



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 81

**Review of
The Pawnbrokers Act 1860**

PROPOSALS PAPER

JANUARY 1985

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SUMMARY OF PROPOSALS

PREFACE

The Commission has been asked to review the *Pawnbrokers Act 1860-1984* having regard to the requirements of associated legislation.

The Commission emphasises that the proposals put forward in this paper are tentative only. They will be revised in the light of comments and views received in response to the paper.

Because the Government has requested that high priority be given to the reference the Commission requests that comments be sent to it by **28 February 1985**.

Unless advised to the contrary, the Commission will assume that comments received on the paper are not confidential and that commentators agree to the Commission quoting from or referring to their comments, in whole or part, and to their comments being attributed to them. The Commission emphasises, however, that any desire for confidentiality or anonymity will be respected.

The paper is based on material available to the Commission on 31 December 1984. The material can be studied at the Commission's office by anyone wishing to do so.

CHAPTER 1 - INTRODUCTION

(a) Terms of reference

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

1.2 Arising out of complaints of an abuse of pawnbroking practice² an amendment to the Act was recently passed by Parliament.³ In the course of the debate on the Bill, the Minister in charge of the amendment in the Legislative Council undertook that the Act would be reviewed as a whole in the light of modern conditions. The Government has undertaken within one year to introduce legislation to replace the existing Act. As a consequence the Attorney General gave the reference to the Commission and asked that it be treated as one of high priority.

(b) Preliminary submissions

1.3 The Commission wrote to a wide range of persons and organisations inviting them to make preliminary submissions. These included all licensed pawnbrokers in Western Australia and a wide variety of social welfare, consumer and legal interest groups. By means of advertisements in *The West Australian*, *The Australian*, and *Brief*,⁴ members of the public were invited to make preliminary submissions. A number of written and oral submissions were received in response. In addition, an officer of the Commission has had discussions with pawnbrokers, the Department of Consumer Affairs, the Police Department, the Corporate Affairs Office, community law centres, court officers and others. This paper is based on the information so far received. The Commission is grateful to all those who responded.

¹ Hereinafter cited as the "*Pawnbrokers Act*".

² Para 3.26 below.

³ *Pawnbrokers Amendment Act 1984*. This amendment will remain in force only for one year from the date of its coming into force (24 December 1984).

⁴ The journal of the Law Society of Western Australia.

(c) Background

1.4 Pawnbroking came to Western Australia from England. The history of pawnbroking in England has been long and diverse.⁵ At one time pawnbrokers represented a major source of consumer finance for the industrial working class. Today the pawnbroking industry is a very minor source of finance both in Australia and England.

1.5 Nevertheless, while long a trade in decline, the number of licences in Western Australia has increased from about three seven years ago to a present total of twenty-one. One pawnbroker estimates that pawnbroking turnover has doubled in Western Australia in the last year alone. The resurgence is no doubt at least partly due to unemployment and the numbers of persons dependent on social security benefits. Those affected may need money in emergencies. If other sources of finance are unavailable resort can be had to pawning some of their possessions. It would, however, be a distortion to regard pawnbrokers' clients as consisting only of those in necessitous circumstances. People may require cash for a variety of reasons and offer jewellery, electrical goods, tools of trade, musical instruments and so on as security for the loan.⁶

1.6 All pawnbrokers in Western Australia are also licensed as second-hand dealers and some also hold other licences, for example as auctioneers, gun dealers, and motor vehicle dealers. These diverse businesses are normally carried on under the one roof.⁷ Indeed pawnbroking is often a subsidiary development of an earlier and larger business such as second-hand dealing or auctioneering.

⁵ 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) published in 1971 (Cmnd 4596 Vol 1, paras 2.4.10-2.4.14).

⁶ For example, some clients are tradesmen or small traders with cash flow problems. Others use pawnbrokers to finance gambling.

⁷ The present requirement for separate applications for certain occupational licences could perhaps be avoided or modified consequent upon the enactment of the *Commercial Tribunal Act 1984* which provides for the establishment of a Commercial Tribunal to act as the licensing body in respect of a range of occupations. The full jurisdiction of the Tribunal is yet to be determined.

(d) The Commission's approach

(i) Basic objective

1.7 It is generally in a pawnbroker's own interest (as with any other commercial activity) to carry on his business with fairness and integrity, and to ensure that his clients are satisfied in their dealings with him. The question can accordingly be asked whether pawnbroking should continue to be regulated by special legislation or whether it is sufficient to rely on the general law. It is to be noted that pawnbroking is regulated in all Australian jurisdictions,⁸ in New Zealand⁹ and in the United Kingdom.¹⁰

1.8 The Pawnbrokers Acts in these jurisdictions, as in Western Australia, serve two main functions -

- (a) the licensing of pawnbrokers and the regulation of certain aspects of their relationship with their clients;
- (b) the protection of the public generally against the possibility of a pawnbroker's business becoming, however innocently, an avenue for the disposal of stolen property.

The Commission considers that these are legitimate functions and that regulation should continue.

As to (a): Many clients of pawnbrokers are from vulnerable groups often in urgent need of money. Complaints to the Department of Consumer Affairs suggest that there have recently been some instances of misleading and oppressive conduct made easier,

⁸ *Pawnbrokers Act 1860-1984* (WA)
Pawnbrokers Act 1958-1983 (Vic)
Pawnbrokers Act 1888-1975 (SA)
Pawnbrokers Act 1902-1982 (NSW)
Pawnbrokers Act 1849-1965 (Tas)
Pawnbrokers Act 1980-1983 (NT)
Pawnbrokers Act 1902-1926 (ACT).
Queensland revised its pawnbroking legislation as recently as last year: see the *Pawnbrokers Act 1984* (Qld).

⁹ *Pawnbrokers Act 1908-1981* (NZ).

¹⁰ The *Pawnbrokers Act 1872-1960* (UK) is to be replaced by the *Consumer Credit Act 1974* (UK). The pawnbroking provisions of that Act are to come into force on 19 May 1985. The Crowther Report recommended that the regulation of pawnbrokers should continue.

the Commission suspects, by the lack of effective enforcement machinery and the absence of clearly expressed obligations and penalties.

The most appropriate general safeguard for ensuring that clients are dealt with fairly and honestly is to provide that only fit and proper persons are permitted to carry on pawnbroking. In addition, clear and precise requirements are needed to ensure that pawnbroking transactions are properly documented, and that the client's goods are safeguarded and returned to him on repayment of the loan. Since the goods are deposited only as security for the loan, sale of the goods upon the client's default should be so effected as to obtain a fair market price and any surplus refunded to the client.

As to (b): It is in the public interest that the police are given reasonable powers of entry onto a pawnbroker's premises, for the purpose of tracing stolen goods and obtaining information for the apprehension of the offenders.

1.9 The Commission accordingly proposes that pawnbroking should continue to be subject to a basic legislative framework to ensure fair dealing and the protection of clients and others such as victims of theft.

(ii) Limits of proposals

1.10 The basic aim of the proposals set out in this paper is to provide the minimum legislative controls necessary for these purposes.

The Commission has sought to avoid control for the sake of control and to resist any temptation to "overkill". Although, as indicated above, there is some evidence of oppressive conduct this seems restricted to a small proportion of those in the pawnbroking business. Few complaints have been made to the relevant legal aid, social welfare and consumer affairs authorities. Most of the Commission's proposals do no more than restate existing controls in a modern and more effective form. Indeed in some cases the Commission suggests that present controls should be dropped altogether. The important question of control of interest rates is dealt with in chapter 3 below.

