is taken to be an operator licence for surveillance of persons and investigation of persons.

5 Applications under 1963 Act

- (1) An application for a commercial agent's licence or private inquiry agent's licence under the 1963 Act that had been made, but not determined, before the commencement of Division 1 of Part 2 of this Act is to be dealt with under the 1963 Act as if this Act had not been enacted.
- (2) An application for a subagent's licence under the 1963 Act that had been made, but not determined, before the commencement of Division 2 of Part 2 of this Act is to be dealt with under the 1963 Act as if this Act had not been enacted.

6 Action under section 11 or 12 of 1963 Act

- (1) Action under section 11 or 12 of the 1963 Act that had been commenced but not completed before the commencement of Division 1 or 2 of Part 2 of this Act, as the case may be, may be completed under the 1963 Act as if this Act had not been enacted.
- (2) Cancellation of a licence under the 1963 Act, as referred to in subclause (1), is taken to be cancellation of the corresponding licence under this Act.

7 Appeals under section 14 of 1963 Act

- (1) An appeal that had been made but not determined under section 14 of the 1963 Act may be heard and determined as if this Act had not been enacted.
- (2) A decision by the District Court in respect of such an appeal has the same effect as if it had been a decision by the Administrative Decisions Tribunal for the purposes of this Act.

8 Register

The Register referred to in section 15 of the 1963 Act is taken to be the Register of Licensees under this Act.

9 Continued application of Part 3 of 1963 Act

- (1) Despite the repeal of Part 3 of the 1963 Act, compliance by the holder of a master licence for debt collection with the requirements of that Part is taken to be compliance with the requirements of Parts 1 and 2 of Schedule 2 to this Act.
- (2) This clause ceases to have effect on the expiry of 12 months from the commencement of section 18 of this Act.

10 Continued application of Schedule 1 to 1963 Act

Schedule 1 to the 1963 Act continues to apply to and in respect of any action commenced under that Schedule before the commencement of section 18 of this Act.

11 Fidelity bonds

- (1) Any fidelity bond that had been lodged with a court pursuant to section 35 of the 1963 Act is taken to have been terminated by the person by whom it was given.
- (2) If such a bond is supported by security of the kind referred to in section 35 (2) (b) of the 1963 Act, the security is to be returned to the commercial agent by whom it was given.

12 Certificates under 1963 Act

A certificate under section 42 of the 1963 Act is taken to be a certificate under section 22 of this Act.

[Second reading speech made in—
Legislative Assembly on 3 June 2004
Legislative Council on 21 September 2004]

BY AUTHORITY