



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 81

**Review of
The Pawnbrokers Act 1860 - 1984**

REPORT

JUNE 1985

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

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To: THE HON J M BERINSON MLC
ATTORNEY GENERAL

In accordance with the provisions of section 13 of the *Law Reform Commission Act 1972-1978*, I am pleased to present the Commission's report on the *Pawnbrokers Act 1860-1984*.

Daryl R Williams
Chairman

28 June 1985

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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*¹ having regard to the requirements of associated legislation.

1.2 Arising out of complaints of an abuse of pawnbroking practice,² 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.³ 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.⁴ 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.⁵ The total value of pawnbroking transactions has also substantially increased. The resurgence is no doubt partly due to

¹ Hereinafter referred to as the "Pawnbrokers Act".

² See paras 2.5 to 2.6 below.

³ Western Australian *Parliamentary Debates* 15 August 1984, 762-763.

⁴ 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), (1971), Cmnd 4596, Vol 1, paras 2.4.10-2.4.14.

⁵ This is the number provided to the Commission by the head of the CIB Dealers Squad.

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.⁶ 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.⁷ 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.⁸ The loan is sometimes repaid in a

⁶ 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.

⁷ 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 metropolitan area.

⁸ One pawnbroker informed the Commission that he had once lent eight thousand dollars on items of jewellery.

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.⁹

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.¹⁰

1.10 The Paper contained a set of tentative proposals for the updating of the pawnbrokers legislation and invited public comment on them.¹¹ 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.¹² They included the newly formed Association of Western Australian Pawnbrokers¹³ 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.

⁹ 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.

¹⁰ 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.

¹¹ 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.

¹² These names are listed in Appendix I.

¹³ 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.¹⁴

1.13 The Commission is grateful to those who commented or otherwise assisted it and thanks them for doing so.¹⁵ 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.

¹⁴ Paras 3.16 to 3.20 below.

¹⁵ 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.

(b) Avoidance of unnecessary controls

1.16 The Commission has been at pains not to recommend any requirement unless satisfied that it is necessary in the light of present circumstances.¹⁶ In some instances it recommends the removal of an existing restriction.¹⁷ In other cases the Commission decided against adopting a proposal even though strongly urged to do so by commentators. The Commission considered that the object sought by the commentators could be substantially achieved by other, less restrictive means, or otherwise could not be justified.

1.17 The nature of the pawnbroking industry may change in future years in ways which cannot now reasonably be anticipated. Implementation of the statutory role recommended below¹⁸ for the Commissioner for Consumer Affairs would enable him to monitor developments and to recommend from time to time any further legislative adjustments required.

6. FORMAT OF REPORT

1.18 In the following chapters, the Commission sets out its final recommendations under the same broad headings as in the Proposals Paper, namely -

- (a) Licensing
- (b) Regulation of relationship between pawnbroker and client
- (c) General duties of pawnbrokers
- (d) Powers of the police and other authorities
- (e) Miscellaneous.

¹⁶ 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.

¹⁷ See, for example, para 3.20 below.

¹⁸ Para 2.17(d) and (i).

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.¹ 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 article² 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

¹ 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.

² 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 be carried forward into the new *Pawnbrokers Act*.

security by merchants, bankers, commission agents, brokers, or licensed auctioneers in the ordinary and bona fide course of mercantile or banking transactions".

2.3 The Commission considers that, subject to two amendments, section 2 of the *Pawnbrokers Act* is satisfactory in substance provided that the present exclusion in section 30 continues, and it **recommends** the retention of section 30 accordingly. The proposed amendments to section 2 are as follows.

(b) Omission of the words "or security"

2.4 In the Proposals Paper the Commission expressed its concern that the words "or security" at the end of the phrase "by way of pawn, pledge, or security" in the definition might extend the ambit of the Act beyond true pawnbroking (which involves the pawnbroker taking possession of the article) to include cases where the article, although secured by a charge, remains in the borrower's possession. The Commission accordingly tentatively proposed that, following Queensland,³ these words should be deleted. No commentator disagreed. The Commission accordingly **recommends** their deletion.

(c) Pawnbroking to include options to repurchase

2.5 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. " ⁴

In explaining the amendment the Minister for Consumer Affairs said:⁵

³ *Pawnbrokers Act 1984 (Qld)*, s 6.

⁴ The Act came into operation on 24 December 1984.

⁵ *Western Australian Parliamentary Debates*, 15 August 1984, 762-763.

"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 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."

2.6 The device of purchasing the goods and granting an option back was first used in Western Australia many years ago, and its use in recent times has not been limited to one firm only.⁶ A pawnbroker suggested that its use was the consequence of a combination of the existing minimum three months' redemption period provision and the requirement that unredeemed articles be sold at public auction.

2.7 Use of the device has been regulated differently in South Australia.⁷ The South Australian *Pawnbrokers Act 1888-1975* has been extended to persons using such a method of dealing. It provides⁸ 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 twenty dollars, 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 on any terms, and every such transaction, article, payment, advance, and loan shall be deemed a pawning, pledge, and loan respectively within this Act. "

⁶ Victorian officials have informed the Commission that the device is also used in that State.

⁷ A similar approach to that in South Australia was contained in s 6 of the *Pawnbrokers Act 1872-1960* (UK). That Act has now been replaced by the *Consumer Credit Act 1974-1982* (UK).

⁸ *Pawnbrokers Act 1888-1975* (SA), s 5.

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.⁹

2.9 There was general agreement among the commentators with the Commission's suggestion that a similar provision should be adopted in this State.¹⁰ 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.¹¹

2.10 Reports indicate that some pawnbrokers have also used devices such as taking a caveat on clients' land or having clients sign promissory notes as a condition of making a loan. Pawnbrokers using devices which do not involve taking possession of goods would normally be credit providers within the *Credit (Administration) Act 1984* and would therefore require a licence as such.¹²

⁹ Possibly the "sale and option to repurchase" device would be treated by the court as a "loan contract" within the meaning of s 5 of the *Credit Act 1984* and so be regulated by that Act. The user of the device might also be required to be licensed as a "credit provider" under s 6(1) of the *Credit (Administration) Act 1984*. In the Commission's view, it is preferable that such transactions be deemed to be pawnbroking transactions (with which they are closely allied), thus requiring the users of the device to obtain a pawnbroker's licence and extending the specific protection accorded by the new Pawnbrokers Act to the transaction. If this were done, the transaction would be regulated by the new Pawnbrokers Act and not by the *Credit Act 1984*: footnote 2 to para 3.7.

¹⁰ One pawnbroker, however, expressed reservations.

¹¹ The South Australian provision is confined to loans not exceeding twenty dollars. No money limit is necessary or desirable in Western Australia.

The Commission recognises that the South Australian provision could be improved to make it clear that it covers cases where the option to purchase is granted not to the client but to an associate of the client.

¹² They would not be carrying on business as pawnbrokers in respect of those transactions and so not be exempt from that Act. The loan transaction would also be required to conform to the *Credit Act 1984*.

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".¹³ 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 expertise¹⁴ rather than by a court exercising criminal jurisdiction (a Court of Petty Sessions).¹⁵
- * 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,¹⁶ 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.¹⁷

¹³ *Pawnbrokers Act*, s 3.

¹⁴ Para 2.15 below.

¹⁵ Licensing involves administrative law matters which have previously been the subject of Commission recommendations. See the Commission's *Report on Review of Administrative Decisions : Appeals* (1982).