(iii) Removal of archaic language

1.11 The present legislation is expressed in archaic language with inadequate penalties and also contains provisions which are now superseded by later legislation. **Whatever the substance of any changes the Act should be redrafted in contemporary language.**

CHAPTER 2 - LICENSING

2.1 The present Western Australian legislation was enacted in 1860 and has been little amended. Like the English legislation of the time, and as with the other Australian colonies, provision was made for licensing pawnbrokers. Drawing on contemporary legislation in Western Australia in respect of other occupations, and on more modern pawnbrokers legislation in other jurisdictions, the Commission makes the following tentative proposals.

(a) **Definition of pawnbroking.**

2.2 The present legislation defines a "pawnbroker" to include "every 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 whatsoever taken by such person by way of pawn, pledge or security".¹ **The Commission is concerned that the words "or security" might extend the ambit of the Act beyond the true category of pawnbroking and, following the Queensland *Pawnbrokers Act 1984*, proposes their deletion.**² Section 30 excludes from the operation of the Act "loans or advances made on any goods, chattels, live stock, wool, bonds, bills, title deeds, or other security by merchants, bankers, commission agents, brokers, or licensed auctioneers in the ordinary and *bona fide* course of mercantile or banking transactions". This provision does not appear to have caused difficulty in Western Australia or elsewhere and has recently been re-enacted in the Queensland *Pawnbrokers Act 1984*. **The Commission accordingly does not propose any change in the substance of section 30.**

(b) **The licensing process**

2.3 The present method of licensing is by application to a Court of Petty Sessions supported by recommendations by "five householders residing in the district". If granted, the licence operates only to the 31st December next 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 1902-1984*.

¹ S 2.

² However see paras 3.26-3.29 below for proposals for extension of the definition of pawnbroking to cover the use of certain other practices, sometimes deceptively, of the type the subject of the *Pawnbrokers Amendment Act 1984*.

2.4 The Commission proposes that -

- (i) Jurisdiction to license pawnbrokers be vested in the Commercial Tribunal created under the *Commercial Tribunal Act 1984* when that Tribunal is established.³ In the mean-time pawnbrokers should continue to be licensed by the nearest available Court of Petty Sessions.⁴
- (ii) There should continue to be a right of appeal from a decision to refuse a licence.⁵
- (iii) Provision should be made for the cancellation or suspension of pawnbrokers' licences. Provision should also be made for the imposition of alternative disciplinary penalties falling short of cancellation or suspension.⁶
- (iv) Unless cancelled or suspended, pawnbrokers' licences should operate from the date on which they are granted for an indefinite period, subject only to payment of any prescribed annual fee and filing of a prescribed statement.⁷
- (v) The existing requirement that a pawnbroker must take out separate licences for each place of business is unnecessary and should not be carried forward.⁸
- (vi) The applicant should be a person of the age of 18 years or more who in the opinion of the licensing body is a fit and proper person to hold a licence and

³ At present the cognate Act, the *Credit (Administration) Act 1984*, excludes pawnbrokers from the need to obtain a licence from the Commercial Tribunal as a "credit provider": see para 2.5 below.

⁴ In its Working Paper on the *Local Courts Act 1904-1982* and *Rules: Jurisdiction, Procedures and Administration* (Project No 16: Part I, 1983) and in its Discussion Paper on *Courts of Petty Sessions: Constitution, Powers and Procedure* (Project No 55 Part II, 1984) the Commission suggested the merger of Local Courts and Courts of Petty Sessions and creation of a single court with an Administrative Law Division to deal with administrative law matters presently vested in these separate courts. The creation of a Commercial Tribunal is an alternative way of dealing with some, but not all, of the existing administrative law functions of these courts.

⁵ Consideration should also be given to the question whether an appeal is to lie from a decision to grant a licence.

⁶ See, for example, the *Credit (Administration) Act 1984*, s 23.

⁷ Containing such up-to-date financial and personnel information of the type to be required of other credit providers by the *Credit (Administration) Act 1984* as is appropriate to pawnbrokers having regard to the size of their operations.

⁸ All the addresses of the business should be named in the licence and be required to be approved. Provision should be made for amendment or addition without undue difficulty.

who has financial and material resources available to him to carry on the business of pawnbroking.

- (vii) Provision should be made for inquiries to be made by or on behalf of the licensing body as to any objection to the granting of any licence, or in support of any application for the suspension or cancellation thereof.
- (viii) Pawnbroking should be open to firms and corporate bodies as well as to natural persons. Modern occupational licensing legislation in Western Australia provides that all the members of the firm or directors of the company, in each case including the persons or officers in *bona fide* control, must be of good character.⁹

2.5 The *Credit (Administration) Act 1984* provides similarly in respect of "credit providers". If pawnbrokers were brought under this legislation¹⁰, little adaptation would be required to enable the Commission's proposed licensing system to be conducted under it.¹¹

The Commission tentatively proposes that this be done.

2.6 **One additional licensing requirement** beyond those normally required of credit providers **is desirable** for pawnbrokers, **namely that the applicant satisfy the licensing body that he has made reasonable arrangements for the safekeeping of the pawned articles and their insurance** against fire, theft etc.

2.7 The Commission notes that in some occupational licensing legislation concerned with brokers and agents provision is made requiring the applicant to show that he understands the relevant law and to provide a bond or other security. However in light of the nature of pawnbroking, the relative simplicity of the law involved, the scale of transactions, the fact that

⁹ It is desirable to ensure that persons who would otherwise be unable to obtain a licence are not able to trade behind a corporate facade or behind the good reputation of another person. The present Act prohibits the lending of a licence: s 28.

¹⁰ At present pawnbrokers are excluded in that Act from the need to obtain a licence as a "credit provider": s 7(1)(f). Pawnbrokers could be brought under that Act by repealing that exclusion. If this is undesirable because of the need to keep credit legislation uniform throughout Australia, equivalent provisions to those in the *Credit (Administration) Act 1984* could be included in the new Pawnbrokers Act.

¹¹ Any necessary adaptations could be specified either in that Act or in the new Pawnbrokers Act. The Governor is given power by s 45 of the *Credit (Administration) Act 1984* to make exemptions from the licensing requirements of that Act. That power could be used in respect of pawnbrokers to exempt them from inappropriate and unnecessarily burdensome requirements such as the need to advertise applications for a licence.

unlike many other brokers¹² the pawnbroker does not hold money on behalf of others¹³, and the size and history of the industry in Western Australia, **the Commission is tentatively of the view that** such requirements are unnecessary.

¹² For example, finance brokers.

¹³ Except surplus proceeds from sale of unredeemed pledges.

CHAPTER 3 - REGULATION OF RELATIONSHIP BETWEEN PAWNBROKER AND CLIENT

3.1 A pawn has been described as a security where, by contract, a deposit of goods is made as security for a debt and a right to the property vests in the pawnbroker so far as is necessary to secure the debt. The common law provides rules as to the rights and obligations of parties to pawnbroking transactions.¹ In Western Australia, as elsewhere, pawnbroking transactions are therefore regulated by the common law except insofar as it has been varied by statute. This chapter deals with those areas of concern where practical experience suggests that the common law or existing statutory provisions require amendment or clarification or where submissions to the Commission have suggested reform. These relate to -

- (a) control of interest rates;
- (b) the consequences of failure to redeem pawned articles; and
- (c) the use of alternative legal devices to that of the traditional pawn.

