

**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 81**

The Law Reform Commission of Western Australia is established under the *Law Reform Commission Act 1972-1978*.

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In accordance with the provisions of section 13 of the *Law Reform Commission Act 1972*

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## **CHAPTER 1 INTRODUCTION**

### **1. TERMS OF REFERENCE**

1.1 The Commission has been asked to review the *Pawnbrokers Act 1860-1984*<sup>1</sup> having regard to the requirements of associated legislation.

1.2 Arising out of complaints of an abuse of pawnbroking practice,<sup>2</sup> an amendment to the *Pawnbrokers Act* was passed by Parliament in 1984. In the course of the debate, the Minister in charge of the amendment in the Legislative Council undertook that the Act would be reviewed as a whole and that new legislation would be introduced to replace it.<sup>3</sup> The Attorney General consequently gave the reference to the Commission and asked that it submit a report as soon as practicable.

### **2. THE PAWNBROKING INDUSTRY IN WESTERN AUSTRALIA**

1.3 In order to place the Commission's recommendations in context, the following briefly outlines the history and present position of the pawnbroking industry in this State.

1.4 Pawnbroking came to Western Australia from England. The history of pawnbroking in England has been long and diverse.<sup>4</sup> At one time pawnbrokers represented a major source of consumer finance for the industrial working class, but today the industry is a very minor source of finance both in Australia and England.

1.5 Nevertheless, from being long in decline, the pawnbroking industry has recently undergone a resurgence. The number of licences in Western Australia has increased from three several years ago to a present total of twenty-one.<sup>5</sup> The total value of pawnbroking transactions has also substantially increased. The resurgence is no doubt partly due to

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<sup>1</sup> Hereinafter referred to as the "Pawnbrokers Act".

<sup>2</sup> See paras 2.5 to 2.6 below.

<sup>3</sup> Western Australian *Parliamentary Debates* 15 August 1984, 762-763.

<sup>4</sup> For a useful history of pawnbroking in England see K Hudson, *Pawnbroking: An Aspect of British Social History*, (1982) and M Tebbutt, *Making Ends Meet: Pawnbroking and Working Class Credit*, (1983). See also the Report of the United Kingdom Committee on Consumer Credit (known as the Crowther Report),

unemployment and the numbers of persons dependent on social security benefits. Those affected may need money in emergencies, and, if other sources of finance are unavailable or are considered inappropriate, resort to pawning some of their possessions. However, pawnbrokers' clients are not confined to those in necessitous circumstances. People may require cash for a variety of reasons and offer items such as jewellery, electrical goods, tools of trade or musical instruments as security for the loan. For example, some clients are tradesmen or small traders with cash flow problems. Others use pawnbrokers to finance gambling.

1.6 All pawnbrokers in Western Australia are also licensed as second-hand dealers and some hold other licences, for example as auctioneers or motor vehicle dealers.<sup>6</sup> These diverse businesses are normally carried on under the one roof. Indeed, pawnbroking is often a subsidiary development of an earlier and larger business such as that of jeweller, second-hand dealer or auctioneer.

1.7 Pawnbroking businesses in Western Australia are generally operated independently of each another.<sup>7</sup> Their premises are modest, the fittings varying according to whether the main items dealt with are jewellery or, for example, household goods. A pawnbroker's clientele usually become aware of his services by word of mouth, through small advertisements in newspapers or, in some cases, through handbills or public signs. However, some pawnbrokers also advertise on radio or television.

1.8 Most loans are for small amounts. Some are as little as ten dollars, others range up to two hundred dollars or more. A pawnbroker may occasionally lend quite large sums on appropriate security, such as a motor vehicle or jewellery.<sup>8</sup> The loan is sometimes repaid in a

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<sup>6</sup> The present requirement for separate applications for certain occupational licences could perhaps be avoided or modified. Consequent upon the establishment of the Commercial Tribunal under the *Commercial Tribunal Act 1984*, the Government intends that the Tribunal will be the licensing body in respect of a range of occupations. The full jurisdiction of the Tribunal is yet to be determined: para 2.13 below.

<sup>7</sup> In other words, there is presently no chain of pawnbrokers' shops under the one management. Some interrelationships nevertheless do exist. The Commission is aware of a case where a partner in one pawnbroking business also conducts a separate pawnbroking business in another part of the Perth



few days, though often not for a month or more. In a proportion of cases the client does not repay at all and the pawnbroker sells the article.<sup>9</sup>

### 3. PROPOSALS PAPER

1.9 The Commission issued a Proposals Paper in January 1985 after taking into consideration the response to an earlier public request for preliminary submissions.<sup>10</sup>

1.10 The Paper contained a set of tentative proposals for the updating of the pawnbrokers legislation and invited public comment on them.<sup>11</sup> Copies of the Paper, together with a covering letter, were also sent personally to -

- \* all licensed pawnbrokers in Western Australia;
- \* all those who had responded to the Commission's request for preliminary submissions;
- \* those with whom the Commission had had preliminary discussions; and
- \* welfare groups, departments, bodies and officials, both in Western Australia and elsewhere, who the Commission considered had an interest in the subject, or who otherwise might be able to assist.

### 4. RESPONSES TO THE PROPOSALS PAPER

1.11 Twenty-five persons or organisations responded.<sup>12</sup> They included the newly formed Association of Western Australian Pawnbrokers<sup>13</sup> as well as some individual pawnbrokers, the Small Business Development Corporation, the Western Australian Department of Consumer Affairs and its counterpart in New South Wales, the Commissioner of Police, the National Police Research Unit, the Council for Civil Liberties in Western Australia and several community law centres and social welfare groups.

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<sup>9</sup> A pawnbroker is obliged by law to retain the pawned article for three months, or such longer period as agreed, before selling it. The client has until sale to repay the loan and interest: para 3.12 below.

<sup>10</sup> The invitation to make preliminary submissions was also sent personally to all licensed pawnbrokers in Western Australia as well as a wide range of social welfare, consumer and legal interest groups.

<sup>11</sup> An advertisement was placed in *The West Australian* and *COSS News*, the journal of the Western-Australian Council of Social Service. An article was also published in *Brief*, the journal of the Law Society of Western Australia.

<sup>12</sup> These names are listed in Appendix I.

<sup>13</sup> This Association (as yet unincorporated) was formed after the Commission's Proposals Paper was issued. It has seven members at present. The Association informed the Commission that its members "represent 75% of all pawnbroking business in metropolitan Perth".

1.12 Representatives of the Commission also had discussions with a number of pawnbrokers. In some instances the discussion took place at pawnbrokers' premises, and pawnbrokers readily permitted, indeed encouraged, the representatives to observe their business operations. Representatives also attended auction sales of unredeemed pledges.<sup>14</sup>

1.13 The Commission is grateful to those who commented or otherwise assisted it and thanks them for doing so.<sup>15</sup> All views expressed have been taken into account in preparing this report.

1.14 In most instances the Commission's final recommendations below conform to the tentative proposals contained in the Proposals Paper. In a number of areas the Commission has modified its view in the light of the comments or its own further consideration. These are indicated in the relevant places below.

## 5. THE COMMISSION'S BASIC AIM

### (a) Defects of the existing Act

1.15 Apart from its archaic and often confusing language, the Commission considers the principal defects of the *Pawnbrokers Act* to be -

- \* the lack of an up-to-date licensing system;
- \* the lack of specific enforcement machinery; and
- \* the absence of clearly expressed powers and obligations to ensure fair dealing.

The Commission **recommends** that the *Pawnbrokers Act* should be replaced by a new Act which places the regulation of pawnbroking on a rational and modern basis. The specific recommendations designed to achieve this are contained in the following chapters.

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<sup>14</sup> Paras 3.16 to 3.20 below.

<sup>15</sup> The Commission also wishes to thank Sir Gordon Borrie, the United Kingdom Director General of Fair Trading, who supplied information about the operation of the *Consumer Credit Act 1974-1982* (UK), which now regulates pawnbroking in that jurisdiction.

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<sup>16</sup> In deciding what is necessary the Commission has been mindful of the fact that many clients of pawnbrokers are from vulnerable groups often in urgent need of funds for living expenses, such as food or rent: para 1.5 above.