¹⁶ In fact such a report is compiled by the CIB Dealers Squad, and filed with the Court. The report includes the financial standing of the applicant, any record of convictions, the location of the proposed premises and the arrangements made for the safe-keeping of pawned articles.

¹⁷ Such a provision would be essential if a pawnbroker's licence is to be continuous, as recommended in paras 2.17 to 2.20 below.

(b) The appropriate licensing body

2.13 The Proposals Paper suggested that jurisdiction to license pawnbrokers should be transferred to the Commercial Tribunal when that Tribunal was established. The Tribunal is now in operation.¹⁸

Its present licensing function¹⁹ is to license "credit providers"²⁰ under the *Credit (Administration) Act 1984*, and it would be a natural extension to authorise it to license pawnbrokers also. Such an extension would also be in conformity with the Government's intention of rationalising licensing processes in the commercial area. The Minister for Consumer Affairs stated that legislation would be introduced in due course transferring to the Commercial Tribunal a number of licensing functions presently performed by separate bodies.²¹

2.14 Most commentators agreed with the Commission's tentative proposal. However, the Association of Western Australian Pawnbrokers expressed concern that the Tribunal would not have sufficient knowledge of the pawnbroking industry and suggested instead the creation of an "industry board" which would include consumer and industry representatives.²²

2.15 The Commission is reluctant to recommend the establishment of a separate body, necessarily part-time, to cover such a small industry. In any case, the *Commercial Tribunal Act 1984* already provides a mechanism which would substantially overcome the Association's concern. That Act requires the Minister to establish a panel of persons

¹⁸ *Government Gazette*, 22 February 1985, 657.

¹⁹ The Tribunal also has certain powers under the *Credit Act 1984*. For example, under Part IX of that Act it may re-open a credit sale or loan contract irrespective of whether the credit provider is required to hold a credit provider's licence: para 3.8 below.

The *Commercial Tenancy (Retail Shops) Agreements Act 1985* also gives the Tribunal jurisdiction over certain commercial tenancy disputes.

²⁰ With certain exceptions, this term includes persons who in the course of business lend money or provide credit to individuals. The specified exceptions include the holders of licences issued under the *Pawnbrokers Act* in respect of their pawnbroking business: *Credit (Administration) Act 1984*, s 7(1)(f).

²¹ Western Australian *Parliamentary Debates*, 19 September 1984, 1373.

In its Working Paper on the *Local Courts Act 1904-1982 and Rules: Jurisdiction, Procedures and Administration* (1983) and in its Discussion Paper on *Courts of Petty Sessions: Constitution, Powers and Procedure* (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.

²² The Association had in mind a body similar to the Real Estate and Business Agents Supervisory Board. However, that Board's functions themselves may be transferred to the Commercial Tribunal: Western Australian *Parliamentary Debates*, 19 September 1984, 1373.

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.²³ The Minister may also establish a further panel of persons whose expertise would be likely to be of assistance to the Tribunal.²⁴ When the Tribunal is concerned with an application for a pawnbroker's licence, for example, the Tribunal would, in addition to the Chairman,²⁵ be required to include an industry and consumer representative selected from the relevant panels.²⁶ One or more persons selected from the panel of experts may also be included.²⁷

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.²⁸ To prevent unsuitable persons trading behind a corporate facade, the officers of the corporate body are required to be fit and proper persons.

²³ *Commercial Tribunal Act 1984*, s 6(1).

²⁴ Id, s 6(2).

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

²⁶ 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.

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

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

- (b) Sets out comprehensive criteria to which applicants for a licence must conform, including sufficient financial resources and an appropriate level of expertise.²⁹
- (c) Requires an applicant for a licence to advertise publicly his intention to do so.³⁰
- (d) Provides for an objection to the grant of a licence to be lodged on specified grounds by the Commissioner for Consumer Affairs (with the consent of the Minister) or by any other person.
- (e) Gives the person refused a licence a right of appeal against the refusal.³¹ (At present a pawnbroker must first obtain leave to appeal.)³² There is a similar right of appeal against the imposition of a condition or restriction on a licence.
- (f) Provides for cancellation or suspension of a licence, and for the imposition of lesser disciplinary penalties (such as a reprimand or a fine), for cause shown. There is provision for an appeal against such determinations.³³
- (g) Permits the holder of a credit provider's licence to operate more than one place of business under the one licence.³⁴
- (h) Provides that, unless cancelled or suspended, a licence operates from the date it is granted for an indefinite period, subject only to the annual payment of a prescribed fee and filing of a prescribed statement.

²⁹ The requirements are set out in full in Appendix II below.

³⁰ The Proposals Paper suggested that it may not be necessary to require applicants for a pawnbroking licence to advertise their intention to apply for a licence, but after further consideration the Commission has concluded that they should do so. If, as is desirable, members of the public are given a right of objection to the grant of the licence, they should be informed by public notice of a person's intention to apply. Implementation of the Commission's recommendation in para 2.20 below would have the effect of requiring applicants to advertise their intention.

³¹ The appeal lies to the District Court: *Credit (Administration) Act 1984*, s 24.

³² *Justices Act 1902-1985*, s 197. The appeal is to the Supreme Court with the leave of that Court.

³³ An appeal lies as of right to the District Court against cancellation or suspension: *Credit (Administration) Act 1984*, s 24. Where the Commercial Tribunal imposes a penalty falling short of cancellation or suspension the person concerned can appeal, as of right, to the District Court where a question of law is involved: *Commercial Tribunal Act 1984*, s 20. Otherwise he is required to obtain the leave of the Tribunal or the District Court to do so: *ibid*.

³⁴ This issue is discussed in the pawnbroking context at paras 2.21 to 2.25 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 model for the licensing of pawnbrokers and that, with little adaptation, it could appropriately be applied to them. Commentators generally agreed. Most considered that this should be done by repealing section 7(1)(f) of the *Credit (Administration) Act 1984* which exempts pawnbrokers from obtaining a licence under that Act. Others, however, were of the view that it was preferable to incorporate similar licensing and associated provisions in the new *Pawnbrokers Act* itself.³⁵

2.19 The Commission agrees with this latter view for the following reasons -

- (a) Since a separate *Pawnbrokers Act* would in any case be required to regulate the non-licensing aspects of the pawnbroking industry (such as the pawnbroker-client relationship) there is no reason (apart from the length of the resulting document) why the licensing and associated provisions should not also be included in that Act.
- (b) Certain changes, detailed below, to the licensing provisions of the *Credit (Administration) Act 1984* would in any case be required to cover special features of the pawnbroking industry and it would be preferable to incorporate those changes directly in the new *Pawnbrokers Act*.

³⁵ The Association of Western Australian Pawnbrokers favoured this alternative. It was concerned that otherwise pawnbrokers could inadvertently become subject to amendments to the *Credit (Administration) Act 1984* designed for other classes of credit providers.

- (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.³⁶

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.³⁷

(d) Special provisions for pawnbrokers' licensing

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

2.21 As mentioned above,³⁸ 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.³⁹ 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 also submitted that a licensee should be confined to one place of business and be required to manage it personally "in order to monitor the movement of goods and supervise unlicensed staff". The Association of Western Australian Pawnbrokers also favoured confining licences to natural persons. However, since its reason was that a client would thereby be more sympathetically treated than if he dealt with an employee of a corporate body, the Association appears to imply that corporate bodies should be excluded from the field altogether. The Commission does not favour such a course.

³⁶ This is particularly important when the industry consists of small businesses, as does pawnbroking.