Some of these, and other, matters would be dealt with by the *Credit Act 1984* in relation to pawnbrokers if pawnbroking transactions are not to be exempted from the operation of that Act.² The Commission understands however, following New South Wales and Victoria, that pawnbroking transactions will be exempted from the detailed control of that Act.³

(a) Should interest rates be controlled?

3.2 At present, there is no statutory regulation of the interest rates or other charges imposed by pawnbrokers. These rates and charges are left to agreement between the pawnbroker and his client.

¹ In part this is dealt with by the general law of bailment and in part by special rules governing pawn transactions. Pawn is sometimes known as pledge.

² Pawnbroking transactions clearly come within the definition of a "loan contract" within the *Credit Act 1984*, s 5.

³ S 19 provides that the Governor may exempt certain transactions from all or any of the provisions of that Act.

From information supplied to the Commission it appears that the interest rate currently charged can be as high as 30% per month but averages about 20% per month or part thereof.⁴ In justifying these rates, pawnbrokers point out that -

- * Most loans are for small amounts (averaging say \$20-100) for short periods (mostly about 1-4 weeks). The unit cost to the pawnbroker of making the loan is accordingly high.⁵
- * The interest charges usually represent the total outlay by the customer (although in the case of large items, such as motor vehicles, a separate storage charge is sometimes imposed). This is in contrast to some other financial businesses where separate procurement, registration and valuation fees are charged, representing a significant addition to the total cost of the loan to the borrower.
- * Pawnbrokers must store the goods in a safe place during the term of the loan and in any case for not less than three months if not redeemed beforehand.
- * A substantial proportion (10-25%)⁶ of the articles pawned are not redeemed and when sold by the pawnbroker often do not realise enough to cover the amount of the loan and interest as well as the expenses of sale.
- * Some pawned articles are subsequently found to be stolen goods. These are returned by the police to the true owner without compensation to the pawnbroker.

3.3 Undoubtedly a pawnbroking loan is not a cheap source of finance. However the cost of the loan must be considered in context. Most loans are small in size and short in period and the cost of interest in dollar terms is quite small. **The Commission does not consider that there is sufficient justification for legislative controls on pawnbrokers' interest rates at this stage** for the following reasons -

⁴ One pawnbroker, long-established, dealing mainly in gold and jewellery and with a high redemption rate, charges 15% per month and argues that 30% per month is excessive.

⁵ However some loans are in excess of \$500, rising, it is said, even to \$8,000 in one case.

⁶ See para 3.7 below.

- (a) Any regulation would be complex since it would need to take into account a number of factors, including not only the amount and period of the loan, but also inspection, storage and insurance charges. These charges would need to be regulated as otherwise a pawnbroker could avoid the intent of the controls by inflating them.
- (b) In dollar terms, the size of the charges involved is usually low, even though as a percentage it may seem high.
- (c) If interest rates and other charges are controlled too stringently, pawnbrokers may desert that business for more lucrative avenues of investment. This could be to the detriment of members of the public who would lose that source of credit.
- (d) There is a sufficient number of pawnbrokers, at least in the Perth metropolitan area, for interest rates to be kept down because of competition between pawnbrokers.

3.4 **However, the *Credit Act 1984*⁷ will enable the Commercial Tribunal, should it be so minded, to control interest rates by fixing maximum rates in respect of any regulated loan contract or class of regulated contracts. This power can be exercised in the future if warranted in the circumstances then prevailing.**⁸

3.5 Apart from the question of controlling pawnbrokers' rates of interest and other charges generally, **there is a case for a body to be empowered to relieve a client from a particular pawn-broking transaction** if the particular circumstances it is -

- (a) unconscionable, harsh or oppressive; or
- (b) the interest rate or other charges are excessive, having regard to the risk, the value of the security, the time for repayment and other relevant circumstances.

⁷ S 170.

⁸ The Commission understands that pawnbroking transactions are generally to be exempted from the *Credit Act*. However the power given by s 170 to fix interest rates could be used in the case of pawnbrokers by an appropriate amendment. **This may require additional power to control other "charges" imposed as a condition of the loan.**

The Commercial Tribunal is to have this power in relation to loan contracts to which the *Credit Act 1984* applies.⁹ **That body should be give similar power to reopen any pawnbroking transaction including power to make consequential orders, such as an order for the repayment of money and the redelivery of goods .**

3.6 **The existing provisions of the Pawnbrokers Act¹⁰ 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. 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 subsequently payable.**

(b) Failure to redeem

3.7 In practice most people redeem their goods. Two long established pawnbrokers estimated that 85-90% of their clients redeem but the industry average may be closer to 75%. It was suggested that the more a pawnbroker lent on particular goods the less likely they were to be redeemed. It was also suggested that the redemption rate varied from area to area and with the type of goods involved. Research by the Commission has disclosed a misconception within the pawnbroking industry as to the legal consequences of failure to redeem.¹¹

- (i) Period of redemption

3.8 The *Pawnbrokers Act* at present provides¹² 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 in every case at least three months to redeem an article before the pawnbroker can lawfully exercise his power of sale. In addition, the client can redeem the

⁹ Ss 145-149.

¹⁰ Ss 12 and 15. See also para 4.2 below.

¹¹ See para 3.11 below.

¹² S 13.

article at any time before the sale takes place, on payment of the amount of the loan, and interest thereon as originally agreed plus the expenses (if any) to the date of payment.¹³

3.9 Some pawnbrokers, while accepting that a minimum period of redemption should be prescribed, consider that the period should be one month. These pawnbrokers argue that the present three months period increases their costs unduly since until the sale by auction the pawnbroker is deprived of his money. Some also argue that a shorter period is in clients' interests as their clients need to be kept to strict repayment deadlines if interest charges are to be met and the goods redeemed. **The Commission nevertheless is presently of the view that the three month period should remain.** Those people who have recourse to pawnbrokers could often have difficulty in meeting the one month deadline and it would be unfortunate if their goods were sold before they reappeared with the payment. The suggested provision¹⁴ enabling a pawnbroker to sell goods on which \$200 or less has been advanced by private treaty will ameliorate the pawnbroker's position since he will not, in respect of those goods, be forced to wait until an auction sale can be arranged after the three months redemption period.¹⁵ It is to be noted that a minimum period of three months is prescribed in Queensland¹⁶ and New South Wales.¹⁷ In the United Kingdom it is six months.¹⁸

3.10 At least one Perth pawnbroker writes to people once the redemption period has expired advising them of the fact. This gives them an opportunity to redeem. Whilst this is undoubtedly a desirable practice, **the Commission is not minded at present to make it a statutory obligation.**

(ii) Surplus on sale

3.11 Section 13 of the *Pawnbrokers Act* provides that after the period of redemption has expired "every such article shall be deemed forfeited", and may be sold. Some pawnbrokers apparently consider that this means that the article becomes the property of the pawnbroker¹⁹

¹³ S 14. This provision should be carried forward into new legislation and apply not only to sales by public auction but to sales by private treaty as hereinafter proposed.

¹⁴ Para 3.22 below.

¹⁵ The arranging of an auction takes some time, because of advertising, the need for an adequate number of lots, etc.

¹⁶ *Pawnbrokers Act 1984* (Qld), s 34.

¹⁷ *Pawnbrokers Act 1902-1982* (NSW), s 13.

¹⁸ *Consumer Credit Act 1974* (UK), s 116.