<sup>17</sup> See, for example, para 3.20 below.

<sup>18</sup>

## CHAPTER 2 LICENSING

### 1. INTRODUCTION

2.1 In the Proposals Paper the Commission proposed that pawnbrokers should continue to be subject to a system of licensing to ensure fair dealing and the protection of clients and others such as victims of theft.<sup>1</sup> No commentator disagreed. The Commission **recommends** accordingly. Details of the recommended system are set out below.

### 2. DEFINITION OF PAWNBROKER

#### (a) General

2.2 Basic to a system of licensing is the question of the activities to be subject to it. Section 2 of the *Pawnbrokers Act* provides that:

"...[E]very person who shall carry on business or shall seek his livelihood in or by advancing upon interest or for or in expectation of profit, gain or reward any sum of money upon security (whether collateral or otherwise) of any article<sup>2</sup> whatsoever taken by such person by way of pawn, pledge or security, shall be deemed and taken to be a pawnbroker, and be deemed and taken to have carried on the trade or business of a pawnbroker within the intent and meaning of this Ordinance. "

This definition is subject to section 30 which excludes from the operation of the Act "loans or advances made on any goods, chattels, livestock, wool, bonds, bills, title deeds, or other

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<sup>1</sup> Pawnbrokers are licensed in all other Australian jurisdictions, in New Zealand and in the United Kingdom. For the relevant legislation, see -

**Australia**

*Pawnbrokers Act 1958-1983* (Vic)

*Pawnbrokers Act 1888-1975* (SA)

*Pawnbrokers Act 1902-1985* (NSW)

*Pawnbrokers Act 1857-1965* (Tas)

*Pawnbrokers Act 1980-1983* (NT)

*Pawnbrokers Act 1902-1926* (ACT)

*Pawnbrokers Act 1984* (Qld)

**New Zealand**

*Pawnbrokers Act 1908-1981* (NZ)

**United Kingdom**

*Consumer Credit Act 1974-1982* (UK), the pawnbroking provisions of which came into force on 19 May 1985.

<sup>2</sup> S 29 of the *Pawnbrokers Act* defines "article" to include "every species of chattels and goods whatsoever". This definition appears to have caused no difficulty in practice, and the Commission **recommends** that it

security by merchants, bankers,



2.8 The Commission in the Proposals Paper suggested that this approach was preferable, since the 1984 amendment could be avoided if the dealing was conducted not by the pawnbroker as such but by an associated person trading as a licensed second-hand dealer on the same premises and using the same staff. In the client's eyes there may be no significant difference. The South Australian provision extends the protection of the Pawnbrokers Act to the client by providing that no matter what form the agreement took, the client would have three months in which to redeem the goods and the pawnbroker would be subject to the other provisions of that Act in respect of the transaction.<sup>9</sup>

2.9 There was general agreement among the commentators with the Commission's suggestion that a similar provision should be adopted in this State.<sup>10</sup> The Commission accordingly confirms the view expressed in the Proposals Paper and **recommends** replacement of the 1984 amendment by a provision along the lines of that of South Australia but drafted in modern style.<sup>11</sup>

2.10

### 3. THE LICENSING SYSTEM

#### (a) The present position

2.11 The present method of licensing is by application to a Court of Petty Sessions supported by recommendations by "five householders residing in the district".<sup>13</sup> If granted, the licence operates only to the 31st December following and is then subject to annual renewal. Appeal from a refusal to grant a licence lies to the Supreme Court of Western Australia under the provisions of the *Justices Act 1902-1985*.

2.12 The Commission considers that the existing licensing system is unsatisfactory for a number of reasons, including the following -

- \* It is preferable that licensing powers in commercial areas should be exercised by a body with special expertise<sup>14</sup> rather than by a court exercising criminal jurisdiction (a Court of Petty Sessions).<sup>15</sup>
- \* Unlike more recent occupational licensing legislation, the *Pawnbrokers Act* makes no specific provision for a report to be made to the licensing body on an applicant's suitability for a licence,<sup>16</sup> for the lodging and hearing of objections to the grant of a licence, and similar matters.
- \* It is unnecessarily burdensome for a pawnbroker to be required to obtain a fresh licence each year.
- \* Unlike modern licensing legislation, there is no provision for cancellation or suspension of a pawnbroker's licence for cause shown.<sup>17</sup>



**(b) The appropriate licensing body**

2.13

representing the interests of those who are required to be licensed by the Act under which jurisdiction is conferred on the Tribunal, and also a panel representing the interests of those who deal with those licensed persons.<sup>23</sup> The Minister may also establish a further panel of persons whose expertise would be likely to be of assistance to the Tribunal.<sup>24</sup> When the Tribunal is concerned with an application for a pawnbroker's licence, for example, the Tribunal would, in addition to the Chairman,<sup>25</sup> be required to include an industry and consumer representative selected from the relevant panels.<sup>26</sup> One or more persons selected from the panel of experts may also be included.<sup>27</sup>

2.16 In light of the above, the Commission confirms its tentative view and **recommends** that the licensing of pawnbrokers should be transferred from Courts of Petty Sessions to the Commercial Tribunal.

**(c) The appropriate licensing procedure**

2.17 The licensing procedure provided in the *Credit (Administration) Act 1984* for the licensing of "credit providers" is in a form common to other modern licensing legislation. In particular, unlike the *Pawnbrokers Act*, the *Credit (Administration) Act 1984* -

- (a) Expressly provides for licences to be granted to corporate bodies as well as natural persons.<sup>28</sup> To prevent unsuitable persons trading behind a corporate facade, the officers of the corporate body are required to be fit and proper persons.

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<sup>23</sup> *Commercial Tribunal Act 1984*, s 6(1).

<sup>24</sup> Id, s 6(2).

<sup>25</sup> The Chairman or Deputy Chairman must be a legal practitioner of not less than seven years standing and practice: id, s 5.

<sup>26</sup> This is on the assumption that, as recommended below, pawn-brokers continue to be licensed under a separate Act rather than the *Credit (Administration) Act 1984*. In view of the small size of the pawnbroking industry in Western Australia the persons selected to represent the industry on the Tribunal may possibly not themselves be pawnbrokers. Similarly, those representing the interests of the clients may not themselves be clients.

<sup>27</sup> Selection from each of the panels is by the Chairman or Deputy Chairman: *Commercial Tribunal Act 1984*, s 13.

<sup>28</sup> This issue is discussed in the pawnbroking context at paras 2.21 to 2. 23 below.



- (i) Empowers the Commissioner for Consumer Affairs to take proceedings on behalf of a complainant against a licensee, or to intervene in proceedings involving a licensee. He may also enter a licensee's business premises for the purpose of ascertaining whether the Act is being complied with or of preparing a report for the Tribunal. The Commissioner may also require a licensee to produce his business records for either of these purposes.

2.18 The Proposals Paper suggested that the *Credit (Administration) Act 1984* provided a satisfactory m

- (c) So far as it is practical to do so, provisions directly concerning the affairs of an industry should be contained in the one piece of legislation for the convenience of those affected.<sup>36</sup>

2.20 The Commission accordingly **recommends** that, with certain changes, referred to below, provisions similar to those in the *Credit (Administration) Act 1984* should be included in the new Pawnbrokers Act itself.<sup>37</sup>

**(d) Special provisions for pawnbrokers' licensing**

- (i) *Qualified person to be in personal control of each place of business*

2.21 As mentioned above,<sup>38</sup> the *Credit (Administration) Act 1984* permits credit providers' licences to be granted to bodies corporate as well as natural persons and to cover more than one place of business. The Commissioner of Police submitted that only natural persons should be able to be licensed as pawnbrokers. A corporate body could conduct a pawnbroker's business but only if a natural person held a licence on its behalf.<sup>39</sup> In support of his view he said that directors of companies were often remote from the company business. They may not reside in the State and so not be available for interviews with respect to breaches of the Act. The Commissioner al



2.24 An exception to the requirement in the previous paragraph should be provided to cover cases where the pawnbroker or manager becomes ill, or is otherwise unavailable, for example during annual leave, and where it is not reasonably practicable to obtain a qualified replacement at short notice. Accordingly the Commission **recommends** the enactment of a provision to the effect that a pawnbroker is not in breach of his licence if the premises are not under the control of himself or the holder of a manager's licence for up to twenty

balance, the Commission **recommends** that this type of arrangement should be allowed to continue. In order to prevent unsuitable persons becoming co-proprietors, the Commission **recommends** that all the non-licensed partners should be required to be of good reputation and character. Where an unlicensed partner is a corporate body, the directors or persons having control of that body should also be required to be of good reputation and character.