³⁷ However, Part IV of the *Credit (Administration) Act 1984*, which empowers the Minister to order an inquiry into matters relating to the provision of credit, and for the procedure to be followed at such an inquiry, need not be included. The Part is of general application and would apply to pawnbrokers in any event.

³⁸ Para 2.17.

³⁹ This is the situation in some cases at present: the pawnbroker's licence is held by a natural person, but the proprietor of the business is a limited liability company. The Commission doubts whether such an arrangement is in conformity with the existing *Pawnbrokers Act* which seems to require that the proprietor be licensed: s 2. Possibly the present practice arose because the Act is drafted in terms which appear to limit the grant of licences to natural persons. This is understandable in view of the fact that limited liability companies did not become common until well after 1860, and the draftsman would not have had them in mind.

2.22 The Commission agrees with the Commissioner of Police that each place of business should be under the personal control of a suitably qualified person, for the reasons he advanced. However, the Commission considers that this could be provided for without either necessarily confining a pawnbroker to one place of business⁴⁰ or resorting to the device whereby the licence is held by an agent rather than by the proprietor directly.⁴¹ To this end the Commission **recommends** that provision be made in the new Pawnbrokers Act for a manager's licence which would only be available to natural persons.⁴² An applicant for such a licence should be required to satisfy the Tribunal as to the same matters as an applicant for a pawnbroker's licence except that, since he would not be the proprietor of the business, his own financial position would be irrelevant. Provision should be made for the cancellation or suspension of a manager's licence, and for lesser disciplinary penalties, along the lines of those applicable to the holder of a pawnbroker's licence.⁴³

2.23 The Commission **recommends** that it should be a condition of the holding of a pawnbroker's licence that his place of business (or each such place if more than one) be in the charge of a natural person who is the holder of either a pawnbroker's licence or a manager's licence. The consequence would be that if the holder of a pawnbroker's licence is a corporate body, its place or places of business must each be in the charge of the holder of a manager's licence. If the holder of a pawnbroker's licence is a natural person he must either control his place of business personally, or install the holder of a manager's licence to do so. If he has more than one place of business, each such place except the one he controls himself (if any) must be controlled by the holder of a manager's licence. In stating that the pawnbroker or his manager must be "in charge" or "in control" of the premises, the Commission does not intend that the person must be on the premises at all times during business hours. However, if he does leave the premises for short periods he should be required to make appropriate arrangements for the business to be properly conducted in his absence.

⁴⁰ It is to be noted that the present Act does not prohibit a pawn-broker from having more than one place of business but he must take out a separate licence for each place: *Pawnbrokers Act*, s 10.

⁴¹ The Commissioner's proposal could, in the absence of further statutory provisions, cause conceptual difficulties. For example, it may be difficult to determine whether the owner or the licensee is fixed with civil or criminal liability for breaches of the legislation: see *Mills v Hartung* [1959] VR 825 and *International Hotel Limited v McNally* (1940) 64 CLR 24.

⁴² There is precedent in other Western Australian legislation for a manager's licence: see the *Motor Vehicle Dealers Act 1973-1985*, s 16. See also s 37 of the *Real Estate and Business Agents Act 1978-1984* which requires every real estate branch office to be in the control of the holder of a real estate agent's licence.

⁴³ As with pawnbrokers' licences, managers' licences should be continuous.

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-eight days, or such further time as the Commercial Tribunal allows.⁴⁴ It should be a condition that such arrangements as are reasonable in the circumstances are made for the proper conduct of the business during the absence.

2.25 The Commission further **recommends** that 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 that place or those places. Appropriate provision should also be made for a licensee to inform the Tribunal of any changes to those arrangements.⁴⁵

(ii) *Partnerships*

2.26 Pawnbroking businesses can be conducted by partnerships as well as by sole traders or corporations. The *Credit (Administration) Act 1984* provides that the holder of a credit provider's licence shall not carry on business of providing credit in partnership with a person who is not the holder of a credit provider's licence.⁴⁶ Thus where the business is carried on by a partnership each partner must be licensed. The *Pawnbrokers Act* on the other hand provides that only one member of a partnership need be licensed,⁴⁷ and the question is whether this provision should be carried forward into the new Act. A number of pawnbroking businesses are presently carried on by partnerships in which only one partner is licensed⁴⁸ and, on

⁴⁴ S 11(3) of the *Commercial Tribunal Act 1984* authorises the Registrar with the consent of the Chairman to exercise the function of the Tribunal in relation to prescribed matters. The Commission suggests that applications for extensions of time be made a prescribed matter thus enabling the Registrar to deal with them.

⁴⁵ It is not intended that the location of the place or places of business should be subject to Tribunal approval except insofar as it is relevant to its proposed power to approve the security arrangements: paras 2.27 and 2.28 below. It would, of course, be necessary for a pawnbroker to ensure that he complied with the requirements of other legislation, eg the relevant town planning scheme.

⁴⁶ *Credit (Administration) Act 1984*, s 15.

⁴⁷ *Pawnbrokers Act*, s 11.

⁴⁸ In other cases no partner is licensed. This occurs where the partnership consists of members who are corporate bodies, the licensee being a natural person who (presumably) purports to hold the licence on behalf of the partners. As indicated in footnote 39 above, it is doubtful whether this situation conforms to the Act.

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 The Proposals Paper suggested that 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 and also for their insurance.

2.28 The Commission confirms its provisional view as regards the safekeeping of the articles and **recommends** accordingly.⁴⁹ However, it does not propose that any requirement be imposed as to their insurance.⁵⁰ It appears that such policies are not readily available in Australia⁵¹ and in any case would be very expensive.⁵² A pawnbroker is liable under the common law for any loss or damage to a pawned article brought about by his default. This, coupled with the proposed requirement as to security arrangements, should be reasonably sufficient. The Commission considers that pawnbrokers should not be able to contract out of their common law liability for loss of or damage to the articles and **recommends** that a provision to this effect be included in the new Act. If a pawnbroker could exclude his liability for negligence by contract he would have less incentive to take proper care of the goods.

⁴⁹ The Tribunal should be empowered to call for reports from the police or other officials to assist it in determining the adequacy of those arrangements. These should normally include a safe for the storage of valuable items and appropriate measures against the risk of damage or loss through fire and other hazards. The CIB Dealers Squad presently makes a report along these lines to assist the Court of Petty Sessions in determining whether a licence should be issued.

⁵⁰ The Commission's proposal was that the pawnbroker be obliged to insure the client's interest in the article on behalf of the client.

⁵¹ The Commission has been informed that although policies of this sort are available on the London insurance market, and could be placed through local brokers, they would normally be subject to restrictive conditions including a substantial excess.

⁵² The cost would be ultimately borne by the client, thus making the cost of a pawnbroker's loan even higher than it now is: para 3.2 below.

(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 above⁵³ 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".⁵⁴ 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*.⁵⁵

(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

⁵³ Paras 2.17(h) and 2.20.

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

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

should not be imposed at this stage. If in the future the failure of pawnbrokers to meet their obligations to their clients seems likely, appropriate legislation could then be introduced.⁵⁶ The *Credit (Administration) Act 1984* provides that a credit provider's licence may be refused if it appears to the Tribunal that the applicant "does not have or is not likely to continue to have sufficient financial resources to enable the applicant to carry on business" under the licence.⁵⁷ Implementation of the recommendation above⁵⁸ that the provisions of that Act apply in respect of pawnbrokers would help ensure that pawnbrokers are not under-capitalised with the consequent risk of insolvency.