¹⁹ This is a misconception, as an old English case, *Walter v Smith* (1822) 5 B & Ald 439, has made clear. It would make nonsense of the requirement that the article (if worth more than 50 cents) must be sold by

and that they may therefore retain any surplus proceeds. The Commission can see no justification for reversing the common law position so as to empower the pawnbroker to retain the surplus.²⁰

3.12 The Commission accordingly proposes, following Queensland,²¹ that the new legislation expressly require the pawnbroker to -

- (a) place the surplus proceeds of sale 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.**

3.13 It should also be provided that if the client makes no request within, say, one year of the date of the notification, the pawnbroker is to pay the surplus to the State Treasurer as unclaimed money.²²

- (iii) Method of sale of unredeemed goods

3.14 Items on which fifty cents or less have been advanced may be sold by private treaty.²³ This sum has remained unchanged in Western Australia since 1860. In fact some pawnbrokers sell privately items of small value on which amounts beyond fifty cents have been lent. The Commission proposes below²⁴ a substantial increase to this limit.

3.15 In some other Australian jurisdictions and in the United Kingdom unredeemed items on which less than a certain amount has been advanced become the property of the

auction. It seems clear that the Act's intention was not to alter the common law requirement that any surplus be paid to the client.

²⁰ See also para 3.15 below at which the Commission discusses a further possibility.

²¹ *Pawnbrokers Act 1984* (Qld), s 35(3).

²² It would then be dealt with pursuant to the *Unclaimed Moneys Act 1912-1947* (or any revised legislation enacted consequent, upon the Commission's report on *Unclaimed Money* (Project No 51, 1980)).

²³ The Act (s 14) does not specifically spell this out but the common law would so permit.

²⁴ Para 3.22.

pawnbroker who can dispose of them as he chooses.²⁵ On the pawnbroker electing to retain the goods the debt owed by the client is extinguished. It is possible that a client will borrow a small amount on an item of great value because that is the only item he has to pledge. Thus simply to allow the pawnbroker to acquire title to the property on the basis of the amount advanced may be to work an injustice. **The Commission accordingly does not propose that such a provision be adopted in Western Australia.**

3.16 Items on which amounts beyond fifty cents have been lent are required by the Act to be disposed of at public auction. A catalogue of all such articles and the time when they were respectively taken in pawn is to be advertised twice in a public newspaper at least four days before the proposed day of sale. In fact advertisements merely list generalised descriptions of the property to be auctioned although large items of particular value are sometimes specifically advertised.

3.17 Traditionally public auctions have been thought the best way of ensuring that a fair price is obtained for goods.

3.18 Pawnbrokers however criticise the existing auction system on the following grounds -

- (a) The sort of domestic goods which are the most often pawned have poor resale value and attract low prices compared with private sales made through a shop, because -
 - (i) public auctions do not attract sufficient members of the public to create a fair market;
 - (ii) a substantial proportion of those attending are second-hand dealers and other pawnbrokers, all of whom have a vested interest in keeping prices low;²⁶

²⁵ In the Northern Territory property on which \$40 or less has been advanced becomes the property of the pawnbroker: *Pawnbrokers Act 1980-1983* (NT), s 28(1). A similar provision exists in Queensland but the amount is \$10: *Pawnbrokers Act 1984* (Qld), s 34(3). In the United Kingdom the amount is £15: *Consumer Credit Act 1974* (UK), s 120.

²⁶ Some pawnbrokers apparently bid for their own stock either as a way of boosting the auction prices or simply to acquire stock themselves for their second-hand business, thus enabling them to take their profit out in a different form. This is unlawful: s 14. In South Australia pawnbrokers are allowed at auction to bid for their own stock: *Pawnbrokers Act 1888-1975*, s 19. **The Commission is not presently minded to recommend such a provision in Western Australia, but calls for comment.**

- (iii) with many consumer durables, such as television sets or cameras, potential purchasers at auction are unable to establish their true working condition.²⁷

- (b) Selling by auction is expensive as -
 - (i) the auctioneer's commission must be paid;²⁸
 - (ii) all the goods must be prepared for auction at the one time and transported to the venue beforehand for inspection by potential purchasers; and
 - (iii) unsold goods must be returned to the pawnbroker.²⁹

In addition to these criticisms it is argued that poor auction results have the effect of deterring pawnbrokers from lending anywhere near the real value of the goods. This is not in the interest of clients who could be lent greater amounts if the sale of unredeemed pledges resulted in higher sale prices.

3.19 It has been suggested that the combination of the three months redemption period referred to above³⁰ and the necessity to auction goods of low or doubtful value led some pawnbrokers to adopt a "purchase and option to repurchase" form of transaction instead of the traditional pawn. This was intended to permit quick and easy resale of goods but was made illegal by the 1984 amendment to the Act. This form of transaction is further discussed below.³¹ The Commission acknowledges the criticisms made of the existing auction system, but considers that these can be overcome in the case of more valuable items. The Commission remains of the view that for such items a properly advertised and conducted auction sale provides the best method of obtaining the true value of the goods.

3.20 The Commission agrees that the existing monetary limit of fifty cents provided by section 14 should be substantially increased. A figure of \$200 would now seem appropriate.

²⁷ Informal warranties may be offered by some pawnbrokers.

²⁸ Such charges can amount to approximately 15% of the sale price.

²⁹ The pawnbroker is apparently required by the Act to auction them again. In fact unless the goods are particularly valuable they will probably be disposed of privately.

³⁰ Para 3.8 above.

³¹ Para 3.26.

3.21 If public auction is to be made unnecessary for particular classes of transaction some other safeguards must be pursued to ensure that the private treaty sale is a fair one. In the United Kingdom if objection is made by the client to the sale price the onus is placed on the pawnbroker to prove that he used reasonable care to obtain the true market value. In the absence of such proof the true market value is substituted for the actual sale price in calculating the amount of any surplus due to the client, or the amount of any deficiency as the case may be.³²

3.22 **The Commission accordingly proposes that pawnbrokers should be allowed³³ to sell by private treaty goods on which \$200 or less has been advanced, subject to the adoption of safeguards of the United Kingdom type.** Thus only very valuable items will need to be auctioned and greater attention can accordingly be given to their condition at sale, and appropriate warranties offered. The relative expenses of sale will be less and as advertising will be more specific more interest by the public generated. A truer price should be obtained.

3.23 An ancillary issue is whether the auctioneer should be required to authenticate in the pawnbroker's books the prices for which goods have sold at auction by signing against each item. At present the pawnbroker simply writes the result in his books. In the absence of allegations of abuse **the Commission suggests that no such further obligation should be imposed.**

3.24 If sale does not return to the pawnbroker sufficient funds to meet his interest charges and costs, he may sue for the balance owing.³⁴ **The Act should include a declaratory provision to this effect.**³⁵

³² *Consumer Credit Act 1974 (UK)*, s 121.

³³ This provision would not, of course, override any other legislation governing the sale of particular goods such as firearms, liquor or motor vehicles.

³⁴ The pawn is merely security for the loan.

³⁵ It is rare for a pawnbroker to sue a client. Such claims could usually be made in a Local Court either using the ordinary procedure or in the Small Debts Division. Claims by clients might be made either in a Local Court or as has occurred in at least some cases in a Small Claims Tribunal although the jurisdiction of the Tribunal in such a matter may be doubtful. A Select Committee of the Legislative Assembly is presently considering the jurisdiction and operation of Small Claims Tribunals.