(iii) *Security and insurance*

2.27



**(e) Other matters***(i) Filing of annual statement*

2.29 The Small Business Development Corporation suggested that consideration be given to triennial rather than annual renewals of licences in order to reduce administrative overheads. The Commission has recommended above<sup>53</sup> the adoption of the provision in the *Credit (Administration) Act 1984* whereby pawnbrokers' licences would be continuous, subject only to the annual payment of a prescribed fee and filing of a prescribed statement. The Commission considers that the annual filing of the statement is necessary to ensure that the Tribunal has reasonably up-to-date information about the operation of the business including the financial resources of the licence holder. However, it endorses the Corporation's plea that the statement be as simple as possible and that the fee should be no greater than the actual cost to the Tribunal in processing the statement.

*(ii) Expertise*

2.30 Although the Commission suggested in the Proposals Paper that an applicant for a pawnbroker's licence should not be required to satisfy the licensing body as to its knowledge of the relevant law, the Commission is now of the view that proof of knowledge of the law - to the degree necessary to operate a pawnbroker's business - is desirable. The Commission notes that an applicant for a credit provider's licence must have "sufficient expertise to enable him to carry on such a business".<sup>54</sup> This would include knowledge of the relevant law. The Commercial Tribunal would be able to accept such evidence on this aspect as it thought fit. The Commission's recommendation in paragraph 2.20 above would in effect require that a similar provision be included in the new *Pawnbrokers Act*.<sup>55</sup>

*(iii) No requirement for a bond or fidelity fund*

2.31 Some commentators suggested that pawnbrokers should be required to take out a bond or subscribe to a fidelity fund, but the Commission **recommends** that such a requirement

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<sup>53</sup> Paras 2.17(h) and 2.20.

<sup>54</sup> *Credit (Administration) Act 1984*, s 12(2)(f). There is an analogous provision for corporate bodies: s 12(4)(e).

<sup>55</sup> A similar requirement as to expertise would apply to managers' licences: para 2.22 above.



**CHAPTER 3**  
**REGULATION OF RELATIONSHIP**  
**BETWEEN PAWNBROKER AND CLIENT**

**1. INTRODUCTION**

3.1 This chapter deals first with the terms of a pawnbroking transaction (interest rates, unconscionable transactions, the proper documentation of interest rates and other charges and the minimum redemption period). It then deals with the sale of unredeemed articles and the right to the surplus, if any.

**2. TERMS OF THE TRANSACTION**

(a) **Interest rates -0.07meOO1 12T73 tC2Ai TD 0 Tc/F2g transaco**



(ii) *Commentators' views*

3.5 Control of interest rates was favoured by the Department for Community Services, the City of Fremantle Consumer Credit Legal and Welfare Service and a private commentator. The first two commentators rejected the arguments against control set out in the Proposals Paper, although the Department for Community Services said that as a practical measure it may be desirable only to set maximum rates on loans of two hundred dollars or more.<sup>4</sup> The Royal Perth Hospital Social Work Department, though not necessarily in agreement, set out,

Commission prefers the latter course<sup>8</sup> and **recommends** the inclusion of a suitable empowering provision in the new Act.

**(b) Re-opening transactions**

3.8 The Commercial Tribunal is empowered<sup>9</sup> to re-open a regulated contract as defined in the *Credit Act 1984*

pawnbroker's book and the pawn ticket<sup>13</sup> include "the rate of interest to be charged... by the week or month (as the case may be)" should be retained and that, in addition, the book and ticket should set out -

- (a) the amount of the interest expressed in dollar terms,<sup>14</sup> clearly identified as interest only; and
- (b) all other charges or fees deducted from the amount of the loan or otherwise payable.

3.11 All those who commented on the proposal expressed approval of the suggestion.<sup>15</sup> The Commission **recommends** accordingly.

**(d) Minimum redemption period**

3.12 The *Pawnbrokers Act* at present provides<sup>16</sup> that, unless a longer period is expressly agreed upon, the period of redemption of any article taken in pawn is three months, and that any agreement for the forfeiture of an article before the expiration of three months is void. In other words, a client has at least three months to redeem an article before the pawnbroker can

pawnbrokers may sometimes have difficulty in meeting any shorter deadline and that it would be unfortunate if their goods were sold before they were able to repay. All those who commented on the issue agreed with the Commission's suggestion.<sup>19</sup> The Commission **recommends** accordingly.

3.14 The Proposals Paper also discussed whether a statutory obligation should be imposed on pawnbrokers to inform the client in writing that the three month period had expired. The Commission suggested that it should not. The Department for Community Services, the Sussex Street Community Law Service and the City of Fremantle Consumer Credit Legal and Welfare Service disagreed.

3.15 After further consideration, the Commission confirms its provisional view. Such an obligation would add to expense and is probably unnecessary if the notification is intended as a reminder to the client. However, there may be clients who are unaware of the pawnbroker's statutory obligation to keep the goods for a minimum of three months before sale and that the goods can be redeemed until sale. Accordingly the Commission **recommends** that a statement to this effect should be required to be included on the pawn ticket in appropriately large type. If the pawnbroker has agreed on a longer period that period should of course be specified instead.

### **3. SALE OF UNREDEEMED GOODS AND RIGHT TO ANY SURPLUS**

#### **(a) Sale of unredeemed goods**

3.16 The *Pawnbrokers Act* regulates the manner of sale of unredeemed goods.<sup>20</sup> Items on which fifty cents or less have been advanced may be sold by private treaty, but those on which a larger amount has been advanced must be sold by public auction.<sup>21</sup> A catalogue of all such items and the time when they were taken in pawn is required to be advertised twice in a public newspaper at least four days before the proposed sale.<sup>22</sup> In fact, as the Proposals Paper

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<sup>19</sup> These included the Country Women's Association, the City of Fremantle Consumer Credit Legal and Welfare Service and the Association of Western Australian Pawnbrokers.

<sup>20</sup> Most people redeem their goods. Two long-established pawnbrokers estimated that eighty-five to ninety percent of their clients redeem, but the industry average may be about seventy-five percent.

<sup>21</sup> *Pawnbrokers Act*, s 14.

<sup>22</sup> *Ibid.* The section goes on to provide a civil penalty for a pawnbroker's failure to comply with the section. In such a case the owner of the article concerned may recover a sum not exceeding forty dollars over and above the value of the article.





Paper outlined a number of reasons for this. Many auctions are poorly advertised. Probably some items are best sold by auction and others by private treaty and it would be undesirable to lay down an inflexible rule.