⁵⁶ Recourse to a bond or fund would only be needed if a pawnbroker was unable to meet his obligations to his client (principally the return of the pawned article on its redemption, or payment of any surplus from its sale if unredeemed). Otherwise a client could recover judgment and levy execution against the pawnbroker's assets in the ordinary way.

⁵⁷ As mentioned above (footnote 16), the existing practice is for the CIB Dealers Squad to provide the licensing court with a report which refers, among other things, to the financial standing of the applicant. There is no express statutory requirement for this practice since the existing Act refers only to the character of the applicant.

⁵⁸ Para 2.20.

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

(i) The Proposals Paper

3.2 At present, there is no statutory regulation of the interest rates or other charges imposed by pawnbrokers, these being left to agreement between the pawnbroker and the client. From information supplied to the Commission it appears that the interest rate currently charged can be as high as thirty percent per month or part thereof¹ but averages about twenty percent per month or part thereof. The Proposals Paper set out the following reasons which pawnbrokers had put forward as justifying these rates -

- (a) Most loans are for small amounts (averaging say twenty dollars to one hundred dollars) for short periods (mostly about one to four weeks). The unit cost to the pawnbroker of making the loan is accordingly high.²
- (b) 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

¹ One pawnbroker, long-established, dealing mainly in gold and jewellery and with a high redemption rate, charges fifteen percent per month or part thereof and argues that thirty percent per month or part thereof would generally be excessive.

² However some loans are in excess of five hundred dollars, rising, it is said, even to eight thousand dollars in one case.

businesses where separate procurement, registration and valuation fees are charged, representing a significant addition to the total cost of the loan to the borrower.

- (c) 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.
- (d) A substantial proportion (ten percent to twenty-five percent) 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.
- (e) 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 The Paper suggested that there was not sufficient justification for legislative controls at present because, for example -

- (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.

3.4 The Paper drew attention to section 170 of the *Credit Act 1984*, which empowers the Commercial Tribunal to fix maximum interest rates in respect of any regulated loan contract or class of regulated loan contracts, and suggested that this power could be used in the future to control pawnbrokers' interest rates if it was then considered desirable to do so.³

³ The Commission indicated that an amendment to s 170 would be required to empower the Tribunal to fix maximum rates for other charges as well.

(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.⁴ The Royal Perth Hospital Social Work Department, though not necessarily advocating control, said that its absence left "little protection for people on low incomes who are desperate enough to borrow from these companies".⁵ Those against control were the Council for Civil Liberties, the Association of Western Australian Pawnbrokers and individual pawnbrokers.

(iii) Commission's view

3.6 It is not possible to determine on the evidence available to the Commission whether pawnbrokers' interest rates and other charges should be statutorily or administratively controlled and, if so, what maximum rate or rates should be prescribed. These questions are for the Commercial Tribunal to address if requested to do so or if it thinks it appropriate, and after due inquiry. Relevant considerations might include the rates and associated charges for other sources of finance, the average amount and period of pawnbroking loans, the risk involved, pawnbrokers' overheads, the degree of competition between pawnbrokers and the need to ensure that pawnbroking remains a viable industry.⁶

3.7 However, the *Credit (Pawnbrokers) Order No 2* of 1985 appears to remove from the Commercial Tribunal the power to set interest rates in respect of pawnbroking transactions.⁷ Accordingly to give the Tribunal this jurisdiction would require either an amendment to the Order or the inclusion of an appropriate provision in the new Pawnbrokers Act. The

⁴ On the other hand the City of Fremantle Consumer Credit Legal and Welfare Service suggested that a provision be included in the *Credit Act 1984* similar to s 150A of the *Victorian Credit Act 1984* which provides that a credit contract is unenforceable where the interest rate exceeds forty-eight percent per annum. Presumably the commentator's suggestion was intended to cover all pawnbroking loans, no matter how small.

⁵ That Department suggested that the Government establish credit institutions for people on low incomes.

⁶ If pawnbroking ceased to be profitable, clients might find it difficult or impossible to obtain finance elsewhere.

⁷ This Order (*Government Gazette*, 29 March 1985, 1137) exempts pawnbrokers from Parts III to VIII of the *Credit Act 1984*. By so doing it also removes loans by pawnbrokers from the definition of a "regulated loan contract" and so removes the power of the Tribunal to limit pawnbroking interest rates: para 3.4 above.

Commission prefers the latter course⁸ and **recommends** the inclusion of a suitable empowering provision in the new Act.

(b) Re-opening transactions

3.8 The Commercial Tribunal is empowered⁹ to re-open a regulated contract as defined in the *Credit Act 1984* if, in the particular circumstances -

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

The Tribunal may set aside part or all of the transaction and make consequential orders for the repayment of money and redelivery of goods.

3.9 The Proposals Paper suggested that, irrespective of whether pawnbroking interest rates are controlled generally, the Tribunal should be given similar power to re-open pawnbroking transactions. This suggestion met with the general approval of the commentators.¹⁰ The Commission accordingly **recommends** that a provision to this effect be included in the new Pawnbrokers Act.¹¹

(c) Documentation of charges

3.10 Whether or not interest rates and other charges are controlled, there is a clear need to ensure that they are set out in writing at the time of the transaction. Accordingly the Proposals Paper proposed that the existing provisions of the *Pawnbrokers Act*¹² requiring that both the

⁸ As indicated earlier, an amendment to s 170 would in any case be necessary to enable the Tribunal to limit charges other than interest. It would therefore seem simpler to provide a comprehensive power in the new Pawnbrokers Act.

⁹ *Credit Act 1984*, ss 145-149. The power does not extend to pawnbroking contracts: see footnote 7 above.

¹⁰ Although the Association of Western Australian Pawnbrokers indicated that it had no objection to a power to re-open a transaction it preferred that it be exercised by its proposed industry control board: para 2.14 above. The Commission has given its reasons for recommending against the establishment of such a board: para 2.15 above

¹¹ The Tribunal should be expressly empowered to review the fairness of any other charges imposed, as well as the interest.

¹² *Pawnbrokers Act*, ss 12 and 15.

pawnbroker's book and the pawn ticket¹³ 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,¹⁴ 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.¹⁵ The Commission **recommends** accordingly.

(d) Minimum redemption period

3.12 The *Pawnbrokers Act* at present provides¹⁶ 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 lawfully exercise his power of sale. In addition, the client can redeem the 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.¹⁷

3.13 The Proposals Paper suggested that the three month period of redemption should be carried forward to the new legislation,¹⁸ as should the right of the client to redeem the article at any time before it is sold. The Commission pointed out that those who have recourse to

¹³ The *Pawnbrokers Act* refers to this document as a "duplicate". The Commission uses the popular term in this report.

¹⁴ That is, the total amount of interest expressed in dollars, payable per week or month as the case may be on that particular loan.

¹⁵ The Jesus People Inc emphasised the importance to the client of specifying the interest in dollar terms as well as in terms of a rate.

One commentator suggested that pawnbrokers should be required to send a copy of the pawn ticket to the police to aid the police in their investigations of theft of property. The Commission is not in favour of this proposal, both on the ground of cost and of privacy considerations.

¹⁶ *Pawnbrokers Act*, s 13.

¹⁷ Id, s 14.

¹⁸ A similar period exists in the *Pawnbrokers Act 1984* (Qld), s 34 and in the *Pawnbrokers Act 1902-1985* (NSW), s 13. In the United Kingdom it is 6 months: *Consumer Credit Act 1974-1982* (UK), s 116.