(iv) Title of purchasers upon sale

3.25 The general principle of law is that no-one can pass good title unless he himself has good title. For example, if the client who pawned the goods had stolen them from the true owner then the purchaser at the auction would not get good title. The Northern Territory Act provides³⁶ that the sale of a pawn is as valid and effectual as if the person selling the pawn had been at the time of sale the owner of the pawn, so that a purchaser obtains a good title to the goods whatever the title of the pawnbroker or his client. The true owner retains as against the pawnbroker and his client a claim for conversion of the property. It has been suggested that doubts about title may be one reason why sale of pawned items brings low prices³⁷ and that if purchasers were so protected sale prices might rise. However such a provision would defeat the claim of the true owner. **The Commission does not at present favour the Northern Territory approach.**

(c) Use of alternative legal devices

3.26 The *Pawnbrokers Amendment Act 1984* added the following section to the Pawnbrokers Act:

"27A. (1) A pawnbroker licensed under this Ordinance shall not buy an article from another person (in this section called "the seller") at a certain price (in this section called "the first price") and, having so bought the article, grant to the seller an option to purchase the article within a particular period at a price higher than the first price.

Penalty: \$5,000 or imprisonment for 3 months.

(2) This section shall cease to have effect on the expiration of 12 months calculated from the day on which it came into operation."

In explaining the amendment the Minister for Consumer Affairs said:

"The problem which this Bill seeks to remedy was brought to my attention earlier this year following an unsuccessful prosecution instituted by the police under the *Pawnbrokers Act*...

These proceedings indicated that [a pawnbroker] was avoiding the operation of the *Pawnbrokers Act* by purchasing goods which consumers had intended to pledge or

³⁶ *Pawnbrokers Act 1980-1983* (NT), s 31.

³⁷ Another is that purchasers do not know whether the goods work properly or are what they are claimed to be: see para 3.18 above.

pawn and then granting to them an option to repurchase those goods at a later time and at a far greater price than the price at which [the pawnbroker] had purchased them.

The court held that this was not a pawnbroking transaction, and that the obligations, little as they are under the *Pawnbrokers Act*, did not apply and the pawnbroker could dispose of the goods before the statutory limit of three months.

Consumers often did not know the nature or effect of the documentation they were signing, and most did not realise that what was happening was in fact a sale of goods. Certainly they did not intend to sell goods to the pawnbroker.

As well, this practice effectively disguised the rate of interest that was payable by the consumer in the event he repurchased the goods."³⁸

3.27 From information available to the Commission it seems that the device of purchasing the goods and granting an option back is an old one used in Western Australia and elsewhere many years ago, and that use of the practice in Western Australia in recent times may not have been limited to one firm only. Indeed it is said that its use is the consequence of a combination of the existing minimum three months redemption period provision and the existing requirements that unredeemed articles be sold at public auction.

3.28 Use of the device has been regulated differently in the United Kingdom and South Australia. Legislation there extends the Pawnbrokers Acts to persons using such a method of dealing. The United Kingdom Act provides³⁹ that:

"In order to prevent evasion of the provisions of this Act, the following persons shall be deemed to be persons carrying on the business of taking goods and chattels in pawn (that is to say), every person who keeps a shop for the purchase or sale of goods or chattels, or for taking in goods or chattels by way of security for money advanced thereon, and who purchases or receives or takes in goods or chattels, and pays or advances or lends thereon any sum of money not exceeding [fifty pounds] with or under an agreement or understanding expressed or implied or to be from the nature and character of the dealing reasonably inferred, that those goods or chattels may be afterwards redeemed or repurchased in any terms; and every such transaction, article, payment, advance, and loan shall be deemed a pawning, pledge, and loan respectively within this Act."

3.29 This approach seems preferable. The Western Australian amendment could easily be avoided. For example the option could be given to another person such as the client's spouse. Alternatively the dealing could be conducted not by the pawnbroker but by an associated company trading as a licensed second-hand dealer on the same premises and using the same

³⁸ Western Australian *Parliamentary Debates*, 15 August 1984, 762-763.

³⁹ *Pawnbrokers Act 1872-1960* (UK), s 6.

staff. In the client's eyes there may be no significant difference. The United Kingdom approach both avoids these loopholes and extends the protection of the Act to the client. The effect would be that no matter what the form of the agreement may be, the client would have three months in which to redeem the goods and the pawnbroker would be subject to the other provisions of the *Pawnbrokers Act* in respect of the transaction. **The Commission tentatively recommends replacement of the 1984 amendment by a provision along the lines of that of the United Kingdom**⁴⁰

3.30 There is a further matter which requires explanation. Reports indicate that pawnbrokers have also used the device of taking a caveat on clients' land and of having clients sign promissory notes. No doubt there are other possible devices. However persons using these devices would be credit providers within the *Credit (Administration) Act 1984* and therefore would require a licence as such.⁴¹

⁴⁰ Except that the money limit, of fifty pounds, should not be reproduced. It is the result of a different legislative background in which loans of more than fifty pounds are regulated not by the *Pawnbrokers Act* but by the *Moneylenders Act*.

⁴¹ They would not be carrying on business as pawnbrokers in respect of those transactions. They would therefore be subject to the relevant regulatory provisions governing credit providers. Until the *Credit (Administration) Act 1984* comes into force they would be subject to the *Moneylenders Act 1912-1982*.

CHAPTER 4 - GENERAL DUTIES OF PAWNBROKERS

4.1 The existing Act imposes a number of general duties upon licensed pawnbrokers and creates offences for breaches thereof. Other Australian pawnbroking legislation and other, more modern, Western Australian occupational licensing legislation provide similar, although more contemporary, standards.

(a) Requirements of the legislation in relation to the documentation of the pawn transaction

4.2 These requirements are as follows:

- (i) Upon taking an article in pawn, to 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: section 12.
- (ii) To number the entries made in his book consecutively, and to give to the client a duplicate¹ 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: section 15.

The pawnbrokers interviewed by the Commission did not make any charge for the duplicate, the cost of issuing it being covered by the interest charged on the loan.

- (iii) From time to time to "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": section 18.

¹ This is commonly known as a pawn ticket.

The records referred to in (i), (ii) and (iii) above are often inspected by the police whose main interest is looking for stolen property.

- (iv) To permit any person by or for whom an article is pawned to inspect the entry of sale relating to the article: section 19.

In practice exercise of this right is rare.

4.3 The above provisions appear to operate satisfactorily, and the Commission proposes no substantive change to them except that delivery of the duplicate (see (ii) above) should be made free of charge.

4.4 While the *Pawnbrokers Act* requires a pawnbroker to keep these records, it is, however, silent on the length of time for which they must be retained. **The Commission proposes that pawnbrokers be required to retain these records for six years from the date of redemption or sale**, that being the time within which a client could normally bring a claim against the pawnbroker in respect of the transaction.

(b) Rights of holders of pawn tickets

4.5 In two matters the existing Act provides statutory rights to the holders of pawn tickets:

- (i) 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 duplicate has been lost or fraudulently taken from him, or has been informed by some credible person that such articles have been stolen: section 16.
- (ii) Where a duplicate is lost or stolen the owner of an unredeemed article can, upon completing a prescribed declaration setting out the circumstances, obtain another copy: section 17.

Some pawnbrokers adhere to the procedure in (ii) particularly where there is some doubt in their minds. However, where the client is known to the pawnbroker sometimes the goods are

permitted to be redeemed without a duplicate. In such a case the pawnbroker simply notes his records accordingly.