- (b) The auctioning of goods involves substantial costs and may achieve nothing if goods are passed in.
- (c) If auction sales were to continue to be required, detailed provisions would be needed<sup>25</sup> governing the manner of advertising, the time and place of sale, the setting of a reserve price and the mode of sale of goods which failed to reach the reserve.<sup>26</sup>
- (d) Increasing the limit for private sale to two hundred dollars, as the Proposals

The onus of proof as to whether these duties had been complied with should, as in the *Credit Act 1984*, rest on the pawnbroker.<sup>31</sup>

**(b) Pawnbrokers purchasing their unredeemed pledges**

3.21 The Commission confirms its provisional view that pawnbrokers should continue to be prohibited from purchasing their unredeemed pledges<sup>32</sup> whether the sale is by private treaty or by public auction, and **recommends** accordingly. This of course includes purchase through an agent. This prohibition is simply a particular instance of a general equitable rule applicable to trustees and others who are subject to fiduciary duties. It is important that pawnbrokers should not be able to place themselves in a position where their duty (to sell at the highest price) may conflict with their self interest (to purchase at the lowest price). Pawnbrokers have informed the Commission that the practice in Western Australia has been for some pawnbrokers to bid for and purchase unredeemed goods being auctioned by them and have argued strongly that this practice should be recognised in the new legislation. Obviously, to avoid a conflict of interest such a practice could not be permitted in respect of sales by private treaty. The Commission is of the view that there is no adequate case for permitting it in respect of auction sales either.<sup>33</sup>

**(c) Surplus on sale**

3.22 Implicit in the discussion above is the Commission's view that it is the client, not the pawnbroker, who is entitled to any surplus on sale (after deducting the reasonable expenses of the sale). Pawnbrokers, in common with others who make loans on the security of property,

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<sup>30</sup> Such a prohibition is not for the benefit of the client, but for a pawnbroker's duties under the

are given the right to sell that property for the purpose of obtaining what is due to them under the loan. There would be little sense in prescribing the manner of sale (as does the present Act) or the general duties of a pawnbroker as to sale (as the Commission recommends) unless the pawnbroker is required to account to the client for the surplus. It is true that the present Act does not, in terms, make any specific reference to the surplus but in the Commission's view the general law still applies.<sup>34</sup> The Association of Western Australian Pawnbrokers and individual pawnbrokers submitted that pawnbrokers should be permitted to retain the surplus on the basis that this has long been the practice in Western Australia and elsewhere, that it accords with client expectations, that it helps compensate pawnbrokers for losses made in cases of deficiencies on other sales and of seizure of stolen property, and that in some jurisdictions pawnbrokers are by statute granted title to unredeemed pawned goods on which small amounts have been advanced. The Commission is not persuaded by these arguments. It is true that very often clients do not claim a surplus and that as a result pawnbrokers retain it, no doubt assuming that they are entitled to do so. Nonetheless this practice is capable of gross injustice, especially where small amounts are advanced on valuable items. Further, the general rule in all jurisdictions is that the surplus belongs to the client. It would be quite wrong to permit pawnbrokers to appropriate the surplus themselves.

3.23 The Proposals Paper suggested that, following Queensland:<sup>35</sup>

"The legislation should make express provision for the pawnbroker who sells an unredeemed article to -

- (a) place the surplus proceeds of sale of the article in a trust account to be maintained by him;
- (b) notify the client at his last known address of the amount of the surplus; and
- (c) pay the surplus to the client at his request.

If the client makes no request within, say, one year of the notification, the pawnbroker should be required to pay the surplus to the State Treasurer as unclaimed money."

3.24 The Department of Consumer Affairs, the Royal Perth Hospital Social Work Department, the City of Fremantle Consumer Credit Legal and Welfare Service, the National

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<sup>34</sup> In the Commission's view the phrase used in s 13 of the present Act, namely that the article is "deemed forfeited", has been widely misunderstood by pawnbrokers. It is not intended to imply that the client has absolutely lost all right to the article, but merely that the pawnbroker's security interest in the article has become exercisable by sale: *Walter v Smith* (1822) 5 B & Ald 439.

<sup>35</sup> *Pawnbrokers Act 1984* (Qld), s 35(3).

Police Research Unit, the Country Women's Association and two private commentators were in broad agreement with the proposal.<sup>36</sup> The Association of Western Australian Pawnbrokers and individual pawnbrokers were strongly against it.<sup>37</sup>

3.25 The Commission, while **recommending** that a provision be included in the new Act as to the client's right to the surplus, now considers that it would unduly add to costs<sup>38</sup> to require pawnbrokers to pay surpluses into a trust account. The only purpose of doing so would be to protect the client in the event of the pawnbroker's insolvency. However, the Commercial Tribunal will in future be in a position to monitor the financial capacity of pawnbrokers thus reducing the likelihood of this occurrence. The Commission further **recommends** that the surplus should be treated merely as a debt due from the pawnbroker to the client.<sup>39</sup> To ensure that clients are made aware of their entitlement to any surplus, the Commission **recommends** that pawnbrokers should be required to -

- (a) include on the pawn ticket a statement as to the client's rights in this regard;  
<sup>40</sup>and
- (b)

inform the client that he is entitled to collect the surplus from the pawnbroker at his business address or otherwise as the parties agree.

Any breach of these requirements should be made an offence.

3.26 The Commission has decided not to recommend that any attempt should be made to define the reasonable costs of sale, given that sale may not involve one or more of advertising, auctioneers' fees, cleaning and repairs, storage, insurance and delivery charges. The surplus accordingly should be defined as the gross proceeds of sale, less the amount of the loan and the interest and other charges owing to the date of the sale and the reasonable costs of effecting the sale. In order to lessen the likelihood of a dispute between pawnbrokers and clients, the Commission **recommends** that, as soon as practicable after the sale, the pawnbroker should be required to -

- (a) calculate the reasonable expenses of the sale and the surplus (if any) due to the client; and
- (b) enter details of those expenses and of the surplus into the appropriate book.<sup>42</sup>

**(d) Other matters**

*(i) Shortfalls*

3.27 The Proposals Paper suggested that the new Act include a declaratory provision expressing the common law rule that if there is a shortfall on the realisation of pawned goods the pawnbroker can sue the client for the difference.<sup>43</sup> The general view of commentators was that such a provision would have little practical value. The Commission has accordingly concluded that the matter should be left to the common law and **recommends** that no specific provision be made.

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<sup>42</sup> Para 4.2(c) below sets out the matters a pawnbroker is presently required to enter into that book. The Commission's recommendation in para 3.26 would have the effect of requiring further particulars to be so entered.

Under the general law pawnbrokers are entitled to set off any surplus on sale against any deficiency arising out of a previous transaction with the same client. This right would continue: see para 3.27 below as to shortfalls.

<sup>43</sup> Since the pawn is merely security for the loan its realisation does not of itself extinguish the debt.

(ii) *Pawned goods becoming property of pawnbroker*

3.28 Pawnbroking legislation in some jurisdictions contains a provision by which unredeemed goods on which small amounts have been lent become the property of the pawnbroker.<sup>44</sup> Correspondingly, the debt owed by the client is extinguished. Pawnbrokers informed the Commission of cases where clients have borrowed small sums on valuable items. To allow the pawnbroker to acquire title to the property on the basis of the amount advanced could accordingly work an injustice and the Commission confirms its provisional view and **recommends** that such a provision should not be introduced.

(iii) *Purchaser's title*

3.29 The Commission in the Proposals Paper said that it did not favour including in the new Act a provision along the lines of that in the Northern Territory<sup>45</sup> under which a purchaser of an unredeemed article from a pawnbroker obtains valid title thereto whatever the title of the original client.<sup>46</sup> The Commission confirms its provisional view and **recommends** accordingly. Although such a provision may encourage purchasers to pay higher prices for goods it would run counter to the general principle that a person cannot give a better title to goods than he himself has. It may also encourage the use of pawnbroking for the disposal of stolen property. The Commission can see no justification for making an exception to the

to do so may not be beyond doubt and the Commission **recommends** that it be made explicit.<sup>48</sup>

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<sup>48</sup> The Local Court (including its Small Debts Division if the claim involved a liquidated amount) would also be available.



## CHAPTER 4

### GENERAL DUTIES OF PAWNBROKERS

#### 1. INTRODUCTION

4.1 The *Pawnbrokers Act* imposes a number of general duties upon licensed pawnbrokers and creates offences for breaches thereof. The Commission's view is that, except as detailed below, these duties should be retained, but in a more contemporary form.

#### 2. DOCUMENTATION

4.2 The existing Act provides that a pawnbroker must -

- (a) Upon taking an article in pawn, record details of the article in a book (in prescribed form) together with details of the money advanced, the rate of interest to be charged on the loan by the week or month (as the case may be), the date the goods were pawned and the name and address of the person pawning the goods.<sup>1</sup>
- (b) Number the entries made in his book consecutively throughout the year, and give to the client a duplicate<sup>2</sup> of the entry signed by the pawnbroker and containing every detail of the entry. Every such duplicate must be delivered at a charge not exceeding one cent. The client must produce it to the pawnbroker before the latter is obliged to redeliver the articles mentioned therein.<sup>3</sup>
- (c) From time to time "...enter in a book to be kept by him for that purpose a true and just account of the sale or disposition of every article which shall have been pawned, and shall have been sold or otherwise disposed of by him, specifying the date when such article was pledged, and the true number of the entry then made thereof, and the name of the person who pledged the same, and the day when and the amount for which every such article was sold".<sup>4</sup>

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<sup>1</sup> *Pawnbrokers Act*, s 12.