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.¹⁹ 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.²⁰ 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.²¹ 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.²² In fact, as the Proposals Paper

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

²⁰ 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.

²¹ *Pawnbrokers Act*, s 14.

²² *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.

pointed out, advertisements merely list generalised descriptions of the property to be auctioned although large items of particular value are sometimes specifically mentioned.

3.17 In the Proposals Paper the Commission said that the present monetary limit for private sale (that is, items on which fifty cents or less had been advanced) had remained unchanged since 1860 and was clearly in need of updating. The Commission proposed a new limit of two hundred dollars subject to the adoption of certain general safeguards as to sales below this amount.

3.18 All commentators on the issue agreed that the present limit for private sale was too low. However, the proposal that it be raised to two hundred dollars met with a mixed response. Some commentators, including the Department of Consumer Affairs and the Council for Civil Liberties, were in favour. The National Police Research Unit submitted that two hundred dollars was too high and suggested ten dollars. The Association of Western Australian Pawnbrokers, a number of individual pawnbrokers and the City of Fremantle Consumer Credit Legal and Welfare Service considered that the limit should be abolished altogether.²³ Other commentators, while not disagreeing with the proposed new limit of two hundred dollars, objected to particular safeguards proposed for sales by private treaty.

3.19 The Commission has reconsidered the whole question of the sale of unredeemed goods and has concluded that it is undesirable to prescribe a specific method of sale at all. In other words, it considers that there should be no statutory requirement that goods on which more than a certain amount has been lent should be sold by public auction. The manner of sale should be left to the judgment of the pawnbroker, subject to an overriding duty to receive the best price reasonably obtainable. This is the position under the *Credit Act 1984* in relation to sales of mortgaged goods to which that Act applies.²⁴ The Commission's reasons for this view are as follows -

- (a) It is far from certain that auction sales achieve better prices than sales by private treaty (that is, "through the shop front"). The Commission has been informed by a number of pawnbrokers that the reverse is true. The Proposals

²³ The Association said that if abolition of any limit was unacceptable, the limit for pledges requiring auction should be at least one thousand dollars.

²⁴ *Credit Act 1984*, s 114. A similar position exists in the United Kingdom in relation to sales of pawned goods: *Consumer Credit Act 1974-1982* (UK), s 121.

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 needed²⁵ 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.²⁶
- (d) Increasing the limit for private sale to two hundred dollars, as the Proposals Paper suggested, would mean that the overwhelming majority of unredeemed goods would in any case be able to be sold by private treaty since most pawnbrokers' loans are for less than this amount.²⁷

3.20 The Commission accordingly **recommends** that the new Pawnbrokers Act should not lay down any requirement as to the mode of sale of unredeemed goods. Instead, following the *Credit Act 1984*,²⁸ pawnbrokers should be made subject to an express statutory duty to exercise their power of sale -

- (a) so as to receive the best price reasonably obtainable;²⁹ and
- (b) as soon after they become entitled to exercise it as is reasonable and practicable in the circumstances.³⁰

²⁵ The present Act is deficient in that it specifies only the manner of advertising. Even this is not usually complied with: para 3.16 above.

²⁶ Some pawnbrokers suggested that goods unsold at an auction should then be permitted to be sold by private treaty. It appears that under the existing Act the goods must again be put up for sale by auction and so on indefinitely.

²⁷ Further, any such limit would require amendment over time and in any event might lead to loans being split into two or more sham transactions, or refusal to lend more than the statutory amount so fixed.

²⁸ *Credit Act 1984*, s 114. The new legislation should make it clear that sale of unredeemed goods is subject to the provisions of other statutes, such as the *Motor Vehicle Dealers Act 1973-1985*, the *Firearms Act 1973-1983* and the *Liquor Act 1970-1985*.

²⁹ In the case of auction sales this would no doubt necessitate adequate advertising. In the case of some sales by private treaty of exceptional goods such as motor vehicles or antiques, quotations from specialist dealers might be required.

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

(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 pledges³² 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.³³

(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,

³⁰ Such a provision would do no more than state in legislative form a pawnbroker's duties under the common law: 36 Halsbury, *Laws of England*, (4th ed 1981) paras 128 and 129.

³¹ To help prevent abuse, the Commission recommends below the continuation of the present requirement that the pawnbroker must properly document the sale: paras 4.1 and 4.2(c). These records would be subject to inspection by the client and government officers.

One Commissioner, Mr Jackson, considers that in order to prevent abuse of this power to sell by private treaty a statutory bar should also be enacted preventing interest from running say one month from expiration of the redemption period.

³² *Pawnbrokers Act*, s 14.

³³ It is true that in some jurisdictions pawnbrokers have been expressly permitted by statute to purchase their unredeemed pledges at auction: *Pawnbrokers Act 1857-1965* (Tas), s 28; *Pawnbrokers Act 1888-1975* (SA), s 19. However, New South Wales, like Western Australia, contains a specific prohibition: *Pawnbrokers Act 1902-1985* (NSW), s 20. In Queensland, Victoria, the Northern Territory and New Zealand the statute is silent but in the Commission's view the prohibition under the general law would apply.

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.³⁴ 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:³⁵

"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

³⁴ 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.

³⁵ *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.³⁶ The Association of Western Australian Pawnbrokers and individual pawnbrokers were strongly against it.³⁷

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 costs³⁸ 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.³⁹ 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;⁴⁰ and
- (b) unless the client otherwise requests in writing,⁴¹ 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

³⁶ One commentator (who desired to remain anonymous) submitted that the proposed surplus moneys trust account should be audited annually and that any unclaimed money be paid to the fidelity fund which he suggested should be established.

³⁷ One pawnbroker claimed that most of his profit came from his appropriation of surpluses. Others said that it was seldom that their sales produced any surplus. If this is so a specific requirement that the surplus is payable to the client would have little impact upon their business.

³⁸ These costs would either be subtracted from the surplus otherwise due to the client or be passed on to clients generally in the form of higher interest rates.

³⁹ The significance of this recommendation lies in that if the Act were silent on the matter the general law may treat the surplus as trust money. This may require the pawnbroker to maintain a trust account and might render him liable for conversion if he did not. An obligation to keep a trust account would seem unnecessary in view of the generally small sums involved.

The Commission in its *Report on Unclaimed Money* (1980) recommended that persons who, in the course of business, hold money on behalf of others which has been unclaimed for six years should be required to pay it into the Unclaimed Moneys Fund: paras 3.27 and 3.28. The Commission recommended that this requirement should not apply to sums less than \$50: para 4.8. Deeming the surplus from the sale of an unredeemed article merely as a debtor-creditor item would mean that the Commission's recommendation in that report would not apply to it.

⁴⁰ The client should continue to have the right to inspect the pawnbroker's record of particulars of the sale which the Commission recommends should include the calculation of the expenses of the sale: paras 3.26, 4.1 and 4.2(d) below.

⁴¹ The Association of Western Australian Pawnbrokers submitted that a letter from a pawnbroker may sometimes be unwelcome if one spouse has pawned an article without the knowledge of the other. The Commission's recommendation is designed to meet this concern.

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.⁴²

(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.⁴³ 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.

⁴² 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.