4.6 These provisions in substance seem to be acceptable although the Commission proposes that they be expressed in modern terms.

(c) Other general requirements

Pawnbroker's sign:

4.7 The existing Act requires a licensed pawnbroker to "have his name at length painted in legible characters at least 50 millimetres deep, with the words 'Licensed Pawnbroker' constantly and permanently remaining and plainly to be seen and read over the door" of the pawnbroking premises: section 8.² The New South Wales Act³ requires only that these words be "kept displayed in a conspicuous position on the outside" of the licensed premises. **The Commission proposes adoption of the New South Wales provision.**

Hours and days of trading:

4.8 The Act obliges licensed pawnbrokers

- (i) Not to accept pawns before 8 am or after 9 pm (except on Saturdays and the evenings before Good Friday and Christmas Day when that time is extended to 11 pm): section 21.
- (ii) Not to trade on Sundays, Christmas Day or Good Friday: section 22.

The Commission proposes that these provisions should be repealed leaving the question of permitted trading hours to be governed by the appropriate legislation concerned with trading hours generally.

² The Act also makes it an offence punishable by a fine of up to \$20 for any person not holding a pawnbroker's licence to "keep up any sign, writing, painting or other mark on or near to his house, shop or premises which may imply or give reasonable cause to believe that such shop, house or premises is or are the house, shop or premises of a licensed pawnbroker": s 9.

³ *Pawnbrokers Act 1902-1982* (NSW), s 11.

(d) Offences

4.9 Breaches of the duties imposed by the provisions referred to in (a) and (c) above are punishable as offences under section 26.⁴

4.10 In addition section 26 creates two further offences:

- (i) It is an offence for a licensed pawnbroker to purchase or take in pledge any article from a person under the age of 18 years, or apparently intoxicated.

The provision should be clarified to make it clear that the prohibition extends to persons under the influence of drugs.

- (ii) When the sum agreed to be advanced on any pledge is under twenty dollars it is an offence 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".

Whatever the social origins of the offence of making loans in "anything but money" **the Commission can see no significant reason for its continuance and proposed its repeal.**

(e) New offences and penalty

4.11 **Further offence provisions may be necessary**, depending upon the nature and scope of any further duties imposed on pawnbrokers by new legislation. **Such offences might cover the misappropriation by pawnbrokers of the surplus proceeds of sale of unredeemed pawn⁵ or the wrongful sale of a pawn within the redemption period.⁶**

⁴ The archaic and confusing form of s 26 seems to have misled some pawnbrokers and others as to its precise effect, especially as to rights of inspection of pawnbrokers' books. The statement of offences in modern form in the new legislation will avoid this confusion.

⁵ See paras 3.11-3.13 above. In New South Wales both failure upon demand to repay the surplus proceeds of an unredeemed pawn after sale and failure to permit the holder of a pawn ticket to inspect the appropriate records are punishable as offences.

⁶ See para 3.8 above.

4.12 **It should also be an offence for a licensed pawnbroker to repledge his interest in any of the pawned articles.** Such an express prohibition is desirable to ensure that clients are able to trace and redeem their goods.

4.13 **Offence provisions should be so drafted as to enable conviction of each relevant party or officer where the pawnbroker is a corporation or firm.** This will facilitate the vetting of applications for licences and help prevent the real offenders from re-establishing themselves under a new name or by use of a nominee licence-holder.

4.14 **The maxim penalties for offences under the Act (present ranging from \$20 to \$50) should be increased to, say, \$500.**⁷

(f) **Consequences of illegality**

4.15 **The consequence as between pawnbroker and client of any breach of the legislation by the pawnbroker should be spelled out. It may be desirable that where transactions are in breach of the legislation the pawnbroker should be prevented from recovering interest. In no case should clients be prevented from redeeming their goods.**⁸

(g) **Second-hand Dealers Act 1906-1965**

4.16 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.⁹ Pawnbrokers legislation should be consistent with that Act in common areas. At present the two Acts differ in some such areas, including trading hours. That Act is presently being reviewed by a special government Working Party. The report is not yet to hand. That review and **any subsequent amendments to the *Second-hand Dealers Act* should therefore be considered when the *Pawnbrokers Act* is being redrafted.**

⁷ The maximum penalty for most offences under the *Credit Act 1984* is \$1,000 or \$2,000.

⁸ This general approach is consistent with that taken in the *Credit Act 1984*. See, for example, s 42. A recent article discussing the general subject is L Szekely, *Occupational Licensing and the Enforceability of Contracts*, (1984) 12 *Aust. Business L. Rev.* 408. The author points out that the New South Wales *Pawnbrokers Act 1902-1982* (like the Western Australian Act) is presently silent on the subject. The author suggests provisions which would bar unlicensed persons from enforcing agreements by legal proceedings but would otherwise not affect civil remedies available to the parties. The Commission at present prefers the approach of the *Credit Act 1984*.

⁹ There are approximately 1,400 licensed second-hand dealers but only 21 licensed pawnbrokers.

CHAPTER 5 - POWERS OF THE POLICE AND OF JUSTICES

(a) Powers of inspection

5.1 The relationship between police and other regulatory authorities on the one hand and pawnbrokers and their businesses on the other must be considered in a number of contexts.

First, investigatory functions associated with the licensing and general regulation of pawnbroking are at present performed by police officers. Unlike more modern legislation, the *Pawnbrokers Act* creates no administrative machinery to ensure day to day compliance with the legislation or for regular inspection of pawnbrokers' practices.¹ **These regulatory functions should be vested in the Commissioner of Consumer Affairs, leaving police only to provide details of such matters as the criminal history records of applicants.** This is a common approach now used.²

Secondly, pawnbrokers may be of interest to the police either in connection with the recovery of stolen property or to ensure that pawnbrokers are not receivers and dealers in stolen property. Unlike the *Second-hand Dealers Act*³ there is no provision in the *Pawnbrokers Act* which specifically confers upon the police power to inspect a pawnbroker's books or the goods pawned.⁴ Police can, of course, obtain a search warrant if they believe stolen goods are on particular premises. However, police, in practice, inspect pawnbrokers' premises on a regular basis without warrant. **Authority to do so seems desirable. Such a power of inspection should extend to all the books and records of the pawnbroking business, to all relevant premises and to all pawned goods wherever stored.** This power should be used only in connection with the location of stolen property or the apprehension of offenders and be subject to appropriate safeguards. For example, the power should vest only in authorised officers⁵ and be exercisable only within normal trading hours.

¹ The existing provisions predate modern policing and regulatory machinery.

² See the *Credit (Administration) Act 1984*. If pawnbrokers were brought under this Act (as the Commission has proposed in para 2.5 above) the Commissioner's powers would automatically apply to them.

³ S 8.

⁴ However any justice of the peace may compel a pawnbroker to produce before him any books or records required to be kept under the Act: s 20.

⁵ That is, officers of the appropriate licensing squad given authority by the Commissioner for Police.

5.2 It is important that those given power to inspect pawnbroking records are placed under an obligation to maintain confidentiality in relation to them. **The Commission accordingly proposes that an express provision be added to the *Pawnbrokers Act* creating an offence of disclosure of information gained in the course of such inspection except in the course of duty.**

(b) Pawnbrokers' duty to inform police

5.3 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 duplicate 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: section 16. **This provision should be continued but expressed in modern form.**

(c) Pawnbrokers' powers of arrest

5.4 Ancillary to the duty described in the previous paragraph, the existing Act empowers a pawnbroker to arrest any person whom he suspects of trying to pawn stolen goods: section 24. The pawnbroker must convey the arrested person to a constable who must bring the person before a justice. The justice has power to commit the arrested person into custody pending investigation as to whether charges should be brought. The section goes on to create an offence of attempting to pawn a stolen article punishable by three months imprisonment.