<sup>2</sup> This is commonly known as a pawn ticket: note footnote 13 to para 3.10 above.

<sup>3</sup> *Pawnbrokers Act*, s 15.

<sup>4</sup> *Pawnbrokers Act*, s 18.

- (d) Permit any person by or for whom an article is pawned to inspect the entry of sale relating to the article. <sup>5</sup>

4.3 The Commission has recommended above the following changes in the substance of these provisions -

- (a) The book and the ticket should, as well as specifying the rate of interest, express the interest in dollar terms and also specify any other charges. <sup>6</sup>The ticket should also be required to contain a reference to the period of redemption and the right to any surplus on sale. <sup>7</sup>
- (b) The pawnbroker should be required to calculate the reasonable expenses of the sale of each unredeemed pledge and record those details and the surplus (if any) in the book referred to in paragraph 4.2(c) above as soon as practicable. <sup>8</sup>

4.4 The Commission further **recommends** that

- (a) The record of details of the article pawned should be required to include the brand name of the article (if any) and any serial number or other identification.
- (b) The pawn ticket should be supplied free of charge. The ticket is an important document wh

### 3. RIGHTS OF HOLDERS OF PAWN TICKETS

4.6 The existing Act provides statutory rights to the holders of pawn tickets, as follows -

- (a) Holders of pawn tickets are deemed to be the owners of the goods pawned and are entitled to delivery of them unless the pawnbroker has previously been notified by the real owner that the ticket has been lost or fraudulently taken from him, or has been informed by some credible person that such articles have been stolen.<sup>10</sup>
- (b) Where the ticket is lost or stolen the owner of an unredeemed article can, upon completing a prescribed declaration setting out the circumstances, obtain another copy upon payment of two cents.<sup>11</sup>

Pawnbrokers usually adhere to the procedure in (b). However, where the client is known to the pawnbroker sometimes the client is permitted to redeem the goods without the ticket. In such a case the pawnbroker simply notes his records accordingly.

4.7 The substance of these provisions seems to be acceptable and the Commission **recommends** that they be carried forward into the new Act but expressed in modern terms. There should, however, be no charge for supplying a copy of the pawn ticket.<sup>12</sup>

### 4.

displayed... in a conspicuous position on the outside" of the premises. The Commission

**recommends** that pawnbrokers' trading hours be considered by the Committee and that appropriate amendments be made to the *Factories and Shops Act 1963-1981*.<sup>19</sup>

(c) **Offences**

4.12 Breaches of the duties imposed by the provisions referred to in paragraphs 4.2 (documentation), 4.8 (pawnbrokers' signs) and 4.9 (trading hours) above are offences under section 26 of the *Pawnbrokers Act*. In addition, that section makes it an offence -

- (a) For a licensed pawnbroker to take in pawn any article from a person under the age of eighteen years, or apparently intoxicated.
- (b) When the sum agreed to be advanced on any pawn is under twenty dollars, for a licensed pawnbroker to " ...make any part of such advance in any thing but money, or sell or exchange any article for any part of the money agreed to be advanced upon such pledge....".

Failure to permit the holder of a pawn ticket to inspect the appropriate records is an offence under section 27 of the *Pawnbrokers Act*.

4.13 The Proposals Paper suggested that -

- (a) breaches of the duties as to documentation and as to pawnbrokers' signs should continue to be offences;
- (b) the description of the offence referred to in (a) of paragraph 4.12 above should be clarified to make it clear that it applies to persons apparently intoxicated by drugs as well as alcohol; and
- (c) the offence provision referred to in (b) of paragraph 4.12 above should be repealed.

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to avoid anomalies, the Retail Trade Advisory and Control Committee should be asked to include in their review the question of permitted trading hours for licensed second-hand dealers.

<sup>19</sup> The repeal of ss 21 and 22 of the *Pawnbrokers Act*, without more, would appear to limit pawnbrokers to normal shopping hours. This may be unduly restrictive.

4.14 The commentators generally confined their comments to the proposal as to intoxication by drugs. One pawnbroker considered that the determination of whether a person was under the influence of drugs could present a problem. However, the Commission's proposal was confined to persons apparently intoxicated by drugs and should occasion no greater difficulty than at present. A social worker suggested that the present scope of the offence be widened by prohibiting a pawnbroker from accepting an article when he had reasonable cause to believe that the client was addicted to drugs, on the ground that "the person was in all probability pawning goods which did not belong to him". The Commission, while acknowledging the social problem referred to, considers that adoption of the commentator's suggestion would place too heavy a burden on pawnbrokers and in any case could well be unacceptable from the viewpoint of the client. The Association of Western Australian Pawnbrokers suggested that the age of 18 years referred to in paragraph 4.12(a) above should be reduced to 17 years on the ground that it disadvantages young persons, particularly those in employment or living independently. However, the present age of 18 years was introduced to help control the problem of young persons attempting to pawn stolen articles.<sup>20</sup> In these circumstances the Commission is reluctant to recommend any reduction of the age. The Commission confirms its provisional views expressed in paragraph 4.13 above and **recommends** that the new Act make provision accordingly.

4.15 The Commission further **recommends** that section 27 of the Pawnbrokers Act should be revised to make it an offence for a person to hold himself out as carrying on business as a pawnbroker without being licensed as such.<sup>21</sup> If this were done, section 9 of the Act should be repealed since that section deals with a special case of holding out (that is, displaying a pawnbroker's sign).<sup>22</sup>

**(d) New offences and penalty**

*(i) New offences*

4.16 The Commission **recommends** that it should be a specific offence for a pawnbroker -

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<sup>20</sup> Western Australian *Parliamentary Debates* (1944) vol 113, 800.

<sup>21</sup> S 27 of the present Act is more limited in that it applies only to "carrying on business".

<sup>22</sup> Footnote 13 to ch 4.

- (a) To repledge any of the articles under pawn. This provision is desirable in order to ensure that clients are able to trace and redeem their goods.<sup>23</sup>
- (b) To fail to repay on demand the surplus proceeds of sale of an

- (a) Where a person who is required to be licensed as a pawnbroker, but is not so licensed, enters into a pawn contract the client is, subject to (d) below, entitled to the return of his goods without repayment of the amount of the loan or the interest or other charges. Where the client has paid an amount which he is not liable to pay, that amount is deemed to be a debt due by the pawnbroker to the client.<sup>28</sup>
- (b) Where a licensed pawnbroker fails to give the client a pawn ticket in the terms required by the Act the client is, subject to (d) below, not liable to pay the pawnbroker the amount of the interest or other charges but the transaction is not otherwise affected.
- (c) Except as provided in (a) and (b), the commission by a pawnbroker of an offence under the Act does not of itself affect the pawn contract.<sup>29</sup>
- (d) Where by virtue of (a) or (b) a client is not liable to pay the pawnbroker a sum of money, the Commercial Tribunal<sup>30</sup> may, on the application of the pawnbroker, increase the client's liability if it considers it just to do so.<sup>31</sup>

4.20 Recommendation (a) is generally in accordance with the position at common law as regards the rights of an unlicensed pawn-broker but there could be doubt whether the client has the right to sue for the return of his goods. Since the basic purpose of the legislation is to protect the public it would be wrong to allow the pawnbroker to keep them. Recommendation (b) probably places the pawnbroker in a better position than at common law since it gives him the right to recover the money he has lent the client. As indicated above,<sup>32</sup> the common law does not allow the court to make any equitable adjustment to a contract affected by illegality.

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<sup>28</sup> This proposal is similar to s 8 of the *Credit (Administration) Act 1984* but is adapted to a pawn contract.