⁴³ 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.⁴⁴ 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 Territory⁴⁵ under which a purchaser of an unredeemed article from a pawnbroker obtains valid title thereto whatever the title of the original client.⁴⁶ 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 general principle for sales of pawned goods.⁴⁷

4. FORUM FOR DISPUTES

3.30 Disputes may arise between pawnbroker and client in regard to matters arising out of the *Pawnbrokers Act*, and it is desirable that the parties should have access to a suitable forum for their resolution. The Commission understands that Small Claims Tribunals in Western Australia accept claims by pawnbrokers' clients as being within their jurisdiction. Their power

⁴⁴ In the Northern Territory property on which forty dollars or less has been advanced becomes the property of the pawn-broker: *Pawnbrokers Act 1980-1983* (NT), s 28(1). A similar provision exists in Queensland but the amount is ten dollars: *Pawnbrokers Act 1984* (Qld), s 34(3). In the United Kingdom the amount is fifteen pounds: *Consumer Credit Act 1974-1982* (UK), s 120.

⁴⁵ *Pawnbrokers Act 1980-1983* (NT), s 31.

⁴⁶ For example, the purchaser from the pawnbroker would get a good title to the goods even though the pawnor had stolen them from the true owner.

⁴⁷ The Commission acknowledges that there are some statutes where the purchaser is given a good title, for example s 76 of the *Police Act 1892-1985*, and s 30 of the *Disposal of Uncollected Goods Act 1970*. However, the circumstances of these sales are such that they would be unlikely to be used by thieves as devices for disposing of stolen property.

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

⁴⁸ 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.¹
- (b) Number the entries made in his book consecutively throughout the year, and give to the client a duplicate² 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.³
- (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".⁴

¹ *Pawnbrokers Act*, s 12.

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

³ *Pawnbrokers Act*, s 15.

⁴ *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.⁵

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.⁶ The ticket should also be required to contain a reference to the period of redemption and the right to any surplus on sale.⁷
- (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.⁸

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 which not only contains essential information, but is also the basis on which the pawnbroker redelivers the article upon redemption. No impediment should be placed in the way of a client obtaining it.

4.5 While the *Pawnbrokers Act* requires a pawnbroker to keep these records, it is silent on the length of time for which they must be retained. The Commission **recommends** that pawnbrokers be required to retain them for six years from the date of redemption or sale, that being the time within which a client could normally bring a claim against a pawnbroker in respect of the transaction.⁹

⁵ Id, s 19.

⁶ Paras 3.10 and 3.11.

⁷ Paras 3.13 and 3.22 to 3.25 respectively.

⁸ Para 3.26.

⁹ No commentator opposed this proposed requirement.

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.¹⁰
- (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.¹¹

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.¹²

4. OTHER GENERAL REQUIREMENTS

(a) Pawnbroker's sign

4.8 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.¹³ The New South Wales Act¹⁴ requires only that these words be "kept

¹⁰ *Pawnbrokers Act*, s 16.

¹¹ *Id*, s 17.

¹² The Commission understands that pawnbrokers do not levy the charge.

¹³ *Pawnbrokers Act*, s 8, The Act also makes it an offence 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

displayed... in a conspicuous position on the outside" of the premises. The Commission agrees with the present requirement as regards the size and content of the sign, but **recommends** the adoption of the New South Wales requirement as to its positioning.

(b) Hours of trading

4.9 The Act obliges licensed pawnbrokers -

- (a) 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).¹⁵
- (b) Not to trade on Sundays, Christmas Day or Good Friday.¹⁶

4.10 The Proposals Paper suggested that these provisions should be repealed, leaving the question of permitted trading hours to be governed by the *Factories and Shops Act 1963-1981*. This suggestion attracted little comment, except that the Association of Western Australian Pawnbrokers submitted that any amendments should not introduce further restrictions on trading hours.

4.11 The Commission adheres to its provisional view that pawnbrokers' permitted trading hours should be governed by the *Factories and Shops Act 1963-1981*, although special provision may need to be made therein. The Commission notes that the Retail Trade Advisory and Control Committee established under that Act has the function of investigating and making recommendations to the relevant Minister on matters relating to shops, including permitted hours of trading.¹⁷ The Commission considers that this Committee is the appropriate body to advise on permitted trading hours for pawnbrokers.¹⁸ It accordingly

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. The Commission recommends below that this section should be subsumed under a wider provision: para 4.15.

¹⁴ *Pawnbrokers Act 1902-1985* (NSW), s 11.

¹⁵ *Pawnbrokers Act*, s 21.

¹⁶ *Pawnbrokers Act*, s 22.

¹⁷ Shops are defined to include places at which pawnbroking is carried on: *Factories and Shops Act 1963-1981*, s 5(1).

¹⁸ The Commission notes that s 9 of the *Second-hand Dealers Act 1906-1965* prohibits a licensee under that Act from purchasing or receiving second-hand goods before 8 am or after 6 pm. Since all licensed pawnbrokers are in fact also licensed second-hand dealers (para 1.6 above) the Commission suggests that,

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

(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.

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.

¹⁹ 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.²⁰ 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.²¹ 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).²²

(d) New offences and penalty

(i) New offences

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

²⁰ Western Australian *Parliamentary Debates* (1944) vol 113, 800.

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

²² 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.²³
- (b) To fail to repay on demand the surplus proceeds of sale of an unredeemed pawn.²⁴

4.17 The Commission further **recommends** that a provision be included in the new Act so as to enable conviction of each consenting director or officer where an offence is committed by a pawnbroker which is a corporate body.²⁵

(ii) *Maximum penalty*

4.18 The maximum penalties for offences under the present Act range from twenty dollars to fifty dollars. These are clearly inadequate and the Commission **recommends** that they be increased to an appropriate amount, having regard to penalties in comparable legislation.²⁶

(e) **Consequences of illegality**

4.19 The Proposals Paper drew attention to the need in the new *Pawnbrokers Act* to spell out the consequences as between pawnbroker and client of the commission of an offence by the pawnbroker. The present Act is silent on the question with the result that the matter is determined by the common law whose rules may lead to uncertainty and harsh results.²⁷ In particular, the courts have no power to grant relief by adjusting the parties' obligations however technical the illegality may have been. The Commission accordingly **recommends** the inclusion in the new legislation of a provision to the following effect -

²³ The Association of Western Australian Pawnbrokers was concerned that legitimate ways of raising finance should not be prohibited. The Commission considers that its recommendation would not have this effect. The proposed prohibition is only against the pawnbroker parting with possession of the pawned goods by repledging them with another party. The police informed the Commission of one case of suspected repledging in recent years.

Although s 27 of the present Act makes it an offence for a pawnbroker to "sell or otherwise dispose of any article pledged to him before the period of forfeiture" this might not cover repledging.

²⁴ This is an offence under the *Pawnbrokers Act 1902-1985* (NSW), s 21(2).

²⁵ This recommendation is in fact covered by the Commission's general recommendation in para 2. 20 above since the *Credit (Administration) Act 1984* contains a provision along these lines: s 48.

²⁶ The Proposals Paper suggested a maximum penalty of five hundred dollars but the Commission now considers that this may be inadequate for serious cases. It is to be noted that the maximum fines for most offences under the *Credit Act* range from one thousand dollars to two thousand dollars. Breach of an order restraining unjust conduct under the *Credit (Administration) Act 1984* carries a maximum fine of ten thousand dollars.

²⁷ L Szekely, *Occupational Licensing and the Enforceability of Contracts*, (1984) 12 Aust Bus L Rev 408.