5.5 The granting of powers of arrest to diverse persons was common in colonial times but there is no longer the same need. **The Commission proposes that section 24 not be carried forward to the new legislation.** The general criminal law, including the powers of arrest by police officers and ordinary citizens, should be sufficient.⁶

⁶ See for example the *Criminal Code*. S 569 empowers arrest of a person offering stolen property for pawn. S 371(2)(c) defines stealing to include taking goods with intent to pawn them and also fraudulently converting goods for example by pawning them. S 518(2)(d) also makes it an offence to pawn goods obtained on credit in certain circumstances.

(d) Power of Justices to order return of pawned goods

5.6 The Act also contains a machinery provision to deal with cases where goods which have been stolen or unlawfully obtained have been pawned. The provision also covers cases where goods lawfully obtained are unlawfully pawned.⁷ A justice of the peace may issue a summons or warrant for the appearance of the pawnbroker before two justices⁸ and for production of the goods. The justices may order the goods to be delivered up to the owner either with or without payment and at such time as they think fit: section 23. This provides a summary procedure for speedy determination of claims by an owner for return of the goods. However this is not intended as a means for ultimately determining questions of title. A proviso to the section permits the pawnbroker within a further three months to take proceedings in a civil court for return of the goods.⁹

5.7 Some pawnbrokers have argued that in such circumstances as those contemplated by the section they should be entitled to retain the goods against the true owner until the pawn fees have been paid. One suggested that this would help safeguard pawnbrokers against the temptation to dispose of property they suspect is stolen or otherwise wrongfully pawned. In New South Wales some magistrates under corresponding provisions have recently ordered owners to pay the amount of the pawn, and sometimes the interest, before the owners can recover the goods. However, the orders made in New South Wales have been criticised as being inconsistent with the common law and as unfair to the true owner. Similar differences of opinion are reported to have arisen in the nineteenth century in England under the corresponding provisions there.

5.8 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. Such a provision has existed in Western Australia, England and New South Wales for many years and a similar although wider provision is found in section 72 of the *Police Act 1892-1984*. As at present advised **the Commission proposes that**

⁷ By, for example, a factor under the *Factors Act 1842* (Eng), 5 and 6 Vict c 39, ss 1, 3 (adopted in Western Australia by 7 Vict No. 13 (1844)).

⁸ That is, a Court of Petty Sessions.

⁹ See for example, *Leicester & Co v. Cherryman* [1907] 2 K.B. 101.

it be brought forward to the new legislation. The provision in the *Pawnbrokers Act* should be in the same substantive terms as the parallel provision in the *Police Act*.

CHAPTER 6 - MISCELLANEOUS

6.1 A number of other matters warrant mention as follows:

(a) Orderly winding up of pawnbroking business

6.2 There is no provision in the existing Act in relation to the winding up of a pawnbroking business on the cancellation of a licence or on the death or other disability of a pawnbroker. In Queensland, if renewal of a licence is refused or if a licence ceases to be in force for any reason, a Magistrates Court may, on the application of any person, make such order with respect to the disposal of articles taken in pawn as the Court thinks fit.¹ **The Commission proposes the adoption of a similar provision in Western Australia.**

6.3 Similarly it seems desirable to make provision to ensure on the death of a pawnbroker an orderly continuance of the pawn relationship. Such a provision is found in section 25 of the *Credit (Administration) Act 1984* which 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. *A similar approach should be adopted in the case of a deceased pawnbroker.*²

(b) Regulation making power

6.4 The *Pawnbrokers Act* is unusual in that it does not contain any power to make regulations in relation to various minor matters or matters which may require change from time to time.³ In Queensland for example the Governor in Council may make regulations with respect to such matters as the keeping of any books or registers required for the purposes of the Act, the prescribing of forms and fees, the terms and conditions to which any licence may be subjected, and penalties for any breach of the regulations.⁴ **The Commission proposes that a similar regulation making power be included in new legislation in Western Australia.**

¹ *Pawnbrokers Act 1984* (Qld), s 42.

² If pawnbrokers were brought under the *Credit (Administration) Act 1984*, s 25 of that Act would of course automatically apply to them.

³ At present regulations are only authorised in relation to fees under s 3.

⁴ *Pawnbrokers Act 1984* (Qld), s 66.

(c) **Evidentiary and minor consequential provisions**

6.5 **Any new pawnbrokers legislation 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. Such provisions are found, for example, in New South Wales and Queensland and in the *Credit (Administration) Act 1984*. The Commission regards such provisions as non-contentious and therefore does not discuss them in detail in this paper.

SUMMARY OF PROPOSALS

The Commission's tentative proposals for the regulation of the pawnbroking industry are summarised as follows -

General

1. Pawnbrokers should continue to be subject to legislative requirements (but in modern form) to ensure fair dealing and the protection of clients and others such as victims of theft.

(paragraphs 1.9 and 1.11)

Licensing

2. The basis of legislative protection should continue to be a scheme of licensing. The Commission does not propose any major change in the substance of the provisions defining pawnbroking except that in one respect an extended meaning should be given to the term to prevent avoidance of the provisions of the Act.

(paragraphs 2.2 and 3.26 to 3.29)

3. The Commission proposes that -

- (i) Jurisdiction to license pawnbrokers be vested in the Commercial Tribunal created under the *Commercial Tribunal Act 1984* when that Tribunal is established. In the mean-time pawnbrokers should continue to be licensed by the nearest available Court of Petty Sessions.
- (ii) There should continue to be a right of appeal from a decision to refuse a licence.
- (iii) Provision should be made for the cancellation or suspension of pawnbrokers' licences. Provision should also be made for the imposition of alternative disciplinary penalties falling short of cancellation or suspension.

- (iv) Unless cancelled or suspended, pawnbrokers' licenses should operate from the date on which they are granted for an indefinite period, subject only to payment of any prescribed annual fee and filing of any prescribed statement of up-to-date financial and personnel information.
- (v) The existing requirement that a pawnbroker must take out separate licences for each place of business is unnecessary and should not be carried forward. However all the addresses of the business should be named in the license and be required to be approved.
- (vi) The applicant should be a person of the age of 18 years or more who in the opinion of the licensing body is a fit and proper person to hold a licence and who has financial and material resources available to him to carry on the business of pawnbroking.
- (vii) Provision should be made for inquiries to be made by or on behalf of the licensing body as to any objection to the granting of any licence, or in support of any application for the suspension or cancellation thereof.
- (viii) Pawnbroking should be open to firms and corporate bodies as well as to natural persons. All the members of the firm or directors of the company, in each case including the persons or officers in bona fide control, must be of good character.

(paragraph 2.4)

The *Credit (Administration) Act 1984* provides a similar scheme of licensing in respect of “credit providers”. With little adaptation pawnbrokers could be licensed under the scheme provided by that Act, or by equivalent provisions in the *Pawnbrokers Act*, and the Commission so proposes.

(paragraph 2.5)

4. Except that the applicant should be required to satisfy the Tribunal that he has made reasonable arrangements for the safekeeping of the pawned articles and their insurance against fire, theft etc., additional requirements are unnecessary. The Commission is

therefore provisionally of the view that it is unnecessary to require the applicant to show for example that he understands the relevant law, or to provide a bond or other security.