<sup>29</sup> This is the effect of the *Pawnbrokers Act 1888-1975 (SA)*, s 51 and the *Credit Act 1984*, s 125.

<sup>30</sup> As mentioned in footnote 44 to ch 2 above the Chairman of the Tribunal may delegate prescribed matters to the Registrar. This is a further area which the Commission suggests be prescribed.

<sup>31</sup> Under s 170 of the *Credit Act 1984*, if the Commercial Tribunal has fixed a maximum rate of interest, the contract is void if the credit provider has overcharged the client. The debtor is entitled to receive back from the credit provider any money he has paid him. A similar provision would seem desirable if the Tribunal decides to exercise the power recommended by the Commission to control pawnbroking interest rates: para 3.6 above.

<sup>32</sup> Para 4.19.



Recommendation (d), which reflects the position in regard to credit providers,<sup>33</sup> would enable the Credit Tribunal to make a similar adjustment in the case of pawnbrokers.

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<sup>33</sup> *Credit Act 1984*, s 85.



however innocently, an avenue for the disposal of stolen property and in recovering stolen property and apprehending offenders.<sup>3</sup> As mentioned above,<sup>4</sup> the *Second-hand Dealers Act 1906-1965* gives the police power to inspect a second-hand dealer's premises.<sup>5</sup> Since all pawnbrokers are also licensed second-hand dealers it would be anomalous if the police could inspect goods pertaining to one part of the licensee's business but not to the other. It is also to be noted that pawnbroking legislation in other jurisdictions gives the police power to inspect premises and records.<sup>6</sup>

5.5 The Commission accordingly **recommends** that, subject to the safeguards listed below, appropriate inspection powers should be given the police, exercisable without warrant. The power should extend to all the books and records of the pawnbroking business, to all relevant premises and to all goods connected with the pawnbroking business wherever stored. The power should be -

- (a) used only in connection with the location of stolen property or the apprehension of offenders;
- (b) vested only in police officers nominated for that purpose by the Commissioner of Police;<sup>7</sup> and
- (c) exercisable only at reasonable hours.

In addition, the Commission **recommends** that a specific offence should be created in the new Pawnbrokers Act of disclosing information gained in the course of inspection except in the course of duty.<sup>8</sup>

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<sup>3</sup> This need is recognised by most pawnbrokers themselves. A number of them informed the Commission that they had no objection to police inspection of their premises or records. Indeed many arrests are made and much stolen property recovered because of information given to police by pawnbrokers. It is, of course, in the pawnbroker's interest to stamp out losses caused by the pawning of stolen property. Para 5.2.

<sup>4</sup> *Second-hand Dealers Act 1906-1965*, s 8.

<sup>5</sup> See for example, *Pawnbrokers Act 1888-1975* (SA), s 45(a) and *Pawnbrokers Act 1984* (Qld), s 50.

<sup>6</sup> The Proposals Paper suggested that authorisation should be confined to officers of the appropriate licensing squad. The Commissioner of Police submitted that this limitation was too restrictive to be practical. The Commission's aim in suggesting it was to ensure that authorisation did not become a meaningless formality. The Commission now considers that the nomination of police officers should be left to the discretion of the Commissioner of Police.

<sup>7</sup> A provision already exists in s 56 of the *Credit (Administration) Act 1984* in relation to the Commissioner for Consumer Affairs. The effect of the Commission's recommendation in para 2.20 above is that a similar provision would be included in the new *Pawnbrokers Act*.

5.6 The Council for Civil Liberties and an individual pawnbroker submitted that,

## 2. PAWNBROKER 'S DUTY TO INFORM POLICE

5.8 The existing Act provides that if a pawnbroker refuses to redeliver a pawned article because he has previously been notified by the real owner that the pawn ticket has been lost or fraudulently taken from him, or has been informed by some credible person that such articles have been stolen, he is required immediately to inform a justice of the peace or some constable of the refusal and the grounds thereof and to name or describe the person concerned.<sup>11</sup> The Commission considers that there should continue to be an obligation on the pawnbroker to notify the appropriate authority where he refuses to deliver the article to the holder of the ticket and **recommends** that it be carried forward into the new legislation, save that the pawner to nThe existing Act provides that iThe e3

section 49 of the *Police Act 1892-1985*.<sup>13</sup> The Commission further **recommends** that the part of section 24 of the *Pawnbrokers Act* which creates the offences referred to in the previous paragraph should be repealed, leaving the matter to be dealt with under the appropriate provisions of the

differences of opinion are reported to have arisen in the nineteenth century in England under the corresponding provisions there.<sup>19</sup>

5.13 In practice, in Western Australia use of this statutory procedure is rare. The typical case involves simple theft. The police on discovering goods are stolen arrange for them to be returned to the rightful owner. There is much to be said in favour of that practice. It may ensure that pawnbrokers are careful as to the goods they take in pawn, thus helping to restrict the distribution of stolen property. The Commission accordingly **recommends** that section 23 be brought forward unchanged into the new legislation except that, for the sake of consistency, the time within which a pawnbroker can bring an action under the section should be extended from three months to six months, as in the *Police Act 1892-1985*.<sup>20</sup>

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<sup>19</sup> C L Attenborough, *The Law of Pawnbroking*, (1897) 110.

<sup>20</sup> S 72 of the *Police Act 1892-1985* contains a similar, but wider, provision. See also s 73 of the *Police Act 1892-1985*, and P W Nichols, *Police Offences of Western Australia*, (1979) 117-119.

## CHAPTER 6 MISCELLANEOUS

### 1. INTRODUCTION

6.1 This chapter discusses a number of miscellaneous matters which can be dealt with shortly.

### 2. WINDING UP OF A PAWNBROKING BUSINESS

6.2 Section 25 of the *Credit (Administration) Act 1984* permits the legal personal representative of a credit provider to obtain an interim credit provider's licence authorising him to carry on the business for a period of 180 days from the death of the licensee. The Commission's recommendation above,<sup>1</sup> that provisions similar to those in the *Credit (Administration) Act 1984* should be included in the new Pawnbrokers Act, would enable an application to be made to the Commercial Tribunal in similar circumstances.

6.3 The existing *Pawnbrokers Act* makes no provision for the winding up of a pawnbroker's business if the licence is cancelled or otherwise ceases to be in force for any reason, thus leaving it uncertain what step can be taken for the redemption of goods, their sale if unredeemed and the return of any surplus to the clients concerned. The Commission **recommends** the inclusion of a provision in the new Pawnbrokers Act giving the Commercial Tribunal power in such a case to make such orders as it thinks fit for these matters.<sup>2</sup>

### 3. REGULATION MAKING POWER

6.4 Appropriate regulation making power will be required as to the keeping of books or registers required for the purposes of the Act, the prescribing of forms and fees and penalties for any breach of the regulations. The Commission **recommends** accordingly.

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<sup>1</sup> Para 2.20.

<sup>2</sup> S 42 of the *Pawnbrokers Act 1984* (Qld) deals with the same problem, but the power it gives the court appears to be narrower.



#### **4. EVIDENTIARY AND MINOR CONSEQUENTIAL PROVISIONS**

6.5 The Proposals Paper drew attention to the need for the new Pawnbrokers Act to contain certain minor evidentiary and consequential provisions, such as transitional licensing arrangements and provisions as to the status of various documents and other methods of proof in legal proceedings. The *Credit (Administration) Act 1984* makes provision in this regard and the Commission's general recommendation above<sup>3</sup> would have the effect of including similar provisions in the new Pawnbrokers Act.

#### **5. OTHER MATTERS**

##### **(a) Proof of identity**

6.6 Some commentators suggested that a pawnbroker should be under a statutory obligation to require proof of a client's identity before accepting goods in pawn. At present the *Pawnbrokers Act* merely requires the pawnbroker to ask the client his name and place of

such services are to be included and the need to keep the notice up to date, would place an undue burden on pawnbrokers.

(c) **Illness, unemployment etc**

6.8 Another suggestion was that the Pawnbrokers Act should include a provision enabling a court or tribunal to grant relief to pawnbrokers' clients in case of unemployment, illness or other unexpected similar difficulties. However, in view of the short-term, small-scale, nature of the transactions involved the Commission considers that this is not practicable.