- (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.²⁸
- (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.²⁹
- (d) Where by virtue of (a) or (b) a client is not liable to pay the pawnbroker a sum of money, the Commercial Tribunal³⁰ may, on the application of the pawnbroker, increase the client's liability if it considers it just to do so.³¹

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,³² the common law does not allow the court to make any equitable adjustment to a contract affected by illegality.

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

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

³⁰ 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.

³¹ 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.

³² Para 4.19.

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

³³ *Credit Act 1984*, s 85.

CHAPTER 5

POWERS OF THE POLICE AND OTHER AUTHORITIES

1. POWERS OF INSPECTION

5.1 Unlike more modern licensing legislation, the *Pawnbrokers Act* creates no administrative machinery to ensure day-to-day compliance with the legislation or for regular inspection of pawnbrokers' practices. Implementation of the recommendation above,¹ that the powers given to the Commissioner for Consumer Affairs or his authorised delegate to inspect the records and premises of credit providers be made applicable to pawnbrokers, will rectify the position in this regard.

5.2 The police have an interest in pawnbroking in connection with the recovery of stolen property and to ensure that pawnbrokers and their employees are not receivers and dealers in stolen property. Unlike the *Second-hand Dealers Act 1906-1965*, 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. Police can, of course, obtain a search warrant if they have reasonable cause to believe stolen goods are on particular premises.² However, in practice, with the consent of pawnbrokers, police inspect pawnbrokers' premises on a regular basis without warrant. The Proposals Paper suggested that statutory authority to do so seemed desirable.

5.3 Most of those who commented on the issue agreed that the police should be given power to inspect pawnbrokers' premises and records without a warrant for those purposes. However the Council for Civil Liberties and an individual pawnbroker were opposed. In their view the police should only be able to search pawnbrokers' premises pursuant to a search warrant.

5.4 Powers of intrusion should not be granted unless it is clearly in the public interest to do so. A person's right to privacy, including the right to conduct a business without undue interference by public officials, is an important principle and inroads into it should not be made lightly. However, the Commission considers that there is a legitimate public interest in protecting the public generally against the possibility of a pawnbroker's business becoming,

¹ Paras 2.17(i) and 2.20.

² *Criminal Code*, s 711; *Police Act 1892-1985*, s 70.

however innocently, an avenue for the disposal of stolen property and in recovering stolen property and apprehending offenders.³ As mentioned above,⁴ the *Second-hand Dealers Act 1906-1965* gives the police power to inspect a second-hand dealer's premises.⁵ 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.⁶

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;⁷ 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.⁸

³ 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.

⁴ *Second-hand Dealers Act 1906-1965*, s 8.

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

⁶ 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.

⁷ 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, whenever the police remove from the pawnbroker's premises goods which they believe to have been stolen,⁹ they should be required to give the pawnbroker a receipt. The head of the CIB Dealers Squad informed the Commission that the police officer concerned usually signs the pawnbroker's book and issues a receipt upon his return to his office. The Commission considers that the practice of signing the book and issuing a receipt is most desirable and should be made obligatory. The Commission accordingly **recommends** that a provision be included in the new Act obliging the police officer who takes possession of a pawned article (whether acting under a search warrant or under powers otherwise conferred) to -

- (a) sign the pawnbroker's book;
- (b) issue a formal receipt to the pawnbroker as soon as practicable thereafter; and
- (c) if the goods are not returned to the pawnbroker within a reasonable time, inform the pawnbroker in writing whether the goods were returned to the rightful owner or of the police's intention with regard to their ultimate disposal.¹⁰

5.7 On a more general point, the Commissioner of Police expressed reservations about powers of inspection and prosecution being given to officials other than police officers. However, as indicated above, the Commissioner for Consumer Affairs already has wide powers to inspect the records and premises of credit providers to ensure that they comply with their statutory obligations and it would accordingly be appropriate also to require the Commissioner for Consumer Affairs to discharge similar functions in relation to pawnbrokers. In these and other matters the Commission emphasises the importance of effective liaison between the Commissioner for Consumer Affairs and the Commissioner of Police.

⁹ The Commission does not intend that the proposed power of inspection should impliedly confer on the police power to seize goods. Such powers are already conferred by other legislation and the common law and should of course be exercised in accordance with any conditions therein laid down.

¹⁰ This would enable pawnbrokers to claim the goods or take other action in appropriate cases.

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.¹¹ 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 pawnbroker be required to inform the police in every case.¹²

3. PAWNBROKER'S POWER OF ARREST

5.9 Section 24 of the existing Act gives a pawnbroker or his servant a wide power of arrest. The broad purpose appears to be to facilitate the apprehension of persons suspected of attempting to pawn or sell stolen goods. The pawnbroker, or his servant as the case may be, must immediately convey the arrested person to a constable who must bring the person before a justice of the peace. 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 sell or pawn a stolen article, or redeem an article without colour of right. The offence is punishable by three months imprisonment.

5.10 The Proposals Paper suggested that this provision should be deleted from the new legislation on the ground that the general criminal law, including the powers of arrest by police officers and ordinary citizens, were sufficient. In response, several pawnbrokers informed the Commission that they had exercised the power of arrest presently found in the Pawnbrokers Act on a number of occasions and submitted that the power be carried forward. The Commission has concluded that it is desirable to retain some power in the pawnbrokers legislation itself and **recommends** accordingly. However, the existing grounds for arrest are unnecessarily wide and should be in the same terms as are contained in the relevant part of

¹¹ *Pawnbrokers Act*, s 16. The earlier part of this section deals with the rights of holders of pawn tickets: para 4.6(a) above.

¹² The wording of the provision should, of course, be consistent with that relating to the rights of holders of pawn tickets: para 4.6 above.

section 49 of the *Police Act 1892-1985*.¹³ 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 *Police Act 1892-1985* or the *Criminal Code*.

4. POWER OF JUSTICES TO ORDER RETURN OF PAWNED GOODS

5.11 The Act also contains a machinery provision to deal with cases where goods which have been stolen or unlawfully obtained have been pawned, or where goods lawfully obtained are unlawfully pawned.¹⁴ A justice of the peace may issue a summons or warrant for the appearance of the pawnbroker before two justices¹⁵ 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. 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.¹⁶ The section thus provides a summary procedure for the speedy determination of a claim by an owner for the return of his goods. However, it is not intended to replace an ordinary action for the ultimate determination of the respective rights of the owner and the pawnbroker.¹⁷

5.12 Some pawnbrokers suggested that in the circumstances contemplated by the section they should be entitled to retain the goods against the true owner until the loan and interest have been paid. One said 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, as the Proposals Paper pointed out, the orders made in New South Wales have been criticised as being inconsistent with the common law and unfair to the true owner.¹⁸ Similar

¹³ The relevant part of this section is as follows:

" ...any person to whom any property ...shall be offered to be sold, pawned, or delivered (if he shall have reasonable cause to suspect that any offence has been committed with respect to such property...or that the same, or any part thereof, has been stolen, or otherwise unlawfully obtained, or is intended to be used for an unlawful purpose), may apprehend and detain the person offering any such property...as aforesaid, and as soon as may be deliver him into the custody of a constable, together with such property to be dealt with according to law... ".

See also s 569 of the *Criminal Code* which provides a power of arrest in broadly similar circumstances. *Pawnbrokers Act*, s 23.

¹⁴

That is, a Court of Petty Sessions.

¹⁵

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

¹⁶

Raymond Lyons & Co v Metropolitan Police Commissioner [1975] 1 All ER 335, 338.