(paragraphs 2.6 to 2.7)

Interest rates

5. The Commission considers that there is not sufficient justification for legislative controls on pawnbrokers' interest rates at this stage.

However, the *Credit Act 1984* will enable the Commercial Tribunal, should it be so minded, to control interest rates by fixing maximum rates in respect of any regulated loan contract or class of such contracts. This power could be exercised in respect of pawnbroking loans in the future if warranted in the circumstances then prevailing. This may require special provision in respect of pawnbrokers' charges, other than interest.

(paragraphs 3.2 to 3.4)

Oppressive transactions

6. There is a case for a body to be empowered to relieve a client from a particular pawnbroking transaction if in the particular circumstances it is unconscionable, harsh or oppressive, or the interest rate or other charges are excessive, having regard to the risk, the value of the security, the time for repayment and other relevant circumstances.

The Commercial Tribunal, which has been given this power in relation to loan contracts to which the *Credit Act 1984* applies, should be given wide power to re-open any pawnbroking transaction including power to make consequential orders, such as an order for the repayment of money and the redelivery of goods.

(paragraph 3.5)

Documentation of transactions

7. 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. 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 subsequently payable.

(paragraph 3.6)

Unredeemed goods

8. The present minimum period for redemption, three months, should remain.

(paragraph 3.9)

9. Pawnbrokers should not be statutorily obliged to inform clients in writing of the expiry of the redemption period.

(paragraph 3.10)

10. 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.

(paragraphs 3.12 to 3.13)

11. Pawnbrokers should continue to be prohibited from bidding at auction for their own stock.

(paragraph 3.18)

12. The auctioneer should not be required by statute to authenticate in the pawnbroker's books the prices for which goods have sold at auction by signing against each item.

(paragraph 3.23)

13. Pawnbrokers should be allowed to sell by private treaty goods on which \$200 or less has been advanced, subject to the adoption of provisions requiring the pawnbroker on request to prove that he has used reasonable care to obtain the true market value.

The Commission does not favour the provision existing in some other jurisdictions by which unredeemed goods on which small amounts have been lent vest, by forfeiture, in the pawnbroker.

(paragraphs 3.15 and 3.22)

14. The Act should include a declaratory provision expressing the existing common law rule that if there is a shortfall on the realisation of pawned goods the pawnbroker can sue the client.

(paragraph 3.24)

15. The Commission does not favour the Northern Territory provision that a purchaser of an unredeemed article from a pawnbroker obtains valid title thereto whatever the title of the original client.

(paragraph 3.25)

Use of devices to avoid Pawnbrokers Act

16. Upon its expiration, the 1984 Western Australian amendment to the *Pawnbrokers Act* prohibiting pawnbrokers from purchasing goods and granting an option to the client to repurchase the goods at an increased price should be replaced with a provision which deems such transactions to be pawn transactions and so subject to the *Pawnbrokers Act*.

(paragraph 3.29)

General duties of pawnbrokers

17. No substantive change to the existing documentation provisions is proposed save as mentioned in proposal 7 above. However pawnbrokers' clients should have a right to a duplicate pawn ticket free of charge where the original is lost or stolen. The Act should require that pawnbrokers' records be retained for 6 years from the date of redemption or sale.

(paragraphs 4.2 to 4.4)

18. The existing provisions relating to rights of holders of pawn tickets to redeem articles are acceptable although they should be expressed in modern terms.

(paragraphs 4.5 and 4.6)

19. The requirements as to pawnbrokers' signs should be modernised by adoption of the present New South Wales provisions.

(paragraph 4.7)

20. The provisions regulating trading hours should be repealed, leaving the question of permitted trading hours to be governed by the appropriate legislation concerned with trading hours generally.

(paragraph 4.8)

Offences and penalty

21. The offence of a licensed pawnbroker purchasing or taking in pledge any article from a person apparently intoxicated should be clarified to make it clear that the prohibition extends to persons under the influence of drugs.

(paragraph 4.10)
22. It should no longer be an offence for a licensed pawnbroker when the sum agreed to be advanced on any pledge is under twenty dollars 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."

(paragraph 4.10)
23. Further offence provisions may be necessary depending upon the nature and scope of any further duties imposed on pawnbrokers by new legislation. Such offences might cover the misappropriation by pawnbrokers of the surplus proceeds of sale of an unredeemed pawn or the wrongful sale of a pawn within the redemption period.

(paragraph 4.11)
24. It should be an offence for a licensed pawnbroker to repledge his interest in any of the pawned articles.

(paragraph 4.12)
25. Offence provisions should be so drafted as to enable conviction of each relevant party or officer where the pawnbroker is a corporation or firm.

(paragraph 4.13)
26. The maximum penalty for offences (at present ranging from \$20 to \$50) should be increased to, say, \$500.

(paragraph 4.14)

Consequences of illegality

27. The consequences as between pawnbroker and client of any breach of the legislation by the pawnbroker should be spelled out. It may be desirable that where transactions are in breach of the legislation the pawnbroker should be prevented from recovering interest. In no case should a client be prevented from redeeming his goods.

(paragraph 4.15)

Second-hand Dealers Act

28. Amendments to the *Second-hand Dealers Act 1906-1965* should be considered when the *Pawnbrokers Act* is being redrafted.

(paragraph 4.16)

Powers of inspection

29. The regulatory functions to ensure day to day compliance with the legislation and for regular inspection of pawnbrokers practices should be vested in the Commissioner of Consumer Affairs.

(paragraph 5.1)

30. Police should be given express authority to inspect pawnbrokers' premises on a regular basis without warrant. Such a power of inspection should extend to all the books and records of the pawnbroking business, to all relevant premises and to all pawned goods wherever stored. This power should be used only in connection with the location of stolen property or the apprehension of offenders, and be subject to appropriate safeguards. For example, the power should vest only in officers authorised by the Commissioner of Police and be exercisable only within normal trading hours.

(paragraph 5.1)

31. An express provision should be added to the *Pawnbrokers Act* creating an offence of disclosure of information gained in the course of such an inspection except in the course of duty.

(paragraph 5.2)

Pawnbrokers' duty to inform police

32. Section 16, requiring pawnbrokers to report cases of refusal to redeliver pawned goods because the pawn ticket has been lost or fraudulently taken or the pawnbroker has been informed by a creditable person that the goods have been stolen, should be continued in modern form. However section 24 giving special powers of arrest to pawnbrokers should not be continued.

(paragraphs 5.3 to 5.5)

Power of Justices to order return of pawned goods

33. Section 23, which provides a summary means for speedy determination of claims to pawned goods should be continued, but in the same substantive terms as the parallel provision in section 72 of the *Police Act 1892-1984*.

(paragraph 5.8)

Miscellaneous proposals

34. There is a need for appropriate provisions in relation to the winding up of a pawnbroking business in the cases of the cancellation of a licence and the death or other disability of a pawnbroker.

(paragraphs 6.2 and 6.3)

35. The *Pawnbrokers Act* should contain power to make regulations in relation to minor matters or matters which may require change from time to time.

(paragraph 6.4)

36. Any new pawnbrokers legislation should contain certain minor evidentiary and consequential provisions.

(paragraph 6.5)

For details of each of these proposals see the paragraphs referred to above.

The proposals are provisional only and will be reviewed in the light of the comments received in response to this paper.