(d) **Harassment**

6.9 A commentator suggested that the new Pawnbrokers Act should contain express provisions forbidding harassment in cases of non-redemption or non-payment of deficiencies on sale. The Commission does not recommend any action in this regard since it has not had brought to its attention any cases where pawnbrokers in Western Australia have harassed clients.

(e) **Provisions in the Pawnbrokers Act which need not be brought forward into the new legislation**

6.10 There are a number of provisions in the present Act which will be overtaken by the Commission's recommendations and which therefore do not need to be brought forward into the new legislation. The Commission does not propose to set these out here as they will be obvious from earlier references in this report. However, there are also some other provisions in the present Act which are, in the Commission's view, either archaic or no longer necessary and should not be carried forward. They are as follows -

- (a) **Section 5:** That part of the section which requires publication in the *Government Gazette* of a list of licensed pawnbrokers would be unnecessary. A register will be kept by the Registrar of the Commercial Tribunal. <sup>5</sup>

- (b) **Section 20:** This section empowers any justice of the peace to compel a pawnbroker to produce his books, vouchers and other documents. Justices of the peace will no longer have any administrative control of pawnbrokers.
- (c) **Section 26:** Some of the offences prescribed in this section have already been considered by the Commission earlier in this report. The section also makes it an offence for a licensed pawnbroker to fail to produce his licence to a justice of the peace. Since this is a corollary of section 20 (see (b) above) it should not be carried forward. The section also provides that a fine incurred by a servant or agent of a pawnbroker may, at the discretion of the convicting justices, be enforced by distress and sale of the pawnbroker's goods. This is an archaic form of the concept of vicarious liability and should be repealed.
- (d) **Section 31:** The provisions of the Shortening Ordinance mentioned in this section are unnecessary as the matters are now dealt with in other, later, enactments.

## 6. SECOND-HAND DEALERS ACT 1906-1965

6.11 All pawnbrokers, as mentioned earlier, are currently also licensed second-hand dealers under the *Second-hand Dealers Act 1906-1965* which regulates certain matters involving that trade. Pawnbrokers legislation should be consistent with that Act in common areas. At present the two Acts differ in some such areas, including trading hours, the age of persons with whom the pawnbroker or second-hand dealer may contract. The Commission recommends that any proposed

*Second-hand Dealers Act 1906-1965* should take

## **CHAPTER 7 SUMMARY OF RECOMMENDATIONS**

### **CHAPTER 1 - INTRODUCTION**

The Commission **recommends** that the existing Pawnbrokers Act should be replaced with a new Act conforming to the recommendations in this report.

(paragraph 1.15)

### **CHAPTER 2 - LICENSING**

The Commission **recommends** that -

- (a) Pawnbrokers should continue to be subject to a system of licensing.

(paragraph 2.1)
  
- (b) Section 2 of the *Pawnbrokers Act*, which defines the activities subject to licensing, should be carried forward into the new legislation subject to the following amendments -
  - (i) The words "or security" at the end of the phrase "by way of pawn, pledge, or security" should be omitted from the section.

(paragraph 2.4)
  
  - (ii) Section 27A of the *Pawnbrokers Act* (as inserted by the *Pawnbrokers Act 0.276 -2tfo 8e8w T 0.0284 Tc 4.11*

- (d) The licensing of pawnbrokers should be transferred from Courts of Petty Sessions to the Commercial Tribunal.  
(paragraphs 2.13 to 2.16)
- (e) Except as provided in (f) below, licensing and associated provisions similar to those in the *Credit (Administration) Act 1984* should be included in the new Pawnbrokers Act.  
(paragraphs 2.17 to 2.20)
- (f) (i) Provision should be made in the new Pawnbrokers Act for a manager's licence, to be available only to natural persons.  
(paragraph 2.22)
- (ii) Each pawnbroking place of business should be required to be in the charge of a natural person who is the holder of either a pawnbroker's licence or a manager's licence.  
(paragraph 2.23)
- (iii) A pawnbroker should not be in breach of the requirement in (ii) above if the premises are not under the control of himself or the holder of a manager's licence for up to twenty-eight days, or such further time as the Commercial Tribunal allows.  
(paragraph 2.24)
- (iv) An applicant for a pawnbroker's licence should be required to specify in his application the place or places at which he proposes to conduct his pawnbroking business and the proposed arrangements for the control of the business at each such place.  
(paragraph 2.25)
- (v) Only one member of a pawnbroking partnership should be required to be licensed. However, all non-licensed partners should be required to be of good reputation and character.  
(paragraph 2.26)
- (vi) It should be a condition of the grant of a pawnbroker's licence that the applicant satisfy the Commercial Tribunal that he has made adequate arrangements for the safekeeping of the pawned articles in his possession.  
(paragraphs 2.27 and 2.28)

- (vii) Pawnbrokers should not be able to contract out of their common law liability for loss of or damage to pawned articles.

(paragraph 2.28)

- (g) Pawnbrokers should not be required to take out a bond or subscribe to a fidelity fund at this stage.

(paragraph 2.31)

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### **CHAPTER 3 - REGULATION OF RELATIONSHIP BETWEEN PAWNBROKER AND CLIENT**

The Commission **recommends** that -

- (a) The Commercial Tribunal should be empowered by the new Pawnbrokers Act to set maximum interest rates in respect of pawnbroking transactions if requested to do so or if it considers it appropriate, and after due inquiry.

(paragraphs 3.6 and 3.7)

- (b) The Commercial Tribunal should be empowered to re-open a pawnbroking transaction in terms similar to the power which it has in relation to contracts under the *Credit Act 1984*.

(paragraphs 3.8 and 3.9)

- (c) The existing provisions of the *Pawnbrokers Act* requiring that both the pawnbroker's book and the pawn ticket include "the rate of interest to be charged....by the week or month (as the case may be)" should be retained and, in addition, the book and ticket should set out -

- (i) the amount of the interest expressed in dollar terms clearly identified as interest only; and
- (ii) all other charges or fees deducted from the amount of the loan or otherwise payable. <sup>1</sup>

(paragraphs 3.10 and 3.11)

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<sup>1</sup> For requirements as to the information to be included on the pawn ticket, see (e) on page 57, (i) on page 58 and (a)(i) on page 59.

- (d) Unless a longer period is agreed upon, the minimum redemption period of any article taken in pawn should continue to be three months and any agreement for the forfeiture of an article before the expiration of that period should continue to be void.

(paragraphs 3.12 and 3.13)

- (e) A statement should be included on the pawn ticket drawing clients' attention to the pawnbroker's statutory obligation to keep the articles for a minimum of three months before sale and that they can be redeemed until sale. If the pawnbroker has agreed on a longer period that period should be specified instead.

(paragraphs 3.14 and 3.15)

- (f) The new Pawnbrokers Act should not lay down any requirement as to the manner of sale of unredeemed articles. Instead, following the *Credit Act 1984*, pawnbrokers should be made subject to an express statutory duty to exercise their power of sale -

- (i) so as to receive the best price reasonably obtainable; and
- (ii) as soon after they become entitled to exercise it as is reasonable and practicable in the circumstances .

The onus of proof as to whether these duties have been complied with should, as in the *Credit Act 1984*, rest on the pawnbroker.

(paragraphs 3.16 to 3.20)

- (g) The existing prohibition on pawnbrokers purchasing their unredeemed pledges, whether sale is by private treaty or by public auction, should be continued in the new Pawnbrokers Act.

(paragraph 3.21)

- (h) A provision should be included in the new Pawnbrokers Act confirming that clients are entitled to any surplus upon sale of their unredeemed pledges after deducting the reasonable expenses of the sale. The surplus should be deemed to be a debt due from the pawnbroker to the client.

(paragraphs 3.22 to 3.25)

- (i) (i) Pawnbrokers should be required to include on the pawn ticket a statement as to the client's rights as regards the surplus.