¹⁷

Pawnbrokers, Public Interest Advocacy Centre Newsletter, October 1984, 2.

¹⁸

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

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*.²⁰

¹⁹ C L Attenborough, *The Law of Pawnbroking*, (1897) 110.

²⁰ 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,¹ 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.²

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.

¹ Para 2.20.

² 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 above³ 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 residence and to record the answer given. The Commission acknowledges that to oblige the pawnbroker to go further by requiring the client to produce satisfactory evidence of his name and address would be useful in tracing stolen property.⁴ However, it could unduly inconvenience the client, since it would require the pawnbroker to refuse to enter into the transaction if no satisfactory means of identification could be produced at that time. In addition, to avoid varying standards amongst pawnbrokers, it may be necessary to lay down by regulation the nature of the proof of identification which would be necessary or sufficient. On balance, the Commission does not favour the proposal.

(b) Notice of financial counselling and welfare services

6.7 The Jesus People Inc suggested that it should be a statutory requirement for pawnbrokers to display a notice on their premises giving details of the financial counselling services available. Another commentator suggested that such a notice be required advising of available welfare services. The Commission acknowledges the reason for the suggestions but considers that the difficulties involved, such as the length and complexity of the notice if all

³ Para 2.20.

⁴ On the other hand it may merely encourage thieves to forge any proof required.

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.⁵

⁵ Cf ss 18 and 19 of the *Credit (Administration) Act 1984*.

- (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, police powers of inspection and licensing arrangements.⁶ The Commission **recommends** that any proposed changes to the *Second-hand Dealers Act 1906-1965* should take account of the Commission's recommendations in regard to pawnbrokers.

⁶ The *Second-hand Dealers Act 1906-1965* has been reviewed by a special government Working Party but its report has not yet been publicly released.

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 Amendment Act 1984*) should be replaced by a provision along the lines of section 5 of the South Australian *Pawnbrokers Act 1888-1975* which has the effect of treating a sale and option to repurchase as a pawnbroking transaction.

(paragraphs 2.5 to 2.9)

- (c) The substance of section 30 of the *Pawnbrokers Act*, which exempts certain transactions from the legislation, should be carried forward into the new Act, as should section 29 which defines "article" to include "every species of chattels and goods whatsoever".

(paragraphs 2.2 and 2.3;
footnote 2 to chapter 2)

- (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)

1

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. ¹

(paragraphs 3.10 and 3.11)

¹ 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)

CHAPTER 4 - GENERAL DUTIES OF PAWNBROKERS

The Commission **recommends** that -

- (a) (i) Pawnbrokers should be required to record details of the pawned article including its brand name (if any) and any serial number or other identification.
- (ii) The pawn ticket should be supplied free of charge.
- (iii) Pawnbrokers should be required to retain their records for six years from the date of redemption or sale.

(paragraphs 4.2 to 4.5)

- (b) The following provisions of the existing *Pawnbrokers Act* should be carried forward into the new Act but expressed in modern terms -

- (i) Holders of pawn tickets are deemed to be the owners of the articles 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.
- (ii) Where a pawn ticket is lost or stolen the owner of an unredeemed article can, upon completing a prescribed declaration setting out the circumstances, obtain another copy.

(paragraphs 4.6 and 4.7)

- (c) The copy of the pawn ticket mentioned in (b)(ii) above should be obtainable free of charge.

(paragraph 4.7)

- (d) The prescribed pawnbroker's sign should be required to be kept displayed in a conspicuous position on the outside of the premises.

(paragraph 4.8)

- (e) Pawnbrokers' permitted trading hours should be governed by the *Factories and Shops Act 1963-1981* and if necessary special provision made for them in that Act. The Retail Trade Advisory and Control Committee should be asked to advise on permitted trading hours for pawnbrokers.

(paragraphs 4.9 to 4.11)

- (f) It should continue to be an offence for a licensed pawnbroker to take in pawn any article from a person -
- (i) under the age of eighteen years; or
 - (ii) apparently intoxicated (which term should be clarified to include intoxication by drugs as well as alcohol) .

(paragraphs 4.12(a) and 4.14)

- (g) That part of section 26 of the *Pawnbrokers Act* which makes it an offence when the sum agreed to be advanced is under twenty dollars for a licensed pawnbroker to "make any part of such advance on anything but money, or sell or exchange any article for any part of the money agreed to be advanced upon such pledge" should not be carried forward.

(paragraphs 4.12(b) and 4.14)

- (h) Breaches of the duties as to documentation (including the new duties recommended in this report) and as to pawnbrokers' signs should continue to be offences.

(paragraphs 4.12 to 4.14)

- (i) The new Act should make it an offence for a person to hold himself out as carrying on business as a pawnbroker without being licensed as such. Section 9 of the existing Act should consequently be repealed.

(paragraph 4.15)

- (j) It should be an offence for a pawnbroker -
- (i) to repledge any of the articles under pawn;
 - (ii) to fail to repay on demand the surplus proceeds of sale of an unredeemed pawn.

(paragraph 4.16)

- (k) A provision be included in the new Act so as to enable conviction of each consenting director or officer where an offence is committed by a pawnbroker which is a corporate body.

(paragraph 4.17)

- (I) 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 -

- (a) The new Act should give appropriate inspection powers to 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 -

- (i) be used only in connection with the location of stolen property or the apprehension of offenders;
- (ii) be vested only in police officers nominated for that purpose by the Commissioner of Police; and
- (iii) be exercisable only at reasonable hours.

(paragraph 5.5)

- (b) 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.

(paragraph 5.5)

- (c) A provision should be included in the new Act obliging the police officer who takes possession of a pawned article (whether acting under a search warrant or under powers otherwise conferred) to -

- (i) sign the pawnbroker's book ;
- (ii) issue a formal receipt to the pawnbroker as soon as practicable thereafter; and
- (iii) if the goods are not returned to the pawnbroker within a reasonable time, inform the pawnbroker in writing whether the goods were returned to the rightful owner or of the police's intention with regard to their ultimate disposal.

(paragraph 5.6)

- (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 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 ¹

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

¹ Three commentators requested anonymity and have therefore not been included in this list.

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 disqualified¹ 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;

¹ 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) has afforded the applicant and any person who, in accordance with section 11, has lodged an objection on that ground, an opportunity

to appear at the hearing and to make submissions and adduce evidence.

(6) Where an application for a licence is refused, the Registrar shall forthwith, by notice in writing served on the applicant and each objector (if any) to the granting of the application, inform the applicant and each such objector of the refusal and of the ground on which the refusal is based and the Registrar shall, as soon as practicable, refund to the applicant so much of the application fee as is specified by the Tribunal as appropriate to be refunded.

(7) Where an application for a licence in respect of which an objection has been lodged in accordance with section 11 is granted, the Registrar shall forthwith, by notice in writing, inform the person who lodged the objection of the granting of the application.

(8) Where an application for a licence is granted -

- (a) the applicant shall be deemed to be the holder of the licence granted; and
- (b) the Registrar shall forthwith, by notice in writing, inform the applicant of the granting of the application.

(9) Notwithstanding anything in this section, the Tribunal may refrain from granting an application for a licence unless -

- (a) where the applicant is not a body corporate - the applicant; or
- (b) where the applicant is a body corporate - all of the directors and officers of the body corporate, or such of them as the Tribunal specifies or refers to,

has or have appeared personally before the Tribunal and satisfied the Tribunal as to such relevant matters referred to in this section as the Tribunal thinks appropriate.