(ii) Unless the client has otherwise requested in writing, pawnbrokers should be required to notify the client in writing at his last known address of the amount of any surplus amounting to twenty-five dollars or more within fourteen days of the sale. The notification should also inform the client that he is entitled to collect the surplus from the pawnbroker at his business address or otherwise as the parties agree.

(iii) Any breach of these requirements should be an offence.

(paragraph 3.25)

(j) As soon as practicable after the sale the pawnbroker should be required to -

(i) calculate the reasonable expenses of the sale and the surplus (if any) due to the client; and

(ii) enter details of those expenses and of the surplus into the appropriate book.

(paragraph 3.26)

(k) The right of a pawnbroker to sue a client in event of a shortfall on the realisation of unredeemed articles should be left to the common law.

(paragraph 3.27)

(l) There should be no provision in the new Pawnbrokers Act to allow unredeemed articles on which small amounts have been lent to become the property of the pawnbroker.

(paragraph 3.28)

(m) A purchaser of an unredeemed article from a pawnbroker should continue to obtain only such title thereto as is provided for at common law.

(paragraph 3.29)

(n) The jurisdiction of Small Claims Tribunals to hear claims brought by pawnbrokers' clients arising out of the Pawnbrokers Act should be made explicit.

(paragraph 3.30)







- (l) The maximum penalties should be increased to an appropriate amount having regard to penalties in recent comparable legislation.

(paragraph 4.18)

- (m) The new Act should spell out (in terms recommended by the Commission) the civil consequences as between pawnbroker and client of the commission of an offence by the pawnbroker.

(paragraphs 4.19 and 4.20)

## **CHAPTER 5 - POWERS OF THE POLICE AND OTHER AUTHORITIES**

The Commission **recommends** that -

- (d) The new Pawnbrokers Act should oblige the pawnbroker to notify the police where he refuses to deliver the pawned article to the holder of the pawn ticket.  
(paragraph 5.8)
- (e) The new Act should continue to grant pawnbrokers and their employees a power of arrest but only in terms similar to that contained in the relevant part of section 49 of the *Police Act 1892-1985*.  
(paragraphs 5.9 and 5.10)
- (f) That part of Section 24 of the *Pawnbrokers Act* which creates an offence of attempting to pawn or redeem a stolen article should be repealed, leaving the matter to be dealt with by the appropriate provisions of the *Police Act 1892-1985* or the *Criminal Code*.  
(paragraph 5.10)
- (g) Section 23 of the *Pawnbrokers Act*, which provides a summary procedure for the determination of a claim by the true owner for the return of articles which have been stolen from him, should be carried forward into the new legislation. However, the time within which a pawnbroker can bring an action for the return of the articles should be extended to six months.  
(paragraphs 5.11 to 5.13)

## CHAPTER 6 - MISCELLANEOUS

The Commission **recommends** that -

- (a) In addition to empowering the Commercial Tribunal to permit the legal personal representative to carry on the business for a certain time, the new Act should enable the Tribunal to make orders for the orderly winding up of a pawnbroking business where the licence is cancelled or otherwise ceases to be in full force for any reason. The power should enable orders to be made for the redemption of goods, their sale if unredeemed and the return of any surplus to the client concerned.  
(paragraphs 6.2 and 6.3)

- (b) The new Pawnbrokers Act should contain power to make regulations as to the keeping of books or registers required for the purposes of the Act, the prescribing of forms and fees and penalties for any breach of the regulations.

(paragraph 6.4)

- (c) The new Pawnbrokers Act should contain certain minor evidentiary and consequential provisions, such as transitional licensing arrangements and provisions as to the status of various documents and other methods of proof in legal proceedings.

(paragraph 6.5)

- (d) Any proposed changes to the *Second-hand Dealers Act 1906-1965* should take account of the Commission's recommendations in regard to pawnbrokers.

(paragraph 6.11)

Daryl R Williams  
Chairman

H H Jackson  
Member

P W Johnston  
Member

C W Ogilvie  
Member

J A Thomson  
Member

28 June 1985

## **APPENDIX I**

### **LIST OF THOSE WHO COMMENTED ON THE PROPOSALS PAPER <sup>1</sup>**

#### **Western Australia**

Association of Western Australian Pawnbrokers  
City of Fremantle Consumer Credit Legal and Welfare Service  
Commissioner of Police  
P Capelli (Crest Gold and Jewellery Pty Ltd)  
Council for Civil Liberties in Western Australia  
Country Women's Association of Western Australia (Inc)  
Department of Consumer Affairs  
Department for Community Services  
Jesus People Inc  
Mintax Consultants  
Royal Perth Hospital Social Work Department  
J D Sinclair  
Small Business Development Corporation  
C R Smith  
G J Steinberg  
Sussex Street Community Law Service  
D J Van Keppel  
R Zandvliet

#### **Other Jurisdictions**

Department of Consumer Affairs (New South Wales)  
Department of Territories and Local Government (ACT)  
Director of Consumer Affairs (Victoria)  
National Police Research Unit

**APPENDIX II**  
**CREDIT (ADMINISTRATION) ACT 1984**

....

Grant or  
refusal of  
licence

12. (1) Subject to subsections (2) and (4), the Tribunal shall grant an application for a licence -

- (a) except where a hearing is required to be held in respect of the application as provided by subsection (5) - as soon as practicable after the expiration of the period allowed by or under section 11(1) for the lodging of an objection to the granting of an application; or
- (b) if a hearing is, pursuant to subsection (5), required to be held with respect to the application - as soon as practicable after the conclusion of the hearing .

(2) An application for a licence made by a natural person shall be refused if it appears to the Tribunal that the person -

- (a) has not attained the age of 18 years;
- (b) is disqualified<sup>1</sup> from holding a licence;
- (c) is an undischarged bankrupt;
- (d) does not have, or is not likely to continue to have, sufficient financial resources to enable the person to carry on business pursuant to the authority that would be conferred by the licence if it were granted;
- (e) is not a person likely to carry on such a business honestly and fairly;
- (f) does not have sufficient expertise to enable the person to carry on such a business; or
- (g) is in any other way not a fit and proper person to be the holder of a licence.

(3) Without affecting the generality of subsection (2) (g), the Tribunal may, in determining whether an applicant is not a fit and proper person to be the holder of a licence, have regard (if such be the case) to the fact that the applicant -

- (a) has, during the period of 10 years that last preceded the making of the application, been convicted of, or served any part of a term of imprisonment for, an offence in Western Australia or elsewhere involving fraud or dishonesty;

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<sup>1</sup> That is, if he has previously been dealt with by the Commercial Tribunal for misconduct and disqualified.

- (b) was, at the time of the making of the application, bound in relation to such an offence by a recognizance; or
  - (c) had, at the time of the making of the application, a charge pending against the applicant in relation to such an offence.
- (4) An application for a licence made by a body corporate shall be refused if it appears to the Tribunal that -
- (a) a person concerned in the management of the body corporate has not attained the age of 18 years;
  - (b) the body corporate is disqualified from holding a licence;
  - (c) the body corporate does not have, or is not likely to continue to have, sufficient financial resources to enable it to carry on business pursuant to the authority that would be conferred by the licence if it were granted;
  - (d) the body corporate is not likely to carry on such a business honestly and fairly;
  - (e) the officers of the body corporate are such that it would not have sufficient expertise to enable it to carry on such a business;
  - (f) the reputation of the body corporate is such that it would not be a fit and proper person to be the holder of a licence;
  - (g) an officer of the body corporate is disqualified from being an officer of a body corporate that is the holder of a licence;
  - (h) a director of, or a person concerned in the management of, the body corporate is not of good reputation or character or in any other way would not be a fit and proper person to be the holder of a licence if the director or person were to apply for the licence personally; or
  - (i) any person other than an officer of the body corporate who, in the opinion of the Tribunal, appears to have control, or substantial control, of the body corporate is not of good reputation and character or is not likely to exercise that control honestly and fairly.
- (5) An application for a licence shall not be refused on a ground specified in subsection (2)(d) to (g) or (4)(c) to (i) unless the Tribunal is satisfied that the ground has been made out after it -
- (a) has informed the applicant of the ground and has held a hearing with respect to the application; and
  - (b)



to appear at the hearing and to make submissions and adduce